

The impacts of human rights law on the regulation of armed conflict: A coherency-based approach to dealing with both the “interpretation” and “application” processes

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Abstract

Nowadays, human rights law significantly impacts the regulation of armed conflict through two main processes: the “interpretation process”, whereby international humanitarian law is interpreted in light of human rights law’s norms or concepts, and the “application process”, whereby human rights law applies in armed conflict alongside international humanitarian law. These processes raise complex problems with respect to the interplay between the two branches of international law. The aim of this paper is to propose an elaborated theoretical framework, based on legal theories of normative coherence, in order to address that interplay and to overcome the shortcomings of the formal mechanisms usually referred to in practice and legal scholarship. It is demonstrated that such a coherency-based approach recommends

adapting the outcomes of the interpretation and application processes, either by modulating or displacing the inappropriate norm or regime, in light of substantial considerations.

Keywords: international humanitarian law, international human rights law, legal theory, legal interpretation, norms.

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Introduction

It is well known that international humanitarian law (IHL) and international human rights law (IHRL) have different origins. Modern IHL was born during the second half of the nineteenth century, primarily in relation to the foundation of the Red Cross,¹ while IHRL mainly developed after World War II,² under the aegis of the United Nations (UN). It is classically held that the two bodies of law evolved independently and that the two respective communities were mutually distrustful until the 1960s. On the one hand, the development of the regulation of armed conflict was neglected by the UN community, since, as emphasized by the International Law Commission (ILC) in 1947, such development could show a “lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace”.³ On the other hand, IHRL was seen by the IHL community and by the International Committee of the Red Cross (ICRC), in particular, as a utopian and politically driven ideal, diametrically opposed to the pragmatic and neutral approach that the Committee favoured in order to alleviate, in a concrete way, the suffering of people in armed conflict.⁴

Although this classical narrative seems exaggerated, since connections existed between the two worlds during the 1940s and 1950s,⁵ it is undisputable that the 1968 Tehran Conference played a crucial role in bringing them closer together. IHL was actually put under great pressure by the human rights

1 However, modern IHL also developed in relation to other aspects than the protection of wounded members of armed forces in the field, including neutrality in naval warfare, the codification process of the laws and customs of war and the prohibition and regulation of weapons.

2 However, the first attempts to limit the sovereignty of States vis-à-vis their own citizens at the international level date back to the period following World War I. This was mainly in relation to the protection of certain minorities after the dismantling of the Central Powers; see e.g. Millan R. Casanova, “‘Minority Treaties’ Protection in the Interwar Period: Its Contribution to Maintain the European Order after 1945”, in Ioan Horga and Alina Stoica (eds), *Europe a Century after the End of the First World War (1918–2018)*, Romanian Academy Publishing, Bucharest, 2018, pp. 351–355.

3 International Law Commission (ILC), *Report of the International Law Commission on the Work of Its First Session*, in *Yearbook of the International Law Commission*, 1949, p. 281, para. 18.

4 See e.g. Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy*, Cambridge University Press, Cambridge, 2015, pp. 53–54.

5 Katharine Fortin, “Complementarity between the ICRC and the United Nations and International Humanitarian Law and International Human Rights Law, 1948–1968”, *International Review of the Red Cross*, Vol. 94, No. 888, 2012, pp. 1440–1450.

community, which criticized that body of law for its inability to protect persons and human rights in armed conflicts. This was exacerbated by the protracted and extremely violent armed conflicts occurring at the time, such as the Vietnam War and the struggles for liberation in the colonies. A clear will was expressed at that time to further “humanize” the regulation of armed conflict and ensure better protection of people.⁶ This firstly led to the development of IHL itself. The Tehran Conference adopted several resolutions, including the famous Resolution XXIII, entitled “Human Rights in Armed Conflicts”,⁷ which was later endorsed by the UN General Assembly Resolution 2444, concerning “Respect for Human Rights in Armed Conflicts”.⁸ These titles are confusing, however, since the resolutions do not deal with human rights at all – they recommend the normative development of IHL itself.⁹ It is on that basis, following the initiatives undertaken by the UN Secretary-General in accordance with the recommendations of Resolution 2444, that the work for the reaffirmation and development of IHL started, which resulted in the two 1977 Additional Protocols to the Geneva Conventions. That work was finally conducted under the aegis of the ICRC, after unsuccessful attempts to place certain IHL developments under the UN umbrella.¹⁰

IHRL significantly impacted the material content of the two Additional Protocols. It pushed further the movement initiated after World War II, giving predominance to the principle of humanity in its balance against the principle of military necessity. It did this, notably, by reducing any reciprocity in IHL through the exclusion of additional belligerent reprisals in Additional Protocol I (AP I)¹¹

6 See e.g. Marko Milanovic, “A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law”, *Journal of Conflict and Security Law*, Vol. 14, No. 3, 2010, p. 460.

7 United Nations, *Final Act of the International Conference on Human Rights, Tehran, 22 April to 13 May 1968*, 1968, p. 18, available at: https://legal.un.org/avl/pdf/ha/fatchr/Final_Act_of_TehranConf.pdf (all internet references were accessed in February 2022).

8 UNGA Res. 2444 (XXIII), 19 December 1968.

9 In paragraph 2 of Resolution 2444, which endorses Resolution XXIII, the resolution “[i]nvites the Secretary-General, in consultation with the International Committee of the Red Cross and other appropriate international organizations, to study ... [t]he need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare”.

10 See e.g. the view upheld by some States in relation to the protection of journalists in armed conflicts: *Respect for Human Rights in Armed Conflicts: Protection of Journalists Engaged on Dangerous Missions: Argentina, Austria, Colombia, Finland, France, Iran, Japan, Madagascar and Senegal: Revised Draft Resolution*, UN Doc. A/C.3/L.1797/Rev. 3, 30 November 1970.

11 Certain reprisals were already prohibited in the Geneva Conventions: see Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 46; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 47; Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 13; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 33. That list has been extended under AP I: see Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Arts 20, 51(6), 52(1), 53(c), 54(4), 55(2), 56(4).

and by providing the Martens Clause in the core articles of that Protocol.¹² More straightforwardly, its content clearly informed some provisions enshrined in the two Protocols, especially the fundamental guarantees protecting persons from any inhumane treatment. In particular, the fair trial guarantees provided for in the International Covenant on Civil and Political Rights (ICCPR), which had recently been adopted, were almost copy-pasted in Additional Protocols I and II, under Articles 6 and 75 respectively.¹³ As a result, IHRL and the case law of its monitoring bodies could be seen as an entirely legitimate tool for interpreting the content of those provisions. As emphasized by certain scholars,¹⁴ by replicating such IHRL content in the Protocols, their drafters introduced a powerful driving force for the evolution of IHL within that body of law itself. As will be seen in detail below, several institutions and courts actually engaged in this “interpretation process”, by which IHRL significantly impacted IHL through the interpretation of that body, in light of its norms and case law.

The 1968 Tehran Conference not only gave an impulse to the development of IHL itself. Resolution 2444 has been followed by a series of resolutions that clearly acknowledged the applicability of IHRL in any armed conflict.¹⁵ For instance, in its Resolution 2675, adopted at its twenty-fifth session (1970), the UN General Assembly affirmed that “[f]undamental human rights, as accepted in international law and laid down in international instruments, *continue to apply fully in situations of armed conflict*”.¹⁶ IHL was no longer viewed as the only body of law exclusively regulating armed conflict; IHRL was considered as also being applicable to such situations, in parallel to IHL. This “application process”, by which IHRL does not impact IHL itself but more generally impacts the regulation of armed conflict through its applicability to those conflicts, is now well recognized in legal scholarship and confirmed in State and judicial practice.¹⁷

However, both the interpretation and application processes raise several issues, especially with respect to the interplay between IHL and IHRL. Practice shows that, in some instances, no mechanism at all is provided to address this

12 The Martens Clause first appeared in the preamble of the 1899 Hague Convention. It was repeated in the Geneva Conventions in the final provisions dealing with the execution of the Conventions: see GC I, Art. 63; GC II, Art. 62; GC III, Art. 142; GC IV, Art. 158. It is only with AP I that the Martens Clause has been given a prominent place and a general scope as it has been put in Article 1, as part of the general provisions of the Protocol.

13 See Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, paras 4515, 3005.

14 See e.g. Gloria Gaggioli, *L'influence mutuelle entre les droits de l'homme et le droit international humanitaire à la lumière du droit à la vie*, Pedone, Paris, 2013, p. 106.

15 Note that, already in 1967, the UN General Assembly “considered that essential and inalienable human rights should be respected even during the vicissitudes of war” in relation to humanitarian assistance in the Middle East (UNGA Res. 2252 (ES-V), 4 July 1967), whereas the 1968 Tehran Conference adopted a specific resolution on “Respect for and Implementation of Human Rights in Occupied Territories” (United Nations, above note 7, p. 5), later endorsed by the UN General Assembly in a resolution having the same title (UNGA Res. 2443 (XXIII), 19 December 1968).

16 UNGA Res. 2675 (XXV), 9 December 1970 (emphasis added). See also e.g. UNGA Res. 3318 (XXIX), 14 December 1974.

17 See e.g. below notes 83–89.

interplay, or, when specific mechanisms are mentioned, like the *lex specialis* principle or the principle of systemic integration, they prove to be unsatisfactory, mainly because they are mere formal mechanisms, whereas dealing with the interactions between IHL and IHRL involves value judgements. This paper argues for a coherency-based approach, based upon legal theories on coherence, which gives weight to substantial considerations and serves as a suitable legal framework to both the interpretation and application processes. After describing both these processes and the difficulties that they raise regarding the interplay between IHL and IHRL, the paper delves into the legal theories on coherence and shows how these difficulties might be overcome by resorting to those theories.

The interpretation process versus the application process

The two main ways through which IHRL currently impacts the regulation of armed conflict are the interpretation of IHL in light of IHRL norms and case law, whereby IHRL impacts IHL itself,¹⁸ and the applicability of IHRL in armed conflicts alongside IHL.

The interpretation process

The interpretation process has been performed by several jurisdictions and institutions, mainly those charged with sanctioning IHL violations or monitoring the application of that body of law. Although this process has the potential to

18 IHRL might also impact IHL itself through a normative rather than a mere interpretative process, by inspiring secondary norms applicable to IHL or incorporating IHRL content into primary (conventional or customary) IHL norms. However, this process remains quite limited. There are a few cases of IHRL impact on the secondary norms applicable to IHL; these arguably include the non-reciprocal character of IHL treaty obligations and the current trend towards recognizing IHL as bestowing rights to individuals rather than merely imposing obligations upon States (see. e.g. Theodor Meron, “The Humanization of Humanitarian Law”, *American Journal of International Law*, Vol. 94, No. 2, 2000, pp. 247–252). With respect to primary IHL norms, no IHL treaty incorporating IHRL norms, as the two Additional Protocols did in 1977, has since been adopted. On the other hand, while the ICRC Customary Law Study suggests that IHRL has been incorporated into customary IHL norms (Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>), it is argued that the concerned Rules, in particular Rule 99, dealing with detention, and Rule 100, concerning the fair trial guarantees, amount to a “disguised” application and interpretation process respectively. Regarding Rule 99, this is already noticeable in the title of that Rule, which prohibits “arbitrary detention”, those terms being specific to the IHRL narrative. It is even more apparent with respect to the procedural guarantees claimed by the ICRC to be applicable in non-international armed conflict (NIAC), especially the right of *habeas corpus* (*ibid.*, pp. 351–352), which is entirely based upon human rights practice and case law. Such “disguised” application is contentious since, unlike in the traditional application process (discussed below), these IHRL guarantees, including the right of *habeas corpus*, are incorporated into IHL and bind armed groups. Regarding Rule 100, the ICRC interpreted the fair trial guarantees applicable to any armed conflict, including NIACs, notably in light of human rights treaties and case law, as incorporating certain IHRL requirements, such as the right to be tried “without undue delay” (*ibid.*, p. 363), although those requirements are provided by IHL treaties only with respect to specific protected persons in international armed conflict (IAC).

greatly influence the regulation of armed conflict, as it leads to the incorporation of IHRL into IHL, few indications are given in practice on how the process must be conducted.

Practice

The first instances of elaborated interpretations of IHL through IHRL date back to the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY). Those interpretations mainly concerned the IHL fundamental guarantees, notably the prohibitions against torture,¹⁹ cruel/inhumane treatment²⁰ and slavery.²¹ This interpretation process is witnessing a revival today, through the work of the ICRC and the activity of the International Criminal Court (ICC).

Firstly, the ICRC devotes general considerations to this process in its recent updated Commentaries on the Geneva Conventions,²² in particular in each introductory part of those Commentaries. Each such part deals with the interpretation of the commented-upon Convention in light of any other relevant rules of international law, including IHRL.²³ In addition, in the core part of the Commentaries, the ICRC has proceeded to engage in significant interpretations of conventional IHL norms in light of IHRL. Those interpretations not only echo those made by the ICTY²⁴ but also concern other fundamental guarantees, such as the fair trial guarantees²⁵ and the principle of *non-refoulement*.²⁶ Such interpretations have also been made in relation to many specific notions, like the qualification of “religious personnel” as protected persons under Geneva Convention I (GC I),²⁷ or specific protections, like the minimum amount of living space for prisoners of war (PoWs)²⁸ and the use of weapons against those

19 See e.g. International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgment (Trial Chamber), 15 March 2002, para. 181. See also ICTY, *The Prosecutor v. Anto Furundžija*, Case No. IT-95-17-1-T, Judgment (Trial Chamber), 10 December 1998, paras 143 ff.; ICTY, *The Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, paras 452–493, 534–542.

20 See e.g. ICTY, *Delalić*, above note 19, paras 534–540.

21 See e.g. ICTY, *The Prosecutor v. Dragoljub Kunarac et al.*, Case Nos IT-96-23-T, IT-96-23/1-T, Judgment (Trial Chamber), 22 February 2001, paras 519–520; ICTY, *Krnojelac*, above note 19, para. 353.

22 For less recent ICRC practice, see e.g. ICRC Customary Law Study, above note 18, p. xxxi.

23 See in particular ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), paras 39–41; ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed., Geneva, 2017 (ICRC Commentary on GCII), paras 41–42; ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (ICRC Commentary on GC III), paras 99–105, available at: <https://tinyurl.com/5yf9ta5n>. The updated ICRC Commentary on GC III is much more developed on this issue than the two other Commentaries.

24 In relation to cruel/inhumane treatment, see e.g. ICRC Commentary on GC III, above note 23, paras 651–659, particularly para. 655 fn. 417, as well as paras 665–669; in relation to torture, see e.g. *ibid.*, paras 662–681, particularly paras 662, 668, 673 fn. 474, 674 (with examples of torture taken from IHRL case law), 681.

25 See e.g. *ibid.*, paras 710–731, particularly paras 715, 718, 723, 724, 728.

26 See *ibid.*, paras 744–751, particularly paras 746, 749.

27 See ICRC Commentary on GC I, above note 23, para. 1968 fn. 20.

28 See ICRC Commentary on GC III, above note 23, para. 2090 fn. 32.

prisoners, as provided by Geneva Convention III (GC III) under Articles 25 and 42 respectively.²⁹

Secondly, the ICC recently engaged in the interpretation process in the *Al Hassan* case. In its 2019 decision on the confirmation of charges,³⁰ the ICC Pre-Trial Chamber substantially relied on IHRL to interpret the fair trial guarantees that any tribunal must afford in non-international armed conflicts (NIACs) in relation to criminal prosecutions. The *Al Hassan* case notably concerns tribunals established by armed groups, in particular the coalition between AQMI and Ansar Dine, two terrorist organizations that took control over certain localities of northern Mali in April 2012, including the city of Timbuktu and its region. The accused was an alleged member of the Islamic police created by that coalition and was allegedly involved in the work of the Islamic Tribunal set up by the terrorist organizations for prosecuting conduct contravening their strict religious laws. The Islamic Tribunal rendered numerous judgments and sentenced many persons to corporal punishments, including flogging, lashes and amputations. The Tribunal operated until January 2013, when the terrorist coalition was pushed back by the Malian authorities, supported by the French army. The accused was charged with the war crime of passing sentences without due process. The ICC Pre-Trial Chamber referred to IHRL in order to interpret the guarantees that the Islamic Tribunal had to respect, including the statutory guarantees, namely the independence and impartiality of the Tribunal,³¹ and the procedural guarantees, which include a series of requirements, such as those stemming from the rights of the accused.³²

The interpretation process has also been conducted by several other bodies, but only in an unelaborated or implicit way.³³ This is the case with regard to the US

29 See *ibid.*, paras 2536 ff.

30 ICC, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18-461-Corr-Red, Corrigendum to the Decision on the Confirmation of Charges (Pre-Trial Chamber), 13 November 2019.

31 *Ibid.*, paras 378–380.

32 *Ibid.*, paras 383–384; see also paras 483, 492.

33 However, it is worth observing that no interpretation of IHL in light of IHRL has been made at all by most other bodies, which are nonetheless competent to rule on IHL violations together with violations of other branches of international law or domestic law. For instance, the International Court of Justice (ICJ) has never undertaken such an interpretation, although it has pronounced on IHL violations in several cases and those violations concerned fundamental guarantees, such as the prohibition against torture, or other rules, like those dealing with the requisition or destruction of properties, whose content could have potentially been clarified in light of IHRL, notably in order to harmonize the norms belonging to the two different regimes: see ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *ICJ Reports 2005*, paras 206–207; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, para. 132. This is also the case with regard to the Eritrea–Ethiopia Claims Commission. Although competent to address violations of both IHL and IHRL, the Commission decided not to consider IHRL given that no party to the case relied on it (regarding the International Covenant on Civil and Political Rights, 16 December 1966 (ICCPR), see Eritrea–Ethiopia Claims Commission, *Partial Award: Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 and 22*, 28 April 2004, para. 25). This is quite unfortunate since the issues put before the Commission concerned matters with respect to which IHRL could have played a clarifying role, such as the conditions of detention of PoWs and civilians, as well as the administration of occupied territories. Finally, numerous fact-finding, inquiry and independent commissions and panels of experts have been given the mandate by UN institutions—either the UN Security Council, the UN Secretary-General, the Commission on Human Rights or the Human Rights Council—to

Supreme Court, which merely referred to Article 14 of the ICCPR in a footnote of its judgment in the *Hamdan* case, when it dealt with the fair trial guarantees afforded under Article 3 common to the four Geneva Conventions.³⁴ This is also the case with regard to the Israeli Supreme Court and the Commission of Inquiry on the Protests in the Occupied Palestinian Territory: both briefly referred to the law enforcement paradigm regarding the use of lethal force against civilians who do not take a direct part in hostilities in international armed conflicts (IACs)³⁵ or against PoWs under Article 42 of GC III, as well as in relation to any use of lethal force in occupied territories under Article 43 of the 1907 Hague Regulations.³⁶ Finally, this is also the case with regard to some human rights bodies, in particular when those bodies have interpreted Article 43 of the Geneva Convention IV (GC IV). That article, which provides that a mere administrative board may review the legality of the detention of civilians, was considered as being required to fulfil a certain IHRL requirement – namely, that of affording “sufficient guarantees of impartiality and fair procedure to protect against arbitrariness”.³⁷ Such interpretations have actually been made in the course of the application process, when, as we will see in detail later,³⁸ those bodies resorted to IHL to interpret the IHRL norm that they applied in relation to the detention of civilians in IACs. IHL was itself interpreted while being used by human rights bodies as an interpretive standard for the applied IHRL norm.

Unavoidable interplay: The issue of the incorporation of IHRL into IHL

When an IHRL norm is used to interpret an IHL one, the former is incorporated into the latter. Through this process of interpretation, the incorporated IHRL

investigate violations of both IHRL and IHL. However, most of them did not proceed to any interpretation of the applicable IHL rules in light of IHRL (see, nonetheless, below note 36), even when they specifically addressed the issue of the relationships between IHL and IHRL.

34 US Supreme Court, *Hamdan v. Rumsfeld, Secretary of Defense, et al.*, 558 US 557, No. 05.184, 29 June 2006, pp. 70-71, available at: www.supremecourt.gov/opinions/05pdf/05-184.pdf.

35 See below note 36; see also *The Public Commission to Examine the Maritime Incident of 31 May 2010: The Turkel Commission*: Report, Part 1, January 2011 (Report of the Turkel Commission), para. 234, available at: www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ENG_turkel_eng_a.pdf. It has also been argued that the Israel Supreme Court interpreted (customary) IHL in light of IHRL with respect to the use of lethal force against legitimate targets under IHL, in particular civilians directly taking part in hostilities in IACs: see Israel Supreme Court, *Public Committee Against Torture v. Government*, Case No. HCJ 769/02, 14 December 2006, para. 40. According to the Turkel Commission, the Court “incorporate[d] human rights law into international humanitarian law”: Report of the Turkel Commission, above, p. 232 fn. 809.

36 Regarding the Israel Supreme Court, see *Yesh Din – Volunteers for Human Rights and Others v. Israel Defense Forces Chief of General Staff and Others*, Case No. HCJ 3003/18, 24 May 2018, paras 39–40; regarding the Commission of Inquiry, see *Report of the Detailed Findings of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory*, UN Doc. A/HRC/40/CRP.2, 18 March 2019 (2019 Protests Report), paras 84–93, particularly para. 86, and fn. 100.

37 European Court of Human Rights (ECtHR), *Hassan v. The United Kingdom*, Appl. No. 29750/09, Judgment (Grand Chamber), 16 September 2014, para. 106. See also Inter-American Commission on Human Rights (IACHR), *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 143; IACHR, *Coard and Others v. United States*, Report No. 109/99, Case 10.951, 29 September 1999, para. 58.

38 See the below section on “Elaborated but Confusing Frameworks”.

norm then “indirectly” regulates situations to which the IHL interpreted norm applies, according to the specific conditions for the applicability of IHL. However, the scope of application of IHL is broader than that of IHRL in certain respects; in other words, IHL applies to situations to which IHRL is not applicable.

Firstly, no derogation is allowed from IHL norms, while such derogation is possible with respect to certain human rights.³⁹ Secondly, IHL is indisputably applicable to both States and any armed groups in NIACs once they are party to such conflicts, whereas the issue of the applicability of IHRL to non-State actors and in particular to armed groups is controversial. Under the traditional view, IHRL does not apply to armed groups, but there is a current trend in practice to admit such an application with respect to armed groups having territorial control and/or exercising government-like functions.⁴⁰ Thirdly, IHL applies to persons or properties that are not necessarily under the (physical or territorial) control of a party to the conflict,⁴¹ while such control is a traditional prerequisite for the applicability of IHRL.⁴²

The crucial issue, then, is whether IHRL can be used to interpret an IHL norm when that norm is designed to apply to situations to which IHRL is not or could not be applicable according to the conditions for its applicability. Practice shows that IHRL is used as an interpretative standard even in such cases. Indeed, IHRL obligations have been incorporated into IHL, although States are formally authorized to derogate to those obligations. This is the case for certain IHRL obligations that have been used in practice as interpretive standards for IHL fair trial guarantees. For instance, in the *Al Hassan* case, the ICC incorporated the IHRL rights to be tried “without undue delay”⁴³ (or “within a reasonable time”⁴⁴), “to present and examine witnesses”, and to public proceedings within the IHL fair trial guarantees applicable to NIACs,⁴⁵ although those rights may be

39 See e.g. ICCPR, Art. 4; European Convention on Human Rights (ECHR), 4 November 1950, Art. 15; American Convention on Human Rights (ACHR), 22 November 1969, Art. 27.

40 See e.g. Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), *Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council*, December 2016, available at: www.geneva-academy.ch/joomlatools-files/docman-files/InBrief7_web.pdf.

41 See e.g. the law regulating the conduct of hostilities, in particular the rules on targeting. On that control requirement regarding the IHL fundamental guarantees, see e.g. Raphaël van Steenberghe, “Who Are Protected by the Fundamental Guarantees under International Humanitarian Law? Part II: Breaking with the Control Requirement in light of the ICC Case Law”, *International Criminal Law Review*, Vol. 22, 2022, available at: <https://tinyurl.com/yckrrwc3>.

42 At the international level, see e.g. Human Rights Committee (HRC), General Comment No. 31, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10; at the European level, see e.g. ECtHR, *Georgia v. Russia (II)*, Appl. No. 38263/08, Judgment (Grand Chamber), 21 January 2021, para. 81; at the US level, see e.g. IACHR, *Coard*, above note 37, para. 37.

43 ICCPR, Art. 14(3).

44 ECHR, Art. 6(1); ACHR, Art. 8(1); African Charter on Human and Peoples’ Rights, 27 June 1981, Art. 7(1)(d).

45 ICC, *Al Hassan*, above note 30, para. 384.

subject to derogations under IHRL.⁴⁶ The ICRC did the same with respect to the first two foregoing rights.⁴⁷ This means that, as incorporated into IHL, such guarantees can no longer be subject to any derogation in times of armed conflict. Moreover, both the ICRC and the ICC, as well as other international criminal jurisdictions, have interpreted several IHL fundamental guarantees applicable in NIACs, and therefore binding upon armed groups, in light of IHRL norms.⁴⁸ These norms then became “indirectly” applicable to those groups, although their scope of application does not traditionally extend to such groups. More specifically, practice even shows that certain norms of international law, such as those provided in the International Convention against the Taking of Hostages, have been mobilized by international tribunals to interpret IHL, although the treaty containing them expressly provides that it is not applicable in armed conflict.⁴⁹

The ICRC position on this issue is, however, ambiguous. In each introductory part of its updated Commentaries, when developing its general considerations on the interpretation of the commented-upon Convention in light of any other relevant treaties of international law, the ICRC refers to “human rights law *where applicable*”.⁵⁰ In its updated Commentary on GC III, it even adds that “[i]t is important to note that treaties other than the Conventions themselves are referred to in the Commentaries on the understanding that they apply *only if all the conditions relating to their geographic, temporal and personal scope of application are fulfilled*”.⁵¹ This might suggest that IHRL can only be used as an interpretive tool for an IHL norm when it is or could be applicable to the situation regulated by that norm. However, by emphasizing that these other relevant treaties “are referred on the understanding that they apply”, the ICRC appears to confuse the interpretation and application processes. This is reinforced by the fact that the ICRC also considers in its Commentaries that referring to human rights treaties is relevant to complement – and not just to interpret – the IHL ones,⁵² such as the IHRL treaties prohibiting the death penalty in relation to the transfers of PoWs to third States.⁵³ In any case, when making interpretations in the core part of the Commentaries, the ICRC does not enquire whether the IHRL norm used as an interpretive tool is or could be applicable to the situation

46 No human rights treaty expressly excludes derogations to those guarantees. In addition, even if the practice of human rights bodies has extended the list of guarantees of due process that may not be subject to any derogation, the aforementioned guarantees have not been included on that list: see e.g. IACHR, *Report on Terrorism and Human Rights*, above note 37, paras 261–262.

47 See e.g. ICRC Commentary on GC III, above note 23, paras 722–723.

48 See above notes 19–21, 24–26 and 31–32.

49 See e.g. ICTY, *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgment (Appeals Chamber), 29 July 2004, para. 639 fn. 1332; Special Court for Sierra Leone (SCSL), *The Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-04-15-A, Judgment (Appeals Chamber), 26 October 2009, paras 577–579. See also the ICC *Elements of Crimes* regarding the taking of hostages as a war crime (ICC, *Elements of Crimes*, The Hague, 2011, pp. 17, 33, available at: <https://tinyurl.com/y3d6tebm>), which “are ‘largely taken from’ the definition contained in the Hostages Convention” (SCSL, *Sesay*, above, para. 579).

50 See ICRC Commentary on GC I, above note 23, para. 35; ICRC Commentary on GC II, above note 23, para. 35; ICRC Commentary on GC III, above note 23, para. 94 (emphasis added).

51 ICRC Commentary on GC III, above note 23, para. 95 (emphasis added).

52 See *ibid.*, para. 105.

53 See *ibid.*, para. 1543.

regulated by the IHL interpreted rule.⁵⁴ More specifically, the ICRC did not bar itself from resorting to IHRL to interpret the fundamental guarantees provided under common Article 3, although those guarantees are applicable to any armed group party to a NIAC and the IHRL scope of application does not traditionally extend to such groups. The Committee even refers to IHRL to interpret common Article 3 as including the principle of *non-refoulement*, while expressly asserting that this principle is binding upon both States and armed groups.⁵⁵

Some developments on the interpretation of common Article 3 nonetheless remain intriguing in the updated ICRC Commentaries, in particular with respect to the statutory fair trial guarantees, namely the independence and impartiality of tribunals. While indicating that “[h]uman rights bodies have stated that [such guarantees] can never be dispensed”, the Commentaries indeed emphasize that the “interpretation given to [them] by these bodies is also relevant in the context of common Article 3, *at least for courts operated by State authorities*”.⁵⁶ Those last terms suggest that the interpretation based on IHRL would only be valid for States, not armed groups, in accordance with the limited personal scope of application of IHRL. Such a position is, however, untenable as it directly contradicts an important principle of IHL—namely, the principle of equality between belligerents. It would indeed lead to an asymmetry of the application of the interpreted IHL norm, since IHRL used as an interpretive standard would have been incorporated into that norm.⁵⁷

No elaborated legal framework

The interpretation process has great potential to impact the regulation of armed conflict by incorporating IHRL standards into IHL, even when those standards are not applicable to the situation regulated by IHL. However, that process has not been the object of any elaborated legal framework in practice.

Firstly, few indications are given of the reasons justifying a resort to IHRL in order to interpret IHL. The only indications are those briefly mentioned by the ICTY in the *Kunarac* case and the ICRC in its updated Commentaries. Both the ICTY and the ICRC suggest that referring to IHRL to interpret IHL is relevant because the two regimes share certain common features. In the *Kunarac* case, the only case in which the ICTY expanded on the interplay between IHL and IHRL, the ICTY indicated that it “had recourse to instruments and practices developed in the field of human rights law” to interpret undefined IHL concepts, such as the notion of torture, “[b]ecause of [the] *resemblance* [between these two bodies of law], in terms of goals, values and terminology”.⁵⁸ On the other hand, the

54 See above notes 24–29.

55 See e.g. ICRC Commentary on GCIII, above note 23, para. 750.

56 *Ibid.*, para. 715 (emphasis added).

57 That issue must be distinguished from the potential asymmetry that could result, as we will see in detail below, from the *application* of IHRL, when IHRL may arguably be said to apply only to one party to the armed conflict, namely the State: see the below section on “Modulating Applicable IHRL Obligations”.

58 ICTY, *Kunarac*, above note 21, para. 467 (emphasis added).

ICRC indicated that “[r]eference has been made to human rights law where relevant to interpret *shared concepts* (e.g. cruel, inhumane and degrading treatment)”.⁵⁹

Secondly, few indications are given about the standards that must guide the interpretation of IHL through IHRL. Although the ICTY made general observations on those standards, these observations were quite limited and vague and were expressed only in relation to the determination of the notion of torture under IHL. In the *Kunarac* case, where the observations were the most elaborated,⁶⁰ the Tribunal merely warned against “embrac[ing] too quickly and too easily concepts and notions developed in a different legal context” and indicated that “notions developed in the field of human rights [could] be transposed in international humanitarian law only if they [took] into consideration the specificities of the latter body of law”.⁶¹ In other words, although the ICTY emphasized that IHL was somewhat similar to IHRL, it suggested that adaptations of the IHRL interpretive norm might be needed when incorporated into IHL, given the specificities of the latter.⁶² One such adaptation made by the Tribunal mainly concerned the specific IHRL requirement that a State agent must be involved in the act of torture.⁶³ While the Tribunal extended such involvement to both State and non-State parties to armed conflicts in early cases,⁶⁴ it completely excluded that requirement from the notion of torture later in the *Kunarac* case⁶⁵ and repeated the aforementioned solution in subsequent case law.⁶⁶ Moreover, the only IHL specificity to which the Tribunal briefly referred in its reasoning was that IHL, unlike IHRL, was binding upon both States and armed groups.⁶⁷ The

59 ICRC Commentary on GC I, above note 23, para. 40; ICRC Commentary on GC II, above note 23, para. 41; ICRC Commentary on GC III, above note 23, para. 101 (emphasis added).

60 Regarding less elaborated observations, see also ICTY, *Delalić*, above note 19, para. 473; ICTY, *Furundžija*, above note 19, para. 162; ICTY, *Krnjelac*, above note 19, para. 181.

61 ICTY, *Kunarac*, above note 21, para. 471.

62 Such emphasis by the Tribunal on the specificity of IHL, justifying the adaptation of the interpretive IHRL norm, has also been expressed in other cases dealing with the definition of torture under IHL: see e.g. ICTY, *Krnjelac*, above note 19, para. 181.

63 Another adaptation was related to the specific purpose for which the act of violence must be committed in order to amount to an act of torture. In the *Furundžija* case, the ICTY added the purpose of humiliating the victim to the purposes expressly mentioned in the 1984 Convention Against Torture: ICTY, *Furundžija*, above note 19, para. 162. While that interpretation has been followed by the Tribunal in the *Kvočka* case (ICTY, *The Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Judgment (Trial Chamber), 2 November 2001, para. 140), it was rejected later by the ICTY, which argued that this purpose was not yet part of the customary definition of torture under international law (see e.g. ICTY, *Krnjelac*, above note 19, para. 186).

64 See e.g. ICTY, *Delalić*, above note 19, para. 473; ICTY, *Furundžija*, above note 19, para. 162.

65 See ICTY, *Kunarac*, above note 21, para. 496.

66 See e.g. ICTY, *Kvočka*, above note 63, para. 138; ICTY, *Krnjelac*, above note 19, para. 162; ICTY, *The Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgment (Appeals Chamber), 21 July 2000, para. 148; ICTY, *The Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-T, Judgment (Trial Chamber), 17 October 2003, para. 82; ICTY, *The Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgment (Trial Chamber), 1 September 2004, paras 488–489; ICTY, *The Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, para. 240; ICTY, *The Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-T, Judgment (Trial Chamber), 27 September 2007, para. 514; ICTY, *The Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, para. 519.

67 See ICTY, *Kunarac*, above note 21, para. 470; see also ICTY, *Delalić*, above note 19, para. 473.

specificities on which the Tribunal rather focused were actually specific to the relationships between IHRL and international criminal law. The Tribunal emphasized that the former was mainly binding upon States and was designed to engage State responsibility in case of violations, whereas the latter focused on the criminal responsibility of individuals, which therefore made the requirement of the involvement of a State agent irrelevant with respect to the crime of torture.⁶⁸ Finally, the ICTY never identified in its case law any specific legal mechanism upon which it could legally ground such interpretations of IHL by reference to IHRL.

By contrast, in its updated Commentaries, the ICRC referred to a specific legal mechanism. According to the Committee, IHRL may be used to interpret the Geneva Conventions on the basis of the principle of systemic integration, as enshrined in Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties.⁶⁹ That article provides that a treaty shall be interpreted in light of “any relevant rules of international law applicable in the relations between the parties”. However, the ICRC does not seem to adopt a rigorous and cautious approach with respect to the application of Article 31(3)(c). As already emphasized,⁷⁰ its reasoning suggests that the rule of a treaty can only be considered for the interpretation of the Geneva Conventions “if all the conditions relating to [the] geographic, temporal and personal scope of application [of that treaty] are fulfilled”. Yet, according to Article 31(3)(c), a rule must be “applicable in the relations between the parties” in the mere sense that those parties must be bound by it because they ratified the treaty providing it, not in the sense that the rule must be applicable to the concrete situation at stake. In addition, the ICRC does not pronounce on the meaning of the controversial notion of “parties” to which the relevant rule of international law must be applicable in order to serve as an interpretative standard for a treaty. The issue is indeed whether that notion must include all the States Parties to the interpreted treaty or only those parties to the specific dispute concerning the interpretation of the treaty.⁷¹ This seems important, since the updated Commentaries intend to interpret the Geneva Conventions, which are universally ratified, notably by resorting to IHRL instruments, to which less States are parties. Similarly, the ICRC does not question whether mere soft-law instruments may act as a relevant rule for the interpretation of the Geneva Conventions, although it relies on such instruments

68 See ICTY, *Kunarac*, above note 21, paras 470, 493–495. Regarding such reference to the specificity of international criminal law rather than of IHL to justify adaptations of the notion of torture under IHRL, see ICTY, *Furundžija*, above note 19, para. 162; ICTY, *Furundžija*, above note 66, para. 148; ICTY, *Brđanin*, above note 66, paras 488–489; ICTY, *The Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgment (Appeals Chamber), 28 February 2005, para. 283.

69 ICRC Commentary on GC I, above note 23, para. 33; ICRC Commentary on GC II, above note 23, para. 33; ICRC Commentary on GC III, above note 23, para. 92.

70 See above notes 50–51 and corresponding main text.

71 See e.g. Ulf Linderfalk, “Who are ‘the Parties’? Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the ‘Principle of Systemic Integration’ Revisited”, *Netherlands International Law Review*, Vol. 55, No. 3, 2008; see also ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, UN Doc. A/CN.4/L.682, 13 April 2006, paras 470–472.

in the core text.⁷² More generally, the ICRC does not elaborate on how such systemic integration concretely operates in general or in relation to the interpretation of IHL through IHRL in particular. It merely makes a few general observations that echo those already made by the ICTY on that issue in the *Kunarac* case – notably, that “human rights law and interpretations can[not] be transposed mechanically to humanitarian law provisions, and differences [must] be pointed out where relevant”.⁷³ Regarding the specific issue of detention regulated by GC III, the ICRC states in general terms that “[r]eferences to human rights law and standards must ... be read with due regard to the particular context and to the specificities of detention in armed conflict”.⁷⁴ Moreover, in all of its interpretations made in the core part of its Commentaries, few adaptations of the interpretive IHRL standard are expressly indicated and articulated.⁷⁵

Finally, in its confirmation decision in the *Al Hassan* case, the ICC also relied on a legal mechanism to justify resorting to IHRL in order to interpret IHL. That mechanism is however specific to the ICC’s Rome Statute, as it is derived from Article 21(3) of the Statute. Article 21 indeed deals with the law applicable before the ICC, with that law including IHL, and its third paragraph contains a general test of consistency of this applicable law with IHRL. In the *Al Hassan* case, the ICC used that test to perform an interpretive function with respect to the fair trial guarantees,⁷⁶ as it usually does with respect to various procedural issues regulated by the Rome Statute.⁷⁷ However, the ICC remained completely silent on the concrete operation of that test in relation to the interpretation of IHL through IHRL and, more particularly, regarding the issue of the fair trial guarantees that any tribunal must afford in NIACs.

Legal scholarship is unfortunately no more helpful than the foregoing practice. Few scholars actually focus on the interpretation process; legal literature is more attracted, as we will see,⁷⁸ to the application process. It is nonetheless worth observing that some scholars point to another legal mechanism upon which the interpretation of IHL through IHRL could be based: namely, the well-known *lex specialis* principle.⁷⁹ However, there are disagreements on whether

72 See e.g. ICRC Commentary on GC III, above note 23, para. 2541.

73 ICRC Commentary on GC I, above note 23, para. 40; ICRC Commentary on GC II, above note 23, para. 41; ICRC Commentary on GC III, above note 23, para. 101.

74 ICRC Commentary on GC III, above note 23, para. 102.

75 See e.g. the adaptation of the IHRL definition of torture; however, the ICRC merely refers to the ICTY case law on that issue (ICRC Commentary on GC III, above note 23, para. 681). With respect to implicit adaptations, however, regarding the minimum amount of living space that dormitories of PoWs should afford, the ICRC refers to the standard established by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, but requires Detaining Powers to comply with that standard only “wherever circumstances permit” (*ibid.*, para. 2090 fn. 32).

76 ICC, *Al Hassan*, above note 30, paras 378 (statutory guarantees), 383 (procedural guarantees).

77 See e.g. the case law described in William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed., Oxford University Press, Oxford, 2016, pp. 530–534.

78 See e.g. below notes 110 and 119.

79 See e.g. Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham and Northampton, MA, 2019, p. 216; Laura M. Oleson, “Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law – Demonstrated by the Procedural Regulation of Internment in Non-International

IHRL should be seen as the *lex generalis*, in light of which IHL, as the *lex specialis*, may be interpreted,⁸⁰ or rather as the *lex specialis*, acting as an interpretive tool for IHL, which is considered the *lex generalis* with respect to certain issues.⁸¹ This already evidences the shortcomings of such a mechanism, which does not provide any guidance on the determination of which rule must be seen as the *lex specialis* or *lex generalis*. These limits will be examined in detail later, when dealing with the main legal mechanisms used in practice to deal with the problems raised by the interplay between IHL and IHRL.⁸²

The application process

The application process, which stems from the applicability of IHRL in armed conflict, has been much more addressed in practice. Difficulties may arise only in the case of the interplay between IHRL and IHL, when the two bodies of law simultaneously apply to the same situation and enter into conflict. Several mechanisms have been used in practice to overcome these difficulties.

Practice

The application process has been conducted by all the bodies devoted to monitoring the application of IHRL, including the Human Rights Committee (HRC),⁸³ the European Court of Human Rights (ECtHR),⁸⁴ the Inter-American Commission on Human Rights (IACHR),⁸⁵ the Inter-American Court of Human Rights (IACtHR)⁸⁶ and the African Commission on Human and People’s Rights.⁸⁷ Given the number of such bodies, which contrasts with the few bodies monitoring the application of IHL, and their intense activity, notably in relation to situations of armed conflict, it is not surprising that a significant part of their case law is devoted to the application process.

In addition, that process has also been abundantly addressed before other bodies competent to pronounce on IHRL violations together with violations of other branches of international law or domestic law, like the International Court

Armed Conflict”, *Case Western Reserve Journal of International Law*, Vol. 40, No. 3, 2009, p. 451; Heike Krieger, “A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study”, *Journal of Conflict and Security Law*, Vol. 11, 2006, p. 275.

80 See e.g. H. Krieger, above note 79, p. 275.

81 See e.g. M. Sassòli, above note 79, p. 216.

82 See the below section on “The Unsatisfactory Traditional Frameworks”.

83 See e.g. HRC, above note 42, para. 11; HRC, “General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life”, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 64.

84 See e.g. ECtHR, *Hassan*, above note 37, para. 104.

85 See e.g. IACHR, *Report on Terrorism and Human Rights*, above note 37, para. 61.

86 See e.g. IACtHR, *The Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Series C, No. 148, 1 July 2006, para. 179.

87 See e.g. ACHPR, Communication 227/99, “Democratic Republic of Congo/Burundi, Rwanda, Uganda”, 29 May 2003, available at: www.achpr.org/sessions/descions?id=138.

of Justice (ICJ)⁸⁸ and the numerous fact-finding missions or commissions of inquiry established by the Human Rights Council or the UN Security Council.⁸⁹

No automatic interplay: The issue of the conflicting application of IHL and IHRL to the same conduct

The applicability of IHRL in armed conflict does not necessarily mean that this body of law will interplay with IHL. Contrary to what occurs in the interpretation process, the concerned IHRL norm is not incorporated into IHL and remains subject to its own scope of application. This means that any interplay between IHRL and IHL with respect to a given conduct may arise only when that conduct simultaneously falls into the scope of application of both bodies of law. As a result, at least five cumulative conditions must be met.

Three conditions result from the scope of application of IHRL: as already seen,⁹⁰ (1) the IHRL norm applicable to the conduct must not have been subject to any valid derogation; (2) that conduct must be that of a State (or an international organization) and not of an armed group (at least not of an armed group that does not exercise government-like functions and/or have any territorial control); and (3) the conduct must have occurred with respect to a person who is under the jurisdiction of the State bound by the concerned IHRL norm (through its personal or spatial control). The two other conditions result from the scope of application of IHL: (4) the conduct must have a nexus with an armed conflict,⁹¹ which means that conduct, like the killing of a person, may well occur in the context of an armed conflict and be regulated by IHRL while failing to have any nexus with the conflict and therefore being outside of the scope of application of IHL; and (5) the conduct must occur with respect to persons fulfilling a particular status under IHL, traditionally that of belonging to the enemy,⁹² which means that acts of violence committed by a party to an armed

88 See e.g. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, para. 106; ICJ, *Armed Activities*, above note 33, para. 216.

89 See e.g. *Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya*, UN Doc. A/HRC/17/44, 12 January 2012 (2012 Libya Report), paras 61, 146; *Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: Detailed Findings*, UN Doc. A/HRC/31/CRP.3, 15 February 2016 (2016 Libya Report), para. 20.

90 See the above section on “Unavoidable Interplay: The Issue of the Incorporation of IHRL into IHL”.

91 For practice referring to the nexus requirement, see e.g. *Report of the Commission on Human Rights in South Sudan*, UN Doc. A/HRC/40/69, 12 March 2019 (2019 South Sudan Report), para. 101; *Situation of Human Rights in Yemen, including Violations and Abuses since September 2014: Report of the Group of Eminent International and Regional Experts on Yemen*, UN Doc. A/HRC/45/6, 28 September 2020 (2020 Yemen Report 1), para. 67. It is argued that the scope of that test may be determined in light of the nexus requirement for the purpose of establishing criminal responsibility for war crimes; see e.g. M. Sassòli, above note 79, pp. 200–203; on that scope, see e.g. ICTY, *Kunarac*, above note 21, paras 58–59; ICC, *The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges (Pre-Trial Chamber), 23 March 2016, para. 2689.

92 See e.g. Antonio Cassese *et al.* (eds), *Cassese’s International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2013, p. 67; M. Sassòli, above note 79, p. 199. See also SCSL, *The Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-04-15-T, Judgment (Trial Chamber), 2 March 2009, paras 1451, 1453. See, in particular, Article 4 of GC III and GC IV, Article 41 of AP I, and the condition of not

conflict against persons affiliated to that party are normally regulated exclusively by IHRL.⁹³

Admittedly, practice shows many situations in which similar conduct is likely to be simultaneously regulated by both IHRL and IHL and therefore to give rise to interplay between the two bodies of law. The conducts concerned include those abundantly discussed in legal scholarship, namely the use of lethal force as well as the detention of persons for security reasons, especially in NIACs. However, other practice, especially the detailed reports of the human rights fact-finding missions and commissions of inquiry,⁹⁴ evidences a much wider range of conduct that may trigger the application of both IHL and IHRL norms. Such conduct may encompass enforced disappearance,⁹⁵ internal displacement of persons,⁹⁶ pillaging,⁹⁷ the use of human shields,⁹⁸ closures⁹⁹ and curfews,¹⁰⁰ obstacles to humanitarian assistance,¹⁰¹ attacks or restriction of movements on journalists,¹⁰² unfair administration of justice,¹⁰³ and destruction of civilian objects,¹⁰⁴ including

directly participating in hostilities set out in common Article 3 and Article 4 of Additional Protocol II (APII) regarding the enjoyment of the fundamental guarantees (on the interpretation of these conditions as meaning that those guarantees only protect against inter-party violence, see e.g. Raphaël van Steenberghe, “Who Are Protected by the Fundamental Guarantees under International Humanitarian Law? Part I: Breaking with the Status Requirement in light of the ICC Case Law”, *International Criminal Law Review*, Vol. 22, No. 3, 2021, pp. 367–369).

- 93 See nonetheless the ICC view that the protections against rape and sexual slavery apply even to intra-party violence: ICC, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-1707, Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9 (Trial Chamber), 4 January 2017; ICC, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-1962, Judgment on the Appeal of Mr Ntaganda against the “Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9” (Appeals Chamber), 15 June 2017.
- 94 See e.g. also ECtHR, *Georgia v. Russia (II)*, above note 42, paras 176–199 (pillaging and destruction of properties), 290–291 (internal displacement of persons), 310–311 (pillaging and destruction of schools), 323–325 (failure to investigate).
- 95 See e.g. 2016 Libya Report, above note 89, paras 149–152; 2020 Yemen Report 1, above note 91, para. 67.
- 96 See e.g. *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/22/59, 5 February 2013 (2013 Syria Report), Annex XIII, para. 21; *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/27/60, 13 August 2014, para. 132.
- 97 See e.g. *Assessment Mission by the Office of the United Nations High Commissioner for Human Rights to Improve Human Rights, Accountability, Reconciliation and Capacity in South Sudan: Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/31/49, 22 April 2016 (2016 South Sudan Report), para. 46.
- 98 See e.g. *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48, 25 September 2009 (2009 Gaza Report), paras 1096–1106.
- 99 See e.g. *ibid.*, paras 1300–1322.
- 100 See e.g. *Report of the Human Rights Inquiry Commission Established Pursuant to Commission Resolution S-5/1 of 19 October 2000*, UN Doc. E/CN.4/2001/121, 16 March 2001 (2001 Occupied Territories Report), paras 93–94.
- 101 See e.g. *Situation of Human Rights in Yemen, including Violations and Abuses since September 2014: Report of the Group of Eminent International and Regional Experts on Yemen*, UN Doc. A/HRC/45/CRP.7, 29 September 2020 (2020 Yemen Report 2), paras 110–147.
- 102 See e.g. 2001 Occupied Territories Report, above note 100, para. 94; 2012 Libya Report, above note 89, para. 131.
- 103 See e.g. 2020 Yemen Report 2, above note 101, paras 334–335.
- 104 See e.g. 2013 Syria Report, above note 96, para. 13; 2016 South Sudan Report, above note 97, para. 46; *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*,

places of worship, historic or cultural monuments,¹⁰⁵ hospitals¹⁰⁶ and objects essential to the survival of the civilian population,¹⁰⁷ such as flour mills or chicken farms.¹⁰⁸ That being said, difficulties may arise from the interplay between the IHL and IHRL norms applicable to the same conduct only when there is a normative conflict between those norms, with that notion of conflict being understood in a broad sense: the two norms provide for different – but not necessarily contradictory – results.¹⁰⁹

Elaborated but confusing frameworks

Such conflicts of norms, arising from the applicability of IHRL in armed conflict, have been abundantly addressed in practice and legal scholarship. The core approach followed in practice to solve such conflicts is the harmonization of the two bodies of law through the interpretation of the applicable IHRL norm in light of IHL. This particular process has been designated by certain scholars as leading to the “humanitarization” of IHRL.¹¹⁰ It operates in an opposite way to the interpretation process examined above, but the logic underlying the two processes is similar. While it is admitted that IHRL may impact the regulation of armed conflict, either through IHL itself by its interpretation in light of IHRL or by applying in armed conflict simultaneously with IHL, this might only be possible if IHRL is somewhat adapted when needed.

This “humanitarization” of IHRL is based upon several mechanisms in practice. The most familiar is the *lex specialis* principle, and the 1996 ICJ Advisory Opinion in the *Nuclear Weapons* case is an emblematic precedent in this respect. It is indeed well known that the Court ruled that the right to life under Article 6 of the ICCPR, understood as the right of not being arbitrarily deprived of one’s life, had to be interpreted in light of the relevant IHL provisions when applied in armed conflict.¹¹¹ Since then, the *lex specialis* principle has been abundantly used in practice.¹¹² To a lesser extent, courts have

25 January 2005 (2005 Darfur Report), para. 318, available at: www.un.org/ruleoflaw/files/com_inq_darfur.pdf; 2009 Gaza Report, above note 98, paras 323–324.

105 See e.g. 2012 Libya Report, above note 89, paras 148 (IHL), 150 (IHRL).

106 See e.g. 2020 Yemen Report 2, above note 101, para. 84.

107 See e.g. 2016 South Sudan Report, above note 97, para. 52; 2009 Gaza Report, above note 98, paras 926–941.

108 For a series of conducts regulated by both IHL and IHRL, see e.g. 2019 South Sudan Report, above note 91, paras 96–98; *Report of the Commission on Human Rights in South Sudan*, UN Doc. A/HRC/43/56, 31 January 2020, paras 26, 66–68.

109 For a similar approach to the notion of normative conflict, see e.g. ILC, above note 71, para. 25. See also M. Sassòli, above note 79, p. 438.

110 One of the first scholars to use this term was Vera Gowlland-Debbas, “The Right to Life and the Relationship between Human Rights and Humanitarian Law”, in Christian Tomuschat, Evelynne Lagrange and Stefan Oeter (eds), *The Right to Life*, Martinus Nijhoff, Leiden and Boston, MA, 2010, p. 128; see also Hélène Tigroudja, “Les conflits armés”, in Michel Levinet (ed.), *Le droit au respect de la vie au sens de la Convention européenne des droits de l’homme*, Anthémis, Limal, 2010, p. 215; Jean d’Aspremont and Jérôme de Hemptinne, *Droit international humanitaire: Thèmes choisis*, Pedone, Paris, 2012, p. 86.

111 ICJ, *Nuclear Weapons*, above note 88, para. 25.

112 The ICJ again referred to the *lex specialis* principle with respect to the relationships between IHL and IHRL in the *Wall* case (above note 33, para. 106), but not in the *Armed Activities* case (above note 33, para. 216).

also resorted to another mechanism: the principle of systemic integration. This is actually the only mechanism to which the ECtHR has referred in its case law dealing with alleged violations of the European Convention on Human Rights (ECHR) in armed conflicts,¹¹³ while the IACHR has combined it with other mechanisms, including the *lex specialis* principle,¹¹⁴ in similar cases.¹¹⁵

However, this claimed “harmonization” of the two bodies of law through the interpretation of IHRL in light of IHL, often expressed in practice by the paradigmatic formula that IHL and IHRL “are complementary, not mutually exclusive”,¹¹⁶ is flawed, or at least confusing. There are indeed instances in which the norms of the two bodies of law cannot be conciliated by merely interpreting one norm in light of the other. Conflicts can then only be solved through the displacement of one norm to the detriment of the other. This can hardly be said to amount to a harmonization of the two norms. A well-known example is the application of the IHRL requirements to provide detainees with the right of *habeas corpus* and periodic review to the internment of PoWs in IACs. The relevant IHL regulation does not contain such requirements – as is traditionally sustained,¹¹⁷ they would be inappropriate since PoWs are detained merely for the purpose of preventing them from returning to combat, and they can therefore be interned until the end of active hostilities without their detention being reviewed. In such cases, the applicable IHRL requirements are not formulated in a way that would allow interpretation of those requirements in order to apply them in

Regarding the human rights monitoring bodies, see e.g. above notes 83 and 85; regarding the commissions of inquiry and fact-finding missions, see e.g. 2012 Libya Report, above note 89, para. 146; 2005 Darfur Report, above note 104, para. 143; 2001 Occupied Territories Report, above note 100, para. 62; 2019 Protests Report, above note 36, paras 81–83; 2020 Yemen Report 1, above note 91, para. 11; *Report of the OHCHR Investigation on Sri Lanka (OISL)*, UN Doc. A/HRC/30/CRP.2, 16 September 2015 (2015 Sri Lanka Report), para. 178.

113 See ECtHR, *Hassan*, above note 37, para. 102; ECtHR, *Georgia v. Russia (II)*, above note 42, para. 95.

114 See e.g. IACHR, *Franklin Guillermo Aisalla Molina (Ecuador–Colombia)*, Admissibility Report No. 112/10, Inter-State Petition IP-02, OEA/Ser.L/V/II.140, Doc. 10, 21 October 2010, para. 121.

115 See e.g. *ibid.*, para. 122. Although the Commission relied on the IHL regulation not only to interpret the relevant IHRL norm but also to pronounce on violations of that regulation itself, it ceased such practice after the IACtHR ruled in the *Las Palmeras* case (Preliminary Objections, Judgment, Series C No. 67, 4 February 2000, para. 33) that the Commission, like itself, was only competent to pronounce on IHRL violations.

116 That formula has been used by the HRC in its General Comment No. 31 (above note 42, para. 11) and repeated by the commissions of inquiry or fact-finding missions established by the Human Rights Council (see e.g. 2016 Libya Report, above note 89, para. 20; *Report of The International Fact-Finding Mission to Investigate Violations of International Law, including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance*, UN Doc. A/HRC/15/21, 27 September 2010, paras 68, 71; 2020 Yemen Report 2, above note 101, paras 178–179).

117 See e.g. M. Sassòli, above note 79, p. 440. However, a less traditional view envisages a qualified *habeas corpus* to which PoWs should be entitled, in particular “where the detainee (a) challenges his or her status as a prisoner of war; (b) claims to be entitled to repatriation or transfer to a neutral State if seriously injured or ill; or (c) claims not to have been released or repatriated without delay following the cessation of active hostilities” (*Report of the Working Group on Arbitrary Detention: United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, UN Doc. A/HRC/30/37, 6 July 2015, para. 30).

parallel with IHL. They must simply be displaced by the relevant IHL regulation when applicable.

Practice nonetheless shows that human rights bodies are strongly willing to consider that IHL and IHRL may be harmonized even when they are clearly contradictory. An illustrative example is the *Hassan* case. The ECtHR presented its ruling on the interplay between Article 5 of the ECHR and the IHL regulation on detention in IACs as a true instance of harmonization of the two bodies of law, which the Court allegedly reached through the interpretation of Article 5 in light of the relevant IHL regulation on the basis of the principle of systemic integration.¹¹⁸ Yet, it is well known that the two norms concerned are clearly contradictory, since Article 5, unlike IHL, does not provide for any ground of detention based on security reasons among its exhaustive list of grounds and requires that the detention be reviewed by a court rather than by a mere administrative body. This conflict could therefore only be avoided by displacing Article 5 in favour of the relevant IHL regulation, since Article 5 was applicable to the case due to the absence of any derogation to it. By incorporating that IHL regulation into Article 5 under the guise of interpretation, the Court actually engaged in rewriting the ECHR, an approach that has been qualified as an act of “judicial vandalism” in legal scholarship.¹¹⁹ At any rate, the principle of systemic integration is unsuitable in any case of conflicts of norms that cannot be overcome through an interpretation process but only through the displacement of one norm in favour of the other, such as in the *Hassan* case. The *lex specialis* principle would be more appropriate, provided that it is admitted that this principle can act not only as an interpretive tool (as a rule of norm conflict avoidance¹²⁰), in which case it would be unhelpful too, but also as a displacement tool (as a rule of norm conflict resolution¹²¹), justifying the setting aside of the “inappropriate” regulation.¹²²

However, even when the interpretation of IHRL through IHL is possible, it is hard to consider such interpretation as a harmonious process that would conciliate the two competing norms by respecting their own specificities. Actually, it may also entail a displacement process, but at the level of the interpretive standards rather than the norms themselves. When the issue of the interpretation of the applicable IHRL norm arises, such as the interpretation of the right to life under Article 6 of the ICCPR, different interpretive standards may actually be available—either the IHL one, authorizing the deprivation of life merely on the basis of the status of the persons involved, or the IHRL one,

118 ECtHR, *Hassan*, above note 37, para. 102.

119 M. Milanovic, above note 6, p. 475. It is arguable that the ECtHR would remain competent to adjudicate the case even if it would have to assess the concerned conduct in light of the relevant applicable IHL norm that would have displaced Article 5 of the ECHR; similarly, in relation to Article 2 of the ECHR, see ECtHR, *Georgia v. Russia (II)*, above note 42, Concurring Opinion of Judge Keller, p. 153, para. 25 (and the case law quoted by the judge).

120 On this terminology, see e.g. M. Milanovic, above note 6, p. 465.

121 On this terminology, see *ibid.*

122 See e.g. ILC, above note 71, para. 56; see also G. Gaggioli, above note 14, p. 59, in which the author distinguishes between the “interpretative” *lex specialis* and the “derogatory” *lex specialis*.

making the use of lethal force dependent upon circumstances.¹²³ That particular interpretation process therefore implies that a choice must be made between two competing legal frameworks and that one will have to give priority to the other. In practice, the IHL framework is usually favoured to the detriment of the IHRL one. This is definitely not seen as a harmonious process by human rights proponents, who argue that the conflict between the two legal frameworks should rather be solved in favour of the human rights framework, at least in certain particular circumstances.¹²⁴ The only difference with the classical displacement process, which operates at the level of the norms themselves, is that the applicable IHRL norm is formulated in such an open way, using terms like “arbitrariness”, that its interpretation is made possible. Had the IHRL norm been formulated in another way, like the absolute formulation of Article 2 of the ECHR, the IHL framework would also be given precedence, not under the guise of interpretation but through the displacement of the IHRL norm in favour of the IHL one.

Traditional legal framework versus a coherency-based approach

Practice and legal scholarship show that there is a lack of any satisfactory legal framework to guide both the interpretation and application processes and to overcome the difficulties arising from those processes. It is submitted that such guidance may be found through a coherency-based approach, mainly drawn from legal theories on the normative coherence of legal systems.

The unsatisfactory traditional frameworks

It has already been emphasized that practice sometimes does not identify any legal framework or only makes general and vague considerations on the matter, especially in relation to the interpretation process, and that the principle of systemic integration is incapable of dealing with true conflicts of norms when IHL and IHRL apply simultaneously. That being said, this principle and any similar mechanisms, such as the *lex specialis* principle, are intrinsically unsatisfactory, with respect to both the interpretation and application processes. The main reason for this is that such mechanisms are only formal tools, and providing solutions to the interplay between IHRL and IHL cannot merely result from a formal process. Rather, it involves substantial considerations, qualified by certain scholars as entailing “a highly value-based decision [which results from] political

123 On those two different paradigms, see e.g. Gloria Gaggioli (ed.), *Expert Meeting: The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*, ICRC, Geneva, 2013, pp. 4–12. See also the below section on “Setting Aside the Applicable IHRL Regime”.

124 See e.g. Vera Gowland-Debbas and Gloria Gaggioli, “The Relationships between International Human Rights and International Humanitarian Law: An Overview”, in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and International Humanitarian Law*, Edward Elgar, Cheltenham and Northampton, MA, 2013, p. 85.

choices”.¹²⁵ Such substantial considerations must be taken into account when determining in which case and how those mechanisms operate.

In particular, the principle of systemic integration does not determine which norms must be considered as “relevant” for the interpretation of another norm applicable in relation to the same parties. Similarly, the *lex specialis* principle does not contain in itself any indication of which norm must be qualified as general or special in relation to a particular subject matter. It does not therefore come as a surprise that diverging views are upheld in that respect, with an increasing number of scholars as well as human right bodies arguing nowadays that an IHRL standard may sometimes constitute the *lex specialis* and prevail over the competing IHL framework. This approach is particularly noticeable with regard to the use of lethal force against persons who may lawfully be targeted under IHL, especially when there are no ongoing hostilities and those persons are located in an area under the firm control of the targeting party. By contrast to the ruling of the ICJ in the *Nuclear Weapons* case, it has been argued that, in such circumstances, the restrictive human right standard had to prevail over the more permissive IHL framework, as the *lex specialis*.¹²⁶ This clearly evidences that the traditional mechanisms used to deal with the interplay between IHL and IHRL are not able to provide by themselves any automatic solution, as any solution to that interplay actually involves “policy and value judgement[s]”.¹²⁷

It has been argued in legal scholarship that such judgements should ultimately be made by the legislator¹²⁸ – namely, by the States, which should draft new treaties to determine the applicable law. It has therefore been suggested that it would be appropriate to “write a treaty of IHL enlightened by IHRL [which would incorporate the outcomes of the interpretation process] and a treaty of IHRL applicable in wartime enlightened by IHL [which would incorporate the outcomes of the application process], and hope that the two reach the same conclusions”.¹²⁹ However, although this might be the best option, it is hard to imagine that States would agree to engage in new treaties in the near future, especially about such a controversial matter.

Another option is to elaborate clear guidelines to practitioners on the subject. This has actually been done by a group of experts in a work that provides a comprehensive and detailed overview of the law applicable to State military

125 Anja Lindroos, “Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*”, *Nordic Journal of International Law*, Vol. 74, No. 27, 2005, p. 42.

126 See e.g. Laura M. Olson and Marco Sassòli, “The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts”, *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 613–614; David Ktetzmer, Avias Ben-Yehuda and Meirav Furth, “Thou Shall Not Kill: The Use of Lethal Force in Non-International Armed Conflicts”, *Israel Law Review*, Vol. 47, No. 2, 2014, pp. 191 ff.

127 M. Milanovic, above note 6, pp. 479, 481.

128 See e.g. *ibid.*, p. 482. The author supports this argument only with respect to conflicts of norms that cannot be solved through a mere interpretation process, but which involve displacing one rule in favour of another. However, as already argued, it seems artificial to distinguish between the interpretation and displacement processes, since both lead to the same result – namely, prioritizing the solution provided by one legal system over the solution provided by the other.

129 L. M. Oleson, above note 79, p. 457.

operations, drawn from the interplay between the relevant IHL and IHRL norms.¹³⁰ This impressive overview, addressing a wide range of issues, is preceded by a description of the theoretical model that the experts adopted to determine the applicable law. Two frameworks in which both IHL and IHRL are applicable are distinguished: (1) the “active hostilities” framework, in which IHL is the primary applicable body of law, while IHRL, as the secondary body of law, may be adapted in light of IHL;¹³¹ and (2) the “security operations” framework, in which IHRL is the primary applicable body of law, while IHL, as the secondary body of law, may be interpreted in light of IHRL.¹³² The determination of the primary applicable law is made according to a range of factors,¹³³ but as it is designed to be a guide for practitioners, the document does not propose any elaborated legal theory upon which the determination of those factors can be legally based. It also does not provide any satisfactory indication of the criteria for the articulation of the secondary applicable law to the primary one, although this lies at the heart of the interplay between IHL and IHRL; it merely refers in that respect to the unsatisfactory principle of systemic integration.¹³⁴ Finally, the document does not distinguish between the interpretation and application processes, although such distinctions matter, notably for jurisdictional purposes. It does not address a key issue raised by the interpretation process – namely, that the interpretation of IHL in light of IHRL may impact not only States but also armed groups – although it does engage in such a process on several topics.¹³⁵

Any legal theory designed to provide a successful framework for conceptualizing the interplay between IHL and IHRL must take into account the substantial considerations involved by such interplay. Marco Sassòli is one of the few scholars to have incorporated non-formal considerations in his proposal for a theoretical framework. Admittedly, he argues for the application of the *lex specialis* principle as requiring priority to be given to the rule having the ‘larger ‘common contact surface area’ with the situation’ at stake.¹³⁶ However, he adds that another factor might be taken into account – namely, a “less formal (and less objective) factor, [which] is the extent to which the solution conforms to the systemic objectives of the law”.¹³⁷ He specifies that “[t]he systemic order of international law is a normative postulate founded upon value judgments”.¹³⁸ Yet he does not elaborate on those substantial considerations, referring in that respect to the ILC work on the fragmentation of international law.¹³⁹

130 Daragh Murray, *Practitioner’s Guide to Human Rights Law in Armed Conflict*, Oxford University Press, Oxford, 2016.

131 *Ibid.*, p. 90.

132 *Ibid.*, p. 91.

133 *Ibid.* These factors include not only the existence of explicit rules on a given conduct but also the fact that those rules are designed for regulating that conduct, the nature of the armed conflict, the existence of active fighting, the status or activity of the individual, and the degree of control exercised by the State.

134 *Ibid.*, p. 90.

135 See e.g. *ibid.*, p. 194.

136 M. Sassòli, above note 79, p. 439.

137 *Ibid.*

138 *Ibid.*

139 ILC, above note 71, para. 104.

Towards a coherency-based approach

The notion of “normative coherence” as developed in legal theory about legal systems, enriched by certain theoretical reflections on legal pluralism and antinomies in law, is a promising candidate for providing a suitable legal framework for the interplay between IHL and IHRL in relation to both the interpretation and application processes.

Normative coherence as developed in legal theory

According to the legal theory on coherence,¹⁴⁰ a legal system is characterized by both consistency (or formal coherence) and coherency (or material coherence). Consistency is the result of a logical process. It means that no apparent or genuine contradiction exists within the concerned system or, at least, that the system contains within itself the necessary tools, such as the *lex specialis* principle, to solve any apparent or real conflict of norms. This process is in line with the theory of legal pluralism that aims at building a common legal system from different normative orders.¹⁴¹ According to that theory, the first step consists of avoiding conflicts of norms through a horizontal exchange between these normative orders, on the basis of either cross-internormativity, which means apparent or express *renvoi* from the legal source of one order to the legal source of another order, or cross-interpretation, which entails the interpretation of one norm or concept of one order in light of a norm or concept of another order.¹⁴²

However, proponents of the legal theory on coherence emphasize that such a consistency process (or formal coherence) is not sufficient. The mechanisms for resolving real or potential conflicts of norms are unable to provide any automatic solutions to such conflicts since the identification of these conflicts and the application of those mechanisms are not merely logical operations. They involve non-formal choices – that is, choices of a substantial nature. This requires seeking a hermeneutical constraint that is capable of guiding these choices. Such a constraint is actually what enables a legal system to be coherent (or materially coherent) and to become a genuine legal system. It acts as a compatibility test

140 See e.g. Norberto Bobbio, *Teoria dell'ordinamento giuridico*, G. Giappichelli Ed., Torino, 1960, particularly pp. 69 ff.; Ronald Dworkin, *Law's Empire*, Fontana Press, London, 1986, particularly pp. 176 ff.; Neil MacCormick, “Coherence in Legal Justification”, in Aleksander Peczenik, Lars Lindahl and Bert Van Roermund (eds), *Theory of Legal Science: Proceedings of the Conference on Legal Theory and Philosophy of Science, Lund, Sweden, December 11–14, 1983*, D. Reidel, Dordrecht, Boston, MA and Lancaster, 1984, pp. 235 ff.; Vittorio Villa, “Normative Coherence and Epistemological Presuppositions of Justification”, in Patrick Nerhot (ed.), *Law, Interpretation and Reality*, Kluwer, Dordrecht, Boston MA and London, 1990, pp. 430 ff.; Aldo Schiavello, “On ‘Coherence’ and ‘Law’: An Analysis of Different Models”, *Ratio Juris*, Vol. 14, No. 2, 2001, pp. 233 ff.; Amalia Amaya, “Ten Theses on Coherence in Law”, in Michael Araszkievicz and Jaromir Savelka (eds), *Coherence: Insights, from Philosophy, Jurisprudence and Artificial Intelligence*, Springer, Dordrecht, 2013, pp. 257–260.

141 See e.g. Mireille Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World*, Hart, Oxford and Portland, OR, 2009.

142 *Ibid.*, pp. 19 ff.

with respect to the legal solutions available from the operation of the formal mechanisms for resolving conflicts of norms and, more generally, with respect to any legal solution of the concerned legal system. It allows “the multitudinous rules of [the] developed legal system [to] ‘make sense’ when taken together”.¹⁴³

General principles of law are seen as the best candidates to serve as such a hermeneutical constraint, as they express the fundamental values of a system. As a result, the solutions obtained for establishing the formal coherence of a legal system must be tested against those principles. This is not a test of conformity, since general principles are not clear-cut rules but ponderable elements.¹⁴⁴ Rather, it is a test of compatibility, which may vary in degree. This process has the advantage of providing a constraint while giving at the same time a sufficient margin of flexibility to adapt the solutions to the specificity of each case. Such a process is actually also in line with the second step proposed by the theory on legal pluralism that aims at building a common legal system from different normative orders. That second step consists of harmonizing these orders through the establishment of a vertical relationship of compatibility – and not of conformity – with an international norm.¹⁴⁵

It is worth observing that such a harmonization process, involving a hierarchical relationship of compatibility with general principles of law, has also been developed in theoretical reflections on antinomies in law.¹⁴⁶ It has been asserted in that framework that

any legal system must be coherent in the sense that no contradiction may exist between its norms but also that these norms must be characterized by a relationship of harmony, [which is evidenced by the matching of the legal solutions that have been chosen and] which is informed by the overall spirit of that system.¹⁴⁷

That spirit itself is derived from the general principles which ground the system.

Using normative coherence to build an “integrated common regulation on armed conflict”

All the foregoing theoretical constructions prove to be particularly interesting for providing a suitable legal framework for the issue of the interplay between IHL and IHRL. This issue is indeed a matter of coherence between the two bodies of law. In particular, as shown above,¹⁴⁸ there is no doubt that a consistency (or formal coherence) process currently operates in practice between IHL and IHRL:

143 N. MacCormick, above note 140, p. 238.

144 See e.g. Robert Alexy, *A Theory of Constitutional Rights*, Oxford University Press, Oxford, 2002, pp. 57 ff.; Emmanuelle Jouannet, “L’influence des principes généraux face aux phénomènes de fragmentation du droit international contemporain”, in Rosario Huesa Vinaixa and Karel Wellens (eds), *L’influence des sources sur l’unité et la fragmentation du droit international*, Bruylant, Brussels, 2006, pp. 115 ff.

145 M. Delmas-Marty, above note 141, pp. 39 ff.

146 See e.g. Charles Perelman (ed.), *Les antinomies en droit*, Bruylant, Brussels, 1965.

147 Charles Huberlant, “Antinomies et le recours aux principes généraux”, in C. Perelman (ed.), above note 146, p. 212 (author’s translation).

the relevant courts and monitoring bodies explicitly or implicitly resort to mechanisms for resolving or avoiding conflicts of norms. This means, according to the terminology used in the aforementioned theory on legal pluralism,¹⁴⁹ that horizontal exchanges, through cross-internormativity and cross-interpretation, clearly take place between the two bodies of law in situations of armed conflict.

Moreover, as also previously emphasized, those mechanisms for resolving or avoiding conflicts of norms between IHL and IHRL have been criticized as not being satisfactory, precisely because the identification of such conflicts and the operation of those formal mechanisms involve choices which cannot be made on the basis of formal tools, but only by resorting to substantial considerations. In other words, consistency between the two bodies of law is not sufficient; it must be complemented by the establishment of a coherence (or material coherence) process, which entails testing the compatibility of all the potential legal solutions drawn from the interpretation and application processes with a hermeneutical constraint. Again, according to the terminology used in certain theories on legal pluralism,¹⁵⁰ this would allow moving from a horizontal process of coordination between IHL and IHRL to a vertical process of harmonization and therefore to progressively building an international common legal system that is specifically devoted to the regulation of armed conflict. Such a system, which may be deemed as amounting to an “integrated common regulation on armed conflict”, with IHL as its core, would be drawn from the approximations of the latter body of law not only with IHRL but also, more generally, with any other branch of international law applicable in armed conflict, such as international environmental law.¹⁵¹ Contrary to similar projects in legal scholarship,¹⁵² this amounts to an integrated¹⁵³ and comprehensive¹⁵⁴ common legal system, specific to armed conflicts.¹⁵⁵ In any

148 See the introduction to this paper and the above section on “The Interpretation Process Versus the Application Process”.

149 M. Delmas-Marty, above note 141, pp. 39 ff.

150 *Ibid.*

151 On the approximation of that branch of international law with IHL, see Raphaël van Steenberghe, “Interactions between International Environmental Law and International Humanitarian Law regarding the Protection of the Environment during Warfare”, *Journal of International Criminal Justice*, forthcoming.

152 See below notes 153–155.

153 See by contrast the project submitted by Jean Pictet in the 1960s to bring IHL and IHRL together within a common legal system that he named “international humanitarian law”: Jean Pictet, “The Principles of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 48, No. 573, 1966; Jean Pictet, “The Principles of International Humanitarian Law – II”, *International Review of the Red Cross*, Vol. 48, No. 574, 1966; Jean Pictet, “The Principles of International Humanitarian Law – III”, *International Review of the Red Cross*, Vol. 48, No. 575, 1966. The project merely involves the juxtaposition of the two bodies of law under a similar heading – except certain principles that Pictet developed and qualified as common to both the Geneva Law and IHRL, like the principles of inviolability, non-discrimination and security.

154 See by contrast the project of “complete and full *jus in bello*” only briefly advocated by Gerd Oberleitner in his book *Human Rights in Armed Conflict* (above note 4, p. 124); this project consists of an integrated common regulation on armed conflict built upon the approximations of various regulations applicable in armed conflict, including IHL and IHRL but also other fields of international law, and driven by shared concerns and a quest for coherency.

155 See, by contrast, similar projects that do not however prove specific to armed conflict, such as the project for an “international law common to the protection of individuals”, as advocated by scholars such as

case, its legal solutions would have to be compatible with its overall spirit, expressed by a foundational principle.

Admittedly, identifying such a principle is not an easy task, but it must start from the rationale of the historical crux of the interplay between IHL and IHRL: the 1968 Tehran Conference and the mandate given by States to work for an immediate expansion of IHRL into armed conflicts, a sphere exclusively regulated by IHL until that time. The project was clearly – and is still – intended to further humanize the regulation of armed conflicts,¹⁵⁶ mainly by incorporating IHRL into IHL through normative and interpretative processes, and by applying IHRL in armed conflicts, which makes the human rights bodies competent to enforce that regulation. This objective of strengthening the protection of persons in armed conflicts must determine the first prong of the foundational principle, acting as a “coherency test” for the interplay between IHL and IHRL. Both the application and interpretation processes must operate in such a way that the ensuing legal solutions afford the best protection to individuals. This is in line with the *pro homine* principle according to which IHRL “norms must always be interpreted and applied in way that most fully and adequately protects human beings” and, if more than one norm applies, “the one that gives most protection or freedom to the individual should prevail”.¹⁵⁷ This must not be confused with the *lex favorabilis* principle, although it involves similar substantial considerations. *Lex favorabilis* is mainly used in the human rights sphere to harmonize two or several IHRL norms through interpretation. By contrast, under the foundational principle, the considerations based on the most favourable protection command favouring one general approach to the interplay between IHL and IHRL with respect to both the interpretation and application processes. Whenever possible, IHRL must be fully incorporated into IHL through interpretation and both IHRL and IHL must apply cumulatively to the conduct concerned.

On the other hand, the full incorporation of IHRL into IHL and the cumulative application of IHRL and IHL, which results in providing individuals with the best protection, must be counterbalanced by other considerations, because of the specific context in which that regulation, common to IHL and IHRL, is designed to apply – namely, armed conflicts. The second prong of the foundational principle of such common regulation, acting as a “coherency test”, must therefore involve considerations specific to armed conflicts. Those considerations must be inspired by what fundamentally distinguishes the regulation of war from the regulation applicable in peacetime. It is argued that such specificity is clearly linked to the principle of military necessity. As

Antonio Cançado Trindade (*International Law for Humankind: Towards a New Jus Gentium*, Martinus Nijhoff, Leiden and Boston, MA, 2010, pp. 511 ff.), or the project that resulted in the 1990 Declaration of Turku (*Declaration of Minimum Humanitarian Standards*, UN Doc. E/CN.4/Sub.2/1991/55, 2 December 1990), which provides for a series of “minimum humanitarian standards” applicable in any situation.

156 See e.g. M. Milanovic, above note 6, p. 460.

157 H. Victor Condé, *A Handbook of International Human Rights Terminology*, 2nd ed., University of Nebraska Press, Lincoln, NE, 2004, p. 207, quoted in L. M. Oleson, above note 79, p. 456.

emphasized by scholars, who refer to the ILC, “military necessity is the justifying factor inherent in all rules of IHL which, in derogation from the rules applicable in peacetime, permit the resort to measures meeting the needs of the extreme circumstances prevailing in situations of armed conflict”.¹⁵⁸ What matters under that principle is to take into account the realities of war in order to make efficient fighting possible, and those considerations are not in fact opposed to the objective of affording the best protection to individuals—rather, they serve that purpose. The main reason for this is that failure to duly take account of the realities of war in any regulation of armed conflict is likely to result in a loss of credibility of that regulation and ultimately to lead to its non-respect or even rejection. This would considerably lessen or even entirely annihilate the protection afforded to individuals in armed conflict.

Those considerations of effectiveness, against which any common regulation on armed conflict should be tested, involve both *in concreto* and *in abstracto* assessments. Since they may be context-dependent, such considerations must be assessed on a case-by-case basis, notably in light of the capacities of the parties, especially armed groups in NIACs, and the particular circumstances ruling at the time, like the degree of territorial control exercised by the concerned party. Since they relate to the particular situation of armed conflict, they may also be tested against certain features which are specific to that situation. Those features include the sociological reciprocity in the fighting of war, which is duly taken into account by the principle of equality of belligerents. They also include the need to detain persons for mere security reasons, the unsuitability of making the legality of the detention of certain persons (namely combatants) subject to a review process, and the possibility for armed groups to conduct fair trial prosecutions by their own courts and not only through the courts of the government that they are fighting. Any regulation that did not take these features into account would make respect for the regulation (nearly) impossible.

As a result, the combination of the two prongs of the relevant “coherency test” for the determination of the regulation of armed conflict dictates that the outcomes of the full incorporation of IHRL into IHL or of the cumulative application of IHL and IHRL must be adjusted, but only if, and to the extent that, they conflict with those effectiveness-based considerations. As will be detailed in the next part of this paper, such an adjustment process can take two main forms: it may entail *modulating* the IHRL interpretive standard or applicable regulation, which is particularly well suited when the realities of war require taking into account certain circumstances *in concreto*, including the material capacities of the parties to the armed conflict; or it may involve *setting aside* the inappropriate IHRL interpretive standard or applicable regulation, which is generally the case when the realities of war require taking into account

158 Nils Melzer, “Targeted Killing or Less Harmful Means? Israel’s High Court Judgment on Targeted Killing and the Restrictive Function of Military Necessity”, *Yearbook of International Humanitarian Law*, Vol. 9, 2006, p. 104. See also ILC, *Report of the International Law Commission on the Work of Its Thirty-Second Session (5 May -25 July 1980)*, in *Yearbook of the International Law Commission*, Vol. 2, Part 2, 1980, p. 45, para. 27.

certain considerations *in abstracto*, like structural features specific to situations in armed conflict, which cannot be subject to any modulation.

Non-international armed conflicts versus international armed conflicts and occupations

The coherency-based approach must be tested with respect to NIACs as well as IACs and occupations in relation to significant issues dealt with by IHL. While considering NIACs and IACs/occupations in turn, this paper will address the core effectiveness-based considerations against which the full incorporation of IHRL into IHL or the full application of IHRL in armed conflict must be tested, in accordance with the two prongs of the coherency test.

Non-international armed conflicts

It is with respect to NIACs that IHRL has the most potential to influence the regulation of armed conflict, since the regulation of NIACs by IHL remains limited in numerous aspects, compared to IHL applicable to IACs and belligerent occupations. However, it is also with respect to NIACs that both the interpretation and application processes raise the most significant difficulties.

The interpretation process in NIACs

The main difficulty concerning the interpretation process in NIACs stems from the need to adapt the full incorporation of IHRL into IHL, as prompted by the first prong of the coherency test, in light of a general effectiveness-based consideration – namely, the principle of equality of belligerents. Actually, the operation of that principle with respect to the incorporation of IHRL into IHL may have a twofold impact. It might result either in a setting aside or modulating of the relevant IHRL interpretive standard. This mainly comes from the fact that IHRL initially emerged as a body of law only applicable to States and that it is now called, under the interpretation process, to regulate the conduct of non-State actors through its incorporation into IHL.

The application of the principle of equality of belligerents

The principle of equality of belligerents originally developed with respect to IACs to avoid any asymmetrical application of IHL between the parties to such conflicts, in light of the legality of their use of force under *jus ad bellum*.¹⁵⁹ A State lawfully resorting to force under *jus ad bellum* cannot dispense with respecting (certain)

¹⁵⁹ See e.g. Vaios Koutroulis, “And Yet It Exists: In Defence of the ‘Equality of Belligerents’ Principle”, *Leiden Journal of International Law*, Vol. 26, No. 2, 2013, p. 449; Keiichiro Okimoto, “The Relationship between *Jus ad Bellum* and *Jus in Bello*”, in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford University Press, Oxford, 2015, p. 1214.

IHL obligations while fighting against an aggressor State. Although the relationships between States, characterized by horizontal sovereign equality, are significantly different from the relationships between States and armed groups, which must rather be envisaged “under the vertical domain of domestic law”,¹⁶⁰ the principle of equality of belligerents has also been deemed applicable in NIACs.¹⁶¹ Considered as a cardinal IHL rule “dominat[ing] the entire body of the laws and customs of war”,¹⁶² this principle has usually been interpreted in relation to NIACs as meaning that both States and armed groups must be bound by the same relevant IHL rules once they are party to a conflict.¹⁶³ The rationale for asserting this principle in NIACs is, however, less clear since *jus ad bellum* is only applicable to inter-State uses of force and is not therefore relevant with respect to internal armed conflicts.¹⁶⁴ Legal scholarship and practice nonetheless refer to various rationales, most of which relate to the particular situation of the armed groups in question, such as their more limited capacity compared to States’ capacity,¹⁶⁵ the (un)justness of their cause,¹⁶⁶ the illegality of their fighting under domestic law¹⁶⁷ or the controversial basis upon which they are bound by IHL.¹⁶⁸ In any case, it is undisputed that the key legal effect of the principle of equality of belligerents is the symmetrical application of IHL to any party to the NIAC.

The principle has traditionally been construed as peculiar to IHL, and therefore as not applying to other bodies of law, such as IHRL.¹⁶⁹ Yet it remains applicable in any case of the interpretation process, when IHRL is used to interpret IHL.¹⁷⁰ Since IHRL is incorporated into IHL under that process and

160 Jonathan Somer, “Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict”, *International Review of the Red Cross*, Vol. 89, No. 867, 2007, p. 659.

161 See e.g. ICRC Commentary on GC III, above note 23, para. 538; Yuval Shany, “A Rebuttal to Marco Sassòli”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, p. 432; François Bugnion, “*Jus ad Bellum, Jus in Bello* and Non-International Armed Conflicts”, *Yearbook of International Humanitarian Law*, Vol. 6, 2003, p. 186; M. Sassòli, above note 79, p. 12; J. Somer, above note 160, pp. 659–664.

162 F. Bugnion, above note 161, p. 174.

163 See above note 161.

164 See e.g. V. Koutroulis, above note 159, pp. 449–450 fn. 4.

165 See e.g. Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, pp. 34–35.

166 See e.g. Jasmine Moussa, “Can *Jus ad Bellum* Override *Jus in Bello*? Reaffirming the Separation of the Two Bodies of Law”, *International Review of the Red Cross*, Vol. 90, No. 872, 2008, p. 990.

167 See e.g. Ezequiel Heffes, “Generating Respect for International Humanitarian Law: The Establishment of Courts by Organized Non-State Armed Groups in Light of the Principle of Equality of Belligerents”, *Yearbook of International Humanitarian Law*, Vol. 18, 2015, p. 187.

168 See e.g. Jean-Marie Henckaerts and Cornelius Wiesener, “Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice”, in Ezequiel Heffes, Marcos D. Kotlik and Manuel J. Ventura (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice*, Springer, The Hague, 2020, pp. 197–199; SCSL, *The Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Appeals Chamber), 31 May 2004, para. 22.

169 See e.g. J.-M. Henckaerts and C. Wiesener, above note 168, p. 202; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 95.

170 See e.g. J. Somer, above note 160, pp. 663–664. Although in unclear terms, the author seems to distinguish the interpretation process, to which the principle of equality is applicable, from the application process, to which the principle is not applicable (*ibid.*, fn. 46).

becomes part of it, the interpreted IHL norm must logically conform to the principle of equality of belligerents, irrespective of the nature of the body of law serving as the interpretive standard. Practice confirms such a view. Notably, when interpreting IHL in light of IHRL with respect to NIACs, courts and other bodies have usually considered that the interpreted IHL norm applied to both States and armed groups alike,¹⁷¹ though IHRL is classically construed as not applying to armed groups. As we will see below, the ICTY case law on torture unambiguously confirms the impact of the principle of equality of belligerents on the incorporation of IHRL into IHL through the interpretation process.

Setting aside IHRL interpretive standards

In the course of the interpretation process, the IHRL interpretive standards might be set aside in the interest either of States or of armed groups. The ICTY case law on torture is an emblematic example of the role played by the principle of equality of belligerents in adapting an IHRL standard in order to avoid any imbalance unfavourable to States. As already seen,¹⁷² in early cases, the Tribunal extended the requirement of the involvement of a State official in the acts of torture to officials of non-State parties, including armed groups, in order to avoid making the prohibition of torture applicable only on the governmental side. Later, in the *Kunarac* case,¹⁷³ it simply set aside that requirement. This view has been followed by the Tribunal in subsequent case law,¹⁷⁴ as well as by the ICC¹⁷⁵ and other institutions.¹⁷⁶

IHRL standards may also be set aside in the interest of armed groups, when the incorporation of that standard into IHL would prevent those groups from conforming to the interpreted IHL obligations or would make the fulfilment of those obligations almost impossible. This is, for example, the case with regard to the guarantee that a court must be “regularly constituted” provided under common Article 3 if that guarantee is interpreted in light of the IHRL requirement that the court must be established in accordance with the law of the State.¹⁷⁷ Any court established by armed groups would be unlawful since no domestic law has ever authorized the creation of such courts. On the other hand, the only alternative option – namely, to use the State’s courts – is hard to imagine in practice. Even if armed groups succeed in gaining control over such courts, it is not certain that those courts will still be in operation¹⁷⁸ and it is unlikely that

171 See above notes 19–21, 24–26 and 31–32. Note, however, the ambiguous ICRC assertion in its updated Commentary on GC III: see above note 56 and corresponding main text.

172 See above note 64 and corresponding main text.

173 See ICTY, *Kunarac*, above note 21, para. 496.

174 See above note 66.

175 See e.g. ICC, above note 49, p. 32.

176 See e.g. ICRC Commentary on GC III, above note 23, para. 681.

177 For a plausible interpretation in that sense, see e.g. ICRC Customary Law Study, above note 18, p. 365, combined with p. xxxi. See also US Supreme Court, *Hamdan*, above note 34, Dissenting Opinion of Judge Alito, p. 3.

178 The enemy State might have closed those courts before leaving the territory controlled by the armed group: see e.g. cases in Syria (International Legal Assistance Consortium, *ILAC Rule of law Assessment*

the armed groups will be willing to resort to them,¹⁷⁹ especially with the same judges and in accordance with the applicable domestic law. This is why the requirement that a court must be “regularly constituted” is increasingly interpreted today as being encapsulated in the statutory guarantees and no longer as an autonomous requirement.¹⁸⁰ This is the approach expressly followed in the ICC *Elements of Crimes*¹⁸¹ and emphasized by the ICC in its recent case law.¹⁸² The requirement of “a regularly constituted court” had already been dropped in AP II, which merely requires that the court must “[offer] the essential guarantees of independence and impartiality”.¹⁸³ Alternatively, it is gradually being admitted that the term “law” might refer to the law of the armed group,¹⁸⁴ which nonetheless means that the armed group is able to legislate.

Similarly, the *nullum crimen sine lege* guarantee, as explicitly provided in Article 6(2)(c) of AP II, must not be interpreted in light of IHRL as requiring that the prohibited conduct must necessarily be criminalized by the law of the State.¹⁸⁵ Although practice shows that armed groups conduct prosecutions on the basis of existing domestic law,¹⁸⁶ they cannot be

Report: Syria 2017, 2017, p. 78, available at: www.ilacnet.org/wp-content/uploads/2017/04/Syria2017.pdf and the Ivory Coast (Daniel Balint-Kurti, *Côte d'Ivoire's Forces Nouvelles*, Africa Programme Armed Non-State Actors Series, Chatham House, 2007, p. 27).

- 179 See e.g. Louise Doswald-Beck, “Judicial Guarantees under Common Article 3”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 491. This is nonetheless possible, as it occurred in Sri Lanka: see Katrine Fortin, *The Accountability of Armed Groups under Human Rights Law*, Oxford University Press, Oxford, 2017, p. 164.
- 180 See e.g. Mark Klamberg, “The Legality of Rebel Courts during Non-International Armed Conflict”, *Journal of International Criminal Justice*, Vol. 16, No. 3, 2018, p. 9. See also Stockholm District Court, Case No. B 3787-16, Judgment, 16 February 2017, available at: <https://casebook.icrc.org/case-study/swedensyria-can-armed-groups-issue-judgments>, para. 26; Jonathan Somer, “Opening the Floodgates, Controlling the Flows: Swedish Court Rules on the Legal Capacity of Armed groups to Establish Courts”, *EJIL: Talk!*, 10 March 2017, available at: www.ejiltalk.org/opening-the-floodgates-controlling-the-flow-swedish-court-rules-on-the-legal-capacity-of-armed-groups-to-establish-courts/.
- 181 Although the requirement that the courts must be “regularly constituted” still appears in the ICC *Elements of Crimes*, that requirement means, according to those *Elements*, that the court must “afford the essential guarantees of independence and impartiality”: ICC, above note 49, p. 34.
- 182 ICC, *Al Hassan*, above note 30, paras 375–377.
- 183 AP II, Art. 6(2).
- 184 See e.g. ICRC Commentary on GC III, above note 23, para. 728; S. Sivakumaran, above note 169, p. 306. See also the declaration of Nigeria during the preparatory works of AP I: *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974–1977), Vol. 8, Berne, 1978, p. 360, para. 20.
- 185 During the preparatory works of AP II, it was discussed whether Article 6(2)(c) had to include the law of armed groups (see e.g. the declaration of Argentina, in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974–1977), Vol. 9, Berne, 1978, p. 314, para. 54). Although the English version of Article 6(2)(c) refers to the term “law”, which might be interpreted as including the rebels’ law, the French version appears more restrictive as it refers to “national or international law”. However, as argued in the 1987 Commentary on the Additional Protocols (above note 13, para. 4605), the law of armed groups could be considered as a type of national law.
- 186 Regarding armed groups in Ukraine, see UN Office of the High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine: 16 February to 15 May 2017*, 13 June 2017, para. 94, available at: www.ohchr.org/Documents/Countries/UA/UAReport18th_EN.pdf. Regarding armed groups in Sri Lanka, see Zachariah Chierian Mampilly, *Rebel Rulers: Insurgent Governance and Civilian Life during*

barred from enacting their own criminal law and prosecuting individuals accordingly.¹⁸⁷

Modulating IHRL interpretive standards

Certain IHRL interpretive standards might rather be modulated when incorporated into IHL. This mainly stems from the need to take into account the potential limited capacity of armed groups compared to the usually higher capacity of States. Although this is not problematic with respect to negative obligations like the prohibitions on torture, cruel treatment or slavery, difficulties arise regarding IHL obligations imposing positive duties on armed groups, such as the obligation to afford their courts fair trial guarantees. Interpreting those guarantees in light of IHRL standards, without any adaptation, may result in some armed groups facing serious difficulties in complying with them. An illustrative example is the ICC confirmation decision in the *Al Hassan* case. As already seen,¹⁸⁸ the Pre-Trial Chamber interpreted the fair trial procedural guarantees applicable in any NIAC in light of IHRL as entailing a series of rights for the accused, such as the right of public proceedings, the right to examine or obtain the attendance of witnesses and the right to be assisted by a lawyer, all of which are guarantees that armed groups are not necessarily able to respect. Similarly, the Chamber imposed demanding statutory guarantees on the basis of IHRL, especially in relation to the requirement of independence. It required that the court must be independent “vis-à-vis des autres pouvoirs; c’est-à-dire l’exécutif et le législatif”,¹⁸⁹ adding:

Le Comité des droits de l’homme a ainsi estimé qu’une situation dans laquelle les fonctions et les attributions du pouvoir judiciaire et du pouvoir exécutif ne peuvent être clairement distinguées ... est incompatible avec le principe d’un tribunal indépendant au sens de l’article 14-1 du Pacte international relatif aux droits civils et politiques.¹⁹⁰

A solution must then be found that combines the need to further “humanize” the law of NIAC to the maximum extent possible, through the full incorporation of IHRL into IHL, with both the principle of equality of belligerents and the capacity of any armed group to comply with that solution. It is submitted that such a hard equilibrium can only be achieved by the modulation of the concerned IHRL interpretive standards, through phrasing the interpreted IHL obligations as obligations of conduct.

War, Cornell University Press, Ithaca, NY, 2011, p. 116. Regarding armed groups in the Democratic Republic of the Congo, see Human Rights Watch, *Seeking Justice: The Prosecution of Sexual Violence in the Congo War*, p. 28, March 2005, available at: www.hrw.org/sites/default/files/reports/drc0305.pdf.

187 In that sense, see e.g. UK Ministry of Defence (MoD), *The Joint Service Manual of the Law of Armed Conflict*, Joint Service Publication 383, 2004, p. 404, para. 15.42 fn. 94; Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd ed., Martinus Nijhoff, Leiden, 2013, pp. 745–746; S. Sivakumaran, above note 169, p. 561.

188 See above note 32 and corresponding main text.

189 ICC, *Al Hassan*, above note 30, para. 379.

190 *Ibid.* (footnotes omitted).

In international law,¹⁹¹ as in civil law countries,¹⁹² obligations of conduct are usually opposed to obligations of result. Respect for obligations of conduct is not dependent upon the achievement of any specific result but must rather be assessed against a flexible standard of due diligence, which determines the conduct that must be followed under the obligation at stake.¹⁹³ The obligation is breached when the conduct concretely adopted by the addressee of the obligation does not conform to the conduct required by the standard of due diligence. The standard of due diligence against which the respect for such obligation must be assessed is determined on the basis of several factors, which vary according to the obligation at stake and may include the material capacity of the addressees.¹⁹⁴ As a result, the standard of due diligence may be higher for those with greater capacities.

IHL contains numerous obligations of conduct applicable in both NIACs and IACs.¹⁹⁵ The most well known are the obligations of precaution in attack, as most of those obligations require taking all “feasible” or “reasonable” measures to spare civilians and civilians objects as much as possible.¹⁹⁶ “Feasible measures” may be defined as involving “those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations”.¹⁹⁷ This means that the extent of the measures which must be taken or even the possibility of taking any of them may vary according to a range of factors, including time, terrain, weather, available troops and resources, enemy activity, civilian considerations and the capabilities of the belligerents.¹⁹⁸ The latter factor, the capabilities of the

191 See e.g. Paul Reuter, *Droit international public*, Presse Universitaire de France, Paris, 1958, pp. 56–59; Paul Reuter, “Principes de droit international public”, *Recueil des Cours/Collected Courses*, Vol. 103, No. 9, 1962, pp. 598–599; Riccardo Pisillo Mazzeschi, “Due diligence” e responsabilità internazionale degli stati, Giuffrè, Milan, 1992; Riccardo Pisillo Mazzeschi, “The Due Diligence Rule and the Nature of the International Responsibility of States”, *German Yearbook of International Law*, Vol. 35, 1992; Alexia De Vauleroy, “Les obligations de comportement en droit international public: Due diligence et responsabilité internationale”, PhD thesis, University of Louvain, 2021.

192 On the origin of obligations of conduct in civil law countries, see e.g. James Crawford, *State Responsibility: The General Part*, Cambridge University Press, Cambridge, 2013, pp. 221 ff.

193 See e.g. Timo Koivurova, “Due Diligence”, in *Max Planck Encyclopedia of Public International Law*, 2010, available at: <https://tinyurl.com/2p8kmf62>.

194 See e.g. R. Pisillo Mazzeschi, “The Due Diligence Rule”, above note 191, pp. 44–45.

195 Regarding the obligations of conduct under IHL, see e.g. Gabriella Venturini, “Les obligations de diligence dans le droit international humanitaire”, in Société Française pour le Droit International and Sarah Cassella (eds), *Le standard de due diligence et la responsabilité internationale*, Pedone, Paris, 2018; Antal Berkes, “The Standard of Due Diligence as a Result of Interchange between the Law of Armed Conflict and General International Law”, *Journal of Conflict and Security Law*, Vol. 23, No. 3, 2018; Marco Longobardo, “The Relevance of the Concept of Due Diligence for International Humanitarian Law”, *Wisconsin International Law Journal*, Vol. 37, No. 1, 2019.

196 See e.g. AP I, Arts 57(2)(a)(i–ii), 57(4), 58.

197 ICRC Customary Law Study, above note 18, p. 54; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended 3 May 1996, Art. 3(10); Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, 10 October 1980, Art. 1(5). See also the reservations made by certain States to AP I, including the UK, available at: <https://tinyurl.com/5b68srmr>; France, available at: <https://tinyurl.com/y75tj5mu>; and Spain, available at: <https://tinyurl.com/2e5we5ys>.

198 See also the factors listed in the following documents: Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, above note 197, Art. 3(10); MoD, above note 187, para. 5.32.5; US Department of Defense, *Law of War Manual*, 2015, para. 5.3.3.2.

belligerents, constitutes an important element in the assessment of whether the obligations of precaution are fulfilled. It is thus admitted that those obligations are more demanding for more developed parties to an armed conflict, which benefit from high-tech capacities and sophisticated weaponry.¹⁹⁹ The treaty law of NIAC itself contains several obligations of conduct the application of which is exclusively dependent upon the capacity of the parties to the conflict. Indeed, Article 5(2) of AP II, dealing with detention, provides for obligations that “[t]hose who are responsible for the internment or detention of ... persons ... shall [apply], *within the limits of their capabilities*” (emphasis added). It is worth observing that those obligations are preceded by several core obligations that are intended to apply to any party to the conflict, irrespective of its capacity.²⁰⁰

Likewise, it is submitted that the IHL interpretive standards raising concerns with respect to the capacity of armed groups could be formulated as obligations of conduct when incorporated into IHL, in addition to a set of core rules reflecting a minimum regulation. Regarding, for instance, the fair trial guarantees, this means that the problematic procedural and statutory guarantees, such as those required by the ICC Pre-Trial Chamber in the *Al Hassan* case²⁰¹ – or some of those identified by the ICRC²⁰² – should be phrased as obligations of conduct, which implies that the parties to the conflict should apply them only “to the maximum extent feasible”, while a core minimum standard would still be required in the form of obligations of result. In particular, this approach might be relevant with respect to the following procedural rights: (1) the right of public proceedings, which would have to be granted to the accused only “to the maximum extent feasible”, though the accused should at least be afforded the right to have the judgment pronounced publicly; (2) the right to examine or obtain the attendance of witnesses, which would also have to be afforded “to the maximum extent feasible”, though the accused should at least be granted that right whenever the latter has been afforded to the prosecutor, in order to respect the basic principle of equality of arms;²⁰³ and (3) the right to be assisted by a lawyer, from which the accused would also have to benefit only “to the maximum extent feasible”, though the accused should necessarily be granted the right to be assisted by a competent person who at least meets the standard of education of the prosecution counsel.²⁰⁴ Similarly, the strict standard identified

199 See e.g. Wolff Heintschel von Heineg, “Precautions in Attack”, in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2017, p. 1010; Jean-François Quéguiner, “Precautions under the Law Governing the Conduct of Hostilities”, *International Review of the Red Cross*, Vol. 88, No. 864, 2006, p. 802. But see, *contra*, Nathan A. Canestaro, “Legal and Policy Constraints on the Conduct of Aerial Precision Warfare”, *Vanderbilt Journal of Transnational Law*, Vol. 37, No. 2, 2004, p. 465.

200 AP II, Art. 5(1).

201 See above notes 188–190 and corresponding main text.

202 See e.g. ICRC Commentary on GC III, above note 23, paras 710–731, particularly paras 715, 718, 723, 724, 728.

203 See e.g. Daragh Murray, *Human Rights Obligations of Non-State Armed Groups*, Hart, Oxford and Portland, OR, 2016, p. 218.

204 *Ibid.*, p. 217.

by the ICC Pre-Trial Chamber in relation to the independence of the court on the basis of IHRL²⁰⁵ should be required only to the “maximum extent feasible”. It is clear that the traditional State division between the legislative, executive and judicial powers is rarely replicated within the structure of non-State parties to armed conflicts, but any court established by armed groups should, at a minimum, be composed of judges who do “not have structural links to the armed group command structure”²⁰⁶ in order to conform to the independence requirement. This means that courts established by armed groups might be composed of members of such groups, if no State-like separation of powers exists within those groups.²⁰⁷ Once such separation is established, the non-State party then becomes bound to apply the highest standard.

In sum, the greater the capacities of parties to a NIAC are, the more demanding are their IHL obligations inspired by IHRL, whereas the parties having the lowest capacities remain at least bound by minimum standards. Such a paradigm, based on the assertion of obligations of conduct coupled with core obligations of result, introduces differentiations in the law of NIAC,²⁰⁸ and this enables that law to integrate the highly protective IHRL standards to the maximum extent compatible with the capacity of armed groups while still respecting the principle of equality of belligerents.²⁰⁹ Both parties to the NIAC indeed remain bound by the same obligations, while the level of requirement of those obligations varies according to the capacity of the parties. It is possible that this approach may have the drawback effect of discouraging armed groups from developing their capabilities, but it is hard to imagine that armed groups would purposely refrain from engaging in such development in order to avoid complying with a more demanding standard. Moreover, in practice, the objective of armed groups is to defeat their opponents, which usually means gaining more territorial control and acquiring more developed weaponry.

The application process in NIACs

In some cases, the cumulative application of IHRL and IHL in NIACs, as prompted by the first prong of the coherency test, does not raise any specific problem since the relevant applicable IHRL and IHL norms do not provide for different results. However, in certain cases, especially in relation to issues dealt with both by IHL

205 ICC, *Al Hassan*, above note 30, para. 379.

206 D. Murray, above note 203, p. 212; see also Marco Sassòli, “Difficulties and Opportunities to Increase Respect for IHL: Specificities of the Additional Protocols”, in *40th Round Table on Current Issues of International Humanitarian Law: The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives*, International Institute of Humanitarian Law, Sanremo, 7–9 September 2017, p. 4.

207 Consequently, civilians could be judged by military courts, although this is only exceptionally allowed under IHRL.

208 For a discussion of that concept, specific to international environmental law, in relation to IHL, see e.g. Gabriella Blum, “On a Differential Law of War”, *Harvard International Law Journal*, Vol. 1, No. 52, 2011.

209 Regarding the flexibility of due diligence obligations, which “manage to maintain the *legal* equality of belligerents along with taking into account the *factual* asymmetries”, see also M. Longobardo, above note 195, p. 85.

and IHRL, such as the use of lethal force and detention, adaptations might be needed. The relevant applicable IHRL regulation must be set aside in light of effectiveness-based considerations related to the specific needs of parties to any armed conflict. In addition, it is open to question whether the other applicable IHRL obligations must be modulated through formulating them as obligations of conduct in order to conform to the principle of equality of belligerents and to take into account the capacities of the parties to the conflict.

Cumulative application

The cumulative application of IHRL and IHL is always possible in NIACs since no formal contradiction exists between the relevant applicable norms of the two bodies of law. Most often, IHRL provides for further protection than the relevant applicable IHL norm as it is more detailed or it deals with issues unaddressed by IHL. In such cases, IHRL acts as a suitable complement to IHL. In a few instances, IHL nonetheless proves to be more protective than IHRL. An illustrative example is the prohibition under Article 17 of AP II on expelling any civilian from the country, whereas IHRL only prohibits mass expulsion of aliens and authorizes individual expulsion subject to specific safeguards.²¹⁰

In some cases, the content of the regulation provided by the relevant applicable IHRL and IHL norms is entirely similar, such as the prohibition against adversary distinction or the prohibition against the death penalty for pregnant women. In other cases, the regulation is not the same but the IHRL norm is formulated in such a flexible way that it can be easily accommodated with the exceptions or limitations provided by IHL with respect to the same protection in NIACs. Such flexibility is mainly ensured through four different mechanisms. Firstly, certain IHRL norms contain express exceptions that are broad enough to cover the corresponding IHL regulation. In that sense, the prohibition of compulsory or forced labour provided in certain IHRL treaties does not contradict the possibility envisaged under Article 5(1)(e) of AP II to oblige detainees to work, since those treaties exclude from the definition of forced or compulsory labour “any work required to be done in the ordinary course of detention”²¹¹ or “any work or service exacted in cases of emergency, that is to say, in the event of war”.²¹²

Secondly, several IHRL norms allow for restrictions to the rights that they grant to individuals. This is the case with the restrictions contained in Article 12 of the ICCPR with respect to the right to liberty of movement, according to which that right may be subject to restrictions “which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedom of others, and are consistent with the other rights

210 In that sense, see e.g. Vincent Chetail, “Transfer and Deportation of Civilians”, in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 179, p. 1195.

211 ECHR, Art. 4(3)(a).

212 Forced Labour Convention, 1930, Art. 2(2)(d).

recognized in the present Covenant”.²¹³ Such a limitation enables the conciliation of that right with the exceptions provided by corresponding IHL protections in NIACs, in particular the exceptions to the prohibition against forced movement of civilians under Article 17 of AP II, according to which such movement is authorized when needed for ensuring “the security of the civilians involved or imperative military reasons”.²¹⁴

Thirdly, numerous IHRL norms merely entail obligations of conduct, the assessment of which is context-dependent—and such context might include the limited resources available to a party to an armed conflict. This is the case with regard to the rights provided in the International Covenant on Economic, Social and Cultural Rights (ICESCR), including the rights to food, to health and to education. According to Article 2(1) of the ICESCR, only the progressive realization of those rights is required in light of the “available resources”. Although this means that “a minimum core obligation” must at least be respected, the Committee on Economic, Social and Cultural Rights (CESCR) has emphasized that “any assessment as to whether [this] minimum core obligation [is discharged] must also take account of resource constraints applying within the country concerned”.²¹⁵ Again, such flexibility makes those rights compatible with corresponding IHL norms applicable in NIACs, although those norms do not contain absolute protection, such as the obligation under Article 5(2)(d) of AP II to provide detainees with medical examinations “only within the limits of [the] capabilities [of the parties to the armed conflict]”.

Fourthly, several IHRL norms prohibit certain conduct only when the conduct is “unlawful” or “arbitrary”, and this can make such prohibitions compatible with corresponding IHL norms. In relation to the prohibition against interference with correspondence,²¹⁶ for example, Article 5(2)(b) of AP II provides that the number of cards and letters sent and received by detainees “may be limited by [a] competent authority if it deems necessary”. However, as discussed in the next section, this does not always provide a solution with respect to the interactions between the two norms. In certain cases, mainly in relation to the right to life and the right to liberty, IHRL provides for a specific regime in light of which a conduct might be considered “unlawful” or “arbitrary”, and that regime might be significantly different from the IHL one. In such cases, effectiveness-based considerations may require setting aside the concerned IHRL regime.

213 See also e.g. Article 2 of Protocol No. 4 to the ECHR securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, as amended by Protocol No 11, 16 September 1963.

214 Regarding such mechanisms of limitation, allowing for exceptions provided by corresponding IHL obligations, see also the limitation provided by Article 8 of the ECHR to the right to respect for private and family life, including the right to correspondence, which enables compatibility with the right of the Detaining Power to limit the number of cards or letters sent and received by detainees under Article 5 (2)(b) of AP II; and the limitation on the right to freedom of thought, conscience and religion contained in Article 18 of the ICCPR or Article 9 of the ECHR, which allows compatibility with the right of the Detaining Power to decide whether it is “appropriate” to provide detainees with spiritual assistance under Article 5(1)(d) of AP II.

215 CESCR, General Comment No. 3, “The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)”, UN Doc. E/1991/23, 14 December 1990, para. 10.

216 See e.g. ICCPR, Art. 17.

Setting aside the applicable IHRL regime

The issue of setting aside the applicable IHRL regime mainly arises with respect to the use of lethal force and detention in armed conflicts. According to IHRL, the use of lethal force is subject to a restrictive regulation. Notably, such force can only be used as a last resort in case of absolute necessity, which depends upon the circumstances ruling at the time, and the proportionality test must include the potential death of the victim as well as any other person.²¹⁷ This contrasts with the traditional IHL regime, according to which the use of lethal force is dependent upon the status of the targeted persons and the proportionality test only includes the death of persons other than the victim, who are protected against attacks.²¹⁸ It is well admitted that it would not make sense to require parties to any armed conflict to comply with the foregoing restrictive IHRL regime, at least during active hostilities. Such a regime must therefore be set aside. At the formal level, this issue has been solved, as already seen,²¹⁹ by interpreting the term “arbitrarily” that qualifies the deprivation of life prohibited under most IHRL instruments as to be assessed in light of IHL, since that latter body of law is the *lex specialis*. In the ECHR, however, such an interpretation is not possible because the right to life is not formulated in a way that allows for this interpretation; the ECHR merely provides limited circumstances in which lethal force can be used, and none of them can be accommodated with the more permissive IHL regulation. Here the solution involves setting aside the applicable IHRL norm, in particular Article 2 of the ECHR, but not under the guise of interpretation. The IHL regime must prevail on the basis of the *lex specialis* acting as a displacing tool and not as a mere interpretive mechanism.

The same concern arises with respect to detention and, more specifically, the grounds for detention. It is inherent in armed conflict that persons may be detained for mere security reasons, at least in order to avoid them returning to or engaging in combat, including for a long period of time if needed. Admittedly, several IHRL instruments do not provide any specific ground for detention and merely prohibit “arbitrary detention”.²²⁰ This leaves the door open for administrative detention—that is, detention decided by the executive branch without criminal charges. However, it is well admitted that such detention must remain exceptional and it is contested that it could be justified by any general reference to security reasons.²²¹ In addition, such a justification would clearly be prohibited under the ECHR regime: Article 5 of the ECHR exhaustively lists the grounds for detention (with the main ones relating to criminal proceedings), and

217 See above note 123 regarding the IHRL paradigm with respect to the use of lethal force. See also M. Sassòli, above note 79, pp. 601–603.

218 See above note 123 regarding the IHL paradigm with respect to the use of lethal force. See also M. Sassòli, above note 79, pp. 604–607.

219 See above note 111 and corresponding main text.

220 See e.g. ICCPR, Art. 9; ACHR, Art. 7.

221 This might explain why States are inclined to derogate to IHRL in order to proceed to detention for mere security reasons in NIACs: see e.g. *Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict*, Chatham House and ICRC, London, 22–23 September 2008, p. 7.

the list does not contain any security-related grounds.²²² As a result, it would again be unrealistic to require belligerents to abide by those restrictive IHRL standards in armed conflicts. In particular, if the ECHR regime was applied, this could have the drawback effect of pushing States to conduct criminal proceedings against those captured in order to justify their detention, even if they acted in conformity with IHL and despite the recommendation made in AP II to “grant the broadest possible amnesty”.²²³ Again, this might be solved by resorting to the principle of *lex specialis*, either as an interpretive tool, when the right of liberty is merely formulated as prohibiting “arbitrary” deprivation of liberty, or as a displacing tool, when the right of liberty is formulated as providing only certain grounds for detention that do not include security reasons, as in Article 5 of the ECHR.

Yet it is contested that IHL might be used as a *lex specialis* in such a case in NIACs, since, contrary to the law of IACs dealing with PoWs under GC III and civilian detainees under GC IV, no express grounds for detention are provided in IHL treaties or customary IHL applicable to NIACs.²²⁴ IHL is silent on this issue, focusing instead on the conditions of detention. Yet such silence must also be taken into account in the IHL regulation on detention, which must be considered as a whole. As a result, IHL regulating detention in NIACs, including its silence on the grounds for detention, might be considered as a *lex specialis* and might inform the “arbitrariness” of the detention under IHRL or prevail over the much more restrictive IHRL standard provided under Article 5 of the ECHR. As a result, detention for security reasons in NIACs cannot be prohibited under that article when applied in armed conflicts, even though it is not expressly authorized under IHL.

Modulating applicable IHRL obligations

The issue of the modulation of certain IHRL obligations applicable in NIACs is linked to the controversial question of the scope of application of the principle of equality of belligerents. It is indeed disputable whether that principle extends to IHRL when the latter is applied in NIACs and regulates conduct in parallel to IHL.²²⁵ By contrast to the interpretation process, the application process does not involve the incorporation of the IHRL norm into IHL. When applied alongside IHL, the IHRL requirement does not become part of IHL and is not therefore

222 Regarding the two paradigms, see e.g. M. Sassòli, above note 79, pp. 613–614, 617–619.

223 AP II, Art. 6(5).

224 This is the classical view: see e.g. Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict*, Oxford University Press, Oxford, 2016, pp. 74, 75; Els Debuf, *Captured in War: Lawful Internment in Armed Conflict*, Pedone and Hart, Paris and Oxford, 2012, pp. 486–488; Gabor Rona, “An Appraisal of US Practice Relating to ‘Enemy Combatants’”, *Yearbook of International Humanitarian Law*, Vol. 10, 2007, p. 240. This view is however contested nowadays: see e.g. Jelena Pejic, “Conflict Classification and the Law Applicable to Detention and the Use of Force”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, p. 94; Sean Aughey and Aurel Sari, “Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence”, *International Law Studies*, Vol. 91, 2015, p. 108.

225 For a similar line of questioning, see e.g. J.-M. Henckaerts and C. Wiesener, above note 168, p. 202.

formally subject to the principle of equality of belligerents, since, according to the traditional view,²²⁶ the scope of application of that principle is limited to IHL. As a result, parties to NIACs might be bound by different IHRL norms, or one party – namely States – might be required to respect IHRL while the other – that is, armed groups – would not have to comply with any IHRL rule.

However, such a traditional and formal understating of the principle of equality of belligerents may be called into question in light of the evolution of the regulation of armed conflict through IHRL. Practice shows instances in which equality between belligerents has been advocated with respect to specific issues regulated by both IHL and IHRL. One emblematic example is the regulation of child soldiers under the 2000 Optional Protocol to the Convention on the Rights of the Child. With regard to this instrument, armed groups complained that the standard applicable to them under Article 4 was more demanding than the obligation imposed on States under the same article.²²⁷ In addition, in some cases, States protested that they were bound to comply with IHRL rules while fighting against armed groups that did not have to apply those rules.²²⁸ Likewise, institutions like the Guatemalan Commission on Historical Clarification, whose mandate was to clarify the human rights violations that occurred throughout the long-standing violence in Guatemala, acknowledged the applicability of IHRL to armed groups “*in order to give equal treatment to the Parties*”.²²⁹ More generally, it seems artificial to treat the interpretation and application processes so differently in that regard, when an issue is simultaneously regulated by both IHL and IHRL. The only reason for resorting to the interpretation of IHL through IHRL rather than to the application of IHRL in armed conflicts is when the concerned IHL norm is formulated in an open way. Yet, *interpreting* open-formulated IHL notions like the fair trial guarantees as including a series of guarantees provided under IHRL comes close to *applying* those IHRL guarantees in parallel to those provided under IHL.

There is therefore a strong argument that the scope of application of the principle of equality of belligerents extends to IHRL, when that body of law applies to a specific issue that is also regulated by IHL and that directly bears on the relations between the parties to the NIAC. Typical examples of this are the use of lethal force and detention in relation to such conflict. Regarding the use of lethal force, it has been advocated, as already seen,²³⁰ that the restrictive IHRL standard should prevail over the IHL one in certain specific circumstances, in particular when force is used “against isolated individuals who are lawful targets

226 See above note 169; see also e.g. M. Sassòli, above note 79, p. 588; K. Fortin, above note 179, p. 337; Yoram Dinstein, *Non-International Armed Conflicts in International Law*, Cambridge University Press, Cambridge, 2014, pp. 169, 225.

227 See e.g. the practice quoted in S. Sivakumaran, above note 169, p. 88.

228 See e.g. the practice quoted in Christian Tomschat, “The Applicability of Human Rights to Insurgent Movements”, in Hans Fischer *et al.* (eds), *Krisensicherung un Humanitärer Schutz – Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, Berliner Wissenschaftsverlag, Berlin, 2004, p. 576.

229 Practice quoted in and translated by J.-M. Henckaerts and C. Wiesener, above note 168, p. 203.

230 See above note 126 and corresponding main text.

under IHL but are located in regions under a State's firm and stable control, where no hostilities are taking place and it is not reasonably foreseeable that the adversary could readily receive reinforcement".²³¹ Regarding detention, while, as also seen,²³² IHL does not expressly provide for any ground for detention with respect to NIACs, it does not expressly contain other safeguards required by IHRL either, including that the grounds for detention must be established by law and that the procedure must afford the detainees with a right of *habeas corpus*. Depending on whether or not the principle of equality of belligerents extends to IHRL, the more protective IHRL standards with respect to both the use of lethal force and detention would bind both States and armed groups or only the former.

The mere application of those IHRL obligations to States would not only upset the aim of further "humanizing" IHL as much as possible through the application of IHRL in armed conflict, but would also probably be untenable for States, especially when armed groups exercise control over a large portion of the territory and administer that territory through State-like institutions. It is hard to imagine in particular that States would accept being bound to provide enemy detainees with the right to challenge the legality of their detention before a court, when the opposing armed groups would be allowed to dispense with affording such a guarantee to captured members of the government side. Admittedly, the current trend in practice is to advocate for the applicability of IHRL to armed groups,²³³ thus reducing the inequality gap between States and those groups. However, that approach raises several issues, such as the determination of the level of development that armed groups must reach in order for IHRL to be applicable to them. Moreover, a significant inequality remains with respect to armed groups that do not reach such a level of development but nonetheless exercise some control over the territory. Finally, under that approach, no minimum IHRL regulation is applicable either to such groups or to those having no control at all.

In order to avoid such difficulties and, in particular, the all-or-nothing approach to the applicability of IHRL to armed groups, sliding-scale approaches have been proposed in legal scholarship, such as the notion of different applicable IHRL obligations in accordance with different thresholds²³⁴ or in accordance with each specific context in which the obligations are intended to apply.²³⁵ However, besides having inherent shortcomings, like the difficulty in determining the relevant thresholds in practice or the lack of any general guiding framework, those approaches are not flexible enough to propose similar IHRL obligations to all parties to a NIAC, in accordance with the principle of equality of belligerents.

231 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Report Prepared by the International Committee of the Red Cross for the 32nd International Conference of the Red Cross and Red Crescent, 8–10 December 2015*, 2015, p. 35.

232 See above note 224 and corresponding main text.

233 See above note 40 and corresponding main text.

234 See e.g. Tilman Rodenhäuser, who distinguishes between three distinct thresholds (*Organizing Rebellion Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law*, Oxford University Press, Oxford, 2018, pp. 147–149).

235 See e.g. Daragh Murray, who supports a context-dependent approach (above note 203, pp. 177–180).

It is obvious that this principle must not lead either to the full application or to the non-application of IHRL to States and armed groups. Although the full application would fully serve the aim of further “humanizing” IHL through the application of IHRL in armed conflict, it would not take into account the effectiveness-based considerations related to the capacity of armed groups. Conversely, the non-application of IHRL to parties to a NIAC would entirely annihilate any positive impact of IHRL on the regulation of armed conflict and would run counter to the well-established view that IHRL is applicable in armed conflict. A possible alternative approach to conciliate the application of IHRL with the principle of equality of belligerents and the various levels of capacity of armed groups is again to resort to obligations of conduct with respect to IHRL obligations imposing positive standards and to combine them with core obligations of result providing a minimum regulation. The need for differentiation in order to take into account the specific capacities of armed groups is not sought through the assertion of different IHRL obligations for the different types of armed groups, as proposed by the above-mentioned sliding-scale approaches,²³⁶ but through the assertion of the same obligations involving a flexible standard of due diligence. Under this approach, those obligations of conduct are the same for any party to a NIAC, both States and any kind of armed group, and the fluctuating nature of those groups is then taken into account through the standard of due diligence. In addition, this approach has the advantage of relying on well-known categories of obligations in both general international law and IHL.²³⁷ Finally, as already shown above,²³⁸ the combination of those obligations with core obligations of result is an approach expressly envisaged by the law of NIAC, in particular under Article 5 of AP II.

This approach is arguably relevant for the application of the IHRL standards in NIACs with respect to both the issue of the use of lethal force in specific circumstances and the issue of detention. Regarding the use of lethal force, the IHRL restrictive standard, which entails that arrest and capture are given priority over targeting, must be applied “to the maximum extent feasible”. As formulated in the form of an obligation of conduct, requiring the parties to “make their best efforts” to comply with the IHRL standards in light of their capacities as well as all the circumstances ruling at the time, that obligation is flexible enough to enable various factors to be taken into account for its assessment. Those factors do not therefore merely include the firm control exercised by the targeting party over the territory where the lawfully targetable person is located. They also encompass, for example, the possibility of “arrest [ing] the fighter, the danger inherent in an attempt to arrest the fighter and the danger the fighter poses to [the targeting party] and civilians as well as the immediacy of this danger”.²³⁹ More generally, it becomes feasible for a party to

236 See above notes 234–235.

237 See above notes 191 and 195.

238 See above note 200 and corresponding main text.

239 M. Sassòli, above note 79, p. 609.

an armed conflict to apply the more restrictive IHRL standard when the fighter or even a group of fighters can be arrested without that party “being overly concerned about other [fighters belonging to the same armed forces] interfering in that operation”.²⁴⁰

Regarding the issue of detention, certain IHRL safeguards, such as the requirements to provide the grounds for detention by law and to afford detainees with the right of *habeas corpus*, must be modulated and regulated by obligations of conduct coupled with core minimum standards. Those standards would involve that a person may lawfully be detained only if the aim of the detention is to avoid them taking a direct part in hostilities (again) and only if they are afforded the right to contest the legality of their detention before a person other than their captor.²⁴¹ The additional obligations would be obligations of conduct that would require both establishing the grounds for detention through the enactment of a specific law and providing detainees with a right of *habeas corpus* before a judiciary court, but only “to the maximum extent feasible”. This means that, depending upon the circumstances ruling at the time and the capacities of the parties, those parties might, for example, only be able to—and would therefore have to—establish an impartial administrative body to review the legality of the detention.²⁴²

Admittedly, this approach would introduce more flexibility, which could potentially lower the level of protection with respect to the obligations owed by States, compared to the full application of unmodulated IHRL obligations to them. However, there would not be any difference with that full application

240 *Ibid.*

241 *Ibid.*, p. 621..

242 It is worth observing that similar solutions, involving the application of the same but adapted obligations inspired by IHRL to both States and any armed group party to a NIAC, has been advocated by the ICRC through resorting to IHL itself. Regarding the use of lethal force, the ICRC adopted such an approach in the well-known Section IX of its *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (Interpretive Guidance). Here the ICRC resorted to the IHL concept of military necessity, arguing that the capture and arrest of a lawfully targetable person must be favoured under IHL when the targeting of that person is not justified by military necessity, such as when the person is located in a region firmly controlled by the targeting party: Nils Melzer (ed.), *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, pp. 77–82. This actually comes close to advocating for the application of the relevant IHRL standard to any party to an armed conflict, including NIACs. In addition, the test based on military necessity is context-dependent and enables that standard to be adapted to the circumstances present at the time and in particular the capacities of the parties, as does the standard of due diligence against which the respect for obligations of conduct is to be assessed. Another similar approach has been followed by the ICRC in its Customary Law Study with respect to the issue of detention in NIACs. Here the ICRC identified the customary IHL procedural safeguards on the basis of human rights practice, including the entitlement to *habeas corpus*, without however defining the precise contours of those safeguards. As already seen (above note 18), this also comes close to the application of the relevant IHRL standards to parties to NIACs. That being said, both approaches have been strongly criticized in legal scholarship: regarding the ICRC position on the use of lethal force in the Interpretive Guidance, see e.g. W. Hays Parks, “Part IX of the ICRC ‘Direct Participation in Hostilities’ Study: No Mandate, No Expertise, and Legally Incorrect”, *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010; regarding the ICRC’s approach to the issue of detention in its Customary Law Study, see e.g. Marco Sassòli, “Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law”, *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, p. 17.

whenever States operate as usual, since the standard of due diligence would be highly demanding in such case. In addition, this would allow certain IHRL obligations to be accommodated with the realities of war that States themselves might face and that can make the application of those standards unrealistic even for them, such as the obligation to proceed to the review of the legality of the detention before a judiciary court when the State is engaged in active hostilities and is led to capture numerous fighters in a short period of time.²⁴³ Finally, States could not derogate to the modulated IHRL obligations even if those obligations can be subject to derogation under IHRL, given the operation of the principle of equality of belligerents.

International armed conflicts and occupations

The potential for IHRL to impact on IHL and further “humanize” that body of law is less significant with respect to IACs and belligerent occupations, since both situations are much more regulated under IHL than NIACs. In addition, the (potential) application of the principle of equality of belligerents raises fewer problems, since those situations only involve States and IHRL is applicable to those actors. However, there are still certain difficulties with respect to both the interpretation and application processes.

The interpretation process in IACs and occupations

Practice shows few cases of interpretations of IHL in light of IHRL with respect to the IHL norms that are exclusively applicable to IACs and situations of belligerent occupations. In addition, only a few of those cases required that the IHRL standards had to be adapted.

Practice

With respect to IACs, instances of the interpretation process may be found in the updated ICRC Commentaries concerning the protection of the wounded and sick as well as PoWs. The main instance elaborated by the ICRC relates to Article 42 of GC III, which deals with the use of weapons against PoWs and provides that such use, “especially against [PoWs] who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances.” According to the ICRC, the notion of an “extreme measure”, conditioning the use of lethal force under Article 42 of GC III, must be determined in light of the traditional IHRL standards.²⁴⁴ This is a consistent approach, since, as emphasized by the ICRC, Article 42 is “one of the few provisions of humanitarian law that govern the use of force in situations that do not pertain to the conduct of hostilities”.²⁴⁵

243 In that sense, see e.g. M. Sassòli, above note 79, p. 621.

244 ICRC Commentary on GC III, above note 23, para. 2536.

245 *Ibid.*, para. 2538.

Regarding situations of occupation, one significant instance of incorporation of an IHRL standard into IHL relates to Article 43 of the 1907 Hague Regulations, which states:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

In the *Armed Activities* case, the ICJ interpreted Article 43 as incorporating the IHRL positive obligation to protect persons from acts of violence by a third party. The Court concluded that Article 43 “comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party”.²⁴⁶ This is consistent with the function that any Occupying Power is intended to perform, namely restoring and maintaining public order in occupied territories, since IHRL was designed to apply to such activities.

Modulating IHRL standards

Certain instances of the interpretation process may raise concerns. The incorporated IHRL standard might be subject to modulation in order to account for effectiveness-based considerations related to the specific features of armed conflicts.

An example of this is the reference made by the ICRC to the demanding IHRL standard relating to the minimum amount of living space for prisoners as a guide for interpreting Article 25 of GC III dealing with quarters in PoW camps. As acknowledged by the ICRC, such a demanding standard can only be required “wherever circumstances permit”.²⁴⁷ It was thus necessary to modulate that standard by phrasing it as a mere context-dependent obligation. This is due to the fact that unlike ordinary prisoners, PoWs are not detained for criminal purposes, but only in the context of hostilities in order to avoid them returning to combat. As a result, it is not excluded that a Detaining Power may be led to capture a significant number of individuals in a short period of time during or after intensive fighting. In such situation, it may be hard for the Detaining Power to provide immediately all the detainees placed in the PoW camp with the amount of living space required under IHRL.

The application process in IACs and occupations

The issues raised by the application process with respect to IACs and situations of occupation are broadly similar to those relating to the application process concerning NIACs, except for the issue of the potential application of the

²⁴⁶ ICJ, *Armed Activities*, above note 33, para. 178.

²⁴⁷ ICRC Commentary on GC III, above note 23, para. 2090 fn.32.

principle of equality of belligerents, which does not raise any significant problems in this case since only States are normally involved. Certain features specific to IACs and situations of occupation must nonetheless be emphasized regarding both the cumulative application of IHRL and IHL and the displacement or adaptation of the applicable IHRL regulation.

Cumulative application

Cumulative application of the relevant applicable IHRL and IHL norms is not always possible in IACs and occupations. Conflicts, understood in a narrow sense (meaning that the application of one norm leads to a result prohibited by the other), indeed exist between certain applicable norms of the two regimes in those situations.

Regarding IACs, it is open to question whether Article 30(1) of GC III, according to which “[i]solation wards shall, if necessary, be set aside for cases of contagious or mental disease”, may be cumulatively applied with relevant contemporary IHRL regulation, in particular Article 14 of the Convention on the Rights of Persons with Disabilities (CRPD). The latter article provides, *inter alia*, “that the existence of a disability shall in no case justify a deprivation of liberty”. It is now well admitted that the past IHL approach to persons with mental health conditions is outdated, as evidenced by the fact that the Geneva Conventions²⁴⁸ consider those conditions as a disease.²⁴⁹ Accordingly, it is undisputed that such persons cannot be detained for the sole reason of their actual or perceived impairment. However, practice is not straightforward with regard to the legality of their detention in two specific situations: namely, when they are deemed dangerous to others or to themselves. Detention in those situations seems to be allowed by the HRC²⁵⁰ as well as by certain States and experts.²⁵¹ In such cases, the “necessity” of the isolation of the mentally disabled persons in PoW camps under Article 30(1) of GC III must at least be read in light of that practice. This would amount to an interpretation process according to which mentally disabled persons may be isolated only if “necessary”, meaning only if they pose a danger to others or themselves.

However, no interpretation is possible if it is argued that such danger could never justify by itself the detention of mentally disabled persons. This is the view supported by the Committee on the Rights of Persons with Disabilities²⁵² as well

248 See e.g. not only Article 30(1) of GC III but also Articles 16, 17, 18, 20 and 22 of GC IV, referring to the “infirm” or “wounded and sick”.

249 In that sense, see also e.g. ICRC, *How Law Protects Persons with Disabilities in Armed Conflict*, Geneva, 13 December 2017, p 7; Alice Priddy (ed.), *Disability and Armed Conflict*, Geneva Academy, Geneva, April 2019, pp. 52–53, 56, 69, 77.

250 See HRC, General Comment No. 35, “Article 9 (Liberty and Security of Person)”, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 19.

251 See those quoted in the ICRC Commentary on GC III, above note 23, paras 2242 fn. 33, 2244 fn. 35.

252 See HRC, *Thematic Study on the Rights of Persons with Disabilities under Article 11 of the Convention on the Rights of Persons with Disabilities, on Situations of Risk and Humanitarian Emergencies: Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/31/30, 30 November 2015, paras 10, 47, 55.

as by certain States and experts,²⁵³ which emphasize that such detention would otherwise amount to an adverse distinction or even to acts of torture or degrading and humiliating treatment. According to this view, the applicable IHRL regulation, namely Article 14 of the CRPD, contradicts Article 30(1) of GC III. The conflict between IHRL and IHL must be solved in light of the two prongs of the coherency test, according to which the outcomes of the interactions between IHRL and IHL must aim at ensuring the best protection of individuals to the maximum extent compatible with effectiveness-based considerations. It is thus submitted that the conflict may be solved by favouring the exclusive application of the IHRL regulation, which is the most protective regime, as this would not prevent the Detaining Powers from effectively managing PoW camps where such persons are detained. Contemporary knowledge of mentally disabled persons shows that nothing justifies treating those persons differently from others in that regard, since their impairment does not give rise in itself to more danger for others or themselves.²⁵⁴ Accordingly, they could be isolated if they pose a danger to others but only as a result of a punitive measure like the other detainees.²⁵⁵

Another conflict of norms, understood in a narrow sense, concerns the law of occupation.²⁵⁶ Article 66 of GC IV authorizes the Occupying Power to hand over persons, including civilians, accused of having breached its penal regulation “to its properly constituted, non-political *military courts*” (emphasis added). On the other hand, States are prohibited from bringing civilians before military courts under the case law of the ECtHR.²⁵⁷ Again, the conflict of norms may be solved in light of the coherency-based approach. IHL should prevail, not because effectiveness-based considerations featuring IHL would displace the inappropriate IHRL regulation, but rather because Article 66 of GC IV offers the best protection to people as sought by the rationale of the coherency-based approach. Indeed, the underlying purpose of the IHL regulation is to avoid the annexation of the occupied territory by the foreign power and therefore to protect the right of people to self-determination.²⁵⁸ That fundamental collective right might then be seen as superseding the right of individual civilians to be tried before civilian courts, as provided in the case law of the ECtHR. In any case, the military courts established by the Occupying Power must respect the detailed judicial guarantees provided in GC IV²⁵⁹ and

253 In that sense, see also ICRC Commentary on GC III, above note 23, para. 2242 fn. 33.

254 See e.g. HRC, *Rights of Persons with Disabilities: Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc. A/HRC/40/54, 11 January 2019, para. 27.

255 See e.g. GC III, Art. 89(4).

256 On that narrow conflict, see e.g. Marco Sassòli, “La Cour européenne des droits de l’homme et les conflits armés”, in Stephan Breitenmoser, Bernhard Ehrenzeller and Marco Sassòli (eds), *Droits de l’homme, démocratie et Etat de droit: Liber amicorum Luzius Wildhaber*, Dike, Zürich, 2007.

257 See e.g. ECtHR, *Cyprus v. Turkey*, Appl. No. 25781/94, Judgment (Grand Chamber), 10 May 2011, paras 277–278; ECtHR, *Incal v. Turkey*, Appl. No. 22678/94, Judgment (Grand Chamber), 9 June 1998, paras 70–72.

258 See e.g. M. Sassòli, above note 79, p. 438.

259 See in particular GC IV, Arts 64–77.

other relevant IHL rules,²⁶⁰ supplemented by all the IHRL safeguards protecting persons before any criminal court.²⁶¹

That being said, the foregoing conflicts seem to be the only formal conflicts of norms between IHL and IHRL in IACs and occupations. Usually, it is possible to proceed to the cumulative application of IHRL and IHL. However, as already emphasized, by contrast to NIACs, IHRL has less potential to further “humanize” the IHL norms that are specifically applicable to IACs and occupations, since those situations are much more regulated by IHL. Accordingly, IHL often provides for better protection than IHRL, especially with respect to specific issues like the regulation concerning the amount of the various financial resources available to PoWs or civilian internees,²⁶² or the specific protective guarantees relating to the death penalty²⁶³ or, more generally, those applicable in any case of criminal and disciplinary prosecution, like the relaxation of the principle of assimilation to enemy armed forces by the leniency clauses, which allows taking into account the allegiance of the accused to their own party.²⁶⁴ Yet, in certain instances, IHRL proves to be more developed and more protective, such as with respect to the principle of *non-refoulement* protecting civilians under GC IV.²⁶⁵

Finally, as in NIACs, the applicable IHRL norms are often formulated in a sufficiently flexible way to accommodate the exceptions or limitations contained in the corresponding IHL regulation, which makes the cumulative application of IHRL and IHL possible. However, given the detailed regulation of IACs and occupations under IHL, instances of such accommodation are much more numerous than in NIACs, whether through exceptions²⁶⁶ or restrictions²⁶⁷ provided in the relevant IHRL norm, the formulation of the

260 See in particular AP I, Art. 75.

261 See e.g. Yukata Arai-Takahashi, “Law-Making and the Judicial Guarantees in Occupied Territories,” in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 179, pp. 1438 ff. See also the HRC admitting that civilians are put on trial before military courts but only if such trials are “very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14 [of the ICCPR]”: HRC, *Salim Abbassi and Abbassi Madani v. Algeria*, Communication No. 1172/2003, UN Doc. CCPR/C/89/D/1172/2003, 28 March 2007.

262 See e.g. GC III, Part III, Section IV; GC IV, Part III, Section IV, Chap. VI.

263 See e.g. GC III, Arts 100, 101; GC IV, Art. 75.

264 See e.g. GC III, Arts 83, 87, 100.

265 See e.g. V. Chetail, above note 210, pp. 1203–1205.

266 See e.g. the exception to the IHRL prohibition on forced or compulsory labour, above notes 211–212, which might enable that prohibition to be compatible with the IHL right of the Detaining Power to oblige certain categories of detainees to work (see e.g. GC III, Art. 49).

267 See e.g. the restrictions on the IHRL right to manifest one’s religion or belief (contained notably in Article 18(3) of the ICCPR or Article 9(2) of the ECHR), which might make that right compatible with the IHL limitation on the religious practice of detainees, which is indeed subject to the requirement that it must comply with the disciplinary routine of the camp (Hague Regulations, 1907, Art. 18; GC III, Art. 34; GC IV, Art. 93). On this compatibility, see specifically the ICRC Commentary on GC III, above note 23, para. 2371 fn. 29. For instances of compatibility between IHRL and the law of belligerent occupation, based on the existence of restrictions on the concerned IHRL rights, see e.g. D. Murray, above note 130, pp. 243–244 (right to freedom of expression), 244–246 (right to freedom of movement, right to freedom of association and right to freedom of assembly), 256–257 (right to property).

concerned IHRL obligations as obligations of conduct,²⁶⁸ or the limitation of the IHRL prohibition to “arbitrary” or “unlawful” conduct.²⁶⁹

Displacement or modulation of the applicable IHRL regime

Although the cumulative application of IHL and IHRL is possible, the applicable IHRL regime must nonetheless be set aside in certain instances because it proves inadequate in light of effectiveness-based considerations related to the specific features of armed conflicts. This is the case with respect to the use of lethal force, at least in situations of active hostilities, and detention. The results must be the same as those described above with respect to NIACs.²⁷⁰ The IHL regulation must prevail.

However, it is generally admitted that this process raises less difficulty in IACs and occupations, especially regarding detention, since IHL expressly provides for a right to detain for security reasons in such situations.²⁷¹ That express legal basis may then be referred to as the *lex specialis* in order to interpret or displace the inappropriate IHRL regime in that respect.²⁷² This is also the case concerning the express regulation of the right of *habeas corpus* under GC IV, which does not require that the detention must necessarily be challenged before a judiciary court,²⁷³ unlike in IHRL.²⁷⁴ The inappropriate IHRL requirement may then be displaced by relying on the express IHL *lex specialis*.

Yet no express regulation exists regarding the right of *habeas corpus* as far as PoWs are concerned. While IHRL requires that detainees must be able to challenge the legality of their detention, GC III remains silent on that issue. Such silence is due to the fact that, according to the traditional approach,²⁷⁵ it would be inappropriate to provide persons with a right of *habeas corpus* when those persons are detained not for criminal purposes but for the sole reason of

268 See e.g. the rights provided in the ICESCR, which must be afforded by each contracting party “to the maximum of its available resources” (Art. 2(1)). This enables those rights to be conciliated with IHL norms that do not impose absolute obligations, such as the obligation of the Occupying Power, “[t]o the fullest extent of the means available to it, [to ensure and maintain], with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory” (GC IV, Art. 56); the obligation of the Occupying Power, “[t]o the fullest extent of the means available to it, [to ensure] the food and medical supplies of the population” (GC IV, Art. 55); or the obligation of the captor State to take “all feasible precautions ... to ensure [the] safety” of those combatants who “have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation” (AP I, Art. 41(3)).

269 See e.g. the human right to correspondence provided in the ICCPR, which prohibits any arbitrary or unlawful interference with correspondence (Art. 17(1)). This enables that right to be cumulatively applied with, for example, the right afforded by IHL to the Detaining Power to limit the correspondence sent by PoWs (GC III, Art. 71) or civilian internees (GC III, Art. 107) and to subject the correspondence sent to or by PoWs (GC III, Art. 76) or civilian internees (GC IV, Art. 112) to censorship.

270 See the above section on “Setting Aside the Applicable IHRL Regime”.

271 See Article 21 of GC III regarding PoWs, and Articles 42 and 78 of GC IV regarding civilian internees.

272 See the above section on “Setting Aside the Applicable IHRL Regime”.

273 See GC IV, Arts 43, 78.

274 Regarding IHRL, see e.g. ICCPR, Art. 9(4); ECHR, Art. 5(4).

275 See above note 117.

preventing them from returning to combat. This silence must then be considered as part of the regulation on the detention of PoWs, and that regulation must be seen as the *lex specialis* capable of displacing the inappropriate IHRL regime, including the right of *habeas corpus* granted under that regime.²⁷⁶

In certain instances, the applicable IHRL regime does not have to be displaced but must be merely modulated. An illustrative example is the use of lethal force in circumstances where the lawfully targetable person is located in a territory under the firm control of the targeting party. It has already been seen that the IHRL regime has been said to be applicable to such situations and to prevail as the *lex specialis* over the more permissive IHL regime.²⁷⁷ As supported with respect to NIACs, the applicable IHRL regime should nonetheless be modulated in order to take into account the various circumstances ruling at the time.²⁷⁸ It should be framed as an obligation of conduct, requiring that arrest and capture must be preferred to targeting “to the maximum extent feasible”. This allows for the consideration of numerous factors in addition to the control exercised by the targeting party.

Conclusion

The interplay between IHL and IHRL has been the object of numerous studies in legal scholarship. However, no study has ever proposed any elaborated theoretical framework, combining formal and substantial considerations, in order to address the interplay resulting from both the interpretation of IHL in light of IHRL (the interpretation process) and the application of IHRL in armed conflicts alongside IHL (the application process).

These processes represent the two main ways through which IHRL currently impacts the regulation of armed conflict since the 1960s and, in particular, since the 1968 Tehran Conference. Although the two processes are often operated in practice, by courts or other competent bodies, legal frameworks that have been proposed to guide them are either lacking or unsatisfactory. The main reason for the unsatisfactory nature of the currently proposed mechanisms, such as the *lex specialis* principle or the principle of systemic integration, is that they are only formal tools. They do not integrate any substantial considerations that are necessary to deal with the interplay between IHL and IHRL.

Such considerations have a key place in the legal theories on normative coherence, which deal with the interrelations of norms of any genuine legal system. Those theories mean that any legal system entails not only a formal coherence (“consistency”) between its norms but also a material coherence (“coherence”) that is obtained through testing the compatibility of the solutions of the system against its foundational principle. Such theories, enriched by other

276 See e.g. G. Gaggioli, above note 14, p. 52.

277 See above note 126 and corresponding main text.

278 See the above section on “Modulating Applicable IHRL Obligations”.

theoretical reflexions such as those on legal pluralism, have the potential to provide an adequate framework for the relationships between the IHL and IHRL norms.

Accordingly, the outcomes of the interpretation and application processes must be compatible with the foundational principle according to which the best protection must be afforded to persons, in conformity with the mandate given by States at the 1968 Tehran Conference (first prong of the coherency test), provided or to the extent that the resulting legal solution does not conflate with effectiveness-based considerations specific to situations of armed conflict (second prong of the coherency test). This means that the full incorporation of IHRL into IHL (as a result of the interpretation process) or the cumulative application of IHL and IHRL in armed conflicts (as a result of the application process) can only be limited if, or to the extent that, it is justified by the particular circumstances ruling at the time (*in concreto* considerations) or general features specific to armed conflicts (*in abstracto* considerations). Those limitations may result either in modulations or displacements of the inappropriate regime.

Modulation has mainly been elaborated in this paper in relation to NIACs, especially in order to take into account the principle of equality of belligerents in light of the different levels of capacities of the parties to the conflict, particularly armed groups. It has been submitted that the best approach to combine those effectiveness-based considerations with the aim of further “humanizing” the regulation of armed conflict through IHRL, as required by the coherency test, is to phrase the IHL obligation interpreted in light of IHRL or the IHRL obligation applicable alongside IHL in armed conflict as an obligation of conduct. Although such an obligation would be applicable to both parties to the conflict, the standard of due diligence against which the respect for the obligation is to be assessed would enable taking into account the particular circumstances ruling at the time and the different intrinsic features of each party, including their material capacity. In addition, such obligations would be supplemented by core obligations of result. This sliding-scale approach, which bears mainly on the content of the obligations rather than on their existence, has been advocated with respect to several issues, including the fair trial guarantees and the procedural guarantees in case of detention.

In certain instances, however, modulation is not possible and the inappropriate IHRL regime must be displaced in favour of the IHL one. This has been asserted in relation to NIACs as well as IACs and occupations, mainly with respect to the regimes relating to the use of lethal force – at least when that force is used in active hostilities – and the grounds for detention. The IHL regime is to be preferred in those cases, given the specific features of any armed conflict. Displacements of the IHRL standard have also been argued in order to avoid making the ensuing regulation (almost) impossible to be respected by the parties to the conflict, in particular by armed groups in NIACs, in instances of potential interpretation of certain IHL guarantees in light of IHRL.