1

Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication

Helen Duffy

I. INTRODUCTION

Writing back in the 1970s, Baxter noted that 'the first line of defence against international humanitarian law is to deny that it applies at all'.[1] Controversy around international humanitarian law (IHL) applicability has been a staple feature of international practice for decades: denials that armed conflicts exist lest 'terrorist' adversaries be legitimised; or exorbitant claims that they arise from intransigent problems of law enforcement such as drug-related violence or terrorism. Today, controversies concerning the applicability of IHL, and its significance, are ongoing, and increasingly inextricably bound up with the question of co-applicability with other areas of international law, in particular international human rights law (IHRL).

The implications of over- and under-inclusive approaches to IHL applicability depend to a large extent on the approach taken to co-applicable law. On the one hand, the denial of IHL applicability to evade the strictures of that body of law assumes a narrow view of IHL as the only relevant constraining law, the non-applicability of which leaves a legal vacuum to be exploited. On the other hand, overreaching approaches to IHL are in turn often predicated on assertions that if IHL does apply it displaces the normally applicable standards of IHRL. Conversely, denial of IHRL applicability has at times been supported by reference to applicable IHL, without grappling with the normative or procedural implications of this exclusive approach. Understanding applicable law inevitably involves viewing the law governing armed conflict in its broader framework, considering IHL and IHRL together and grappling with the thorny issue of how they interact in theory and, most importantly, in practice.

[1] Richard Baxter, 'Some Existing Problems of Humanitarian Law', *Military Law and Law of War Review* 14 (1975), 297–303 (298).

https://doi.org/10.1017/9781108674416.002 Published online by Cambridge University Press

While disputes around the applicability of IHL, IHRL and the nature of their interrelationship are not new, the international landscape within which these issues are considered has been transformed in recent years. Several developments are worth highlighting at the outset, as they emerge recurrently throughout our enquiry into the law, and outstanding controversies, in relation to applicability and co-applicability. The first set relate to the factual and political context within which the discussion is set, and the second to the changing legal and institutional context in which questions of co-applicability arise in practice.

A. *Practice, Politics and Positioning of Parties*

Conflict recognition and classification have long been fraught political issues,[2] particularly in the context of non-international armed conflicts (NIACs), which form the majority of armed conflicts in the world today. Not uncommonly, States' positions bear limited relation to legal standards or facts on the ground. Yet as we will see, in practice the position of a State influences a great deal; not only its own approach to applicable law, but arguments advanced in litigation[3] and, rightly or wrongly, sometimes also the approach of courts to (co-)applicability.[4] The murky reality that States' positions are rarely transparent and frequently disputed, for a range of legal and political reasons, renders determinations as to applicable law more challenging. It also makes it all the more important, in line with the principle of legality and the proper functioning of IHL, that the existence of an armed conflict (and the applicability of IHL) are treated as legal questions capable of being objectively applied, not dependent on the position of one or more affected parties.[5]

[2] Bohrer in this volume, 109 *et seq*. See generally, Elizabeth Wilmshurst (ed.), *International Law and Classification of Conflicts* (Oxford University Press, 2012); Andrea Bianchi and Yasmin Naqvi, *International Humanitarian Law and Terrorism* (Oxford: Hart, 2011), ch. 1.

[3] Both States and applicants to rights litigation may deny the applicability of IHL for various reasons; Section III and Larissa van den Herik and Helen Duffy, 'Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches', in Carla M. Buckley, Alice Donald and Philip Leach (eds.), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Leiden: Brill/ Nijhoff, 2016), 366–406; Françoise J. Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body', *International Review of the Red Cross* 90 (2008), 549–72 (549).

[4] E.g., ECtHR, *Hassan v. United Kingdom*, Grand Chamber Judgment of 16 September 2014, Application No. 29750/09, discussed in Section III.

[5] The test for the applicability of IHL is, and has to be, a legal one; see Section II, see also, e.g., ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Trial Chamber Judgment of 7 May 1997.

Notorious recent examples of extreme selectivity, or 'strategic'[6] approaches to the applicability of IHL, IHRL, or both, provide part of the backdrop to the normative discussion on co-applicability. Such an approach characterised much of the 'war on terror', wherein disputes about *applicability* of legal frameworks have featured centre stage,[7] inflating the perceived relevance of IHL and, indeed, interplay in the counter-terrorism context.[8] Many of the worst excesses of counter-terrorism practice (torture, arbitrary detention or burgeoning targeted killings) may reveal a broader legality issue – an unwillingness to be constrained by law – rather than genuine differences of view on applicability and co-applicability.[9] Nonetheless, it was through the blanket – and, as will be argued, erroneous – invocation of IHL as '*lex specialis*', purportedly displacing human rights norms and the jurisdiction of human rights courts and bodies (without applying consistently norms of IHL either), that accountability for such practices before national courts and international human rights bodies has been avoided.[10] This gruelling tug of war between paradigms of recent decades underscores the importance of understanding and clarifying applicable law and ensuring effective oversight.

B. *The Complexity of Conflict*

Another crucial aspect of the factual landscape is the undeniable transnational, multi-actor complexity of many contemporary armed conflicts. However much we wish it were not so, in practice this can make it difficult

[6] Yuvul Shany, 'Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror', in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (Oxford University Press, 2011), 13–33 (13). See also, Beth Van Schaak, 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change', *International Law Studies* 90 (2014).

[7] Helen Duffy, *War on Terror and the Framework of International Law*, 2nd edn. (Cambridge University Press, 2015), chs. 6 and 7.

[8] *Ibid*. Policies of targeted killings by, e.g., Russia, the United States and Israel are not limited to conflict situations, yet are justified by broad reference to IHL.

[9] On drones reflecting disputes about whether international law applies at all rather than applicable law, see UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston', 28 May 2010, UN Doc. A/HRC/14/24/Add.6.

[10] See, e.g., US submissions to the United Nations Human Rights Council (UNHRC) or Committee against Torture (CAT) arguing that its treaty obligations do not apply in armed conflict; e.g., US Department of State, 'Second, Third and Fourth Periodic Reports of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights', 21 October 2005, available at: www.state.gov/j/drl/rls/55504.htm, and 30 December 2011, available at: www.state.gov/j/drl/rls/179781.htm.

to distinguish between certain situations of violent unrest and organised crime and NIAC, or between international and non-international conflicts.[11]

The transnational nature of the violence, the multiplicity of States (some failed and failing) that may intervene,[12] and, in particular, the range, scale and capacity of non-State actors (NSAs) resorting to force,[13] from insurgent groups, terrorist networks or franchises to organised criminal entities, are part of this factual complexity.[14] For example, while dispute has often focused on the applicability of IHL to 'terrorist' entities,[15] comparable questions emerge increasingly in the light of the extreme violence and control by organised criminal groups in parts of Latin America,[16] raising the spectre of IHL as the legal framework of choice when law is at 'its wits' end' in the struggle against NSAs.[17] This new frontier in the battle over IHL applicability reminds us that, at a minimum, how we approach definitions of conflict and applicability in one situation, such as in relation to counter-terrorism, may have an impact in other emerging contexts. This again enhances the importance of clear and cautious approaches to what constitutes an 'armed conflict' to which IHL applies.

The second group of broad trends worthy of preliminary note relate to legal and institutional changes which impact inescapably on the context within which our discussion takes place.

[11] Development, Concepts and Doctrine Centre, 'Global Strategic Trends Out to 2040', MOD 02/10c30 (2010) and UK Strategic Defence and Security Review 2010, cited in Wilmshurst (ed.), *Classification of Conflicts* 2012 (n. 2), 1–8 (4).

[12] Robin Geiß, 'Armed Violence in Fragile States', *International Review of the Red Cross* 91 (2009), 127–42.

[13] Michael Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience* (New York: Henry Holt, 1997), referred to the decisive 'breaking of the monopoly of the means of violence'.

[14] See Section II.A.1.b.

[15] Section II.

[16] E.g., IACommHR, 'The Human Rights Situation in Mexico', 31 December 2015, OEA/Ser.L/V/II. Doc. 44/15, available at: www.oas.org/en/iachr/reports/pdfs/Mexico2016-en.pdf; Annyssa Bellal, 'The War Report: Armed Conflicts in 2017', *The Geneva Academy of International Humanitarian Law and Human Rights*, March 2018, 86, suggesting that Mexican cartels are parties to an armed conflict with the Mexican armed forces. Amy Carpenter, 'Civilian Protection in Mexico and Guatemala: Humanitarian Engagement with Druglords and Gangs', *Homeland Security Review* 6 (2012), 109–36.

[17] See Carrie Comer and Daniel Mburu, 'Humanitarian Law at Wits' End: Does the Violence Arising from the "War on Drugs" in Mexico Meet the International Criminal Court's Non-International Armed Conflict Threshold?', *Yearbook of International Humanitarian Law* 18 (2015), 67–89; Carina Bergal, 'The Mexican Drug War: The Case for a Non-International Armed Conflict Classification', *Fordham International Law Journal* 34 (2011), 1042–88; ICRC, 31st International Conference of the Red Cross and Red Crescent, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', 31IC/11/5.1.2, October 2011 (hereinafter the 'Challenges of Contemporary Armed Conflicts'), 11.

C. Co-applicability Confirmed

While at one time the applicability of IHRL in conflict situations in general was itself contentious, in recent decades there has been an overwhelming shift, such that the vast weight of international authority and opinion now confirms that IHRL continues to apply in times of armed conflict.[18] As such, the focus of the debate has shifted to *how* it co-applies alongside IHL, addressed at Sections III and IV. While, undoubtedly, some dispute on the relevance and applicability of human rights in armed conflict remains,[19] as reflected in the sections that follow and in the approach of other chapters to this volume, it is suggested that much of this reflects differing views on the pros and cons of how the law has developed, its historical or moral force, rather than on where the law stands today.[20]

A further normative shift – less emphatic but nonetheless perceptible – may also be underway in terms of how the relationship between IHL and IHRL is conceptualised. As explored in Section IV, simplistic approaches to co-applicability, such as seeing one body of law as a '*lex specialis*' to displace another, are ceding to a more nuanced approach to ongoing, weighted co-applicability.

Numerous commentators also point to 'narrowing gaps' between relevant areas of applicable law. There has certainly long been recognition of substantial overlap between IHL and IHRL in terms of objectives, principles and areas of substantive coherence.[21] This is most obvious in respect of humane treatment or fair trial, for example, but as explored in Section V there may be further movement on less obvious issues such as detention, the right to life or duty to investigate. Caution is also due not to overstate the convergence. It is in part the real substantive differences that remain – as regards starting points, processes and in some cases outcomes – that make it so important to ascertain applicable law. So far as the areas of law develop through practice over time, gaps may narrow, and the normative significance of debates on applicability may diminish to an extent.[22]

[18] Section II on, e.g., the position of States, ICJ, ICRC, and Section III on the voluminous body of practice of IHRL courts and tribunals.

[19] Section II on, e.g., US and Israeli positions.

[20] Section II.A; Ziv Bohrer in this volume, Chapter 2, and Janina Dill in this volume, Chapter 3, lend historical and moral perspectives on co-applicability.

[21] See, e.g., Cordula Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflicts', *Israel Law Review* 40 (2007), 310–55 (310).

[22] The law on NIAC and IAC moving closer is reflected in ICRC, Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law* (Cambridge University Press, 2005) (hereinafter the *ICRC Customary Study*).

Likewise, within IHL, while a gap remains between the detailed body of IHL treaty standards governing international armed conflict (IAC) and the quite limited treaty law directed to NIAC,[23] the divide has also substantially narrowed. In large part this development was also influenced by the work of tribunals, and the development of customary international law in NIAC.[24]

D. *Applicability in an Age of Adjudication*

A final transformative shift in the international institutional landscape relates to the emergence of an 'era of international adjudication'.[25] Various levels of international adjudication are relevant here, and have played decisive roles in determining issues of applicable law. First, the international criminal tribunals, beginning with the pioneering International Criminal Tribunal for the former Yugoslavia (ICTY), that breathed life into skeletal provisions of IHL. As this chapter discusses, the ad hoc tribunals and the International Criminal Court (ICC) have provided authoritative interpretations on the scope of application of IHL as well as its content,[26] and arguably en route have strengthened its enforcement.[27] The International Court of Justice (ICJ) in

[23] Common Art. 3 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, 75 UNTS 31 (hereinafter: GCI), Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1969, 75 UNTS 85 (hereinafter: GCII), Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, 75 UNTS 135 (hereinafter: GCIII), Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 75 UNTS 287 (hereinafter: GCIV) and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977, 1125 UNTS 609 (hereinafter: APII), (where the legal threshold is met) govern NIACs, contrasting with the body of Hague and Geneva law applicable in IACs. Many early IHL treaties were born in a period when international law was essentially an inter-State affair, though post WWII and recent treaties (e.g. Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3 (hereinafter: ICC Statute) retain the distinction.

[24] E.g., the *ICRC Customary Study* 2005 (n. 22) identifies 148 customary rules applicable in NIACs. The influence of adjudication, especially the work of tribunals and human rights bodies, is clear.

[25] Helen Duffy, *Strategic Human Rights Litigation* (Oxford: Hart, 2018), ch. 2, citing Christopher Greenwood's speech at Leiden University (2015).

[26] E.g., ICC, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06 OA5, Appeals Chamber Decision of 15 June 2017, defining child soldiers on the same side as protected persons under IHL.

[27] Although the tribunals developed ICL, focused only on those aspects of IHL giving rise to criminal responsibility and not the fuller preventive purpose of IHL, their influence on IHL is indisputable.

turn had a crucial role in determining the applicability of IHRL in conflict, and the principle of co-applicability.

More recent, and certainly more voluminous, is the burgeoning resort to human rights courts and tribunals, including to address violations in armed conflict. Within this practice we see an incremental but decisive shift in the level and nature of engagement, by a multiplicity of IHRL mechanisms, with IHL. Whether one lauds or laments this development (on which my co-contributors and I may take different views), the fact is that it is increasingly through the development of jurisprudence that questions of the scope of application of IHRL, and interplay with IHL, will be addressed, and given content.[28] As explored in Section IV, this engagement with IHL has certainly been uneven and sometimes faltering. But it holds promise for both the relevance and operability of IHRL in conflict situations, and for the prospect of judicial oversight and remedies for victims that have long been elusive.[29] This is particularly so given the stark contrast between the expanding architecture of human rights litigation and the continuing lack of an international IHL complaints mechanism.[30]

In short, we come to the issue of applicability necessarily informed by the political and historical context, and mindful of the normative, institutional and practical significance of the theoretical discussion.[31]

This chapter's primary goal is to explore where law and practice stand on the applicability of IHL, IHRL and their co-applicability, while acknowledging complexities and areas of uncertainty. Although significant doctrinal discussion has been dedicated to the theoretical issues of co-applicability, these are

[28] As we will see, skeletal treaties often do not, on their face, provide answers on many key questions, enhancing the normative influence of the judicial process.

[29] This is particularly so where national remedies are blocked in security-charged situations, e.g., through non-justiciability, state secrecy or immunities; see, e.g., Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford University Press, 2014); Helen Duffy,'Accountability for Counter-terrorism: Challenges and Potential in the Role of the Courts', in Fergal F. Davis and Fiona de Londras (eds.), *Critical Debates on Counter Terrorism Judicial Review* (Cambridge University Press, 2016), 324–64.

[30] The IHL supervisory systems that comprise the Protecting Power mechanism, the enquiry procedure and the International Fact-Finding Commission envisaged in Art. 90 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 12 December 1977, 1125 UNTS 3 (hereinafter: API) are under-utilised. The confidential supervisory role of the ICRC is crucial but is not a complaints procedure.

[31] See Section II.A.1.b; Terry D. Gill, 'Classifying the Conflict in Syria', *International Law Studies Series. US Naval War College* 92 (2016), 353–80 (378); see, e.g., Duffy, *War on Terror* 2015 (n. 7), ch. 7B.

not the object of this chapter.[32] Instead, it seeks to bring a practical perspective to the legal issues – considering how questions of applicability and interplay arise, and are determined, in practice, and exposing some of the array of relevant contextual, legal, political and institutional factors that may have a bearing on co-applicability.

Section II seeks to set out the basic legal framework governing applicability (*ratione materiae*, *personae*, *loci* and *temporis*) of IHL, and more briefly IHRL, revealing convergence and divergence, evolution and complexities in each. Section III explores the increasingly significant approach of human rights courts and bodies to IHL and co-applicability with IHRL. Section IV suggests a law and practice-based framework for understanding the interplay between these branches of law. Section V looks at what this framework of co-applicability means in practice, through the prism of particular issues, namely, review of the lawfulness of detention, targeted killings, cyber operations and investigations.

II. APPLICABILITY OF IHL AND IHRL, AND OUTSTANDING CONTROVERSIES

A. *Applicability* Ratione Materiae

1. The Material Applicability of IHL in Conflict

a) the sine qua non: existence of and nexus to an international or non-international armed conflict The scope of IHL is limited *ratione materiae* to situations of armed conflict. It provides a body of rules specifically directed at limiting the effects of war, by protecting persons who are not or are no longer participating in the hostilities and regulating means and methods of warfare. The elemental question upon which IHL applicability depends is then what constitutes an 'armed conflict'. The connected question is which type of conflict and which body of IHL applies. Despite the developments in

[32] See, e.g., Droege, 'Interplay between IHL and IHRL' 2007 (n. 21), 310; Gerald Draper, 'Humanitarian Law and Human Rights', *Acta Juridica* (1979), 193–206 (193); Dietrich Schindler, 'Human Rights and Humanitarian Law: Interrelationship of the Laws', *American University Law Review* 31 (1982), 935–43; Noam Lubell, 'Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate', *Israel Law Review* 40 (2007), 648–60; Nancie Prud'homme, *'Lex Specialis*: Oversimplifying a More Complex and Multifaceted Relationship?', *Israel Law Review* 40 (2007), 356–95 (385); Marko Milanovic, 'The Lost Origins of *Lex Specialis*: Rethinking the Relationship between HR and IHL', in Jens David Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights* (New York: Oxford University Press, 2016), 78–118.

the 'typology' or nature of conflicts around the globe,[33] and some convincing questioning of such distinctions,[34] it appears to hold true as a matter of law today that there are two types of armed conflict, IAC and NIAC, with significance for applicable IHL.[35]

IHL is applicable to conduct with a *nexus* to or which is 'associated' with the armed conflict, not to any and all conduct that takes place in the broad *context* of the conflict.[36] In any event, the determination as to whether particular conduct is carried out as part of an armed conflict is a prerequisite to IHL applicability, before any question of co-applicability arises. It may be questioned how clearly defined and understood, for the purposes of IHL applicability, this nexus criterion is. What is clear is that the nexus requirement does not derive from the nature of the actors involved; militaries around the world often engage in activities abroad that do not form part of any armed conflict, while other actors exercise their authority in diverse ways within armed conflict.[37]

The test for the applicability of IHL is a legal one, depending on whether the facts meet the definition of 'armed conflict' in international law. It is perhaps remarkable, given the normative significance of the existence of 'armed conflict' and the exceptional framework it triggers, that the term was not defined in IHL (or human rights) treaties.

In the absence of a treaty definition, international courts have stepped into the breach. While the ICJ and human rights bodies have provided relatively slight guidance on this point,[38] it has been through the first level of

[33] Sylvain Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations', *International Review of the Red Cross* 91 (2009), 69–94 (89); Marko Milanovic and Vidan Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict', in Nigel D. White and Christian Henderson (eds.), *Research Handbook on International Conflict and Security Law* (Cheltenham: Edward Elgar, 2012), 256–314 (257 *et seq.*).

[34] E.g., James Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict', *International Review of the Red Cross* 85 (2003), 313–50.

[35] E.g., Wilmshurst, *Classification of Conflicts* 2012 (n. 2), chs. 1, 2–8; ICRC, *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949*, Commentary (online edn.), 2016, Art. 3, para. 472.

[36] The nexus requirement is explored in most detail in relation to 'war crimes'; ICC, *Elements of Crimes* (The Hague: International Criminal Court, 2011); e.g., Knut Dörmann, 'Preparatory Commission for the International Criminal Court: the Elements of War Crimes', *International Review of the Red Cross* 83 (2001), 461–87.

[37] *Ibid.*; Darragh Murray, Elizabeth Wilmshurst and Francoise Hampson *et al.*, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford University Press, 2016) (hereinafter: *Practitioners' Guide*).

[38] As noted in Section III, they have been reluctant to address the existence of conflict 'applicability' question.

international adjudication referred to above[39] – by international criminal courts and tribunals – that the basic elements of a broadly accepted definition of armed conflict have been identified. The ICTY in the *Tadić* case, since widely replicated, including by the International Criminal Tribunal for Rwanda (ICTR), the ICC, the Special Court for Sierra Leone and others, provides a broadly accepted starting point:

> [A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[40]

Whether an armed conflict exists is then an essentially factual assessment. It is independent of the position of the parties or their acknowledgement that they are in a state of war.[41] In practice, as already noted, the position of parties to the conflict may well be significant,[42] but legally we will see that the existence of a conflict, and its international or non-international nature, reduces to a determination of the use and nature of the force and of those employing it.

b) classification and applicability: international armed conflict

Classification of the conflict, according to the differing thresholds and criteria, is crucial; just in legal terms it influences applicable treaty law, to an extent relevant IHL standards,[43] and potentially co-applicability with IHRL.[44] Once again, the answers to the classification questions are not, however, transparent from the treaties themselves. Beyond, for example, Common Article 2 (CA2) of the Geneva Conventions making clear that it applies to conflicts 'between two or more of the High Contracting Parties', IHL treaties do not define IACs. Once again, in significant measure it has been international criminal tribunals, supported by the work of the International Committee of the Red Cross (ICRC), that have provided guidance as to the basic criteria for IAC.

[39] Section I.

[40] See, ICTY, *Tadić*, Trial Chamber Judgment (n. 5), para. 561. See also ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment of 14 March 2012, para. 539 (hereinafter: ICC, *Lubanga*, Judgment).

[41] Common Art. 2 (CA2) to the Geneva Conventions.

[42] Section IV on interplay, where the classification is one factor of influence. Political significance is noted below.

[43] Narrowing gaps, including the role of *ICRC Customary Study* 2005 (n. 22), is noted in Section I.

[44] See Section IV, on multiple factors relevant to determining the priority to be afforded to which area of law, (only) one of which may be the nature of the conflict.

i) Any Use of Force or a Minimum Threshold? The ICRC's CA2 Commentary notes that 'any difference arising between two States and leading to the intervention of armed forces is an armed conflict'.[45] This view, reflected in, for example, ICTY jurisprudence and by many if not most commentators, is that an IAC arises when there is recourse to any armed force between two or more States.[46] This is a low threshold, wherein factors such as duration and intensity (central to NIACs) are generally not considered relevant.

Some commentators have begun to question whether practice indicates at least some kind of 'intensity' requirement for any kind of armed conflict, IAC or NIAC.[47] On the one hand, there is support for the proposition that, in practice, States operate as if there were an intensity threshold; minor incidents at inter-State borders or brief interventions on another State's territory against specific terrorist targets without apparent territorial State consent have not generally led to assertions by affected States that an IAC has arisen as a result.[48] Silence on the existence of a conflict may, of course, be explained by other reasons, including political factors or the opaque nature of State consent.[49] But reluctance to invoke the armed conflict paradigm may also reflect the degree of force used. It has also been suggested that this reflects the traditional idea of war as excluding minor armed incidents.[50]

The predominant view of current law appears to be that there is no intensity threshold requirement for IAC, unlike for NIAC considered

[45] Jean S. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, vol. 1 (Geneva: International Committee of the Red Cross, 1952), 32.

[46] IHL in IAC also applies to total or partial military occupation, even if met with no armed resistance, and wars of self-determination against colonial domination.

[47] See, e.g., Jann Kleffner, 'Scope of Application of International Humanitarian Law', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd edn. (Oxford University Press, 2013), 43–78; Robert Kolb, *Advanced Introduction to International Humanitarian Law* (Cheltenham: Edward Elgar, 2014), 22; Use of Force Committee, 'Final Report on the Meaning of Armed Conflict', in Christine Chinkin, Sarah Nouwen and Christopher Ward (eds.), *International Law Association: Report of The Seventy-Fourth Conference* (2010), 676–721 (692–708).

[48] Bianchi and Naqvi, *International Humanitarian Law and Terrorism* 2011 (n. 2).

[49] See, e.g., Duffy, *War on Terror* 2015 (n. 7), lethal attacks in Yemen or Pakistan in chs. 5 and 6 or the Bin Laden operation in ch. 9. See also, Bianchi and Naqvi, *International Humanitarian Law and Terrorism* 2011 (n. 2), 76–7.

[50] See Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in Wilmshurst (ed.), *Classification of Conflicts* 2012 (n. 2), ch. 3, 32–79; and Steven Haines, 'The Nature of War and the Character of Contemporary Armed Conflict', in Wilmshurst (ed.), *Classification of Conflicts* 2012 (n. 2), ch. 2, 9–31; Yoram Dinstein, *Non-International Armed Conflict in International Law* (Cambridge University Press, 2014), 11–13.

below.[51] There is, however, at least scope for differences of view as to whether a certain minimal threshold of force separates random acts of violence from IAC, as it does for NIAC, and as to the direction that legal development may take in the future. The debate on the law may also reflect divergent views on the policy and normative implications; whether an inclusive view ensures that IHL operates as a constraining legal framework, or lowers standards of protection otherwise provided by IHRL, as well as the broader potential repercussions of classification as an IAC for escalation of conflicts.[52]

ii) States Using Force Transnationally: IAC or NIAC? Other issues of dispute in relation to the classification of IACs go to the heart of what renders a conflict 'international': is it the nature of the parties or a feature of geography? It appears to be increasingly accepted that territorial limits are not as key as they were once thought to be, for IACs or for NIACs. As noted below, NIACs may and often do extend beyond frontiers without ceasing to be NIACs, while as the ICTY definition set out above shows, the key determinant with regard to IAC is whether there are State forces on either side. This is reflected plainly in the ICC's *Lubanga* judgment that 'in the absence of two States opposing each other, there is no international armed conflict'.[53] Numerous areas of uncertainty and controversy nonetheless remain.

Internationalising NIACS? : Where a State intervenes directly or indirectly in a pre-existing NIAC abroad, the question arises as to whether the conflict is necessarily rendered 'international'?[54] Where a State intervenes on the side of a non-State party, and exercises 'overall control'[55] over it, such that there are then States engaged in the conflict on each side, the conflict would be

[51] E.g., Jean S. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, vol. 3 (Geneva: International Committee of the Red Cross, 1960), 22 *et seq*.; ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Appeal Chamber Judgment of 15 July 1999, para. 70 (hereinafter: ICTY, *Tadić*, Appeal Chamber Judgment); and Gabriella Venturini, 'The Temporal Scope of Application of the Conventions', in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds.), *The 1949 Geneva Conventions: a Commentary* (Oxford University Press, 2015), 52–66 (51 *et seq*., 55).

[52] See, Pictet, *The Geneva Convention (I) Commentary* 1952 (n. 45), Art. 2; Jelena Pejic, 'The Protective Scope of Common Art. 3: More than Meets the Eye', *International Review of the Red Cross* 93 (2011), 189–225, on policy reasons for rejecting a threshold for IACs; ICRC, 32nd International Conference of the Red Cross and Red Crescent, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Report, 8–10 December 2015, Report, Geneva, October 2015, 32IC/15/11, 8; Kleffner, 'Scope of Application of International Humanitarian Law' 2013 (n. 47), 45. Note *infra* concerns regarding the implications of classification of the Syria conflict.

[53] ICC, *Lubanga*, Judgment (n. 40), para. 541.

[54] See, ICTY, *Tadić*, Appeal Chamber Judgment (n. 51), paras. 137–40.

[55] *Ibid*., para. 120.

internationalised.[56] Where a State intervenes on another State's territory on the side of the State, however, the resulting conflict involves States – including a foreign State – on one side and a non-State actor(s) on another. Experts differ as to the classification of such a conflict,[57] though the emphasis on the nature of the parties as a key consideration may suggest that the conflict remains a NIAC as far as it remains 'asymmetric', with State and non-State parties on each side.[58]

iii) Intervention Directed against NSAs Without State Consent?: An associated question of great recent import is whether an IAC automatically arises when a State intervenes against an armed group on another State's territory, without the territorial State's consent.[59] Academics and commentators differ on whether it matters whether the military action is *directed* solely against the armed group, as opposed to against the State's institutions as such. On one view, any use of force on another State's territory in the absence of that State's consent will constitute an IAC.[60] On another, if military action is directed solely against an armed group and the force employed is not *between* States, the conflict remains a NIAC.[61]

[56] ICC, *Lubanga*, Judgment (n. 40), para. 541; Tristian Ferraro, 'The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to this Type of Conflict', *International Review of the Red Cross* 97 (2015), 1227–52 (1231, 1250).

[57] Differing views are reflected in, e.g., Wilmshurst, *Classification of Conflicts* 2012 (n. 2); see also, Dill in this volume, Chapter 3; George Aldrich, 'The Laws of War on Land', *American Journal of International Law* 94 (2000), 42–63 (62).

[58] ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Confirmation of Charges Decision of 15 June 2009, para. 246 – the presence of limited foreign troops 'not directed against the State of the CAR and its authorities' did not change the NIAC; ICC, *Lubanga*, Judgment (n. 40), para. 541; see also, Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012), 224.

[59] Gill, 'Classifying the Conflict in Syria' 2016 (n. 31), 353, 371, provides examples. In addition to Syria, 'drone strikes by the United States against various jihadist armed groups in Pakistan and Yemen, the intervention of Turkey against PKK positions in northern Iraq, cross-border action by the armed forces of Kenya into Somalia in pursuit of Al-Shabaab fighters, and Colombian incursions into Ecuador against FARC rebels. In none of these did any of the States concerned ever consider themselves in a situation of armed conflict with each other.'

[60] Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' 2012 (n. 50), 73. See also, Marco Sassòli, 'Transnational Armed Groups and International Humanitarian Law', *HPCR Occasional Paper Series* (2006), 4–5; Dieter Fleck, 'The Law of Non-International Armed Conflicts', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd edn. (Oxford University Press, 2013), 581–609 (584–5).

[61] Gill, 'Classifying the Conflict in Syria' 2016 (n. 31); ICC, *Bemba*, Confirmation Decision (n. 58), para. 246.

Here, as elsewhere, much depends on the 'factual realities' on the ground as regards who and what is *targeted* and *affected* by the intervention, whatever its underlying purpose. No ready boundaries can be drawn between the territorial State and its population, public property and infrastructure, themselves constituent elements of the State, quite apart from the fact that the State is more likely to become embroiled in the conflict where force is used on its territory. It has therefore been suggested that '[f]or these reasons and others, it better corresponds to the factual reality to conclude that an international armed conflict arises between the territorial State and the intervening State when force is used on the former's territory without its consent.'[62] A pragmatic approach, and State practice cited above, would favour careful evaluation of particular facts, including first and foremost the nature of the parties fighting one another, the targets of the intervention and its impact, rather than blanket conclusions.[63]

The complexity of conflict classification is heightened by the fact that, in practice, the question may not be whether there is *an* armed conflict and which type, but which legal regimes apply to the complex cluster of conflicts, involving myriad parties and participants, that may arise in any one situation. There are several historical examples of this,[64] though the conflict in Syria following the interventions by coalition forces against ISIS from 2014 takes the complexities of conflict classification to a new level.

iv) Syria: Epitomising Classification Conundra The Syrian conflict, which began as an uprising and escalated into a complex mosaic of overlapping armed conflicts, epitomises the classification challenges. We have identified the nature of the parties to the conflict as a central question for classification purposes, but even brief consideration of the array of actors participating in hostilities in Syria shows that this provides no easy answers.

First, there is an armed conflict between armed groups participating in the Syrian conflict, of which there are said to be hundreds, and the Syrian State. However repressive, and despite withdrawal of recognition by some States and the EU, Assad's government continues to represent Syria (it is not a failed State, for example)[65] and to constitute a State party to the conflict fighting

[62] ICRC, *The Geneva Convention (I) Commentary* 2016 (n. 35), Art. 2, para. 262.

[63] On caution in State practice labelling a conflict 'international' and discussion of Syria, see, Gill, 'Classifying the Conflict in Syria' 2016 (n. 31).

[64] See Gill, 'Classifying the Conflict in Syria' 2016 (n. 31), 353; Louise Arimatsu and Mohbuba Choudhury, 'The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya', *International Law PP 2014/01* (London: Chatham House, 2014).

[65] Gill, 'Classifying the Conflict in Syria' 2016 (n. 31), 353.

against non-State armed groups. The State fights with foreign support – militias provided with Iranian assistance, foreign fighters from Lebanon, Iraq and Afghanistan, and Iranian and Russian military force. However, as far as all this external intervention is on the side of the State, this would not seem to affect the non-international nature of the conflict between the State's forces and organised armed groups (OAGs).

Within this conflict, questions also arise as to the OAGs (which are diverse in nature, organisation and *modi operandi*) of relevance to whether they – and which of them – constitute parties to the conflict. Some fractioning and breakaway groups, with shifting allegiances and relationships to one another, is common in a NIAC, but for groups to be considered together to constitute a party to a conflict there may need to be some level of cohesiveness, beyond a shared enemy and overlapping goals. As such, it has been suggested that there are most likely several non-State armed parties to the Syrian conflict(s),[66] further problematising the scene.

A second armed conflict arose when Coalition States commenced aerial operations against ISIS-held positions and forces in Syria in August 2014. The United States led the coalition, consisting of a group of some ten Western and regional States, most of which were also engaged in conducting operations against ISIS in Iraq. Unlike in Iraq, the Syrian government has not consented to the Coalition's operations, which it has characterised as violations of its territorial sovereignty, raising the question of the relevance of consent in conflict classification.[67] In turn, Coalition airstrikes have not targeted Syrian government forces, installations or territory held by government forces, but have generally been directed against ISIS forces or resources they control, such as oil installations.[68] Leaving aside controversial attacks against other non-State groups, the conflict might then be said to be *directed* against ISIS, a NSA.

On one view of this situation, 'the US is at war with Syria'.[69] An IAC between Syria and Coalition States arose from the use of force

[66] E.g., the Syrian National Coalition, the collective of non-State groups comprising allegedly Al-Qaeda linked groups (e.g., Al-Nusra Front) and ISIS; Gill, 'Classifying the Conflict in Syria' 2016 (n. 31).

[67] Nor did the Syrian government always actively oppose airstrikes, raising common questions around how to identify 'consent' or lack thereof.

[68] While there have been allegations by Syria of attacks on pro-government forces, the Coalition has reasserted that its conflict is with ISIS, see, 'Syria and Russia Condemn US-led Attack on pro-Assad Forces', BBC, 19 May 2017, available at: www.bbc.com/news/world-middle-east-39972271.

[69] Adil A. Haque, 'The United States is at War with Syria (according to the ICRC's New Geneva Conventions Commentary)', *EJIL:Talk!*, 8 April 2016, available at: www.ejiltalk.org/the-united-States-is-at-war-with-syria-according-to-the-icrcs-new-geneva-convention-commentary.

without State consent, whatever the States in question might say about it.[70] This view is apparently supported by the ICRC's position that if the territorial State does *not* consent to the use of force – even force directed exclusively at an organised armed group – then an IAC arises (albeit potentially alongside a NIAC with the armed groups).[71] Consequently, according to the ICRC's approach, the United States is both in a NIAC with ISIS *and* in an IAC with Syria, for example, and both branches of IHL govern different aspects of US military operations in Syria.[72] A murky factual and normative reality unfolds in which questions arise as to which operations, and the conduct of which actors, are governed by which body of law.[73]

Finally, for the sake of completeness it should be noted that there is most likely a third conflict involving the organised Kurdish forces which control territory in northern Syria (as there is between the Iraqi government and Kurdish forces in the Kurdish autonomous region of northern Iraq). A significant number of States have supported the Syrian or Iraqi governments, and the United States has coordinated with the Kurdish groups to assist them in retaking control of key towns from ISIS. Turkey is in turn in conflict with these Kurdish militias, on the basis of alleged links to the PKK engaged in a separate conflict in southeast Turkey; questions arise as to whether this is a spill-over of that conflict or another separate conflict, raising several additional issues regarding identification of parties and applicable law.[74]

The Syria conflict is emblematic of the complexity of modern conflicts and controversies around classification. While the ICRC's views on IHL applicability are extremely authoritative, its view that Coalition forces are engaged in an IAC in Syria is not uncontroversial.[75] A persuasive case is made that the asymmetric nature of the parties engaged in conflict means

[70] E.g., Brian Egan, 'International Law, Legal Diplomacy and the Counter-ISIL Campaign', Speech at the American Society of International Law, 1 April 2016, available at: www.justsecurity.org/wp-content/uploads/2016/04/Egan-ASIL-speech.pdf: 'Because we are engaged in an armed conflict against a non-State actor, our war against ISIL is a non-international armed conflict, or NIAC.'

[71] See, ICRC, *The Geneva Convention (I) Commentary* 2016 (n. 35), Art. 2, para. 261.

[72] Haque, 'The United States is at War with Syria (according to the ICRC's New Geneva Convention Commentary)' 2016 (n. 69).

[73] Different obligations may also arise as between the various States involved.

[74] There does not seem to be any serious suggestion the United States controls those troops, or that it is in conflict with Turkey, but the number of actors engaged renders the application of the law more complex.

[75] Gill, 'Classifying the Conflict in Syria' 2016 (n. 31).

that it remains non-international in nature despite the role of Coalition forces.[76]

Although the questions are, of course, legally distinct, the debate also reveals how controversy may again reflect, and be influenced by, the perceived impact of classification in practice. For example, it has been suggested that considering Coalition forces to be engaged in an IAC with Syria and a NIAC with ISIS, means civilians enjoy the extensive or at least explicit protections afforded by the law covering IACs,[77] without providing enhanced protection to ISIS fighters.[78] These distinctions and asserted implications are, however, far from straightforward. While a NIAC carries less specific IHL protections for detainees – as there is no prisoner of war (POW) status with additional rights and no specific provisions governing procedural guarantees – this does not equate with a legal gap as far as there are customary rules of IHL as well as applicable IHRL.[79] IHL rules on distinction and protection of civilians – and loss of protection for those participating in conflict – apply for both types of conflict and most of the serious allegations in the Syrian conflict would amount to violations, and war crimes, for either.[80] But there are a few exceptions (such as disproportionate attacks or starvation of the civilian population which arguably arise only in respect of IACs), which may in turn arguably have a potential impact on accountability potential.[81] The perceived implications may, however, be more political than normative or institutional. As one commentator has noted:

> Anyone who thinks that the coalition States presently engaged in an armed conflict with ISIS are also at war with Syria, Iran and Russia, should think again and do a serious reality check. This is not simply a question of academic purity

[76] *Ibid.*; *Practitioners' Guide* 2016 (n. 37).

[77] E.g., GCIV contains a range of protections for civilians in IAC that 'find themselves . . . in the hands of a Party to the Conflict or Occupying power of which they are not nationals' (Art. 4), including protection of the right to religious and family rights (Arts. 27, 38(3)), freedom of movement (Arts. 35, 38(4)), the right to work (Art. 39), the right to humanitarian protection (Arts. 23, 38, 59). API also provides procedural and fair trial protections in this context (e.g., Art. 75 API).

[78] *Ibid.*

[79] See e.g., Section V on rules governing detentions; unlike for IAC, in NIAC, IHL may not provide a clear legal framework and IHRL has a stronger influence, providing basic non-derogable safeguards. There is no POW status during a NIAC.

[80] Allegations regarding, e.g., systematic targeting of civilians, denial of humanitarian assistance, among others, are covered by custom for either conflict, and prohibited in, e.g., Art. 6 ICC Statute.

[81] This is true at least as regards criminalisation under Art. 7 ICC Statute, though even in the unlikely event of ICC prosecution, these crimes overlap with and may well be prosecuted as other crimes.

in applying IHL, but one which has potentially far-reaching consequences. The adage of 'be careful what you wish for' is apropos in this context.[82]

Whatever view one takes of the Syrian conflict, it forces us to acknowledge the complexity surrounding classification of armed conflicts and applicable IHL today, and grapple with its implications. It may indeed highlight the inadequacy of the bifurcated classification of conflicts and of IHL, lending support to proponents of a unified approach down the line. What is clear for now is that classification and applicable IHL depend on a sometimes highly complex factual assessment of the nature of the parties and their relationships – involving multiple States in diverse roles, and myriad armed groups – and to an extent the force employed, with the result that within any one broad armed conflict scenario, there may be IAC, NIAC or multiple variants of each.

c) material applicability: non-international armed conflicts The classification of NIAC under IHL is generally considered more complex than that of IACs.[83] IHL treaty law provides little guidance, providing only negative definitions by exclusion. Armed conflict does *not* cover 'internal disturbances and tensions [or] isolated and sporadic acts of violence'.[84] Common Article 3 negatively refers to conflicts '*not* of an international character'. Additional Protocol 2 to the Geneva Conventions does contain certain additional thresholds for the applicability of that protocol (including control of territory), but it is well established that this does not purport to be a threshold for NIAC, only for that particular protocol to apply. Thus, while APII conflicts are one type of NIAC, they do not qualify – or provide guidance on – the definition and scope of NIACs.[85]

In this context, the ICTY as the first modern international tribunal charged with giving effect to IHL through the prosecution of war crimes, stepped into the breach. It set down twofold criteria for a NIAC: the use of force of some intensity or duration and the nature and organisation of the non-State parties.

i) Intensity NIAC clearly involves armed force that meets a threshold beyond the tensions and 'sporadic' acts of violence that are explicitly excluded. There is some difference of approach as to how best to characterise this intensity threshold however. The ICTY,[86] and the ICC Statute

[82] Gill, 'Classifying the Conflict in Syria' 2016 (n. 31).
[83] 32nd International Conference of the ICRC 2015 (n. 52), 8.
[84] Article 1(2) API.
[85] Article 1(1) APII.
[86] See the definition first advanced in ICTY, *Tadić*, Trial Chamber Judgment (n. 5).

https://doi.org/10.1017/9781108674416.002 Published online by Cambridge University Press

and jurisprudence,[87] have both referred to 'protracted' violence. They do so somewhat differently, with *Tadić* suggesting protracted violence as an element of the definition, whereas the ICC more recently affirming that the groups involved need to have the *ability* to plan and carry out operations 'for a prolonged period of time'[88] (overlapping with the second criterion below on the nature and capacity of the groups).

Later judgments of the ICTY, such as the *Haradinaj* judgment, placed the emphasis on the *intensity* rather than the duration of violence.[89] This approach is arguably consistent with the general exclusion historically of many situations of long-running NSA violence from the definition of conflict[90] (though, as noted, politics and the positions of the States may be the more influential factor).[91] Conversely, where intense armed hostilities broke out between Israel and Hezbollah in Lebanon in July 2006, or attacks on ISIS in 2014, the debate was immediately on the *nature* of the conflict(s), supporting the view that duration is not a prerequisite. One question to arise is whether, in practice, the cross-border nature of the use of force has prompted a more flexible approach to intensity and any duration requirement.[92]

In any event, the basic rule for NIACs as a matter of law is that the force in question must be of a certain intensity; it will generally also be prolonged, to be sufficiently sustained to surpass the excluded sporadic violence, but this will not always be the case. The law does not attempt to identify precisely the sort of factual scenarios in which the intensity threshold is met, which will always be a question of applying the broad twofold legal framework to the particular facts.

The ICTY has identified certain intensity 'indicators' which assist in this assessment. They include the number of confrontations, types of weaponry used, and the extent of injuries and destruction.[93] The motivation or purpose

[87] Article 8 refers to 'protracted armed conflict between government and armed groups or between such groups' for war crimes, though this may be a threshold for ICC purposes, not for NIACs as such. See also, Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' 2012 (n. 50), 56; ICC, *Lubanga*, Judgment (n. 40).

[88] ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges of 28 January 2007, para. 234.

[89] ICTY, *Prosecutor v. Ramush Haradinaj*, Case No. IT-04-84-T, Trial Chamber Judgment of 3 April 2008 (hereinafter: ICTY, *Haradinaj*, Trial Chamber Judgment), paras. 49, 60.

[90] It may be argued that ETA or the IRA were not widely regarded as engaged in armed conflict, perhaps influenced by intensity considerations at any one time, among others.

[91] Duffy, *War on Terror* 2015 (n. 7), ch. 6.

[92] Of course, if the cross border force gave rise to an IAC, the threshold would not apply, though one question is whether cross-border NIACs may justify a similar approach.

[93] ICTY, *Haradinaj*, Trial Chamber Judgment (n. 89).

of the violence does not emerge from jurisprudence, or elsewhere, as a relevant part of the test.[94] Factually, it may be that what most flagrantly distinguishes armed conflict from the intense violence associated with 'organised crime' in Latin America, for example, is its very different ideological or political purpose, though the purpose of the violence, the actors' objectives or perhaps even legitimacy have no obvious relevance under existing law. At present these groups' *raison d'être* would appear principally to have a bearing on whether they meet the second criterion, relating to the nature of parties to the conflict.

ii) Nature of the Parties A key question of contemporary significance relates to when an armed non-State entity may constitute a party to an armed conflict. IHL requires that non-State (sometimes called 'insurgent') groups must be capable of identification as a party and have attained a certain degree of internal organisation for IHL to operate effectively. What this means has been clarified and expanded upon by the first level of adjudication, the work of international criminal tribunals.

The ICTY again led the way (and others followed) in identifying several 'indicators' or 'non-exhaustive criteria' to establish whether the organisational requirement is fulfilled.[95] These include the existence of a command structure and disciplinary rules and systems within the group; potentially (but not necessarily) the existence of an operational headquarters; the ability to procure arms and to plan and carry out controlled military operations; the extent, the seriousness and intensity of the group's military operations; and their ability to coordinate and negotiate settlement of the conflict. Control of territory is not a requirement to constitute a party to a NIAC (only a jurisdictional threshold for Additional Protocol II as noted above), but it may provide a strong indicator that the non-State entity has the requisite military organisation and *modus operandi*. Finally, while compliance with IHL is not itself a criterion, the group must be *capable* of observing and ensuring respect from their ranks with the rules of IHL, on which the framework of IHL rules and principles of distinction and responsibility rest. Domestic courts have also grappled with the criteria, and as one recent UK Supreme Court judgment put it, in somewhat different terms: 'in short, the test is whether the operations conducted by NSAs are characteristic of those conducted by the armed forces of the State, as

[94] See, e.g., preamble of API – application without distinction based on 'causes', and the key legal criteria for armed conflict set out in this section.

[95] See the ICTY in several cases, including the *Haradinaj*, Trial Chamber Judgment (n. 89), followed by the ICC in *Lubanga* case (n. 40).

opposed to its police force'.[96] Whatever its precise contours, the test requires close consideration of the particular group's structure, operations and capability.

iii) Transnational Terrorism as NIAC? The qualification of a NIAC and, in particular, the requirements for constituting a party, set out above, lie at the heart of controversies surrounding the use of force by and against 'terrorist' organisations and networks.[97] The question of whether terrorist groups can be parties to a conflict is not a question that can be answered in the abstract but depends on whether, in particular contexts, the criteria for NIAC are met.

The question emerged most dramatically post-9/11, where a chasm of significant practical import separated the US view on global armed conflict with 'Al-Qaeda and associated groups', and a sceptical majority. Since 9/11, successive US administrations have argued, in varying forms of words, that there was (is) an armed conflict of global reach with Al-Qaeda and 'associated' forces, and more recently with a broader network of violent extremist groups.[98] The position of the Bush administration originally suggested that this conflict was akin to an international conflict, albeit a 'new kind of war' that did not fit into any of the IHL categories, which ran alongside the conflicts in Afghanistan and Iraq.[99] The Obama administration abandoned the 'war on terror' epithet,[100] but (as seen in the government's position in litigation brought by war on terror victims, for example) the assertion of an armed conflict with Al-Qaeda and associated forces remained intact.[101] The groups purportedly embroiled in the conflict have expanded to include disparate groups.[102] This conflict, once considered

[96] UKSC, *Abd Ali Hameed Al-Waheed (Appellant) v. Ministry of Defence (Respondent)* and *Serdar Mohammed (Respondent) v. Ministry of Defence* (Appellant), Judgment of 17 January 2017, [2017] UKSC 2, para. 11.

[97] Duffy, *War on Terror* 2015 (n. 7), ch. 6B.

[98] Bush and Obama administrations, *ibid*.

[99] Duffy, *War on Terror* 2015 (n. 7), ch. 6.

[100] Al Kamen, 'The End of the Global War on Terror', *The Washington Post*, 24 March 2009, available at: http://voices.washingtonpost.com/44/2009/03/23/the_end_of_the_global_war_on_t.html, on how the 'Global War on Terror' was changed to 'Overseas Contingency Operation'.

[101] E.g., Barack Obama, 'Remarks by the President on National Security', The White House Office of the Press Secretary, 21 May 2009, available at: https://obamawhitehouse.archives.gov/the-press-office/remarks-president-national-security-5-21-09. For others, and broad continuity in the Obama presidency's approach to litigation, see Duffy, *War on Terror* 2015 (n. 7), ch. 6B.1. Obama outlined the position in several speeches in 2009, 2013 and 2016.

[102] Al-Shabaab is described as an Al-Qaeda affiliate, and ISIS as ideologically similar but operationally distant from Al-Qaeda, having significant territorial control at its height, and its use of Hezbollah's model of service provision to the civilian population: Press Briefing by Press Secretary Josh Earnest, The White House, 7 March 2016, available at: www.whitehouse.gov/

international,[103] came to be seen by the administration as non-international in nature.[104]

Few would doubt that an entity, such as ISIS at the height of its control in Syria or Iraq – militarily organised, extremely violent, controlling territory, exerting strict control over persons and territory, and dispensing brutal discipline – would meet the criteria of a party to an armed conflict. Whether there is global conflict with ISIS, Al-Shabaab and others, embracing distinct groups and the apparently quite separate conflicts in Syria, Iraq and Somalia supposedly alongside a broader conflict, is a different matter – giving rise to the same basis for scepticism as earlier incarnations of the war on terror.[105] Whether the cluster of supposed affiliates,[106] many of which are quite separate and distinct, some of which have split from and been in conflict with one another at certain junctures,[107] can be said to cohere into one party to this conflict is more doubtful still. There is scant support for a 'network of networks',[108] 'a series of loosely connected operational and support cells',[109] or even 'a far-reaching network of

the-press-office/2016/03/07/press-briefing-press-secretary-josh-earnest-372016; Charlie Savage, Eric Schmitt and Mark Mazzetti, 'Obama Expands War With Al Qaeda to Include Shabab in Somalia', *New York Times*, 27 November 2016, available at: www.nytimes.com/2016/11/27/us/politics/obama-expands-war-with-al-qaeda-to-include-shabab-in-somalia.html.

[103] See, e.g., Jelena Pejic, '"Unlawful/Enemy Combatants": Interpretations and Consequences', in Michael Schmitt and Jelena Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines* (Leiden: Koninklijke Brill, 2007), 335–55 (341).

[104] See, e.g. Speech of 1 April 2016 by Brian Egan, US State Department Legal Advisor, 'International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations', *International Law Studies* 92 (2016), 235–48 (242). Support was found in the decision of the US Supreme Court in *Hamdan v. Rumsfeld*, 29 June 2006, 548 US 557, 630, which found that CA3 would apply irrespective of the nature of the conflict, but is cited as finding that the global conflict with Al-Qaeda and others was a NIAC.

[105] There is little doubt the conflict in Iraq is a NIAC given State consent to the Coalition's intervention, while controversy surrounds the status of the Syrian intervention (see Section II. A.1.b).

[106] Peter Margulies and Matthew Sinot, 'Crossing Borders to Target Al-Qaeda and Its Affiliates: Defining Networks as Organized Armed Groups in Non-International Armed Conflicts', *Yearbook of International Humanitarian Law* 16 (2013), 319–45.

[107] UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic', 13 August 2015, UN Doc. A/HRC/30/48, 3–6. See also, 'Syria al-Qaeda Group Gives Rival Jihadists Ultimatum', BBC, 8 February 2017, available at: www.bbc.com/news/world-middle-east-26338341.

[108] Noam Lubell, 'The War(?) against Al-Qaeda', Wilmshurst (ed.), *Classification of Conflicts* 2012 (n. 2), 421–54 (424).

[109] See SC, Letter dated 19 September 2002 from the Chairman of the Security Council Committee established pursuant to Resolution 1267 of 1999 concerning Afghanistan

violence and hatred'[110] meeting the requirements of a structured organisation, under military command and control, as envisaged by IHL.[111]

Most other States,[112] the ICRC, other inter-governmental organisations and authoritative commentators have overwhelmingly rejected the notion of a potentially global armed conflict with Al-Qaeda and associated groups.[113] Recent attacks in Europe saw the re-emergence of global war rhetoric–terror attacks as '*actes de guerre*' for example – underscoring the importance of clarity as to whether (and, if so, in what circumstances) there is, or can be, a conflict with terrorist networks such as Al-Qaeda, ISIS or others.[114] Looked at more closely, however, these explicitly did not amount to a US-style assertion of a wide-reaching NIAC on terrorist groups.[115]

Overreaching assertions of a global war on terrorist groups must be distinguished from the fact that some groups (rightly or wrongly) labelled 'terrorist' may constitute parties to particular, defined armed conflicts, as they have throughout history and across the globe.[116] Whether the legal criteria are met needs to be assessed in particular contexts and over time.[117]

addressed to the President of the Security Council, 20 September 2002, UN Doc. S/2002/1050. See also, UK cases, 'Special Immigration Appeals Commission (SIAC), "Generic Determination"', 29 October 2003, cases SC/1/2002; SC/6/2002; SC/7/2002; SC/9/2002; SC/10/2002, para. 130.

[110] Barack Obama, Inaugural Address, 21 January 2009, available at: https://obamawhitehouse.archives.gov/blog/2009/01/21/president-barack-obamas-inaugural-address: 'Our nation is at war, against a far-reaching network of violence and hatred.'

[111] See, e.g., Gill, 'Classifying the Conflict in Syria' 2016 (n. 31), on the nature of parties in Syria, and similar analysis re Al-Qaeda in 2008 in Marja Lehto, 'War on Terror – Armed Conflict with Al Qaeda?', *Nordic Journal of International Law* 78 (2009), 499–511 (508).

[112] Attacks in London, Madrid, Denmark, Belgium and elsewhere did not provoke claims from affected States that an armed conflict had arisen, and indeed those governments distanced themselves from the war paradigm. Examples of State practice and Statements at Duffy, *War on Terror* 2015 (n. 7), ch. 6B.1.

[113] See, e.g., ICRC, 28th International Conference of the Red Cross and Red Crescent, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, 2–6 December 2003, Report, December 2003, 03/IC/09: 'the ICRC does not share the view that a global war is being waged and it takes a case-by-case approach to the legal qualification of situations of violence'.

[114] President Hollande referred to the Paris attacks (2015) as an 'act of war' ('Hollande Calls Paris Attacks an "Act of War"', *Al Jazeera*, 14 November 2015, available at: www.aljazeera.com/news/2015/11/hollande-paris-france-attacks-concern-stadium-isil-151114103631610.html), but distanced himself subsequently. See Anthony Dworkin, 'France Maps Out its War against Islamic State', European Council on Foreign Relations, 19 November 2015, available at: www.ecfr.eu/article/commentary_france_maps_out_its_war_against_the_islamic_state5021.

[115] Hollande Statement, and Dworkin, *ibid*.

[116] See, Duffy, *War on Terror* 2015 (n. 7), ch. 6.

[117] Claus Kreβ, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts', *Journal of Conflict & Security Law* 15 (2010), 245–74 (261);

Relevant questions of fact include whether particular groups have sufficient organisation, structure, membership and capability to enforce IHL,[118] but also critically the relationship between diverse groups deemed to constitute the party to the conflict, and whether they have sufficient cohesion (while certainly absolute unity is not required[119]). Identifying the alleged 'party', and those 'directly participating' on its behalf, is impossible if comprised of disparate regional, national, local or individual manifestations of a broadly similar ideology, rather than a structured organisation. The stated positions – whether by the authors of attacks or by States seeking to invoke IHL rules on targeting – do not change the answers to these factual questions. The logic, structure and effective operation of IHL depend precisely on the ability to identify and distinguish the opposing party, with critical implications for targeting and humanitarian protection.[120]

D) APPLICATION *RATIONE MATERIAE*: BELLIGERENT OCCUPATION Finally, the material applicability of IHL (specifically the 1949 Geneva Conventions and API) to situations of occupation is, as a matter of theory at least, relatively straightforward, as reflected in the treaties themselves.[121] The definitional deficit is again apparent as far as there is no definition of occupation in the Geneva Conventions, although Article 42 of the 1907 Hague Regulations, which refers to 'territory actually placed under the control of the hostile army', is broadly considered to reflect customary international law.[122] Common Article 2 makes clear that a situation of occupation can exist even where the occupying forces met with no armed resistance. IHL is therefore potentially applicable to all situations in which territory is taken over by armed forces which replace the authority of the

the Director of the FBI referred to the al-Qaeda 'franchise model' – Robert Mueller, Director FBI, 'From 9/11 to 7/7: Global Terrorism Today and the Challenges of Tomorrow', Chatham House, 7 April 2008, available at: www.chathamhouse.org/sites/default/files/public/Meetings/Meeting%20Transcripts/070408mueller.pdf.

118 ICTY, *Haradinaj*, Trial Chamber Judgment (n. 89), paras. 49, 60; ICTY, *Prosecutor v. Boškoski*, Case No. IT-04-82-T, Trial Chamber Judgment of 10 July 2008, paras. 194–205, and generally, Marko Sassòli and Laura Olson, '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* 90 (2008), 599–627.

119 See Gill, 'Classifying the Conflict in Syria' 2016 (n. 31).

120 See ICRC, 'Challenges of Contemporary Armed Conflicts' 2011 (n. 17), 19.

121 See Common Art. 2 Geneva Conventions and Art. 1(3) API.

122 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, 136, paras. 78, 89; ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, ICJ Reports 2005, 168, para. 172.

ousted sovereign, giving rise to obvious and broad overlap with IHRL, to which we now turn.[123] As this section has shown, the law on the material applicability of IHL has developed and been clarified in recent years – largely through international adjudication. However, there are unquestionably areas of complexity and controversy as to IHL applicability, just as there are in relation to the overlapping human rights framework.

2. Applicability *Ratione Materiae* of International Human Rights Law

Whereas IHL is applicable exceptionally in times of conflict, the starting point for an assessment of the applicability of IHRL is universality. It is in the essence of IHRL that it applies, in principle, at all times and to all people by virtue of their humanity.

As noted above, while at one time the applicability of IHRL in conflict situations in general was seriously questioned, international authority and opinion now overwhelmingly confirms that IHRL continues to apply in times of armed conflict.[124] The proposition enjoys extensive acceptance by States.[125] It has been affirmed by the ICJ on several occasions.[126] As discussed below in Section III, it is further supported by the increasingly consistent view of other international and regional courts, treaty bodies and special procedures, as well as the ICRC,[127] regional political bodies,[128] the United Nations Security Council and General Assembly, among others.[129]

There are, of course, also those who disagree. State practice from the United States and Israel specifically has drawn most attention for the refusal to accept IHRL applicability in particular situations of armed conflict (and in relation to extraterritoriality explored under *ratione loci* below).[130] The nature of their positions, and responses to them, are seen, for example, in deliberations before

[123] See Kleffner, 'Scope of Application of International Humanitarian Law' 2013 (n. 47), 205. Section IV on co-applicability.

[124] States, ICJ, ICRC, human rights courts and bodies and UN bodies, referred to in this section.

[125] E.g., Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body' 2008 (n. 3), 549–50.

[126] First confirmed by the ICJ in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, 226, para. 25; ICJ, *Legality of the Consequences of the Construction of a Wall* (n. 122), paras. 105–6; ICJ, *Armed Activities* (n. 122), para. 216.

[127] *ICRC Customary Study* 2005 (n. 22).

[128] See, e.g., Peace and Security Council of the African Union, Statement on Libya, Communiqué of 23 February 2011, PSC/PR/COMM(CCLXI).

[129] See, e.g., SC Res. 1019 of 9 November 1995 and GA Res. 50/193 of 22 December 1995 (Former Yugoslavia); SC Res. 1653 of 27 January 2006 (Great Lakes); GA Res. 46/135 of 19 December 1991 (Kuwait under Iraqi occupation), among others.

[130] See, e.g., Concluding observations of the Committee against Torture (CAT) on the periodic reports of the United States regretting 'the State party's opinion that the Convention is not applicable in times and in the context of armed conflict' (18 May 2006, CAT/C/USA/CO/2, at

human rights bodies.[131] The fact the US position shifted even slightly, to acknowledge continued application of IHRL in conflict situations in principle,[132] may itself be an indication of the extent of the shift internationally. In any event, in the light of the sea change on the international level, the key areas of legal dispute are now located in *how* the framework operates in theory and in practice in conflict situations, not *whether* it is applicable at all.

IHRL is clearly far broader in its scope than IHL. In stark contrast to the status determinations and principle of distinction at the core of IHL, IHRL is based on universality, and explicitly applies 'without distinction' based on nationality, residence, sex, origin, race, religion, language or other status. It consists of a system of international norms designed to secure a baseline of protection for all, reflecting the inherent value of all human persons. This fundamental purpose may, in turn, be reflected in the momentum towards an inclusive approach to IHRL applicability. This is seen not only in relation to applicability in armed conflict in general, but in relation to personal and geographic scope, as seen in relation to evolution of approaches to non-State actors, and extraterritorial application, as addressed below.

B. *Applicability* Ratione Personae: *Personal Applicability*

1. Personal Scope of Duty-bearers under IHL and IHRL

IHRL and IHL are, at least in part, directed at different actors, which has often been cited as a crucial area of divergence.[133] As branches of international law, both impose obligations on States. But IHL binds parties to armed conflict be they State or non-State 'organised armed groups'.[134] While perhaps less

para. 14). See also the fourth periodic report of the United States to the UNHRC (30 December 2011, CCPR/C/USA/4, at para. 507). UNHRC, Consideration of reports submitted by States parties under article 40 of the Covenant pursuant to the optional reporting procedure, Fourth periodic reports of States parties, Israel, 14 October 2013, UN Doc. CCPR/C/ISR/4, 12 December 2013, para. 47, recognising debates but asserting that the regimes apply in different circumstances.

[131] *Ibid.*

[132] UNHRC, Consideration of reports submitted by States parties under article 40 of the Covenant, Fourth periodic report, United States of America, 30 December 2011, UN Doc. CCPR/C/USA/4, 22 May 2012, para. 507, acknowledging that 'Determining the international law rule that applies to a particular action [in] armed conflict is a fact-specific determination.' The United States, however, resists applicability to relevant issues raised by the UNHRC, such as detentions, renditions and targeted killings.

[133] Sandesh Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict', *European Journal of International Law* 22 (2011), 219–64 (240–2).

[134] For obligations on non-party State parties to the Geneva Conventions, see Art. 1.

straightforward to explain doctrinally, this has now long been accepted, a corollary of factual developments in the nature of conflict and its participants. By contrast, IHRL was traditionally seen to impose obligations on States, which were later accepted as extending to international organisations, and it still struggles to grapple with factual realities around NSA responsibility, arguably hampering its relevance in the modern world. The disparity between State and non-State parties to a conflict (both of whom would be bound by IHL and only the former also by IHRL) has been cited – in the author's view unconvincingly – also as an impediment to co-applicability, and the role of human rights courts, given supposedly 'lop-sided obligations'.[135] It is therefore particularly noteworthy that IHRL may in fact also be evolving in this regard, albeit falteringly, as seen by the growing body of international *practice* referring to the obligations of non-State armed groups under IHRL in certain circumstances.

It has been suggested by the CAT that when non-State armed groups exercise functions normally associated with a State, they 'may be equated to State officials for the purposes of certain human rights obligations'.[136] Likewise, in conflict situations where the NSA controls an area of a State's territory, such that the State can no longer exercise its protective function and there would otherwise be a 'vacuum of protection',[137] growing international practice – from the UN Human Rights Council (UNHRC), Commissions of Inquiry, UN Special Rapporteurs and others – refers to non-State groups' human rights obligations.[138] The Libya Commission reporting to the UNHRC described it as 'increasingly accepted that where non-State groups exercise de facto control over territory they must respect fundamental human rights of persons in that territory'.[139] The former UN Special Rapporteur on

[135] Jelena Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force', in Wilmshurst (ed.), *Classification of Conflicts* 2012 (n. 2), 80–116 (115). In the author's view this does not reflect the nature of States' IHRL obligations.

[136] CAT, *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998, 25 May 1999, UN Doc. CAT/C/22/D/120/1998, para. 6.5.

[137] E.g., ECtHR, *Al-Skeini v. United Kingdom*, Grand Chamber Judgment of 7 July 2011, Application No. 55721/07 (ECtHR, *Al-Skeini v. United Kingdom*), para. 142, and principles of interpretation at Section IV. State responsibility may also, or alternatively, arise where NSAs control the area but States control the NSAs: see, e.g., *Ilaşcu and Others v. Moldova and Russia*, Grand Chamber Judgment of 8 July 2004, Application No. 48797/99; *Catan and Others v. Moldova and Russia*, Grand Chamber Judgment of 19 October 2012, Application Nos. 43370/04, 8252/05 and 18454/06.

[138] See, e.g., Andrew Clapham, 'Non State Actors', in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds.), *International Human Rights Law*, 3rd edn. (Oxford University Press, 2018), 557–79.

[139] UNHRC, Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, 1 June 2011, UN Doc. A/HRC/17/44, para. 72.

Terrorism and Human Rights reached similar conclusions in relation to ISIS.[140] Peace accords or truth commissions provide further recognition of 'gross violations of human rights and international humanitarian law by all warring factions',[141] implying that IHRL applied to all sides in the first place.[142]

Recognising, at least implicitly, that such groups do not ratify and are not strictly bound by IHRL treaties, reference is often made to customary international law as binding, in principle on States and NSAs alike. The Syrian Commission, which found anti-government armed groups could be 'assessed against customary international law principles', is one example.[143]

A pinch of legal salt may sometimes be needed in assessing the significance of broad references to violence by 'rebels, terrorist groups and other organised transnational criminal networks' as human rights violations as such.[144] But such references, often in the context of an armed conflict, reflect a growing tendency to see IHRL as somehow relevant alongside IHL to evaluating the conduct of non-State armed groups.

It is also noteworthy that most of the shifts towards recognising NSA responsibility (apart from corporate responsibility) arise in respect of armed groups in armed conflict situations. The influence of IHL on the development of IHRL appears to loom large. Not least, IHL speaks to IHRL on the fact that, while there are huge challenges to enforcement (under either area of law), NSA responsibility for human rights violations is hardly implausible. As far as it may now be arguable that OAGs have obligations under both bodies of law, it remains to be seen whether IHL will have a normative influence on IHRL as regards a definition of such groups,[145] or

[140] UNHRC, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, 16 June 2015, UN Doc. A/HRC/29/51.

[141] Sierra Leone Truth and Reconciliation Commission, 'Witness to Truth', *Report* (Accra: GPL Press, 2004), vol. 1, ch. 2, para. 23. See also Guatemala Commission for Historical Clarification, 'Guatemala: Memory of Silence', Conclusions and Recommendations, *Report*, 1999, para. 21.

[142] Clapham, 'Non State Actors' 2018 (n. 138), 280.

[143] See others in Andrew Clapham, 'Introduction', in Andrew Clapham (ed.), *Human Rights and Non-State Actors* (Cheltenham: Elgar, 2013), xxii.

[144] UNHRC, Senegal (on behalf of the Group of African States): draft resolution, 20/ … Situation of human rights in the Republic of Mali, 3 July 2012, UN Doc. A/HRC/20/L.20, para. 2 on Mali. States undoubtedly have positive human rights obligations to prevent and respond, whether the NSA itself has legal responsibility.

[145] Marko Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts', in Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* 2011 (n. 6), 34–94 (56).

whether a distinct approach will follow the different purpose and content of the areas of law.[146]

Convergence and progress in applicability *rationae personae* should not be overstated. States remain the focus of IHRL obligations. It is unclear to what extent international law has yet shifted, or if we are hearing a clarion call from diverse actors for progressive development to keep pace with reality. In addition, while issues of enforcement and mechanisms are, and should perhaps be kept, distinct from the existence of obligations, the whole architecture of the international legal system remains State-centric. We are a long way from individuals being able to enforce rights vis-à-vis non-State armed groups on the international level.[147] While there are indications of the role that national courts can and do play, such as the recent decision of the Swedish District Court that non-State armed groups had the capacity to ensure particular rights in certain situations,[148] in general this is rarely possible domestically either.[149] There is, however, growing engagement by international entities, NGOs and others with NSAs of various types, and trends towards recognition of some form of NSA responsibility.[150] While the gap remains, contemporary practice seems determined to bridge it.

2. Rights-bearers under IHL and IHRL?

Finally, although not strictly speaking a question *ratione personae*, the nature or scope of the beneficiaries of the relevant rules is worthy of brief comment. It is often noted that IHL was traditionally formulated in terms of rules of conduct for States and armed groups, not in terms of rights for individuals. This stands in obvious contrast to IHRL, which has at its core

[146] Note, e.g., the European Court of Justice in *Aboubacar Diakité v. Commissaire general aux réfugiés et aux apatrides*, Fourth Chamber Judgment of 30 January 2014, on a Preliminary Ruling, Case C-285/12, suggested armed conflict for refugee purposes is not the same as for IHL. Non-State actors are not now defined in IHRL.

[147] Section III. See, e.g., lack of a regional mechanism in Asia and much of the Middle East, and limited State acceptance of treaty bodies. See further, Duffy, *Strategic Human Rights Litigation* 2018 (n. 25), ch. 2.

[148] Jonathan Somer, 'Opening the Floodgates, Controlling the Flow: 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.

[149] Helen Duffy, 'Non-State Actors in the Americas: Challenging International Law?' *Grotius Working Paper* (2018).

[150] See, e.g., the practice of 'deeds of commitment' on IHL and associated monitoring by NGO Geneva Call; major NGOs such as Human Rights Watch now routinely address non-State actor violations.

the conferral of rights, vis-à-vis the State, and which incontrovertibly enshrines both rights and obligations.

However, this distinction was never clear cut.[151] A number of rules of IHL are formulated in terms of rights,[152] while other provisions provide for the protection of civil and political rights as well as economic, social and cultural rights, whether or not framed as such.[153] More broadly, many (though certainly not all) IHL rules may be seen as seeking to give effect to the right of persons to protection, albeit taking into account military necessity and the peculiarities of armed conflicts. There may then be primary rights under IHL, independent of the separate question of whether they are enforceable by the individual against the State in respect of violations, where multiple challenges arise.[154] In this respect it is worth recalling, however, the UN Principles on the Right to a Remedy which may contribute to the narrowing gap by confirming victims' rights to a remedy in relation to violations of either area of law.[155]

C. *Applicability* Ratione Loci: *the Question of Geographic Scope*

Another area of difference, overlap and a degree of complexity is the geographic scope of applicability of IHL and IHRL. This is an issue of considerable controversy in respect of each body of law.

[151] See generally, Peters, *Beyond Human Rights* 2016 (n. 18), ch. 7.

[152] See, Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law', *International Review of the Red Cross* 85 (2003), 497–527 (497); Vito Todeschini, 'Emerging Voices: The Right to a Remedy in Armed Conflict – International Humanitarian Law, Human Rights Law and the Principle of Systemic Integration', *Opinio Juris*, 5 August 2015, available at: opiniojuris.org/2015/08/05/emerging-voices-the-right-to-a-remedy-in-armed-conflict-international-humanitarian-law-human-rights-law-and-the-principle-of-systemic-integration.

[153] Examples of such 'rights' include the rights of persons whose liberty is restricted, of families to know the fate of their relatives, to compensation, of POWs to be repatriated after the conflict, while others framed differently may include, e.g., the right to life of enemies placed hors de combat, to judicial guarantees of the wounded and the sick to be protected, collected and cared for, to health and food, and group rights, e.g., the right to a healthy environment.

[154] Peters, *Beyond Human Rights* 2016 (n. 18), ch. 7.2, on 'secondary rights of individuals' in armed conflict *de lege lata*, referring to courts in several States having recognised at times primary 'rights', but rejected claims by individuals as the right of claim was held to correspond to the State of nationality.

[155] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res. 60/147 of 16 December 2005, UN Doc. A/RES/60/147, 21 March 2005 (hereinafter the UN Basic Principles).

1. The Geographic Scope of Applicability of IHL

Treaty law is silent as to the precise geographical scope of IHL. Both Common Article 3 and Additional Protocol II may on their face suggest a broad applicability throughout the entire territory of the State where the conflict is occurring. International criminal adjudication has once again weighed in and ventured something like a definition of scope, albeit in a way that leaves some questions unanswered.[156]

A) THROUGHOUT THE TERRITORIES? According to the ICTY Appeals Chamber, 'international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there',[157] However traditional assumptions that IHL applies throughout the territories of parties to a conflict and not beyond them, are increasingly questioned as both over-expansive and under-inclusive.

It has been noted, for example, that: 'the existence of a NIAC in a limited portion of a State's overall territory cannot serve as the legal basis for the unqualified application of IHL to any and all situations of civil unrest and violence within that State'.[158] In support of this view, the ICRC conference drafting process to Additional Protocol II records that government experts 'considered it inconceivable that, in the case of a disturbance in one specific part of a territory (in a town, for instance) the whole territory of the State should be subjected to the application of the Protocol'.[159]

There is, therefore, a need for a somewhat fluid, and context-specific, approach to applicability, reflecting real-life conflict scenarios. IHL is not applicable *in abstracto*, but to particular conduct with a nexus to the armed conflict. This is a question of fact, in the determination of which geographic parameters may be one factor among others. Much may also depend on the rule in question: it is inherent in the different rules that some, such as on conduct of hostilities, will apply only where there is fighting, while others, say

[156] Noam Lubell and Nathan Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict', *Journal of International Criminal Justice* 11 (2013), 65–88.

[157] ICTY, *Tadić*, Appeal Chamber Judgment (n. 51), para. 70. For NIACs, see ICTR, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chamber Judgment of 2 September 1998, para. 635; Kleffner, 'Scope of Application of International Humanitarian Law' 2013 (n. 47), 59.

[158] Lubell and Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict' 2013 (n. 156).

[159] ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Report on the Work of the Conference, Second Session, 3 May–3 June 1972, vol. I, July 1972, 68, para. 2.59. in *ibid.*

on detention, need to apply wherever the detention takes place.[160] Arguably, it follows then that IHL applicability analysis requires careful consideration, rule by rule and context by context.[161]

b) beyond the territories of state parties, or beyond territory?

Likewise, while traditionally IHL was not considered to extend to the territory of States not party to the conflict,[162] the *Tadić* and *Lubanga* judgments, among others, recognise that armed conflicts can (and often do) cross borders into the territories of States not party to the conflict.[163] As the ICTY noted, NIACs generally arise 'within a State', but do not necessarily unfold entirely within one State's geographic borders.[164] The Rwanda Statute implicitly acknowledged the same by reference to the cross-border history of that conflict.[165] The ICRC, and abundant commentary, likewise reflects that a NIAC may 'spill over' or even be 'cross-border' without necessarily altering the non-international nature of the conflict.[166]

Whether the territorial dimension can be dispensed with entirely, however, is another question. Whether or not there is a rigid 'legal geography of war',[167] the US government's assertion of a conflict with no territorial nexus or limits, providing a basis to invoke 'law of war' rules on targeting and detention anywhere in the world,[168] has been described as 'perhaps the most

[160] Lubell and Derejko, *ibid*., discussing the difference between conduct of hostilities versus rules on prisoners of war; see also ICTY, *Tadić*, Appeal Chamber Judgment (n. 51), para. 68.

[161] See Section IV suggesting this is the governing principle for determining co-applicability.

[162] Christopher Greenwood, 'Scope of Application of IHL', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edn. (Oxford University Press, 2008), 45–78 (51).

[163] See Bianchi and Naqvi, *International Humanitarian Law and Terrorism* 2011 (n. 2), 30.

[164] ICTY, *Tadić*, Appeal Chamber Judgment (n. 51), para. 70.

[165] Article 7 Statute for the International Criminal Tribunal for Rwanda, SC Res. 955 of 8 November 1994, 33 ILM 1598 (1994) (hereinafter: ICTR Statute), refers to *the territory of Rwanda and neighbouring States*.

[166] See Pejic, 'The Protective Scope of Common Article 3: More than Meets the Eye' 2011 (n. 52), 195; see, e.g., Nico Schrijver and Larissa van den Herik, 'Leiden Policy Recommendations on Counterterrorism and International Law', *Grotius Centre for International Legal Studies* (2010), para. 63; Cf. Dapo Akande, 'Are Extraterritorial Armed Conflicts with Non-State Groups International or Non-International?' *EJIL:Talk!*, 18 October 2011, available at: www.ejiltalk.org/are-extraterritorial-armed-conflicts-with-non-state-groups-international-or-non-international.

[167] Kenneth Anderson, 'Targeted Killing and Drone Warfare: How We Came to Debate Whether there is a Legal Geography of War', *Hoover Institution 'Future Challenges' essay series* (online edn. 2011), 3–15.

[168] Duffy, *War on Terror* 2015 (n. 7), ch. 6.1, e.g., Jeh Johnson's Speech (2012) on 'National Security Law, Lawyers and Lawyering in the Obama Administration' on the US right to use force 'without a geographic limitation', see Jeh C. Johnson, 'National Security Law, Lawyers, and Lawyering in the Obama Administration, Dean's Lecture at Yale Law School,

controversial aspect' of the US position.[169] The notion of a limitless global conflict jars with the inherently limited, definable and exceptional nature of armed conflict (and applicable IHL as an exceptional regime).

Concerns are, as ever, not purely legal. They relate in part to the 'international chaos' that would ensue if other States took the same view,[170] and the potential for escalation of conflicts contrary to the UN Charter.[171] Counter-terror legislation in the Russian Federation, authorising the lethal use of force to eliminate the terrorist threat wherever it arises around the globe,[172] and corresponding assassination practices, exposed, *inter alia*, through litigation,[173] is a reminder of the dangers.

While proponents of the 'global' armed conflict suggest that it is necessary to ensure that individuals forming part of an armed conflict, but operating outside of the zone of conflict, cannot escape the consequences of applicable IHL,[174] others argue there must be some territorial 'hook' within which to assess whether the criteria for armed conflict are met.[175] There seems little doubt though that where a conflict does exist, it may yet expand, exceptionally, across borders.[176]

February 22, 2012', *Yale Law & Polity Review* 31 (2012), 141–50. US District Court, District of Columbia, *Al-Aulaqi v. Obama*, Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss, 7 December 2010, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10 Civ. 1469), 1.

169 Ashley Deeks, 'Pakistan's Sovereignty and the Killing of Osama bin Laden', *ASIL Insights* 15 (2011), 2; Kenneth Anderson, 'Rise of the Drones: Unmanned Systems and the Future of War', Written Testimony to the US House of Representatives Subcommittee on National Security and Foreign Affairs, 23 March 2010, 5, para. 11, available at: www.fas.org/irp/congress/2010_hr/032310anderson.pdf.

170 Scott Horton, 'Rules for Drone Wars: Six Questions for Philip Alston', *Harper's Magazine*, 9 June 2010, available at: https://harpers.org/blog/2010/06/rules-for-drone-wars-six-questions-for-philip-alston.

171 Articles 1 and 2(4) UN Charter.

172 See generally, Seth Bridge, 'Russia's New Counteracting Terrorism Law: the Legal Implications of Pursuing Terrorists beyond the Borders of the Russian Federation', *Columbia Journal of East European Law* 3 (2009).

173 See, e.g., 2012 Qatari court conviction of two Russian intelligence agents for the assassination of the former Chechen separatist leader Zelimkhan Yandarbiyev outside a mosque in Doha. Steven Lee Myers, 'Qatar Court Convicts 2 Russians in Top Chechen's Death', *New York Times*, 1 July 2004, available at: www.nytimes.com/2004/07/01/world/qatar-court-convicts-2-russians-in-top-chechen-s-death.html.

174 See, e.g., Michael Lewis, 'The Boundaries of the Battlefield', *Opinio Juris*, 15 May 2011, available at: http://opiniojuris.org/2011/05/15/the-boundaries-of-the-battlefield, para. 5, noting that individuals should not be 'immune from targeting based purely on geography'.

175 See, *ibid.*: Pejic, 'The Protective Scope of Common Article 3: More than Meets the Eye' 2011 (n. 52), 17, suggests there must be a 'hook' to a national ; ICRC, 'Challenges of Contemporary Armed Conflicts' 2011 (n. 17), 10.

176 See, e.g., Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force' 2012 (n. 135).

It is suggested that the key applicability questions continue to relate to the *ratione materiae* questions criteria above – intensity and the nature of the parties – to which geographic locus may be relevant. For example, it may naturally be more difficult to determine whether lethal use of force remote from hostilities was in reality 'associated' with the conflict, whether a potential target was 'directly participating' in hostilities, whether the geographically dispersed persons form an identifiable, cohesive OAG that meets the criteria of a party to a conflict.

Moreover, where IHL is applicable in principle, geographic locus – in particular distance from the 'battlefield' – is likely to influence the *interpretation* of IHL and/or IHRL.[177] Geography may also be relevant to, but will not determine, the interrelationship with IHRL. Where IHL *is* applicable, it must be interpreted and applied alongside IHRL, but the priority afforded to co-applicable norms will depend on a range of factors; distance from hostilities may lead to affording greater weight to IHRL, or to interpreting the requirements of either body differently in light of a contextual analysis, as explored in Sections IV and V.[178]

In conclusion, geography is less determinative of the applicability of IHL and the nature of the conflict than was once the case, and a more flexible approach to territorial limits reflects law keeping pace with practice. The territorial scope of that conflict is not determinative of the *nature* of the conflict either but, rather, as the ICC noted, that depends primarily on the parties. It may be, however, that at a minimum for IHL to apply, there must be *some* nexus to a particular territory – a locus of an armed conflict – where the legal criteria for armed conflict are met. Geographic factors may provide *indicators* that the criteria for IHL applicability are met, or lacking, and influence the contextual interpretation and application of IHL, and its interrelationship with IHRL.

2. IHRL *Rationae Loci*: Extraterritorial Applicability of IHRL

IHRL is applicable throughout States' own territories and wherever they exercise 'jurisdiction' abroad.[179] A State owes human rights obligations

[177] Section IV.4. Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation of Hostilities under International Humanitarian Law', ICRC (2009) and capture v. kill at Section V.

[178] See *Practitioners' Guide* 2016 (n. 37), which suggests this may be so both for targeting issues and for detention, discussed in Section V.

[179] Article 2(1) International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (hereinafter the ICCPR), refers to the State party's obligations to 'respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized

throughout its sovereign territories, even if armed groups seize control and impede their ability to protect rights in practice.[180] Beyond its borders, one of the key issues is whether the individuals come within the 'jurisdiction' of the State, such that IHRL is applicable. As States' spheres of operation and influence grow in a globalised world, a rigid approach to territorial human rights obligations (just like to IHL) has become untenable, and law has developed, sometimes awkwardly, to keep pace.

The precise language delineating the scope of human rights obligations varies between treaties. The ICCPR imposes obligations towards persons 'within [the State party's] territory and subject to its jurisdiction', which has been interpreted as a disjunctive test,[181] while some regional treaties refer to obligations towards persons within the State's 'jurisdiction' and do not mention 'territory' at all.[182] Yet for both, jurisprudence and authoritative guidance from human rights bodies makes clear that States have obligations towards persons within its borders and, exceptionally, beyond them – where the State exercises 'jurisdiction' – sometimes referred to as 'authority', 'power' or 'effective control' – abroad.[183]

As to when such control arises, the law has for the most part evolved case by case, therefore in a somewhat piecemeal way. Whether this is the optimal approach to legal development can easily be questioned, particularly in the light of the confusing and at times contradictory way some of the jurisprudence has unfolded.[184]

in the present convention'. Art. 1 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 (hereinafter the ECHR), and American Convention on Human Rights 'Pact of San José, Costa Rica', 22 November 1969, 1144 UNTS 123 (hereinafter the ACHR).

[180] The State may not be responsible for *violations*, if it has done everything within its power to regain control, but the obligations remain 'applicable': see, e.g., ECtHR, *Catan v. Moldova and Russia* (n. 137). The author was one of the representatives of the applicants.

[181] E.g., see Theodor Meron, *Human Rights in Internal Strife: Their Protection* (Cambridge: Grotius, 1987), 40.

[182] Article 1 ECHR refers to 'secur[ing] to everyone within their jurisdiction' the rights protected therein; likewise Art. 1 ACHR, while the African Charter makes no reference to jurisdiction or territory.

[183] ECtHR, *Al-Skeini v. United Kingdom* (n. 137).

[184] The ECtHR case law has 'not spoken with one voice', as stated by Judge Bonello, Concurring Opinion, *Al-Skeini v. United Kingdom* (n. 137), para. 6. Several cases involved territorial control – e.g., Turkish control of Northern Cyprus (*Loizidou v. Turkey*, Court (Chamber) Judgment of 18 December 1996, Application No. 15318/89) – or failed due to lack of it (*Banković and Others v. Belgium and 16 other Contracting States*, Admissibility Decision of 19 December 1999, Application No. 52207/99, concerning the bombardment of Belgrade by NATO forces). Territorial control is now clearly only one basis of jurisdiction, alongside state agent authority (*Al-Skeini v. United Kingdom* (n. 137)).

However, over time greater consistency has emerged between courts and bodies. While there remain grey areas, IHRL treaty obligations now clearly apply abroad in certain circumstances. The first is where the State exercises effective control of territory abroad,[185] such as directly through military occupation or indirectly through control of a 'subordinate administration'.[186] In this situation the 'full range' of positive and negative obligations arises.[187] Secondly, extraterritorial jurisdiction arises where the State acts outside its own territory through the conduct of its agents abroad ('State agent authority' jurisdiction). IHRL then applies in respect of that particular conduct.

This has long been accepted by most international and regional bodies from the earliest cases where the Human Rights Committee described it as 'unconscionable' to 'interpret the responsibility under the . . . Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory'.[188]

Many courts and bodies, including the ICJ, have now found IHRL to be applicable extraterritorially in conflict situations.[189] The test as set down by the Human Rights Committee, in General Comment No. 31, is whether the person is 'within the *power or effective control* of that State Party, even if not situated within the territory of the State Party'.[190] More expansively, the recent General Comment No. 36 on the right to life includes those whose right to life is 'impacted' in a 'direct and reasonably foreseeable manner' by the State's extraterritorial conduct.[191] The Inter-American system has clarified that 'given

[185] *Ibid.*

[186] E.g., ECtHR, *Cyprus v. Turkey*, Grand Chamber Judgment of 12 May 2014, Application No. 25781/94; for control through occupation, see, e.g., ACHPR, *DRC v. Burundi, Rwanda, and Uganda*, Merits Decision of 29 May 2003, Communication No. 227/99, and control through subordinate administrations, see, e.g., ECtHR, *Catan v. Moldova and Russia* (n. 137).

[187] ECtHR, *Al-Skeini v. United Kingdom* (n. 137), para. 138, on 'the controlling State' having responsibility 'to secure, within the area under its control, the entire range of substantive rights set out in the Convention'. Positive duties to prevent and respond sit alongside positive occupiers' obligations under IHL in occupation.

[188] UNHRC, *Lopez Burgos v. Uruguay*, Merits Decision of 29 July 1979, Communication No. 52/1979, para. 12.

[189] ICJ, *Legality of the Consequences of the Construction of a Wall* (n. 122), paras. 111, 109. The ICJ relied on reports and cases from the UN Human Rights Committee in finding that 'while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory'.

[190] UNHRC, General Comment No. 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13.

[191] UNHRC, General Comment No. 36, Art. 6 (Right to life), 20 October 2018, UN Doc. CCPR/C/GC/36, para. 63, includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a 'direct and reasonably foreseeable manner'.

that individual rights inhere simply by virtue of a person's humanity', where an individual is 'subject to the *control* of another State', obligations still apply.[192] More recent formulations by the Inter-American Court have again been somewhat more expansive, referring to the 'causal effects' of States' conduct.[193] The African Commission on Human and Peoples' Rights (ACHPR) in turn had no trouble determining State responsibility in the face of allegations of massive violations by agents of Burundi, Rwanda and Uganda in neighbouring DRC.[194]

The geographic scope issue proved more controversial in the ECHR context, where jurisprudence has developed in a more erratic fashion. Early decisions of the European Commission and the European Court of Human Rights (ECtHR) found States' obligations to apply to 'all persons under their actual responsibility, whether that authority is exercised within their own territory or abroad'.[195] In *Banković v. Belgium*, however, the Court adopted an apparently more restrictive approach, finding that the aerial bombardment by NATO troops of the TV station in Belgrade fell outside the human rights jurisdiction of the States on the basis of their lack of *control of the territory* on which the alleged violations took place.[196] In justifying its reasoning, the *Banković* judgment asserted that the Convention was intended to apply within the '*espace juridique*' of the ECHR, of which the former Yugoslavia was not then part,[197] igniting a ream of debate on the relevance of the geographic scope of the convention as a whole and the implications for double standards in rights protection.

However, in June 2011 in the *Al-Skeini v. UK* judgment concerning the UK's obligations in Iraq, the Court distanced itself from the *Banković* approach.[198]

[192] Examples including Guantánamo and Grenada; e.g., IACHR, *Coard et al. v. United States*, Judgment of 29 September 1999, Case No. 10.951, para. 37.

[193] IACtHR, 'Environment and Human Rights', Advisory Opinion of 15 November 2017, OC-23/17, referring to the 'authority' or 'control' over a person, including through cross-border *effects*, where there is a 'causal relationship' between the polluting activities in the state's territory and the cross-border impact on rights. UNHRC, General Comment No. 31 (2004) (n. 190).

[194] ACHPR, *DRC v. Burundi et al.* (n. 186). See also the broad formulation in ACommHPR General Comment No. 3 (2015).

[195] See, e.g., ECtHR, *Cyprus v. Turkey* (n. 186), 282; *Issa and Others v. Turkey*, Admissibility Decision of 20 May 2000, Application No. 31821/96, concerning Iraqi shepherds killed by Turkish forces during a military operation in Iraq; *Ilaşcu v. Moldova and Russia* (n. 137) and *Öcalan v. Turkey*, Admissibility Decision of 14 December 2000, Application No. 46221/99; *Catan v. Moldova and Russia* (n. 137).

[196] ECtHR, *Banković v. Belgium* (n. 184), para. 70.

[197] *Banković*, *ibid.*, para. 80.

[198] ECtHR, *Al-Skeini v. United Kingdom* (n. 137). See also ECtHR, *Jaloud v. the Netherlands*, Grand Chamber Judgment of 20 November 2014, Application No. 47708/08, or the ECtHR, *Hassan v. United Kingdom* (n. 4).

The Court took a purposive interpretation,[199] clarifying that the Convention applies extraterritorially where a State either controls territory abroad *or* exercises 'physical power and control over the person in question'.[200] The *Al-Skeini* judgment and others since bring ECtHR jurisprudence broadly into line with the long-established jurisprudence of other courts and human rights treaty bodies. There are now many examples of human rights courts and bodies, international and regional, recognising that when a State exercises, variously, its 'power', 'authority' or 'control' over areas and individuals, it assumes the obligations to respect the human rights of persons affected.

A notable amount of such cases involve extraterritorial action by States in armed conflict or occupation scenarios. This includes the Human Rights Committee finding Israel responsible for violations in occupied territory,[201] or questioning the United States on violations in Afghanistan, Iraq and beyond in the purported 'war on terror'.[202] The ECtHR found Turkey responsible for violations by its military in Cyprus,[203] Russia in the Transnistrian region of Moldova and Chechnya,[204] Armenia for violations in Nagorno-Karabakh,[205] the United Kingdom and the Netherlands in Iraq.[206] The Inter-American Commission on Human Rights (IACHR) acknowledged that the human rights obligations of the United States continued to apply during the US invasion of Grenada[207] and in respect of the detainees in Guantánamo Bay,[208] while the ACHPR addressed violations by Burundi, Rwanda and

[199] *Ibid*., para. 110.

[200] E.g., ECtHR, *Al-Skeini v. United Kingdom* (n. 137), para. 136. It also applies, e.g., on ships controlled by a State or which fly its flag, see, e.g., ECtHR, *Hirsi Jamaa v. Italy*, Grand Chamber Judgment of 23 February 2012, Application No. 27765/09.

[201] UNHRC, Concluding Observations, Israel, 18 August 1998, UN Doc. CCPR/C/79/Add.93; UNHRC, Concluding Observations, Israel, 21 August 2003, UN Doc. CCPR/CO/78/ISR.

[202] Note the United States contests the extraterritorial scope of the convention, though it has softened its position slightly in recent years. See US 4th periodic to the UNHRC and the UNHRC response (n. 132).

[203] ECtHR, *Loizidou v. Turkey* (n. 184). See also, *Cyprus v. Turkey* (n. 186).

[204] ECtHR, *Ilaşcu v. Moldova and Russia* (n. 137) and *Catan v. Moldova and Russia* (n. 137).

[205] ECtHR, *Chiragov and Others v. Armenia*, Grand Chamber Judgment of 16 June 2015, Application No. 13216/05.

[206] ECtHR, *Al-Skeini v. United Kingdom* (n. 137); *Jaloud v. the Netherlands* (n. 198); *Hassan v. United Kingdom* (n. 4).

[207] See IACHR, *Coard v. United States* (n. 192). The IACHR referred to similar previous cases involving the assassination of a Chilean diplomat in the United States and attacks by Surinamese officials in the Netherlands. See, e.g., IACHR, Report on the Situation of Human Rights in Chile, 9 September 1985, OEA/Ser.L/V/II.66, Doc. 17 (referring to Letelier assassination in Washington, DC); also IACHR, Second Report on the Situation of Human Rights in Suriname, 2 October 1985, OEA/Ser.L/V/II.66, Doc. 21, rev. 1.

[208] IACHR, *Precautionary Measures in Guantanamo Bay, Cuba*, 13 March 2002, citing *Coard v. United States* (n. 192).

Uganda during the conflict with DRC.[209] The applicability of IHRL in time of peace or armed conflict and, in most scenarios, whether the State operates inside or outside its own borders, is therefore now well established (though the nature of the obligations arising, and whether there are violations, will of course depend on many factors, including to an extent the degree of control exercised).

The geography of IHRL applicability, like that of war, has therefore expanded in line with the scope of States' activity. Through various processes, including human rights litigation, opposition to extraterritoriality has been voiced, policies challenged, the relevance of IHRL extraterritorially reasserted, and standards around applicability gradually clarified.[210]

D. *Applicability* Ratione Temporis

IHL generally applies until the definitive cessation of the conflict – therefore, as long as the requirements for the existence of an armed conflict set out above are met and specific rules govern occupation. IHRL applies, by contrast, at all times.[211] For reasons of space, this chapter does not deal in detail with temporal applicability, but notes that this too has been controversial, and subject to development, in recent years.

Particularly in the light of alleged armed conflicts with ill-defined parties and ideological associates, concerns arise as to 'war without end'. The implications for the extended or permanent applicability of the exceptional legal framework of IHL are serious.[212] A different manifestation of an expansive approach to temporal scope was revealed in recent national litigation in the interlocutory appeal in the *Al-Nashiri* case before the District of Columbia Circuit Court.[213] US prosecutors argued that the starting point of the conflict with Al-Qaeda could be extended back in time, so as to cover the alleged

[209] ACHPR, *DRC v. Burundi et al.* (n. 186).

[210] See the series of Iraq cases before the ECtHR raising both issues given extraterritorial operations in armed conflicts, e.g., *Al-Skeini v. United Kingdom* (n. 137), *Jaloud v. the Netherlands* (n. 198), *Hassan v. United Kingdom* (n. 4).

[211] Questions on the temporal limits of IHRL also arise, e.g., when obligations were assumed by the relevant State, and whether they are continuing, e.g., are also common disputes in litigation: see, e.g., ECtHR, *Palić v. Bosnia and Herzegovina*, Judgment of 15 February 2011, Application No. 4704/04; *Broniowski v. Poland*, Grand Chamber Judgment of 22 June 2004, Application No. 31443/96; *Janowiec and Others v. Russia*, Judgment of 16 April 2012, Application Nos. 55508/07 and 29520/09.

[212] See Duffy, *War on Terror* 2015 (n. 7), ch. 6B.

[213] United States Court of Appeals for the District of Columbia Circuit, *In Re Abd Al-Rahim Hussein Muhammed Al-Nashiri, Petitioner*, On Petition for Writ of Mandamus and Appeal from the United States District Court for the District of Columbia, Case No. 15-1023, 30 August 2016.

bombing of a French civilian ship off the coast of Yemen in October 2000, before the alleged armed conflict between Al-Qaeda and the United States said to have been triggered by the 9/11 attacks.

The scope of war, and IHL, has thus expanded not only *out* to cover broad terrorist entities and threats, with potentially limitless temporal scope for the future, but *back* in time to cover 'strategies of war' that Al-Qaeda would have been developing at the time.[214] The assessment after the fact, at trial, that the 'conflict' in fact started earlier than had previously been asserted compounds concerns as to the supposed elasticity of IHL.

III. CO-APPLICABILITY AND HUMAN RIGHTS LITIGATION

The significant overlap in the scope of applicability of IHL and IHRL set out in the previous section makes consideration of how norms co-apply a matter of practical necessity. This section focuses on how international adjudication – specifically this time human rights litigation – has evolved to grapple with co-applicability. Its purpose is to map the development of this voluminous emerging body of jurisprudence with a view to understanding the implications for applicability and co-applicability in law and practice in the future. Practice suggests various *factors* that have influenced evolving judicial and quasi-judicial approaches – from the changing nature of the particular treaties to which they give effect, their jurisdiction and mandate, to the positions of the parties to litigation – and how these too may be evolving.

A. *Context: Increased Engagement across Diverse Treaties and Treaty-body Functions*

Unlike the ICJ with its general competence in respect of international law, human rights courts and bodies derive their existence and purpose from particular treaties, and their approach is influenced by their own jurisdictional limits. They are, *generally* speaking, mandated to focus on the interpretation and application of the particular human rights treaty from which their competence derives.[215] As will be seen below, for the most part, this restricts human rights bodies to the application of IHRL, albeit interpreting it in the light of other areas of law such as IHL.

[214] *Ibid.*, 49: the government claimed hostilities could be established by looking to Al-Qaeda's strategy to wage war against the United States, publicly declared in 1996 and in preparation before 9/11.

[215] This is true of, e.g., the Inter-American bodies, the UNHRC or the ECHR, but not the African Commission and Court which have broader competence over 'any . . . relevant human rights treaty' binding on the State.

Most 'general' human rights treaties do not mention IHL.[216] There are glances across in some treaties, such as the ECHR and ACHR, which allow for derogation 'in times of war' or other emergency, thereby implicitly acknowledging the continued applicability of IHRL in such situations (and arguably reflecting assumptions that invoking IHL would coincide with derogation).[217] But for the most part, the increased engagement with IHL has been through the interpretation of human rights provisions in conflict situations.[218]

It is worthy of brief note, however, that human rights treaties themselves may be changing, reflecting the widespread recognition of co-application. A number of more recent treaties refer specifically to IHL, some stipulating obligations for States to respect IHL or acknowledging the interrelatedness of the two fields of law;[219] this brings IHL squarely within the mandate of the relevant court or body. A clear example is Article 38 of the Convention on the Rights of the Child (CRC)[220] embodying the general undertaking to respect and ensure respect for IHL relevant to the child. As such, it is a tailored incorporation into a human rights treaty of Common Article 1 of the 1949 Geneva Conventions. Subsequent instruments, such as the Optional Protocol on the Involvement of Children in Armed Conflict, enshrine more specific obligations to protect children from participation in, and from the effects of, armed conflict.[221] The Convention on the Rights of Persons with Disabilities (CRPD)[222] tailors obligations of protection in respect of persons with disabilities in armed conflict, while the International Convention for the Protection of All Persons from Enforced

[216] General treaties include the ICCPR, the International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (ICESCR), the EHCR, the ACHR, and the African Charter on Human and Peoples' Rights, 27 June 1981, 1520 UNTS 217 (ACHPR).

[217] See ECtHR, *Hassan v. United Kingdom*, below, and dissent by Spano J *et al.* generally on the ECHR derogation, P. Kempees, *Thoughts on Article 15 of the European Convention on Human Rights* (Osterwijk: Wolf Legal, 2017).

[218] Section IV on the principles of interpretation that make this possible and shape their approach.

[219] See Walter Kälin, 'Universal Human Rights Bodies and International Humanitarian Law', in Robert Kolb and Gloria Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham: Elgar, 2013) 441–65 (446–7).

[220] Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (hereinafter the CRC); Hans-Joachim Heintze, 'Children Need more Protection under International Humanitarian Law: Recent Developments Concerning Article 38 of the UN Child Convention as a Challenge to the Red Cross and Red Crescent Movement', *Humanitäres Völkerrecht* 8 (1995), 200–3.

[221] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000, 2173 UNTS 222.

[222] Article 11 Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 UNTS 3, requiring States to take all necessary measures to ensure the protection and safety of persons with disabilities in situations of armed conflict in accordance with IHL.

Disappearance (ICPPED) prohibits *refoulement* to a State in face of a risk of serious violations of IHL.[223] As this trend towards more explicit engagement is likely to continue in new treaties, it will naturally influence the nature and degree of engagement of the relevant body charged with monitoring, interpreting and adjudicating on the law in the future.

As explored in more detail elsewhere,[224] it is also worthy of preliminary note that adjudication – although the focus here – is only one of various ways in which human rights courts and bodies engage with co-applicability. The ten UN treaty bodies, for example, have multifaceted identities and functions, in the context of each of which they have engaged, increasingly, with IHL.[225]

The particular functions may in turn influence their approach to IHL. For example, it was in the standard-setting role that the UN Human Rights Committee handed down General Comment No. 31, offering a relatively clear, if broadly framed, pronouncement on the interrelationship of IHRL in armed conflict as 'complementary, not mutually exclusive'.[226] Consistent with the role of General Comments, the framework stopped short of clarifying more complex issues of co-applicability that arise in practice in particular situations. In their 'promotional role' several international[227] and regional[228] systems have, however, called on States to take a range of actions, including generally respecting IHL,[229] ratifying certain IHL conventions,[230] ensuring criminal accountability, establishing

[223] Article 16 International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, 2176 UNTS 3. Art. 43 also states that the Convention is without prejudice to the provisions of IHL, including the Geneva Conventions.

[224] van den Herik and Duffy, 'Human Rights Bodies and International Humanitarian Law' 2016 (n. 3).

[225] Human Rights Committee (UNHRC), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination Against Women (CEDAW), Committee Against Torture (CAT), Committee on the Rights of the Child (CRC), Committee on the Rights of Persons with Disabilities (CRPD), Committee on Migrant Workers (CMW), Committee on Enforced Disappearances (CED), Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT).

[226] UNHRC, General Comment No. 31 (n. 190), e.g., para. 11. See also ACommHPR General Comment No. 3 on the right to life (n. 194). Others have made cursory reference to IHL, e.g., UNHRC General Comment No. 36 (n. 191); CESCR, General Comment No. 15, The Right to Water, 20 January 2003, UN Doc. E/C.12/2002/11, para. 22.

[227] The CRC has on several occasions called on States parties to take into account IHL.

[228] As early as the 1970s the IACHR's reports reference IHL: e.g., IACHR, Report on the Situation of Human Rights in Nicaragua, 17 November 1978, OEA/Ser.L/V/II.45, doc. 16 rev. 1, chapter 2.

[229] E.g., CRC, General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, UN Doc. CRC/GC/2005/6, para. 26.

[230] CRC, General Comment No. 5, General measures on the implementation of the Convention on the Rights of the Child, 27 November 2003, UN Doc. CRC/GC/2003/5, para. 17; CRC, General Comment No. 6 (n. 229), para. 15.

relevant tribunals to prosecute IHL breaches,[231] cooperating with IHL treaty regimes, such as on land mines,[232] and ensuring adequate education on IHL standards.[233]

The State reporting system involves a somewhat more diplomatic process of dialogue and engagement with States. This may explain an often correspondingly cautious approach in general, and in relation to IHL in particular, reflecting the political sensitivities that surround questions of applicability for States. IHL has, however, also grown in significance in Concluding Observations in recent years. For the most part, the emphasis has been on confirming the relevant body's (contested) competence to monitor human rights situations during armed conflict, and references to IHL have most often been generic.[234] Occasionally, they have involved a more substantive consideration of IHL, such as in relation to a range of civil, political, economic, social and cultural rights in Israel,[235] and US responsibility in Afghanistan.[236] A rare focus on the overreaching approach to *applicability* of IHL is seen in the UNHRC Concluding Observations on the US use of drones.[237]

In the *recommendations* to States, committees have on several occasions been fairly specific in calling on States to investigate serious violations of

[231] CERD, General Recommendation XVIII on the Establishment of an International Tribunal to Prosecute Crimes Against Humanity, 18 March 1994, UN Doc. CERD/C/365, Annex I.

[232] CRC, General Comment No. 9, The Rights of Children with Disabilities, 27 February 2007, UN Doc. CRC/C/GC/9, para. 23.

[233] CRC, General Comment No. 1, The Aims of Education, 17 April 2001, UN Doc. CRC/GC/2001/1, para. 16.

[234] E.g., CESCR, Concluding Observations, 9 December 2010, UN Doc. E/C.12/LKA/CO/2-4, para. 28; CESCR, Concluding Observations, 20 November 2009, UN Doc. E/C.12/COD/CO/4, para. 25; CESCR, Concluding Observations, Israel, UN Doc. E/C.12/1/Add.90, 23 May 2003, para. 31.

[235] CAT, Concluding Observations, Israel, 14 May 2009, UN Doc. CAT/C/ISR/CO/4, para. 29 on Gaza; CESCR, Concluding Observations, Israel, UN Doc. E/C.12/1/Add.90, 26 June 2003, UN Doc. E/C.12/1/Add.90, paras. 15, 31; CESCR, Concluding Observations, Israel, 16 December 2011, UN Doc. E/C.12/ISR/CO/3, para. 8; UNHRC, Concluding Observations, Israel, 21 August 2003, UN Doc. CCPR/CO/78/ISR, para. 11; CAT, Concluding Observations, Israel, 23 June 2009, UN Doc. CAT/C/ISR/CO/4, para. 11. These observations neither endorse the *lex specialis* rule, nor grappled with how interplay might work in practice.

[236] CRC, Concluding Observations, United States, 28 January 2013, UN Doc. CRC/C/OPAC/USA/CO/2, para. 7.

[237] UNHRC, Concluding Observations, United States, 23 April 2014, UN Doc. CCPR/C/USA/CO/4, para. 9, questioning the 'very broad approach to the definition and geographical scope of an armed conflict, including the end of hostilities . . . unclear interpretation of what constitutes an "imminent threat" and who is a combatant or civilian . . . the unclear position on the nexus that should exist between any particular use of lethal force and any specific theatre of hostilities, as well as the precautionary measures taken to avoid civilian casualties in practice'.

IHL by States and NSAs,[238] to reconsider the applicability of statutory limitations in reparation proceedings for war crimes,[239] to refrain from offering amnesty for such violations,[240] to cooperate with international criminal tribunals,[241] and to ensure redress and reparations, for example.[242] A definite evolution is discernible towards greater engagement with IHL across the multiple functions of human rights bodies. It remains to be seen whether, as engagement becomes the norm and confidence rises, they will grapple more fully with issues of applicability and the somewhat generic, broad-brush approach to IHL will become more substantive.

The judicial or quasi-judicial nature of the bodies and of the adjudicative process, which is the focus here, distinguishes it from these other functions and processes highlighted above, and arguably influences the approach to IHL.

The judicial process ultimately involves adjudicating concrete factual situations and real-life contexts that lie behind particular cases, albeit in a way that should be mindful of the law-making role of human rights jurisprudence. It is through cases that *abstracto* declarations on interplay are necessarily taken a step further, applied and given content. In a context in which courts must reach a decision in favour of one or the other party to the case, they cannot entirely avoid controversial engagements that might alienate States if they are to discharge their mandate. Ultimately, the judicial or quasi-judicial nature of these proceedings may call for a more decisive, clear and precise approach to technical articulations on matters of substantive law and interplay than other functions.[243] Judicial practice and its approach to applicable law may, however, also be influenced by an array of other considerations, including notably the particular facts from which legal standards emerge, and the positions and arguments advanced by parties to the litigation, in particular State parties.

[238] E.g., CRC, Concluding Observations, Russia, 31 January 2014, UN Doc. CRC/C/OPAC/RUS/CO/1, para. 16; UNHRC, Concluding Observations, Colombia, 4 August 2010, UN Doc. CCPR/C/COL/CO/6, para. 9.

[239] UNHRC, Concluding Observations, Serbia, 20 May 2011, UN Doc. CPR/C/SRB/CO/2, para. 10.

[240] UNHRC, Concluding Observations, Colombia, 26 May 2004, UN Doc. CCPR/CO/80/COL, para. 8.

[241] *Ibid*., para. 13.

[242] The UNHRC indicated that Russia should ensure that victims of serious human rights violations *and* IHL are provided with an effective remedy, including the right to compensation and reparations: see UNHRC, Concluding Observations, Russia, 24 November 2009, UN Doc. CCPR/C/RUS/CO/6, para. 13.

[243] van den Herik and Duffy, 'Human Rights Bodies and International Humanitarian Law' 2016 (n. 3).

B. Evolving Approaches to Co-applicability in Human Rights Adjudication

Human rights litigation of violations in armed conflict today is a particularly dynamic and evolving area of practice. Myriad international and regional bodies now exist to hear such complaints, and the case-load of each is voluminous and growing. As set out below, across the globe these regional and international courts and bodies are increasingly engaged with IHL through the adjudication of human rights obligations in armed conflict situations.

1. Push and Shove within the Pioneering Inter-American System

The Inter-American system for the protection of human rights was the first of the regional systems to engage openly with IHL. The Inter-American Commission on Human Rights got off to a bold but faltering start in the *Abella* case,[244] in which it directly and explicitly 'applied' IHL. The case concerned an attack by a group of individuals on military barracks in Buenos Aires in 1989, in the context of what was described as a 'military uprising'. The Commission reasoned that it was addressing a 'combat situation'[245] which 'none of the human rights instruments was designed to regulate',[246] and that it therefore simply *could* not apply Article 4 on the right to life without regard to IHL (the only alternative being to decline to adjudicate).[247] The attack took place five years after the transition from dictatorship to democracy and outwith what, on any view, might constitute an armed conflict.

The case is often cited as a key example of recognition of the relevance of IHL by human rights bodies.[248] The overreach on material applicability is, however, perhaps the most stunning feature of the decision, and oddly neglected in commentary.[249]

The case has even been cited in support of a particular understanding of the legal tests for applicability, namely, that the Commission considered that an armed conflict may be short in duration (relevant to material applicability).[250] But there is reason to doubt that the IHL applicability criteria (whether the

[244] IACtHR, *Abella v. Argentina*, Judgment of 18 November 1997, Case No. 11.137, para. 1.
[245] *Ibid.*
[246] *Ibid.*, para. 158.
[247] *Ibid.*, para. 161.
[248] For a different critique, see Liesbeth Zegveld, 'The Inter-American Commission on Human Rights and International Humanitarian Law: a Comment on the Tablada Case', *International Review of the Red Cross* 38 (1998), 505–11.
[249] The *Practitioners' Guide* 2016 (n. 37) cites it as an example of the 'hostilities' framework being applied, rendering IHL the primary framework without considering if IHL was applicable.
[250] Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' 2011 (n. 145).

group was sufficiently organised and the intensity threshold met) was given much attention at all. Also doubtful is the Commission's assessment – which may have coloured its approach – that IHL would provide 'greater protection for victims' in the particular case.[251] This first case should perhaps serve as a cautionary tale, underscoring the importance of the crucial preliminary step of ascertaining IHL applicability, for which resort to violence and the challenges it poses are clearly insufficient.

While later cases from the region indicate a more cautious approach to co-applicability (by the Commission and Court), *Abella* does not stand alone in its reluctance to confront the IHL applicability question. In most cases from this region, the relative absence of controversy regarding the existence of long-running NIACs in Colombia or Guatemala, for example, and the nexus between the events and the conflict may partly account for the Commission and Court not considering it necessary to make determinations as to the conflict.

There has, however, been more controversy as to the precise role that IHL should play before the Commission and Court. When the question of how to engage with IHL came before the Inter-American Court (IACtHR), first in the *Las Palmeras v. Colombia* case of 2001, the Court made clear that it considered the Commission to have overreached jurisdictionally in applying IHL directly in *Abella*. It noted that the Court's role and mandate is:

> to say whether or not that norm or that fact is compatible with the American Convention. The latter has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions.[252]

The Court and the Commission have, however, consistently continued to assert the co-application of the two branches of law, albeit with the emphasis on the relevance of IHL to the interpretation of the Convention.[253] Accordingly, in *Coard et al. v. United States* in the context of the US invasion of Grenada, the Commission found that IHL provided 'authoritative guidance' and 'specific standards' relevant to the Convention.[254] Occasionally, as in cases involving the conflict in El Salvador, it has described IHL as an authoritative interpretative tool, but has gone on to 'note . . . grave infractions

[251] IACommHR, *Abella v. Argentina* (n. 244), paras. 158–9.

[252] IACtHR, *Las Palmeras v. Colombia*, Judgment of 6 December 2001, IACtHR Series C, No. 90, para. 22.

[253] E.g., *ibid.*, para. 121; IACHR, *Serrano Cruz Sisters v. El Salvador*, Admissibility Report of 23 February 2001, Case No. 12.132; IACtHR, *Mapiripán Massacre v. Colombia*, Judgment of 15 September 2005, IACtHR Series C, No. 134, para. 115.

[254] IACHR, *Coard v. United States* (n. 192), para. 42.

of IHL' and violations of the convention 'in conjunction with' IHL, en route.[255] On several occasions, including in granting precautionary measures in relation to Guantánamo, the Commission noted that the rules of IHL and IHRL 'may be distinct' and that it may be 'necessary to deduce the applicable standard by reference to IHL as the applicable *lex specialis*'.[256] Subsequently, in numerous cases against Colombia, the Commission emphasised more broadly that the two bodies of law 'complement each other or become integrated to specify their scope or content'.[257]

The IACtHR for its part has underscored the importance of seeing the two bodies of law as co-applicable and that 'the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention'.[258] In *Santa Domingo v. Colombia* it explicitly rejected the idea of 'a ranking between normative systems', but supported the need to have regard to more specific norms in defining obligations under the Convention in particular contexts.[259] Rather than endorsing a simplistic approach to '*lex specialis*' as providing the sole relevant legal basis, in *Serrano Cruz v. El Salvador*, it emphasised that even 'the specificity of the provisions of IHL . . . do not prevent the convergence and application of the provisions of [IHRL]'.[260]

A few clusters of cases provide insights into the Court's approach to co-applicability and factors that may influence it. In the *Bámaca Velásquez v. Guatemala* case, for example, concerning the capture, disappearance and

[255] See IACtHR, *Monsignor Oscar Amulfo Romero y Galdámez v. El Salvador*, Case No. 11.481, para. 66 ('*not[ing]* that the assassination of Monsignor Romero constitutes a grave infraction of the basic principles of international humanitarian law . . . ', and para. 76 ('El Salvador has violated [the American Convention] in conjunction with the principles of Common Article 3'); see also IACtHR, *Extrajudicial Executions and Forced Disappearances v. Peru*, Judgment of 11 October 2001, Case No. 10.247 *et al.*

[256] IACHR, *Precautionary Measures in Guantanamo Bay* (n. 208). See also *Coard v. US* (n. 192). A similarly broad approach to *lex specialis* was evident in its 2002 Report on Terrorism and Human Rights, OEA/Ser.L./V/II.116, doc. 5 rev. 1, corr. (2002). However, it refers to IHL as '*lex specialis* in interpreting and applying human rights protections in situations of armed conflict' (para. 2).

[257] IACHR, *Mapiripán Massacre v. Colombia* (n. 253). See also, e.g., IACtHR, *Avilán v. Colombia*, Judgment of 30 September 1997, Case No. 11.142, paras. 131–42, 159–60, 166–78, 198–203; IACHR, Third Report on the Human Rights Situation in Colombia, Chapter IV, Violence and Violations of International Human Rights Law and International Humanitarian Law, February 1999 OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26; IACtHR, *Prada González y Bolaño Castro v. Colombia*, Judgment of 25 September 1998, Case No. 11.710, Report No. 63/01, 2000, 781.

[258] IACtHR, *Bámaca-Velásquez v. Guatemala*, Judgment of 25 November 2000, IACtHR Series C, No. 70, para. 209.

[259] IACtHR, *Santa Domingo v. Colombia*, 30 November 2012, IACtHR Series C, No. 259.

[260] IACHR, *Serrano Cruz v. El Salvador* (n. 253), para. 112.

death of a former guerrilla commander, the Court had detailed regard to IHL standards.[261] Notably, it did so in considering his right to life, but remained with an IHRL approach to issues related to his detention and torture. The Court was not explicit or clear as to why, though the dearth of detailed IHL on detention in NIAC, or the remote locus of his detention from any situation of active hostilities, may have had a bearing on the Court's emphasis on each area of law.[262] It is also noteworthy that in this case, as in most other cases in which IHL had been invoked, the impact of IHL on the outcome of the case is unclear. As the Court indicated, in the particular case the conduct in question would constitute violations of IHRL *or* IHL (IHL providing no justification for killing a rebel commander no longer participating in the conflict, for torture or for arbitrary detention without any legal process).[263] In addition, the nature of the conflict, and the position of the parties, may also have played a role. In the *Bámaca* case, the State did not dispute the relevance of IHL as a tool of interpretation, but nor was it central to either party's case.[264] Nor in turn was there any doubt about the armed conflict (the longest running NIAC in the region, lasting some 36 years) or the deceased's connection to it. It may be said then it was relatively easy for the Court to grapple with IHL here; its competence to do so was not under attack and it did not bring the Court into any political fray.

The context has been markedly different in other more recent cases. In a series of cases, the Colombian State has put the relevance of IHL centre stage by arguing that, as the matter is governed by IHL, the Inter-American supervisory bodies lack competence *ratione materiae*.[265] In relation to the right to life in *Colombia v. Ecuador*,[266] or *Santa Domingo v. Colombia*[267] or hostage-taking in *Rodriguez Vera (The Disappeared from the Palace of Justice)*

[261] IACtHR, *Bámaca-Velásquez v. Guatemala* (n. 258), para. 121.

[262] See the approach suggested in *Practitioners' Guide* 2016 (n. 37) to the effect that the more remote from hostilities, the more the framework of IHRL takes priority and can fully address the situation at hand.

[263] IACHR, *Bámaca v. Guatemala* (n. 258), para. 145. The Court implicitly found that there were no rules of IHL that created any conflict with those of IHRL in this case.

[264] *Ibid*., para. 208.

[265] *Ibid*. See below on similar arguments advanced by the State in IACtHR, *Carlos Augusto Rodríguez Vera and Others v. Colombia* ('*Palace of Justice*'), Judgment of 14 November 2014, Case No. 10.738. The case concerned, *inter alia*, hostage-taking and disappearances. The author was *amicus curiae*.

[266] IACHR, *Franklin Guillermo Aisalla Molina Ecuador – Colombia*, Inter-State Petition on Admissibility of 21 October 2010, Report No. 112/10, para. 115.

[267] Cluster munitions were used against villagers, allegedly targeting FARC operatives hiding in woods nearby.

v. Colombia,[268] it has sought to rely on IHL *as 'the special, main and exclusive law'*,[269] to render violations beyond the purview of the Court.[270] The Court has consistently given such arguments relatively short shrift in reaffirming the role of IHL in the interpretation of the convention, not its displacement.[271]

The latest stage in the Court's jurisprudential journey is the *Cruz Sanchez v. Peru* case, which has taken the Court's approach to IHL a step further.[272] It builds on its 'interpretative' approach but, unlike its predecessor cases, reaches conclusions on the right to life which are directly defined by reference to IHL, and more permissive as a result. The lethal use of force against members of organised armed groups while they were 'directly participating in the armed conflict' were not considered violations of the convention as they were permitted under IHL; by contrast, killings (where evidence indicated the individual was hors de combat) were arbitrary deprivations of life under the convention.

A couple of features of this latest judgment are worthy of note. First, and most obvious, is the court's willingness to reach conclusions based essentially on IHL standards, even when it had a direct impact on the decision, *and* the outcome was not more favourable to the victims. Secondly, it continued to have regard to IHRL alongside IHL throughout its assessment. Thirdly, in its regard to both areas of co-applicable law, the Court emphasised the need to look carefully at the particular facts and 'take into account all the circumstances and the context of the facts'.[273] These included the existence of the NIAC, the fact that the deceased were members of armed groups, and the objective and *modus operandi* of the operation – a difficult rescue operation, planned and executed with the goal of liberating hostages and capturing the individuals in question. The Court thus draws in considerations from IHRL alongside IHL standards, in the light of the particular circumstances and context of each of the deaths.[274]

The Inter-American system has remained true to its pioneering role in recognising the importance of, and not recoiling from, IHL. The Court and the Commission's approach to recognising IHL as co-applicable law, and using

[268] *Ibid.*

[269] *Ibid.*, para. 38. On lack of clarity in its position, see Judgment, e.g., footnote 37.

[270] *Ibid.*

[271] *Ibid.*, IACtHR, *Palace of Justice* (n. 265), paras. 116–26.

[272] IACtHR, *Cruz Sanchez v. Peru*, Judgment of 17 April 2015, IACtHR Series C, No. 292 (in Spanish; translations are the author's).

[273] *Ibid.*, para. 266.

[274] The lethal force used against most of the guerrillas was lawful but not against those effectively captured before being killed.

it to interpret and give full effect to the Convention in the particular context, is now the prevalent approach to co-applicability by human rights bodies.

2. The Limited but Significant Case Law of the African Commission and Court

The African system is the youngest of the three regional siblings and the volume of its decisions limited in comparison with the others. Although it has engaged through its standard-setting function, it is perhaps surprising that in a continent plagued by conflict the issue has not (yet) arisen with greater frequency in human rights litigation.[275]

In general, the African Commission on Human Rights and Peoples' Rights has tended to emphasise that due to the lack of any mechanism for derogation from the Charter, the Charter obligations continue to apply 'even in civil war'.[276] In the inter-State *DRC v. Burundi, Rwanda and Uganda* case, concerning violations by armed forces of the respondent States during occupation of the DRC, the Commission embraced IHL more fully as 'part of the general principles of law recognised by African States' which the Commission could take 'into consideration in the determination of this case'.[277] The Commission was willing to go further than most in finding violations by reference to specific provisions of the Geneva Conventions and Additional Protocols, referring to IHL and IHRL depending in which area of law provided more specific norms.[278] It might be relevant that the application of IHL did not, on the facts, alter the human rights standards or offer less protection, but it gave rise to additional violations of provisions of IHL.

Also deserving of brief note is the fact that the African Court of Justice and Human Rights' nascent practice signals one rare type of human rights litigation in armed conflict not seen elsewhere, namely, the resort to precautionary or interim measures to prevent imminent conflict-related violations. In one of

[275] Duffy, *Strategic Human Rights Litigation* 2018 (n. 25), ch. 2. ACommHPR General Comment No. 3 (n. 194).

[276] ACHPR, Commission Nationale des Droits de l'Homme et de Libertés/Chad, 11 October 1995, Communication No. 74/92, para. 21.

[277] ACHPR, *DRC v. Burundi et al.* (n. 186). See Arts. 60 and 61 of the African Charter on Human and Peoples Rights, 27 June 1981, 1520 UNTS 217, which provide a basis for this outward-looking approach to other norms.

[278] The Commission found violations during occupation inconsistent with the Geneva Convention IV (n. 23) and API (n. 30), e.g., that 'the indiscriminate dumping of and or mass burial of victims were contrary to Article 34 of Additional Protocol I', as well as the Charter and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 18 December 1979, 1249 UNTS 13.

its first decisions, the Court adopted an Order for Provisional Measures against Libya, explicitly noting the situation of 'ongoing conflict' and that the Peace and Security Council of the African Union had referred to 'violations of human rights and international humanitarian law . . .'[279] The case suggests the Court will not be blind to IHL, though its role in deliberations remains unclear.[280]

The African Court remains in its infancy, and limited possibilities of access to the Court mean it is too early to assess its approach or impact on co-applicability in the future. Its treaty framework and the factual realities of conflicts within its jurisdiction suggest that it is certainly one to watch.

3. Out of the Closet? The Evolving Approach of the European Court

The ECtHR's approach to IHL stands somewhat apart from that of other bodies. It has perhaps had most occasion to consider IHL, given the volume of cases concerning situations of (arguable or established) armed conflict from southeast Turkey to Chechnya, Transnistria, Ukraine, Crimea, South Ossetia, Abkhazia, Nagorno-Karabakh, northern Cyprus, Iraq and beyond.[281] Unlike its Inter-American sister, the cases have frequently emerged from contexts where the existence of conflict was itself a matter of dispute. Perhaps for this reason, among others, a striking feature of much of its practice has been its extreme reluctance to recognise the existence of armed conflict and to engage with questions of IHL applicability.[282] However, over time its position has shifted substantially.[283]

For a long time, the Court's approach was not to engage directly with the existence of 'conflicts' but to take a threefold approach. First, it emphasised that derogation is the appropriate legal vehicle to adjust standards where exigencies so required, as reflected in the explicit reference in Article 15 to war as a permissible basis for derogation. It found in several cases that where the respondent States have not derogated (and they rarely do), the 'normal

[279] ACtHPR, *ACHPR v. Libya*, Order for Provisional Measures, 25 March 2011, Application No. 004/2011, paras. 13, 21.

[280] *Ibid*., para. 25.

[281] Many cases concerned Northern Ireland where on one view there was a conflict though it was never recognised as such; see Steven Haines, 'Northern Ireland 1968–1998', in Wilmshurst (ed.), *Classification of Conflicts* 2012 (n. 2), 117–45 (117–24). Other relevant IACs arose in the former Yugoslavia, Russia/Georgia, Ukraine and Iraq.

[282] On some occasions, although the existence of armed conflict has been recognised, still no reference to IHL has been made. E.g., ECtHR, *Ilaşcu v. Moldova and Russia* (n. 137), para. 42.

[283] This is not linear and as noted below the Court's approach has depended on many factors.

legal background' continues to apply.[284] Secondly, despite this formal position, in line with its consistent emphasis on rendering rights 'practical and effective' not 'theoretical and illusory',[285] the Court has often noted the need to have close regard to the facts and context including the realities of clashes or conflict.[286] Thus, thirdly, as part of this approach, even where the Court has generally made little explicit reference to IHL, it has had close regard to principles of IHL in reaching its conclusions in appropriate cases.[287]

The extent to which the Court has done so, and invoked even IHL-related language and concepts, has been context-dependent. In respect of the use of force against individuals or small groups of alleged terrorists, even within the broad context of conflicts, the Court has broadly maintained a law enforcement approach (with just occasional glances to IHL). It has required, for example, that the State plan and carry out operations to avoid the use of force, minimise threats to life, referring to the use of weapons that minimise human suffering and the importance of warnings.[288]

But as far as it has considered higher intensity armed confrontations, while not being explicit on IHL, it has reached conclusions more directly reflective of IHL principles. Examples emerge from several cases in southeast Turkey and Chechnya. For example, in *Ergi v. Turkey* and *Özkan v. Turkey*, the Court required 'feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of *civilian* life'.[289] In *Benzer and Others v. Turkey*, the judgment rebukes the failure to secure humanitarian aid in the wake of aerial bombardment.[290] In *Isayeva Yusupova*

[284] See, e.g., ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Judgment of 24 February 2005, Application No. 57950/00, para. 191. Derogation would affect derogable rights, notably liberty, under Art. 5, which contains enumerated grounds for detention and safeguards which diverge from IHL. In conflicts overseas, some question whether a State *can* derogate: Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict', in Nehal Bhuta (ed.), *The Frontiers of Human Rights* (Oxford University Press, 2016), 55–88.

[285] ECtHR, *Airey v. Ireland*, Judgment of 9 October 1979, Application No. 6289/73, para. 24.

[286] See, e.g., ECtHR, *Palić v. Bosnia and Herzegovina* (n. 211), as one example; see Section IV on principles of interpretation.

[287] See, e.g., pioneering study in William Abresch, 'A Human Rights Law of Internal Armed Conflict: the European Court of Human Rights in Chechnya', *European Journal of International Law* 16 (2005), 741–67.

[288] See, e.g., ECtHR, *McCann v. United Kingdom*, Grand Chamber Judgment of 27 September 1995, Application No. 18984/91; *Gül v. Turkey*, Judgment of 13 December 2000, Application No. 22676/93; *Hamiyet Kaplan v. Turkey*, Judgment of 13 September 2005, Application No. 36749/97.

[289] ECtHR, *Ergi v. Turkey*, Judgment of 28 July 1998, Application No. 23818/94, para. 79; *Ahmet Özkan and Others v. Turkey*, Judgment of 6 April 2004, Application No. 21689/93, para. 297.

[290] ECtHR, *Benzer and Others v. Turkey*, Judgment of 12 November 2013, Application No. 23502/06.

and Bazayeva v. Russia, it found a violation in the light of the failure to assess and prevent 'possible harm to civilians who might have been present . . . in the vicinity of what the military could have perceived as legitimate targets'.[291] The Court's reference to 'civilians' and 'legitimate targets' is a plain, if not explicit, reference to IHL. Whether we should understand the decision as the co-applicability of norms is unclear due to the Court's failure to explain its approach or acknowledge the relationship between IHRL and IHL.

Particular uncertainty arises from *Finogenov v. Russia* (a hostage-taking case), where the Court relies predominantly on Convention standards, but employs language from IHL, albeit with confusing logic that may not correspond to either body of law. It appears to have found no violation of the right to life of the hostages and hostage-takers through the use of poisoned gas on the curious basis that the use of gas, even if dangerous or potentially lethal, was not an 'indiscriminate attack' as the hostages had a high chance of survival.[292] (Those chances were diminished by a botched subsequent rescue operation in relation to which the Court did find a violation.[293]) While the language is resonant of IHL, the standards are not, and as was typical the Court did not explain.[294]

In more recent cases, however, the Court's opaque, if not myopic, approach has ceded to overt recognition of the relationship between the Convention and IHL. There are many plausible explanations for this, from the growing tide of international legal thinking on interplay, to the Court's own emphasis on the importance of a coherent approach to the Convention consistent with other areas of international law, among others.[295] However, it is suggested that the shift (also, or perhaps principally) relates to the different armed conflicts from which cases have arisen and the different positions of the States concerned vis-à-vis the existence of an armed conflict and the applicability of IHL. The Turkish or Chechen cases, similar to Northern Ireland-related cases before them, often concerned violations where controversy surrounded the existence of an armed conflict. Therefore, IHL was not invoked by the State (and often for different reasons, not by the applicants either).[296] In those contexts, the Court could only address the factually and legally complex issue of interplay if it had first made, on

[291] ECtHR, *Isayeva v. Russia* (n. 284), para. 175.

[292] ECtHR, *Finogenov and Others v. Russia*, Judgment of 20 December 2011, Application Nos. 18299/03 and 27311/03, paras. 231–2.

[293] *Ibid.*, paras. 263–6.

[294] *ICRC Customary Study* 2005 (n. 22), Customary Rule 11.

[295] See Section III.

[296] There was, e.g., no reference to IHL in pleadings concerning the killing of the former Chechen leader in *Maskhadova v. Russia*, Judgment of 6 June 2013, Application No. 18071/05. The author was one of the representatives of the applicants.

its own motion, politically controversial assessments concerning the existence of armed conflict. The Court was reluctant to do so.

By contrast, situations that were, incontrovertibly, armed conflicts at the relevant time have recently made their way to the Court, perhaps influencing the more overt approach to IHL. While a series of cases concerning NATO action in the former Yugoslavia were deemed inadmissible,[297] a minor step forward was taken when the Court explicitly addressed IHL in cases concerning the consistency with principles of legality and non-retroactivity of prosecuting individuals for war crimes during the Second World War.[298] Much more significant, however, is the series of cases concerning the conduct of British troops in Iraq, which gave rise to the most notable shift in the Court's practice.

In some cases, such as *Al-Skeini v. UK*, the significance of engaging IHL did not appear to go beyond citing it in some detail in the record of 'applicable law' at the outset of the judgment, without relying on it in its deliberations or resolution of the case. This inclusion may reflect the fact that applicants and third parties cited IHL,[299] while the omission from the Court's reasoning may reflect the fact that the State did not invoke IHL.[300] The oversight of IHL was particularly controversial in *Al-Jedda v. UK*, which had at its heart an issue on which IHRL and IHL drive in competing directions, namely, the lawfulness of internment and applicable procedural safeguards.[301] While citing IHL as 'relevant international law materials', it was criticised by some for not questioning whether another legal regime – namely IHL – co-applied and provided an alternative legal basis for detention and, arguably, different procedural rules.[302] But then, nor had the parties asked it to.[303]

A decisively different and more robust approach to IHL is seen in *Hassan v. United Kingdom* decided on 16 September 2014. While the judgment is rightly open to criticism on other grounds,[304] the focus here is on the Court's

[297] ECtHR, *Banković v. Belgium* (n. 184).

[298] These cases looked to IHL only as regards how national courts applied international law.

[299] *Al-Skeini v. United Kingdom* (n. 137). The author represented one of the *amicus* interveners concerning occupiers' obligations and extraterritoriality.

[300] See, ECtHR, *Hassan v. United Kingdom* (n. 4).

[301] ECtHR, *Al-Jedda v. United Kingdom*, Judgment of 7 July 2011, Application No. 27021/08, 29.

[302] See Jelena Pejic, 'The European Court of Human Rights' Al-Jedda Judgment: the Oversight of International Humanitarian Law', *International Review of the Red Cross* 93 (2011), 837–51.

[303] The government chose not to argue IHL but the alternative purported justification of Security Council authorisation of detentions, which the Court rejected.

[304] And the applicant, his brother, unsuccessfully alleged violation of the right to life. The Court adopted an unduly flexible approach to the right of life where the detainee died in suspicious circumstances apparently shortly after his release. Although Ziv Bohrer suggests IHL would have been more protective, arguably so is IHRL.

approach to IHL in relation to the lawfulness of the detention of the applicant's brother at UK detention facilities in the context of the international armed conflict in Iraq. The question arose whether IHL might provide a lawful basis for detention and govern the relevant procedural safeguards.

The Court clarified that it 'must endeavour to interpret and apply the Convention in a manner consistent with the framework of international law delineated by the International Court of Justice'. The State had not derogated, which, as explained above, it should have done in order to invoke IHL in the way anticipated in the Convention.[305] Despite this, the Court found it could not ignore the existence of the conflict. For the first time, its decision was based explicitly on IHL.

Considering the permissible grounds of detention under IHL applicable in IACs, which included imperative reasons of security, it found the deceased's detention had a lawful basis. This is particularly noteworthy in relation to the ECHR, which (unlike the ICCPR, for example, with its broad prohibition on 'arbitrary' detention[306]) provides explicit and exhaustive grounds of permissible detention which notably do not including security detention. Likewise, it found the safeguards of access to a 'competent body' applicable in IAC sufficient where it is not 'practicable' to afford the right to 'judicial review' normally applicable under the Convention.[307] The Court suggested it was 'interpreting' IHL and the Convention consistently, despite the facial clash between the two.[308]

A few points are noteworthy as regards the Court's approach to co-applicability and its significance. First, the judgment makes clear that the Convention is not displaced by these rules of IHL, but co-applies; the proposition that the Convention was essentially inapplicable in IAC, which was 'instead' governed by IHL, was rejected.[309] Secondly, each area of law informed the interpretation of the other – in interpreting the relevant rules of IHL, namely, the review by a competent body with 'sufficient guarantees of impartiality and fair procedure', the Court returned to Convention standards.[310] The ongoing interplay of the two sets of norms is therefore evident, in stark contrast to a simplistic displacement approach.

[305] Article 15. See the dissent on this suggesting the *only* proper way to alter Art. 5 obligations is derogation.

[306] The ICCPR prohibits 'arbitrary deprivation of liberty' and 'arbitrary deprivation of life' which, as the ICJ has noted, implies situations where detention or killing are not governed by IHL; *Legality of the Threat or Use of Nuclear Weapons* (n. 126), para. 25.

[307] *Ibid.*, para. 106.

[308] ECtHR, *Hassan v. United Kingdom* (n. 4), paras. 105–7.

[309] ECtHR, *Hassan v. United Kingdom* (n. 4), paras. 7, 86–8.

[310] *Ibid.*, para. 106.

Where the Court saw a clear conflict, however, it followed IHL. This might be seen as a *lex specialis* approach, but it is interesting that the Court does not use that language, and indeed suggests it may not be the most helpful frame of reference. This may have been influenced by third-party interveners' invitation to refrain from becoming embroiled in analysis of '*lex specialis*'. Instead, the Court adopted an (admittedly at times strained) 'interpretative' approach, within which it was necessary to 'accommodate so far as possible' IHL.[311]

The extent of controversy around the judgment is evident from commentary, but opposition is given its most powerful voice in a strident dissenting judgment of four judges.[312] Contending that the majority judgment's interpretative approach seeks to 'reconcile the irreconcilable', the dissent argues that the judgment in fact provides for the *effective* displacement of Article 5 protections in armed conflict.[313] It also asserts that the judgment risks rendering redundant the Convention's derogation provisions, noting compellingly that derogation could and should have been invoked by the government.[314]

Despite the controversies, the *Hassan* case is a significant shift for the European Court in giving effect to applicable law in armed conflict. It accepted the principle of co-application and where possible harmonious interpretation of the Convention and IHL, alongside willingness to grapple explicitly with IHL even when it has a decisive impact on the outcome in the concrete case. It promotes ongoing regard to both areas of law to limit departures from normally applicable law to those strictly justified by more specific rules of IHL.

The Court itself makes clear that its willingness to co-apply IHL in this way will arise only in limited circumstances, and its rationale in so doing raises questions for the future. First, it seeks to limit the scope and impact of this shift by noting that it applies only to IAC, and explicitly not to occupation or NIAC.[315] The sharp distinction the Court adopted between IAC and NIAC is open to question, however, particularly in the light of the narrowing of the gap between the bodies of law. As a matter of practice, the Court's distinction

[311] *Ibid.*, para. 104.

[312] Partly Dissenting Opinion of Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva, paras. 2–9, 18–19. See also, e.g., Lawrence Hill-Cawthorne, 'The Grand Chamber Judgment in Hassan v UK', *EJIL:Talk!*, 16 September 2014, available at: www.ejiltalk.org/the-grand-chamber-judgment-in-hassan-v-uk. Silvia Borelli, 'Jaloud v. The Netherlands and Hassan v. United Kingdom: Time for a Principled Approach in the Application of the ECHR to Military Action Abroad', *Questions of International Law* 16 (2015), 25–43.

[313] *Ibid.*, Partly Dissenting Opinion.

[314] *Ibid.*, Partly Dissenting Opinion, paras. 7–9.

[315] *Ibid.*, Majority Judgment, para. 104.

may mean that it will need to look in some detail at the difficult question of classification of conflicts in the future.

Secondly, the Court confirmed the impact of the arguments of the parties, in particular the position of States. It noted that this was the first case in which a respondent State had 'requested the Court to disapply its obligations under Article 5 or in some other way to interpret them ... in the light of [IHL]',[316] and went on to state:

> the provisions of Article 5 will be interpreted and applied in the light of the relevant provisions of international humanitarian law only where this is specifically pleaded by the respondent State. It is not for the Court to assume that a State intends to modify the commitments which it has undertaken by ratifying the Convention in the absence of a clear indication to that effect.[317]

This qualification also raises a number of questions, including whether and why the Court should not have regard to applicable law *proprio motu*, or where the other party (the applicants) or third-party interveners so request. The desire to hold States to their IHRL obligations unless they specifically invoke IHL is understandable, but it may also reflect erroneous assumptions (in stark contrast to the *Abella* decision where this survey started) that IHRL *always* provides the higher standards of protection.

A final question arguably of broader significance relates to the potential impact of the Court's approach on States' positions and practice in respect of IHL. It remains to be seen if the Court's emphasis might influence government positions in pleadings before the Court, and trigger greater transparency around applicability of IHL and classification of conflicts, with potentially significant implications.

IV. CO-APPLICABILITY AND INTERPLAY: HARMONIOUS INTERPRETATION, *LEX SPECIALIS* AND BEYOND

This section will highlight some of the major features of the way in which, in this author's view, co-applicability of IHL and IHRL should be understood. Several approaches emerge from and are consistent with the growing body of practice discussed in Section III.

The starting point for co-applicable norms, of particular significance in the co-applicability of IHL and IHRL, is harmonious interpretation (Section A,

[316] It noted that 'in *Al-Jedda* ... [the] Government did not contend that Article 5 was modified or displaced by the powers of detention provided for by the Third and Fourth Geneva Conventions'.

[317] ECtHR, *Hassan v. United Kingdom* (n. 4), para. 107.

below). In practice, however, questions may and often do arise as to the *prioritisation* of norms, notably in face of conflict, and how the determination as to priority can be made. This may in certain circumstances be through the vehicle of the '*lex specialis*' construct (Section B, below) or, increasingly, through an apparently more nuanced approach to co-applicability of primary and secondary norms (Section C, below). Finally, understanding co-applicability requires an appreciation of the principles of interpretation of international law and in particular human rights law (Section D, below), indicating that IHRL must be interpreted purposively, flexibly, contextually and effectively, in armed conflict situations as elsewhere.

A. *Harmonious Interpretation*

The starting point for an assessment of the relationship between IHL and IHRL is what has been called the theory of complementarity, which emphasises the scope for harmonious interpretation of the two bodies of law.[318] As one proponent of the view states: '[c]omplementarity means that human rights law and humanitarian law do not contradict each other but, being based on the same principles and values can influence and reinforce each other mutually'.[319]

An emphasis on harmonious interpretation appears throughout the jurisprudence of human rights courts referred to in the previous section.[320] It is supported by the fact that, as the International Law Commission has stated, '[i]n international law, there is a strong presumption against normative conflict'.[321] This drives those applying the law to seek an interpretation whereby all applicable norms can be co-applied and understood not in conflict but in harmony. In some areas this is relatively straightforward; in the many areas of IHL and IHRL where there is normative similarity, each can inform the substantially similar provisions of the other. This harmonious approach features

[318] Droege, 'Interplay between IHL and IHRL' 2007 (n. 21), 337.

[319] *Ibid*.

[320] E.g., IHL 'nourishing' the interpretation of the ACHR in *Sanchez v. Peru*; *DRC v. Burundi, Rwanda and Uganda* (n. 186); or, controversially, the *Hassan* case, which was framed similarly as consistent interpretation, reflecting general reluctance to acknowledge normative conflict.

[321] ILC, '*Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*', Report of the Study Group of the ILC, finalised by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682 (hereafter: 'ILC Report 2006'), para. 37. The report talks of interpretation as being about 'avoiding or mitigating conflict'.

strongly not only in the practice of human rights courts, but also in international criminal adjudication, or indeed the ICRC study on customary IHL.[322]

IHRL will more often provide the meat on the comparable, but skeletal, framework of IHL provisions; examples may include the meaning of humane treatment, fair trial standards affording 'essential judicial guarantees', the definition of slavery,[323] protection of family life[324] or health.[325] However, this will not always be so, and IHL will occasionally be more specific on some aspects, such as the right of family reunification or humanitarian assistance, for example.[326]

If we accept harmonious interpretation as a starting point, we also need to acknowledge where it ends, notably where norms conflict. As the ILC report notes, there is a 'definite limit to harmonisation'.[327] However, it also notes that harmonious interpretation should not be seen as automatically being ruled out by the existence of differing or potentially conflicting norms, if they may be reconcilable after a certain 'adjustment', without distorting the nature and purpose of the norms:

> Of course in such case, it is still possible to reach the conclusion that although the two norms seemed to point in diverging directions, after some adjustment, it is still possible to apply or understand them in such way that no overlap or conflict will remain . . . [This may be] through an attempt to reach a resolution that integrates the conflicting obligations in some optimal way in the general context of international law.[328]

As one commentator put it, while this approach 'may resolve apparent conflicts; it cannot resolve genuine conflicts'.[329] One question is, of course, what constitutes a 'conflict', which may embrace a direct conflict of obligations, where the two bodies pull States in conflicting directions, or a conflict of norms of a permissive nature, or indeed, perhaps, as regards the norms' purposes or objectives. The ILC report on fragmentation states that where:

[322] As the standards explored in Section II make clear, the criminal tribunals frequently interpreted IHL/ICL by reference to human rights standards, and the ICRC Customary law study refers also to human rights practice.

[323] *ICRC Customary Study* 2005 (n. 22), Customary Rule 94, 329–30.

[324] *Ibid*., Customary Rule 105, 379–83.

[325] See, e.g., Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press, 2009), 200, referring to APII the duty not to subject to treatment not specified by the State of health.

[326] *Ibid*., ch. 5. Moir recognises that on some issues IHL in IAC will be more specific, such as human experimentation. See further Section V examples.

[327] ILC Report 2006 (n. 321), para. 42.

[328] ILC Report 2006 (n. 321), para. 43.

[329] Christopher Borgen, 'Resolving Treaty Conflicts', *George Washington International Law Review* 37 (2005), 573–648 (605–6).

> the question of conflict arises regarding the fulfilment of the objectives (instead of the obligations) of the different instruments, little may be done to integrate the two and avoid conflict. In relation to certain issues even in face of conflict the question may well need to be addressed by way of contextual analysis of underlying purposes and principles.[330]

It is often noted that IHL and IHRL pursue similar but not identical purposes, and reflect overlapping but distinct principles (the principle of humanity and the principle of distinction being the most obvious examples of each). One question in deciding whether particular norms are reconcilable is therefore whether the norms in question in fact pursue different purposes or reflect different principles, as opposed to pursuing them in different ways depending on what may be assumed to be prevailing contextual realities.[331]

B. Lex specialis! *The Harry Potter Approach?*

As has been noted in the WTO context, 'the *lex specialis* principle is assumed to apply if "harmonious interpretation" turns out to be impossible, that is, to overrule a general standard by a conflicting special one'.[332] There is a difference of view as to whether *lex specialis* applies only where norms conflict, as opposed to also where one set of norms is more detailed and specific than the other, though it is in the face of irreconcilable conflicts that many see the importance of *lex specialis* coming to the fore.[333]

It was international adjudication – this time before the ICJ in several advisory opinions – that provided the oft-cited starting point for most discussions of co-applicability and the *lex specialis* principle. In the *Nuclear Weapons* Advisory Opinion, the Court endorsed the notion specifically in relation to the right to life in the context of armed hostilities,[334] finding in pertinent part that:

> [i]n principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be *determined by the applicable lex specialis*, namely, the law

[330] ILC Report 2006 (n. 321), para. 33. See also treatment of conflict as arising from 'preventing the fulfilment of the other obligation or undermining its object and purpose', para. 130.

[331] See *infra*, Section IV.E on the separate question of prioritisation, and whether a clear and specific norm can or should defer to a principle or purpose. See also Duffy, *War on Terror* 2015 (n. 7).

[332] ILC Report 2006 (n. 321), paras. 88–9; see also, ILC Articles on the Responsibility of States for Internationally Wrongful Acts, GAOR, 56th Sess., Suppl. 10, Art. 55(4).

[333] See, e.g., ILC Report 2006 (n. 321); Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation, Geneva, 1–2 September 2005, University Centre for International Humanitarian Law, available at: www.adh-geneve.ch/pdfs/3rapport_droit_vie.pdf (hereinafter: the Expert Meeting 2005), 19.

[334] ICJ, *Legality of the Threat or Use of Nuclear Weapons* (n. 126).

> applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life . . . *can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself*.[335]

While affirming the continued application of IHRL in armed conflict, the ICJ therefore found that it must be applied by reference to IHL as the 'directly relevant applicable law'.[336] Eight years later, the Court came to consider a broader range of human rights treaty obligations arising in occupation (to which IHL applicable in IAC applied), and referred to *lex specialis* in a somewhat more nuanced (if not entirely illuminating) way. In its *Wall* Advisory Opinion it recognised the need to consider norm by norm which area of law governed, as 'some rights [were] exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches'.[337]

The following year, in the *Armed Activities* case – the first contentious case to address the issue – the ICJ notably dropped the language of *lex specialis* altogether, stating simply that 'both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration'.[338] This suggested a more fluid interrelationship than the ICJ's earlier formulation of *lex specialis* (and certainly some approaches in State practice) might be understood to indicate, clarifying the concurrent and symbiotic role for both areas of applicable law.

The ICJ's formulation of the relationship as *lex specialis* has been and remains influential, and it undoubtedly remains a relevant, and probably still the dominant, approach. There are, however, also indications of trends away from reliance on *lex specialis* not only by the ICJ but also by other courts and bodies.[339]

[335] *Ibid*., para. 25 (emphasis added).

[336] *Ibid*., para. 35.

[337] ICJ, *Legality of the Consequences of the Construction of a Wall* (n. 122), para. 106.

[338] ICJ, *Armed Activities* (n. 122), para. 216, on alleged violations by the Ugandan military and agents during hostilities in the DRC.

[339] Remarks by Judge Sicilianos of the ECtHR at Leiden University, January 2017, suggesting the ICJ omission was deliberate. See also, Marko Milanovic, 'Norm Conflict, International Humanitarian Law, and Human Rights Law', in Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* 2011 (n. 6), 95–125. Droege, 'Interplay between IHL and IHRL' 2007 (n. 21), 338. Note that UNHRC, General Comment No. 31 (n. 190), outlining the applicability of IHRL in

This judicial shift may in part be explained by the different facts and processes before courts and bodies at any one time.[340] But it may also reflect a sensitivity to growing criticism of *lex specialis*, including among academics.[341] Critically, it may also be influenced by the overreaching reliance on IHL as a regime-wide *lex specialis* to negate the applicability of IHRL and 'strategically' avoid oversight[342] – by the United States on Guantánamo, rendition black sites, Iraq or Afghanistan, or by Colombia to avoid IACtHR jurisdiction – which has been robustly rejected, including by the relevant supervisory courts and bodies.[343]

Such overreaching approaches have caricatured, and exposed, some dubious assumptions concerning *lex specialis*. One is that it can operate on a regime-wide basis, rather than involving a determination as to which rule applies more specifically to the situation at hand on a norm-by-norm and situation-by-situation basis.[344] Despite its attractive simplicity, IHL cannot be seen as monolithically constituting *lex specialis*, just as normative conflict can arise only on the level of *particular norms* not of legal regimes as a whole. The prioritisation of norms cannot, moreover, be considered in abstract as it depends necessarily on context. As one commentator noted: '*lex specialis* is in some sense a contextual principle. It is difficult to use when determining conflicts between two normative orders *in abstracto*, and is, instead, more suited to the determination of relations between two norms in a concrete case.'[345] Another erroneous assumption is that IHL as opposed to IHRL always

armed conflict, was issued just a few months after the *Wall* Opinion, and notably did not utilise *lex specialis* terminology.

340 E.g., for the ICJ, the shift from right to life in hostilities (*Nuclear Weapons*), to broader rights issues. For human rights bodies, see Section II.B on how the facts and functions influence the approach.

341 Describing rejection of *lex specialis* as one of the few points of agreement between academics, see Paul Eden and Matthew Happold, 'Symposium: the Relationship between International Humanitarian Law and International Human Rights Law', *Journal of Conflict and Security Law* 14 (2009), 441–7. See also the *Practitioners' Guide* 2016 (n. 37); Milanovic, 'Norm Conflict' 2011 (n. 339); Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body' 2008 (n. 3), among others.

342 See Section I.

343 Section II and III.B, respectively.

344 Others arguing in favour of a case-specific approach, and noting that on occasion human rights rules may constitute *lex specialis*, include Noam Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict', *International Review of the Red Cross* 87 (2005), 737–54 (751). Some are concerned as to the practicality of a case-by-case approach: Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body' 2008 (n. 3), 562.

345 Anja Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: the Doctrine of *Lex Specialis*', *Nordic Journal of International Law* 74 (2005), 27–66.

provides the detailed and specific 'special rule' in times of armed conflict.[346] A third is that *lex specialis* operates to displace or trump the other law, which therefore becomes irrelevant.

Understood in this way, arguably the problems relate less to inherent difficulties with the concept of *lex specialis* than with its application in practice, to justify the displacement of one regime by another. But confusing and overreaching approaches to the concept may well have had the unintended consequence of contributing to a discernible movement away from framing the debate on interplay in terms of the *lex specialis* language.

C. Weighted Co-applicability and Prioritisation

An alternative approach to co-applicability draws on the strengths of *lex specialis* properly understood, while avoiding the pitfalls. Contextual co-applicability considers the particular context and identifies whether there are relevant co-applicable norms to be applied. Where necessary as norms conflict, greater weight is afforded to norms that are more specifically and appropriately directed to the particular context.

One example of such an approach, without reference to the *lex specialis* doctrine, is found in the *Practitioners' Guide to Human Rights in Armed Conflict*.[347] It emphasises an approach that begins with the factual circumstances on the ground. Leaving aside, of course, conduct with no nexus to the conflict (governed by IHRL as IHL does not apply), it considers first whether the conduct falls within what it calls an 'armed hostilities' or a 'security operations' framework.[348] The former will be 'primarily' governed by IHL, and the latter primarily by IHRL. Within a conflict either IHL or IHRL may provide the 'starting point' or the 'initial reference point with regard to the regulation of a particular situation'.[349] In general, the closer to active hostilities, the greater weight afforded to IHL and the further from them, the greater emphasis given to IHRL.

One strength of this approach, perhaps somewhat superficially, is that it avoids the use of a Latin term that sounds like a Harry Potter spell and creates an illusion of a magic solution. It is undeniable that some of the criticism concerning the lack of clarity around *lex specialis* arguably applies with just as

[346] Despite assumptions, IHL is not necessarily more specific in its content than IHRL, see, e.g., the rules on review of detention or remedy in Section V.

[347] *Practitioners' Guide* 2016 (n. 37).

[348] Arguably, these labels bring their own definitional problems, and these categories may not be necessary.

[349] *Practitioners' Guide* 2016 (n. 37), paras. 4.02–4.24.

much force to the 'law enforcement' and 'hostilities' paradigms and the associated weighted, context-dependent scale.

More importantly, it focuses on the need for a context-driven evaluation of facts, not assumptions, as to which rules more specifically address particular situations. This approach reminds us of the vast array of conduct within conflict that goes beyond active hostilities, to which the 'security framework' is more specifically and appropriately directed. It may also avoid controversies that have beset *lex specialis*,[350] including as regards whether it should be seen as a rule for conflict avoidance or conflict resolution, by placing less emphasis on normative conflict[351] or hierarchy of norms. Critically, it makes clear that there is no place for the regime-wide displacement approach to *lex specialis* noted in practice.[352] In contrast to the (misleading) presentation of *lex specialis* as an invitation to States to ignore their human rights obligations in armed conflict, prioritisation emphasises the continuing relevance of applicable norms.

D. Interpretative Approaches to IHRL of Relevance to Co-applicability

Finally, it is also relevant to bear in mind the influence of approaches to (and principles of) interpretation of applicable law. General principles of interpretation in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) call for interpretation in line with the ordinary meaning, purpose and context of a treaty, alongside other 'relevant rules of international law applicable in the relations between the parties'.[353] This reflects the increased focus on seeing international law as a 'system' that is coherent and not fragmented.[354]

In addition, specific interpretative approaches developed by human rights courts and bodies inform our interpretation of IHRL treaties.[355] Key

[350] Cordula Droege, 'Elective Affinities? Human Rights Law and Humanitarian Law', *International Review of the Red Cross* 90 (2008), 501–48; Jean d'Aspremont, 'Articulating International Human Rights and International Humanitarian Law: Conciliatory Interpretation under the Guise of Conflict of Norms-Resolution', in Malgosia Fitzmaurice-Lachs and Panos Merkouris (eds.), *The Interpretation and Application of the European Convention on Human Rights: Legal and Practical Implications* (Leiden: Martinus Nijhoff, 2013), 3–31.

[351] Martti Koskenniemi, *'Study on the Function and Scope of the Lex Specialis Rule and the Question of "Self-Contained Regimes"'*, ILC (LVI)/SG/FIL/CRD.1 (2004) and Add.1, at 4. The *Practitioners' Guide* 2016 (n. 37), by contrast is not framed in terms of conflict resolution.

[352] Explicitly rejected in the *Practitioners' Guide* 2016 (n. 37), para. 4.03.

[353] Article 31(3)(c) Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331. E.g., ECtHR, *Al-Adsani v. United Kingdom*, Grand Chamber Judgment of 21 November 2001, Application No. 35763/97, paras. 54, 55.

[354] ILC Report 2006 (n. 321), paras. 37–43.

[355] On human rights interpretative principles generally, see IACHR, *Murillo v. Costa Rica*, Judgment of 28 November 2012, Case No. 12.361.

principles – of contextual interpretation, of 'effectiveness' and of interpretation in the light of the particular (protective) purpose of human rights treaties[356] – all seek to ensure that rights are interpreted so as to be 'practical and effective not theoretical and illusory'.[357] They have been relied upon to avoid 'vacuums of protection', but also to ensure that treaties do not pose an impossibly onerous burden on States. Evolutive interpretation ensures that human rights treaties are 'living instruments' that evolve over time in line with the changing realities they are bound to address.[358] Finally, as already suggested above, there is growing recognition of the need for an outward looking 'holistic' interpretation of human rights provisions as part of a broader body of international law,[359] and in the light of the practice of other courts and bodies.[360] Openness to IHL specifically is therefore simply part of a broader phenomenon of holistic interpretation of relevant international law.

The various principles of interpretation of IHRL seek to ensure its relevance, flexibility and effectiveness. They ensure that IHRL is not applied in an abstract way, but in context, in the light of unfolding realities, in a manner capable of effective application and in the light of other applicable norms. Such an approach to the interpretation of each body of applicable law can contribute to ensuring sensitivity to challenging contexts and the need to develop in the light of one another. As we will see in relation to specific issues in Section V, this approach to interpretation is also contributing to a narrowing of the gaps between IHL and IHRL.

E. Conclusions on Contextual Co-Applicability: Norms and Context

The following section suggests certain core aspects of how co-applicability should be understood today. It reflects the practice in Section III, and draws on

[356] The Inter-American system also refers to the '*pro homine*' principle in that 'if in the same situation both the American Convention and another international treaty are applicable, the rule most favourable to the individual must prevail'; IACHR, 'Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism', 13 November 1985, Advisory Opinion OC-5/85. Cf. IACtHR, *Cruz Sanchez v. Peru* (n. 272).

[357] ECtHR, *Marckx v. Belgium*, Judgment of 13 June 1979, Application No. 6833/74; IACtHR, *Barrios Altos v. Peru*, Judgment of 14 March 2001, IACHR Series C, No. 83.

[358] The content of human rights evolves over time; see, e.g., ECtHR, *Selmouni v. France*, Judgment of 28 July 1999, Application No. 25803/94; ECtHR, *Christine Goodwin v. United Kingdom*, Judgment of 11 July 2002, Application No. 28957/95; IACHR, *Murillo v. Costa Rica* (n. 356).

[359] See, e.g., *Al-Adsani v. United Kingdom* (n. 353); IACHR, *Murillo v. Costa Rica* (n. 355).

[360] Courts having regard to parallel approaches of other courts to similar issues is now commonplace. See generally, Duffy, *Strategic Human Rights Litigation* 2018 (n. 25), ch. 2 on 'trans-judicial dialogue'.

the approaches to interpretation and interplay in Section IV. In essence, it requires an approach that carefully identifies all relevant applicable norms, interpreted and (co-)applied in context.

1. A Norm-(by-Norm) and Context-(by-Context) Analysis

The rejection of regime-wide *lex specialis* has already been underscored. Both a *lex specialis* analysis, properly understood, and the alternative 'weighted prioritisation' approach entail the careful evaluation of two factors – context and rules. The prioritisation of conflicting norms must be resolved norm by norm in the light of the particular situation and context.

These approaches combine two conceptually quite distinct considerations: one is based on contextual relevance or appropriateness, on the one hand, and the other on the clarity and precision of the norms, on the other. The first places the emphasis on the rules that are most closely directed to and better able to 'take account of particular circumstances', or 'regulate . . . the matter more effectively'.[361] The second refers to the rules the content of which more 'concretely', 'definitely', 'directly' and 'with clarity' address the issue at hand.[362] While different approaches to interplay emphasise one or the other, both are required for an analysis of co-applicability. The *Practitioners' Guide* weighted co-applicability may start with considering the specific factual context and circumstances but, as practice attests, the exercise depends on their *being* identifiable co-applicable norms.[363] Likewise, *lex specialis* seeks the norms more *specifically* directed to the conduct and *context* in question.[364]

As the examples in Section V illustrate, it is impossible to determine co-applicability without regard to the identification of all applicable norms and a determination of how they can be interpreted and applied in particular contexts. Neither the careful identification of applicable norms, nor their interpretation in context can be neglected.

[361] ILC Report 2006 (n. 321), para. 60. Note also differences of view set out in Expert Meeting 2005 (n. 333), 19–20: some emphasised specific content and others context, i.e., which law was 'designed for the given situation'.

[362] ILC Report 2006, *ibid.*, notes that 'sensitivity to context, capacity to reflect State will, concreteness, clarity, definiteness' are all relevant to assessment of and operation of the *lex specialis* principle, stating that '*[n]o general, context-independent answers can be given to such questions*'.

[363] E.g., discussion of the *Hassan* approach arising in IAC not NIAC, and Section V.

[364] See NIAC, at Sections III.B and V.A. See also Art. 55 of the International Law Commission's (ILC) draft articles on State responsibility, setting out a minority view that the *lex specialis* norm will be the one with 'more specific content'.

2. Identifying the *Particular* Context within the Conflict

What is also clear and common to either approach is that the analysis has to be made on a situation-by-situation basis, taking into account the particular factual context. It is not so much the existence or not of an armed conflict that provides this context, but the particular *situations* arising within the broader armed conflict to which specific IHL norms may be more specifically addressed.

Some of the assumptions regarding IHL as generally providing the *lex specialis* are based on the attention dedicated to the right to life in active hostilities or security detentions in IAC, where IHL provides direction. But the assumptions are further strained in many other situations in which the military engages, most obviously in occupation, for example, where their functions, and the context which need not involve clashes at all, may be more akin to the sort of situation IHRL was directed towards. IHL standards may also be less appropriate, as human rights bodies have reflected, in scenarios where the State's role, and the level of control it exercises, may have more in common with law enforcement than conduct of hostilities. This has generally been true for some hostage-taking situations arising in the broader context of armed conflict, though the particular degree of control in the particular context will also be relevant.[365] It is clear that the analysis of co-applicable law depends on a broader range of contextual factors than simply the existence of armed conflict or indeed the nature of that conflict.

3. The Type of Conflict as (Only) a Factor?

It is suggested that the nature of the conflict, while relevant, is not a determining contextual factor as regards the prioritisation to be afforded to IHL or IHRL. In practice, it may be more often the case that in situations of occupation, or NIAC within the State's own territory, where the occupying State is responsible for ensuring the full range of civil, political, economic and social rights, for example, and has an active law enforcement role, that IHRL assumes particular relevance. IHL may indeed not be relevant at all to many incidents not linked to the conflict.

Moreover, particular questions arise as to the extent of IHL as *lex specialis* in NIACs where it may not be clear whether there *is* an applicable norm of IHL at all. A norm- and context-specific determination requires looking beyond the

[365] UNHRC, *Camargo v. Colombia*, 31 March 1982, Communication No. 45/1979; or ECtHR, *Finogenov v. Russia* (n. 292); but cf. the particular context drawing the Court to IHL in the IACHR, *Cruz Sanchez v. Peru* (n. 272).

nature of the conflict to the facts on the ground and the relevant law applicable to the particular situation.[366]

4. Identifying Specific Norms (and the Sound of Silence?)

Obvious challenges arise in relation to identifying applicable norms in NIAC situations, given the relative normative weakness for this type of conflict. This may be true of targeting,[367] and *a fortiori* detention in NIAC, where there may be no clear and explicit rules as highlighted in Section V. If there is no norm specifically directed to the situation, there is no *lex*, and presumably no *lex specialis*, and no norm to take priority over another.

Difficult questions may, however, arise as to the significance of treaty silence and the implications for co-application.[368] It might be argued that even in the absence of rules, one body of law may have underlying *principles* that govern a customary law, or inform treaty interpretation. Working out whether there is in fact law in relation to a particular situation under IHL, and under IHRL, is not always straightforward, but a crucial challenge to be met. Finally, either IHL or IHRL may be the primary, or more specific, norm in armed conflict situations.[369]

It has been noted that in international law 'nothing indicates which of two norms is the *lex specialis* or the *lex generalis*, particularly between human rights law and humanitarian law'.[370] As noted above, while IHL is often directed more specifically towards hostilities, IHRL may be more specifically directed to particular types of operation within the broader conflict. Each body of law may provide rules that are more specific, detailed and targeted to particular scenarios.[371]

5. Ongoing Relevance and Influence of Both Norms

A final observation relates to the consequences of one norm assuming priority for the other co-applicable norm. As noted above, one disadvantage of the *lex specialis*

[366] Lubell, 'Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate' 2007 (n. 32), 748, speaks to the lack of clear rules on targeting 'participants' in NIAC.

[367] *Ibid*.

[368] See e.g., *Practitioners' Guide* 2016 (n. 37), para. 4.67, noting a 'gap may be a deliberate omission'.

[369] Prud'homme, '*Lex Specialis*: Oversimplifying a More Complex and Multifaceted Relationship?' 2007 (n. 32), 385.

[370] Droege, 'Interplay between IHL and IHRL' 2007 (n. 21), 338.

[371] Consider, e.g., provision of humanitarian assistance, detention rights, repatriation or due process guarantees where each body may lend specific provisions of relevance.

language is that, on a narrow and rigid approach to what it means, it has appeared to provide the exclusive basis for determining the matter, with the other norm effectively displaced. On the stronger view, there remains an ongoing role for the other body of norms. It is suggested that while judicial practice drives in both directions, evolving practice supports the view that both bodies of law co-apply and interrelate on an ongoing basis. The dynamic interrelationship means that such norms may be further 'in the background', but potentially still relevant to the interpretation of the priority norms.[372] This ensures that the human rights norms are not set aside to a greater extent than justified, consistent with the principle of IHRL that permissible restrictions on rights should be no more than necessary.[373] It also meets the objectives of harmonious interpretation as far as possible, minimising and mitigating conflict on an ongoing basis, as set out at the start of this section.[374]

Both IHL and IHRL are applicable in armed conflict situations. Giving meaningful effect to co-applicability means considering applicable norms in the particular contexts; while norms from one or the other area of law may take precedence, both remain applicable and potentially relevant. In this framework, co-applicability provides a basis for a comprehensive and dynamic approach to the law governing armed conflict. It also poses undoubted – and unavoidable – challenges for those seeking to give effect to the law, not least for the courts and bodies before whom, increasingly, these matters fall to be determined.

V. EXAMPLES OF INTERPLAY AND OUTSTANDING QUESTIONS

This section examines what the different approaches to interplay mean in practice by highlighting State practice, adjudicative responses, and the issues, challenges and controversies arising in relation to particular contentious issues. In some areas it also demonstrates how IHL and IHRL may be moving closer together through legal and practical developments.

[372] See, e.g., Sassòli and Olson, 'The Relationship between International Humanitarian and Human Rights Law where it Matters' 2008 (n. 118); see also the *Hassan* case on procedural safeguards (n. 4).

[373] Section IV; specific IHL rules have led the Court's analysis, but IHRL has remained relevant to its interpretation, e.g., IACtHR, *Cruz Sanchez v. Peru* (n. 272); *Bámaca v. Guatemala* (n. 258); ECtHR, *Hassan v. United Kingdom* (n. 4).

[374] ILC Report 2006 (n. 321), para. 37; see also Sassòli and Olson, 'The Relationship between International Humanitarian and Human Rights Law where it Matters' 2008 (n. 118).

A. Detention (and Review of Lawfulness) in Non-International Armed Conflict?

Much controversy, and considerable litigation at the national and international levels, has been dedicated to challenging the lawful basis of detention and, in particular, the procedural safeguards to which 'security detainees' are entitled (and whether it includes judicial review).[375] As discussed in Section II, many detentions pursuant to the putative 'conflict with Al-Qaeda and others' were not related to a genuine armed conflict, and as such no issue of IHL should arise. Lawfulness and safeguards fall to be determined by reference to IHRL, which applies to those who are detained by – therefore under the control of – the State, where operating at home or abroad.[376] However, where detainees *have* been captured or detained in the context of IACs, and in particular NIACs,[377] multiple questions arise concerning the applicability and interplay of IHL and IHRL.[378]

Three litigation processes, before different fora, expose how IHL standards have been invoked by States in various contexts in support of the argument that IHRL procedural protections did not apply, giving rise to differing judicial responses.

A first set of cases emerges from US courts. While the US Supreme Court in the 2008 *Boumidiene* case famously found persons detained at Guantánamo Bay (pursuant to a NIAC) were entitled to *habeas corpus*,[379] the application of *habeas* to detainees held in Afghanistan has thus far been denied.[380] One of the grounds for this was that detention in a zone of 'active combat' rendered *habeas* review impracticable. In the *Maqaleh* litigation, petitions for *habeas* relief were brought by applicants who claimed to have been captured outside Afghanistan, far from combat zones, and transferred *into* the Baghram Air Base military prison in Afghanistan for imprisonment.[381] The Federal District

[375] The question of whether such detention is lawful at all is also controversial, but is arguably 'implicit' in IHL as a corollary of the right to use force. See, e.g., Sivakumaran, *The Law of Non-International Armed Conflict* 2012 (n. 58), 303.

[376] See Section II.C, geographic scope, citing, e.g., *Al-Skeini v. United Kingdom* (n. 137) or IACHR, *Precautionary Measures in Guantanamo Bay* (n. 208).

[377] As noted below, NIACs raise particular uncertainty given the lack of explicit IHL.

[378] The classification of some conflicts has changed mid-course; see, e.g., Afghanistan and Iraq, Duffy, *War on Terror* 2015 (n. 7), ch. 6.

[379] US Supreme Court, *Lakhdar Boumediene et al., Petitioners v. George W. Bush, President of the United States et al.* 553 US 723 (2008). See Duffy, *War on Terror* 2015 (n. 7), ch. 8.

[380] US Court of Appeals for the District of Columbia Circuit, *Al-Maqaleh et al. v. Gates et al.*, Case No. 09-5265, decided on 21 May 2010.

[381] US Court of Appeals for the District of Columbia Circuit, *Al-Maqaleh v. Gates* case, *ibid.*: the applicants alleged capture in Thailand, Pakistan and elsewhere outside Afghanistan, far from hostilities.

Court judge ruled that as these detainees were not *captured* in an area of war, they had the right to challenge their detention (although others that had been captured in Afghanistan and held there did not). However, the Federal Appeals Court for the District of Columbia overturned the decision. As the site of *detention* was in a 'theatre of active military combat',[382] and there were 'practical obstacles'[383] in overseas detention, the detainees had no constitutional right to challenge their detention in a US court.

The applicants sought review based on new evidence. This included evidence of the government's intent to evade the writ of *habeas* and hold them indefinitely by transferring them into Baghram. It also included evidence contesting that logistical difficulties at Baghram in fact rendered *habeas* review infeasible, and of the inadequacy of the alternative procedures advanced. Rejecting the applicants' claim, the Court reiterated that Baghram, unlike Guantánamo, lies in an 'active theater of war'.[384] It appeared to acknowledge that, with sufficient resources, *habeas* petitions may indeed be entertained at Baghram, but that it would not 'divert efforts and attention from the military offensive abroad to the legal defensive at home'.[385] The Supreme Court declined to exercise jurisdiction.[386]

The net effect – years after the 'historic victory' of the *Boumidiene* Supreme Court judgment finding Guantánamo detainees had the right to *habeas corpus* – is a judicially endorsed void to which detainees captured anywhere in the world could be deposited to avoid judicial oversight.[387] The first instance District Court decision also signalled the potential of the judicial role to look past the formal question of an armed conflict to the reality on the ground, the feasibility (or not) of *habeas* and the State's motivation, including implicitly whether the context of 'active hostilities' was being exploited to avoid judicial review. But as this was overturned, the case may suggest that even if individuals are transferred *into* a conflict zone, and even if *habeas* is

[382] *Ibid.*, 4.
[383] *Ibid.*, 22.
[384] US Court of Appeals for the District of Columbia, *Amanatullah v. Obama* and *Hamidullah v. Obama*, Case No. 12-5404, 24 December 2013, 31.
[385] *Ibid.*, 28. For all four judgments, see Rehan Abeyratne, 'Al Maqaleh and the Diminishing Reach of Habeas Corpus', *Nebraska Law Review* 96 (2016), 146–93.
[386] On 23 March 2015, the US Supreme Court granted *certiorari* and disposed of the *Al Maqaleh v. Hagel* case.
[387] Both the extraterritorial issue and armed conflict are at play. See the US Court of Appeals for the District of Columbia, *Al-Maqaleh* case, where the Court stated that 'the *Boumediene* analysis has no application beyond territories that are, like Guantánamo, outside the *de jure* sovereignty of the United States but are subject to its *de facto* sovereignty'.

still feasible, invoking the 'theatre of war' argument provides a pretext to deny rights protections.[388]

A second group of cases arose from detentions by the UK forces abroad.[389] As discussed previously (Section IV), in *Hassan v. UK* the ECtHR for the first time took a close, direct and open look at IHL, and found that where there were explicit IHL rules governing detention invoked expressly by the State, IHRL had to be 'interpreted' in line with IHL. The Court notably emphasised, however, that its approach would have been different in a NIAC.

Which takes us naturally to the cases in which this very issue of detention in NIAC came before the UK courts, culminating in the *Serdar Mohammed* case.[390] The English courts found that there was no lawful basis for the applicant's detention by UK forces in the NIAC in Afghanistan. Absent a clear rule of IHL authorising and regulating detention, IHRL governed, and, absent derogation, there was no lawful basis. On appeal, the Supreme Court found a different lawful basis for detention in Iraq (namely, that of the Security Council, so the lawfulness of detention under NIAC was rendered moot).[391] The approach of the courts in the *Serdar Mohammed* case is therefore more instructive for present purposes than its outcome.

The starting point in relation to the power to detain was a pragmatic contextual one. It was recognised, for example, that 'whether or not it represents a legal right, detention is inherent in virtually all military operations of a sufficient duration and intensity to qualify as armed conflicts, whether or not they are international', which had to 'have a bearing on the interpretation' of relevant law.[392] However, the Court of Appeal ultimately could not find sufficient consensus on the right to detain under customary IHL.[393] Although in this case the issue was rendered moot by the finding of an implied power to detain derived from Security Council resolutions, a shadow was cast over detention in NIAC for future clarification. But it is also important that,

[388] US Court of Appeals for the District of Columbia, *Al-Maqaleh v. Hagel* case, *Amanatullah v. Obama* case and *Hamidullah v. Obama* case (n. 384). The Appeals Court Decision, para. 25, suggested that its decision may have been different if the applicants had been transferred deliberately to preclude judicial oversight.

[389] From a long line of cases concerning detention by UK forces overseas, a few (ECtHR, *Hassan v. United Kingdom* (n. 4); UK Supreme Court, *Al-Waheed and Serdar Mohammed* case (n. 96); ECtHR, *Al-Jedda* and *Al-Skeini v. United Kingdom* (n. 137)) are discussed here.

[390] UK Court of Appeal, *Serdar Mohammed and Others v. Secretary of State for Defence*, 30 July 2015, [2015] EWCA Civ 843; *Al-Waheed and Serdar Mohammed* case (n. 96).

[391] UK Supreme Court, *Al-Waheed and Serdar Mohammed* case 2017 (n. 96).

[392] UK Court of Appeal, *Serdar Mohammed* case 2015 (n. 390); UK Court of Appeal (Civil Division), *Rahmatullah v. MoD*, Judgment of 30 July 2015, [2015] EWCA Civ 843, para. 15.

[393] *Ibid.*, para. 14.

although there was an alternative lawful basis for detention, the procedural safeguards under the ECHR continued to apply and had been violated.

The judgment (and several concurring and dissenting separate opinions) is an indication of the growing engagement of national courts with issues of interplay, cross-referring between IHRL, IHL and the law on peace and security. It also shows how, relying on the ECHR's *Hassan* approach, the Court sought ways to reach an 'accommodation' between relevant areas of co-applicable international law.[394] It would not, however, read into IHL powers and procedures that were not there in respect of NIACs, nor ultimately dispense with judicial guarantees for detainees.

The case also reveals shadows of what has been described as 'background political concerns that … pervade the judicial approach in this case'.[395] Whether or not it did or should shape its approach or the outcome, Lord Wilson expressed his 'relief' to have avoided a conflict between security measures and human rights in a way that might have brought the convention 'into international disrepute'.[396]

The case reserves the question for the future; by which law, and which approach to interplay, should we consider the extent of detainee's entitlement to *habeas* review under international law? Is it IHRL with its clear right to judicially challenge lawfulness before an independent court, or IHL?

If the conflict were international, there would be explicit and clear rules of the Geneva Conventions III and IV – on review procedures for POWs and civilians detained for imperative reasons of security – as *Hassan* attests.[397] By providing for review by an 'appropriate court *or* administrative body', Geneva Convention IV accepts that judicial review is not always appropriate or possible, while implicitly reflecting its importance where the particular context means that it is. But for NIAC, there are no specific IHL treaty provisions on challenging lawfulness at all.

A separate question that must be asked is whether a new *customary* norm of IHL has arisen for NIAC, though the *Serdar* case may suggest otherwise. The prohibition on arbitrary detention in general has been described as customary law in either type of conflict, but it is noteworthy that the ICRC commentary

394 UK Supreme Court, *Al-Waheed and Serdar Mohammed* case 2017 (n. 96), para. 59, and critique in Fiona Ni Aolain, 'To Detain Lawfully or Not to Detain: Reflections on UK Supreme Court Decision in Serdar Mohammad', *Just Security*, 2 February 2017, available at: www.justsecurity.org/37013/detain-lawfully-detain-question-reflection-uk-supreme-court-decision-serdar-mohammed.

395 *Ibid.*

396 Lord Wilson in UK Supreme Court, *Al-Waheed and Serdar Mohammed* case 2017 (n. 96), para. 134.

397 See e.g., Art. 5 Geneva Convention III and Arts. 43 and 78 of Geneva Convention IV.

when focusing on NIACs looks to human rights law to flesh out the meaning of non-arbitrariness.[398] Practice will continue to develop in this field and the law may evolve with it. But until it does, and while neither treaty nor customary IHL makes any specific provision, there is no norm of IHL or issue of co-applicability, still less normative conflict.

One alternative approach that has been suggested is the application by 'analogy' of law applicable in IAC.[399] But there is reason to doubt that there is any principled legal basis for 'analogising' rules that apply in IAC in the context of NIAC to effectively displace binding rights and obligations under IHRL.[400] Moreover, if IHRL is applicable, then there is not a 'gap' to be filled that might justify such application by analogy. Furthermore, courts and tribunals will inevitably have to rule on these issues based on applicable law, not the application of principles by analogy.

However one conceptualises interplay, the identification of applicable law is an inescapable prerequisite to considering interplay in context. On this basis, if IHL does not govern procedural guarantees, the primary framework must be IHRL; this finds support in case law and in the *Practitioners' Guide* which concludes simply that 'internment review is regulated by human rights law'.[401] However, in practice, this proposition continues to meet real resistance. This is often based, it seems, on a sense that respect for IHRL is inappropriate or unrealistic – which is not an argument as to where the law stands but rather as to how one feels about it.

Difficulties in meeting international obligations, including under IHL or IHRL, cannot per se render them inapplicable.[402] Moreover, and in any event, on the facts it may be that persons captured in an 'area of combat' *can* in fact be detained elsewhere (as indeed is reflected in IHL obligations) and safeguards

398 *ICRC Customary Study* 2005 (n. 22), Customary Rule 99, 344. By contrast to IACs, for NIACs, it is IHRL that is cited. Sivakumaran, *The Law of Non-International Armed Conflict* 2012 (n. 58), 303, notes 'both State and non-State armed groups are obliged to review detention through independent and impartial mechanisms', citing a domestic example by the Pristina District Court which found unlawful detention by members of the KLA.

399 Sassòli and Olson, 'The Relationship between International Humanitarian and Human Rights Law where it Matters' 2008 (n. 118), 623.

400 See Kevin Jon Heller, 'The Use and Abuse of Analogy in IHL', in Jens David Ohlin (ed.), *Theoretical Boundaries of Armed Conflict & Human Rights* (Cambridge University Press, 2015), 232–85 (234), which argues that there is 'no basis in international law for taking rules of IHL that exist as a matter of convention and custom only in IAC and applying them in NIAC by analogy . . . ' He notes US courts' reliance on analogy to ill effect and without explanation.

401 E.g., ECtHR, *Hassan v. United Kingdom* (n. 4), and *Mohammad* cases (nn. 96, 390). *Practitioners' Guide* 2016 (n. 37), paras. 8.50–8.59.

402 Rene Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, 2002), 315.

afforded.[403] Likewise, the IHRL framework for its part often *can* and does adequately accommodate security situations and the implications for the right to liberty in many ways, including through derogation,[404] and its inherent flexibility to adjust to contextual realities.[405] It is routine for human rights bodies to ask whether or not the overall effect of the 'totality' of proceedings, in all the circumstances, sufficiently protected rights and afforded a meaningful opportunity to challenge, for example.[406]

Judicial review of the lawfulness of detention is not a right that can be dispensed with, even in situations of emergency, and the importance of prompt review to safeguard against arbitrariness and abuse, including torture, is plain.[407] This is not to deny a degree of flexibility as regards the nature and timing of judicial review; the determination of what constitutes the requirement of being brought before a judge 'as soon as practicable' is an inherently contextual analysis.[408] It remains to be seen how human rights courts would respond to genuine battlefield detentions, where the State provided independent but non-judicial review immediately due to genuine lack of immediate access to regularly constituted courts, and judicial oversight as soon as possible. The contexts in which the issue has arisen in practice have generally been quite different.

While the focus of controversy is on procedural guarantees during NIACs, developments have implications for procedures applicable in IAC too. IHL provides the normative starting point for the analysis based on specific IHL provisions and procedures. However, in interpreting and giving effect to the IHL framework, the more developed standards of IHRL remain relevant. This was seen clearly from the *Hassan* judgment (and *Serdar Mohammed*) where the basic guarantees of procedural overview by a 'competent body' fell to be considered by reference to benchmarks provided in IHRL. In this process much depends upon context. As the *Practitioners' Guide* has suggested, where

[403] Both Geneva Conventions III and IV contain such provisions on obligations towards detainees.

[404] Duffy, *War on Terror* 2015 (n. 7), ch. 7. Derogation is subject to safeguards and the essence of the right cannot be set aside.

[405] Section IV.D.

[406] See, e.g., jurisprudence of the ECHR on fair trial, e.g., ECtHR, *Brogan and Others v. United Kingdom*, Judgment of 29 November 1988, Application Nos. 11209/84, 11234/84, 11266/84, 11386/85.

[407] IACtHR, 'Emergency Situations', 30 January 1987, Advisory Opinion OC-8/87, Ser. A, No. 9; ECtHR, *Brogan v. United Kingdom* (n. 406); UNHRC, General Comment No. 8, Art. 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 29 July 1994, UN Doc. HRI/GEN/1/Rev.1, 8.

[408] E.g., ECtHR, *Khudyakova v. Russia*, Judgment of 8 January 2009, Application No. 13476/04.

individuals are detained far from hostilities, in situations where the State exercises a greater degree of control, greater weight is likely to be afforded to IHRL.[409] If so, even in IACs, where there are two sets of applicable norms under IHL and IHRL, where circumstances such as distance from hostilities make respect for the stricter guarantees of IHRL possible (including judicial review), at that point such review should be provided.[410]

A *contrario*, transfer *into* conflict situations by their captors, as in the *Baghram* cases referred to at the beginning of this section, cannot on any purposive, contextual or effective interpretation of law provide a basis to rely on the exigencies of the situation as a basis for denying such review. These cases are a reminder of the need for vigilance to ensure that illusory battlefield scenarios do not provide an opportunity to circumvent rights and avoid accountability.

B. Lethal Force and 'Targeted Killings'

The classic scenario in which 'the *lex specialis* of IHL' has long been invoked is in relation to the lethal targeting of combatants or persons taking a direct part in hostilities.[411] While not beyond dispute, IHL governs the targeting of individuals in IAC and NIAC.[412] The rules of IHRL and IHL are, moreover, plainly different on this issue, with the former prohibiting force that is 'more than absolutely necessary' and the latter providing more detailed rules of targeting based on the status of the individual.[413] The assumptions on which the rules are based are often cited as fundamentally different, notably the principle of distinction that underpins IHL and the universality of human rights protections. What then, if anything, is the continuing role of IHRL and interplay in the interpretation and application of the law on the lethal use of force in armed conflict?

The clearest manifestation of the tensions surrounding interplay in this area is the controversial question of whether, and if so when, there is an obligation to capture rather than kill combatants or persons who are otherwise legitimate

[409] *Practitioners' Guide* 2016 (n. 37), para. 440.

[410] See, e.g., ECtHR, *Hassan v. United Kingdom* (n. 4) paras. 106, 109, on the relevance of 'context'.

[411] See ICJ, *Nuclear Weapons* (n. 126); David Kretzmer, 'Rethinking the Application of International Humanitarian Law in Non-International Armed Conflicts', *Israel Law Review* 42 (2009), 8–45.

[412] Sivakumaran, *The Law of Non-International Armed Conflict* 2012 (n. 58), 336 and ch. 9, noting whether international law regulates use of force in NIAC has long been disputed.

[413] As noted, under IHRL the use of force must be 'no more than absolutely necessary'.

objects of attack. Some interesting emerging approaches, from limited practice to date, are worthy of note.

An oft-cited national decision was the Israeli Supreme Court seminal 'targeted killings' judgment,[414] which found that while civilians lose their immunity from attack for as long as they participate in hostilities,[415] where their arrest was feasible in all the circumstances and posed no risk to the opposing party, lethal force would be unlawful.[416] More recently, the ICRC Guidance on Direct Participation in Hostilities adopted a broadly similar approach.[417]

The Israeli Court and the ICRC Guidance began with identifying relevant rules, while reflecting the importance of context to their interpretation and application. Within the broad context of armed conflict, there are certain factual scenarios closer to IHRL than to IHL; whether operations unfold in the supermarket versus the battlefield may make a difference to lawful responses. The Supreme Court adopts language drawn over from the human rights world, and is often cited in support of mutual influence of IHRL and IHL. It is open to question, however, to what extent these developments involve the co-application of IHRL and IHL, or the progressive interpretation of IHL itself – of military necessity and, in the ICRC commentary, of humanity.[418]

Similarly, as noted in Section IV, human rights courts and bodies have, often implicitly, begun with IHRL; they have, however, interpreted it in the light of IHL in the context of high-intensity hostilities.[419] Where capture instead of killing was possible, and lethal force avoidable, this had to be done 'before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted'.[420] The issue has also been considered in a comparable, but somewhat more abstract, way by the African Commission and the former

[414] Public Committee Against Torture in Supreme Court of Israel, *Israel v. Government of Israel*, 13 December 2006, Case No. HCJ 769/02.

[415] *ICRC Customary Study* 2005 (n. 22), Rule 6 applicable in IAC and NIAC; Melzer, 'Guidance on Direct Participation in Hostilities' 2009 (n. 177).

[416] *Ibid*.

[417] Melzer, 'Guidance on Direct Participation in Hostilities' 2009 (n. 177), recognises this may not work in a classic battlefield scenario involving high-intensity conflict.

[418] ICRC Guidance suggests that it would 'defy the basic notions of humanity' not to give an opportunity to surrender where there is no necessity for the use of lethal force.

[419] Section IV; see also *Practitioners' Guide* 2016 (n. 37), para. 5.41.

[420] UNHRC, Concluding Observations, Israel 2003 (n. 235), para. 15; discussion in Ryan Goodman, 'The Power to Kill or Capture Enemy Combatants', *European Journal of International Law* 24 (2013), 819–53, and the reply by Michael N. Schmitt, 'Wound, Capture, or Kill: a Reply to Ryan Goodman's "The Power to Kill or Capture Enemy Combatants"', *European Journal of International Law* 24 (2013), 855–61; Ryan Goodman, 'The Power to Kill

Special Rapporteur on Extrajudicial Executions.[421] He emphasises the need for a context-specific analysis of what IHL itself permits and requires by reference, *inter alia*, to 'military necessity', and where IHL is not in fact clear, regard should be had to IHRL.

The *Practitioners' Guide* suggests factors relevant to the relative weight afforded to IHL and IHRL rules. Sustained fighting and lack of territorial control are likely to lead to the 'hostilities' framework taking priority,[422] whereas for operations against a political leader of an armed group located – and controlling hostilities – from abroad, it may be that the human rights framework in fact 'reflects the realities on the ground'.[423] An assessment of these realities has to be made on a case-by-case basis.[424]

Each of these approaches, notably the judgment of a domestic court applying IHL, the UNHRC Observations applying the ICCPR, and the Special Rapporteur's report, take different starting points and approaches. The starting point for analysis of lethal force in armed conflict for most would be the specific and more permissive rules of IHL, though for courts whose competence derives from IHRL, the starting point may be its constituent instrument. But in either case, the other applicable law and principles may also be taken into account in the particular context to determine whether the lethal use of force can be justified in the light of all prevailing circumstances.

The examples may suggest even in respect of targeting in armed conflict where IHL and IHRL appear starkly different, that the outcome of the application of IHL might not be dissimilar to an application of IHRL. This may reflect the evolution and 'humanisation' of IHL, influenced by the parallel development of IHRL, and the 'contextualisation' of IHRL in certain armed conflict situations. So far as this approach continues to evolve, gaps should narrow and the issue of normative conflict in this field should become less significant.

or Capture Enemy Combatants: A Rejoinder to Michael N. Schmitt', *European Journal of International Law* 24 (2013), 863–6.

[421] See Alston, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' 2010 (n. 9), paras. 29–30. ACommHPR General Comment No. 3 on right to life, referring to IHL providing a lawful basis for lethal force when 'necessary from a military perspective' (n. 194, para. 32).

[422] *Practitioners' Guide* 2016 (n. 37), para. 5.20.

[423] Sivakumaran, *The Law of Non-International Armed Conflict* 2012 (n. 58), 371, though he notes this remains 'very much *lex ferenda*'.

[424] *Ibid.*, 372.

C. Cyberspace

The challenge for all law is to keep pace with reality. Part of the contemporary reality is that it is increasingly through cyberspace that attacks are launched, information obtained and rights restricted on a global scale. This raises a number of questions of applicability of both IHL and IHRL, and interplay, with potentially significant rule of law implications. Adjudication in this field is challenging and remains limited. The growth in practice and related concern surrounding 'cyber warfare' and excessive foreign surveillance suggest this is likely to change.

First, as regards IHL applicability, complex questions of applicability arise as to whether and when cyberattacks might themselves give rise to an armed conflict – when they amount to 'armed force between States', or when the intense or protracted 'violence' and 'organised' OAGs' requirements of NIACs might be met and, if so, what the geographic locus and scope of cyber armed conflict might be?

There is no intensity threshold for IACs, and the nature of the 'force' is not defined or qualified.[425] The fact that the law is not explicit on these emerging phenomena does not, of course, mean that existing rules cannot be applied. For example, cyber operations by one State on the territory of another that cause death, destruction or harm to property may quite readily be interpreted as giving rise to armed conflict and be governed by IHL. It would be debatable whether other cyberattacks, accessing information, damaging data or perhaps even exercising a degree of control over infrastructure, despite the profound impact on States and their citizens, would amount to use of 'force' between States under IHL. While it has been suggested that 'the law has no requirement for hostilities at all',[426] uncertainty as to where the line should be drawn for cyber operations by one State against another to trigger an armed conflict poses important challenges for the future.

For NIAC, the intensity threshold would plainly exclude random hackers. The rules governing the level of organisation of a group would render it doubtful whether even a sophisticated virtually organised group of hackers might themselves constitute a militarily organised armed group for the purposes of IHL applicability. At a certain point, the relevant intensity and organisational requirements may be met, but only by, for example, 'destructive

[425] Cf. the use of 'force' that might constitute an armed attack triggering the right to self-defence under the *ius ad bellum*, where a 'scale and effects' criterion is relevant: Haines, 'Northern Ireland 1968–1998' 2012 (n. 281), 461; Duffy, *War on Terror* 2015 (n. 7), ch. 5.

[426] Michael N. Schmitt, 'Classification in Future Conflict', in Wilmshurst (ed.), *Classification of Conflicts* 2012 (n. 2), 455–77, suggests detention may give rise to an IAC.

and sustained' cyberattacks by organised cyber groups.[427] Although the geography of conflict is less key to classification of conflicts than was once assumed, whether a conflict be waged 'virtually' such that the 'armed' group for the purposes of IHL might exist, organise and operate only in cyberspace, is also uncertain. What would the implications be for the ability to clearly define participants in the conflict, and potentially the over-inclusive resort to IHL? Particular challenges of proof as regards responsibility, organisation, nexus between individuals and the groups, and causation pose additional, albeit somewhat separate, challenges.[428]

Where each area of law *is* potentially applicable, the usual questions arise as to how they will co-apply. For the most part, with regard to cyberattacks within armed conflict, the relevant rules on targeting and legitimate military objects would apply.[429] But for cyber *surveillance or monitoring*, however, identifying applicable IHL is more challenging. The normative gap between IAC and NIACs once again rears its head. IHL in IAC has specific provision on seeking information on enemy forces and the State,[430] but NIAC has no such provision. Moreover, it has been suggested that, as IHL makes no provision on surveillance of civilians, for either type of conflict, foreign surveillance even during armed conflict would be covered by IHRL.[431] As usual, this would depend on an analysis of the factual operations and context, and applicable law.

Questions may also arise concerning the applicability of IHRL to extraterritorial cyber surveillance. As set out above, the exceptions to the 'primarily territorial' reach of human rights of treaties, carved out case by case, have tended to include detention, torture and, eventually, lethal use of force that brought persons under the 'physical power and control' of State agents. An issue thus far avoided by human rights courts[432] is whether for extraterritorial surveillance it will suffice that there is effective control over

[427] Schmitt, 'Classification', *ibid.*, 464 – only 'destructive' and 'sustained' cyberattacks by organised groups would meet NIAC criteria.

[428] *Ibid.*, 463.

[429] The type of attack, norms and context would indicate applicable IHL and relationship to IHRL. See, e.g., the *Practitioners' Guide* 2016 (n. 37), para. 15.12.

[430] Article 23, Hague Regulations Respecting the Laws and Customs of War on Land, Annex to the Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, 187 CTS 227.

[431] *Practitioners' Guide* 2016 (n. 37), para. 5.18.

[432] The ECtHR avoided the issue in the recent *Big Brother Watch and Others v. United Kingdom*, Judgment of 13 September 2018, Application Nos. 58170/13, 62322/14 and 24960/15, probably as the United Kingdom did not contest jurisdiction.

the information, and the ensuing impact on privacy and potentially other associated rights?[433]

Where treaties are silent, and case law falters forward file by file, soft law standards can have a vital role in suggesting authoritative interpretations of the law. A prime example is the OHCHR report 'Privacy in a Digital Age'.[434] The report suggests that obligations under the ICCPR extend to foreign surveillance, by virtue of which persons are brought within the State's 'authority'.[435] The recent UNHRC General Comment No. 36 similarly suggests that the ICCPR is applicable to those directly and foreseeably 'impacted' by the State's conduct, which resonates in the surveillance context. By appealing to basic principles, purposive interpretation that avoids protection gaps and 'incentives' to evade obligations,[436] a progressive approach to the applicability of human rights law to surveillance abroad is advanced. Case law in support of that view is, as yet, more elusive.

This issue reminds us of the challenges to the applicability of both IHL and HRL that may arise in adjusting to the contemporary realities of cyberspace. It suggests how apparent gaps in the law, or areas of uncertainty, can gradually be influenced through soft law standards, which may, in the fullness of time, be consolidated through practice of courts and tribunals, State practice, and customary law as practice unfolds.

D. *Investigation and Accountability*

Over the past two decades, IHRL has experienced a tidal wave of development in respect of accountability norms. The result is a detailed body of law setting out the existence of obligations to investigate and prosecute serious violations

[433] Surveillance implicates many rights: e.g., privacy, freedom of expression, right to property and, depending on how used, a host of others, e.g., life or torture. Office of the United Nations High Commissioner for Human Rights (OHCHR), 'The Right to Privacy in the Digital Age', Report, 30 June 2014, UN Doc. A/HRC/27/37.

[434] *Ibid*.

[435] See *ibid*., para. 32. Similar broad approaches are reflected in recent developments elsewhere. E.g., in the IACHR Advisory Opinion on Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), OC-23/18, IACtHR (ser. A), No. 23 (15 November 2017) (in Spanish), para. 81; and UNHRC General Comment No. 36 on the Right to Life, CCPR/C/GC/36, 30 October 2018, para. 36: 'This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.'

[436] *Ibid*., para. 33.

of human rights, and providing detail as to the content of these norms.[437] These duties are non-derogable in situations of emergency, and continue to apply in situations of armed conflict.[438]

IHL has, of course, not developed in the same way, due not least to the relative dearth of supervisory mechanisms and jurisprudential development. In some ways under IHL the existence of a duty to investigate violations is more controversial, though most scholars agree that such a duty exists.[439] On the other hand, unlike most human rights treaties which contain no explicit obligations in this respect,[440] the four Geneva Conventions actually specify the obligation to seek out and bring to justice those responsible for grave breaches.[441] Other provisions reflect specific obligations to investigate deaths of POWs or civilian detainees.[442] While these specific obligations relate to IACs, in relation to both IAC and NIAC it has been suggested that a parallel obligation under customary law may also have emerged.[443]

Both areas of law are therefore said to 'establish a general obligation to investigate suspected violations of the law under their respective legal frameworks', including through criminal investigations.[444] These obligations

[437] Investigation should be prompt, thorough, effective and independent, and provide the basis for individual accountability for serious violations. See, e.g., ECtHR, *Abu Zubaydah v. Lithuania*, Judgment of 31 May 2018, Application No. 46454/11; *Jaloud v. the Netherlands* (n. 198); *Cobzaru v. Romania*, Judgment of 26 July 2007, Application No. 48254/99, para. 68; IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, IACtHR Series C, No. 4; *Barrios Altos v. Peru* (n. 357).

[438] See ECtHR, *Al-Skeini v. United Kingdom* (n. 137), paras. 162, 164, referring to a long line of cases that arose in the context of 'difficult security conditions, including in a context of armed conflict'.

[439] Amichai Cohen and Yuval Shany, 'Beyond the Grave Breaches Regime: the Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts', *Yearbook of International Humanitarian Law* 14 (2011), 37–84; Michelle Lesh and Alon Margalit, 'A Critical Discussion of the Second Turkel Report and How It Engages with the Duty to Investigate Under International Law', *Yearbook of International Humanitarian Law* 16 (2013), ch. 6, 119–45 and ch. 7, 155–86; Michael Schmitt, 'Investigating Violations of International Law in Armed Conflict', *Harvard National Security Journal* 2 (2011), 31–84.

[440] Some IHRL treaties do specify the duty, e.g., CAT, UNPED, but general treaties, e.g., ICCPR, ECHR, ACHR, ACHPR, do not.

[441] Articles 49, 50, 129 and 146 of the four Geneva Conventions and Art. 85, API.

[442] Articles 121 and 131 GCIV.

[443] Claus Kreß, 'Universal Jurisdiction over International Crimes and the Institut de Droit international', *Journal of International Criminal Justice* 4 (2006), 561–85.

[444] *Practitioners' Guide* 2016 (n. 37), paras. 17.03, 17.05; for IHL the duty arises for grave breaches or war crimes.

overlap with the 'right of families to know the fate of their relatives', and with reparation rights, reflected in both.[445]

While the obligation to investigate is reflected in IHL, its scope and content is less clear. There has been some discussion, for example, as to whether only grave breaches are subject to a duty to investigate,[446] or a broader duty to investigate all IHL violations based on the duty to 'suppress',[447] and what are the prerequisites or benchmarks of investigation?

The starting point for co-applicability on this issue, unlike perhaps life or liberty, is then that both IHL and IHRL reflect the same principles and enshrine comparable if distinct rules – albeit ones that do not provide the same level of detail as to the content of the norm. This is therefore an area ripe for harmonious interpretation, whereby IHRL can help to clarify the precise nature of States' obligations to, for example, carry out a prompt, thorough, effective and independent investigation into alleged serious violations of IHL.[448] Perceived tensions with, for example, IHL obligations on commanders to report violations and thus to investigate (which would not meet the independence criteria), may be reconciled as far as this IHL duty sits alongside, not in place of and not to the detriment of, that under IHRL.[449]

Practice suggests considerable areas of mutual influence. Some decisions of human rights bodies have gone as far as to lend weight to the existence of such a duty under IHL itself. In *The Massacres of El Mozote and Nearby Places v. El Salvador*, the IACtHR upheld the obligation under IHL 'to investigate and prosecute war crimes',[450] while in *Gelman v. Uruguay*, amnesties for war crimes or crimes against humanity were deemed inconsistent with this IHL obligation, by reference to the ICRC Customary IHL study.[451] Similarly, the ECtHR Grand Chamber in *Marguš v. Croatia* (citing these Inter-American

[445] *ICRC Customary Study* 2005 (n. 22), Customary Rule 150. UN Basic Principles on Reparation (2005) applies to violations of IHL and IHRL, and provides another example of the role the UN can play in the cross-fertilisation between the two areas of law.

[446] Schmitt, 'Investigating Violations of International Law in Armed Conflict' 2011 (n. 439).

[447] Cohen and Shany, 'Beyond the Grave Breaches Regime: the Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts' 2011 (n. 439). OHCHR, 'International Legal Protection of Human Rights in Armed Conflict', 2011, UN Doc. HR/PUB/11/01, 81.

[448] Of these, the greatest resistance attends the duty of independent investigation, which is not a (common) feature of military investigations to date.

[449] E.g., *ICRC Customary Study* 2005 (n. 22), Customary Rule 153.

[450] IACtHR, *The Massacres of El Mozote and Nearby Places v. El Salvador*, Judgment of 25 October 2012, IACtHR Series C, No. 252, para. 286.

[451] IACtHR, *Gelman v. Uruguay*, Judgment of 24 February 2011, IACtHR Series C, No. 221, para. 210; *ICRC Customary Study* 2005 (n. 22), 692.

cases) referred to the duty to *prosecute*, albeit en route to the application of the ECHR.[452] The brief reference by the ECtHR Grand Chamber in *Al-Skeini v. UK* may lend some further weight to this view. The courts tend not to grapple in detail with this obligation, reflecting in part the general reluctance to engage with IHL in detail as outlined in Section IV and the broad consistency with relevant IHRL.

Conversely, IHL has influenced IHRL on issues such as the right to truth.[453] More broadly, the existence of a conflict and the applicability of IHL may have an influence on human rights standards in other ways. First in the circumstances that trigger the duty to investigate, not every loss of life in the context of hostilities requires investigation, for example, only those that create reasonable suspicion of a violation of IHL.[454] IHRL then provides benchmarks for effective investigation.[455] However, as human rights courts have made clear, in turn the practical realities of armed conflict must be taken into account, including obstacles or concrete constraints that may affect the speed or nature of the investigation.[456] This is seen concretely in the *Al-Skeini* and *Jaloud* judgments, which explicitly reflect such challenges and the need for some adjustment in the way the duty to investigate is discharged.[457]

The implication in this situation of co-applicability, and inherent flexibility, is well encapsulated in the Report of the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions:

> Armed conflict and occupation do not discharge the State's duty to investigate and prosecute human rights abuses … It is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate – this would eviscerate the non-derogable character of the right to life – but they may affect the modalities or particulars of the investigation. In addition to being fully responsible for the conduct of their agents, in relation to the acts of private actors States are also held to a standard of due diligence in armed conflicts as well as peace. On a case-by-case basis a State might utilize less effective measures of investigation in response to concrete constraints. For example,

[452] ECtHR, *Marguš v. Croatia*, Grand Chamber Judgment of 27 May 2014, Application No. 4455/10, para. 132; see also brief reference in ECtHR, *Al-Skeini v. United Kingdom* (n. 137).

[453] Droege, 'Interplay Between IHRL and IHL' 2007 (n. 21).

[454] Sivakumaran, *The Law of Non-International Armed Conflict* 2012 (n. 58), 373; this would lead to the obligation 'collapsing under its own weight'. *Practitioners' Guide* 2016 (n. 37), paras. 17.17, 17.21: incidents of 'possible war crimes' must be investigated also for individual criminal responsibility.

[455] *Practitioners' Guide* 2016 (n. 37), para. 17.22.

[456] ECtHR, *Al-Skeini v. United Kingdom* (n. 137), paras. 164–7.

[457] *Ibid.*, paras. 171–7; ECtHR, *Jaloud v. the Netherlands* (n. 198), paras. 157–228.

> when hostile forces control the scene of a shooting, conducting an autopsy may prove impossible. Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality . . .[458]

Co-applicability of IHL and IHRL obligations in this respect is of real practical import. There are many examples of States seeking to avoid carrying out independent investigations, or oversight of investigations, by arguing the applicability of IHL in displacement of IHRL duties. Where this amounts to the misuse of IHL to avoid accountability it is a perversion of that body of law's basic principles. Effective investigation and, where appropriate, individual accountability, are legal imperatives and not only policy options, but it is only through mechanisms available to individuals, not only to States, that the law can be given effect. Investigation is also a crucial vehicle to learn lessons from the past and contribute to non-repetition and greater respect for both areas of law, and the rule of law more broadly, in the future.

VI. CONCLUSION: LEANING IN

If the first line of defence against IHL has been to deny that it applies at all,[459] a further line of defence against accountability under IHL has been to deny the applicability of IHRL. Through its simplistic promotion as an alternative body of law displacing IHRL, IHL has been manipulated to circumvent rights protections and the oversight of international courts and bodies.

There is, however, no longer any reasonable doubt that, as a matter of law, IHRL applies in armed conflict, and that it does so alongside and in dynamic relationship with IHL. Both areas of law have developed considerably in relevant ways in the past 20 years. Both have evolved in their approaches to the scope of applicability *ratione materiae*, *personae* and *loci* in line with unfolding contextual realities.[460] In relation to both there remain areas where the law may be uncertain, or in flux, as it constantly struggles to keep pace with reality in the face of ever more complex and contested conflict scenarios, multiple actors, new methods and means of warfare, and the growing array of activity (within and beyond conflicts) in which States and the military engage around the world.

[458] UNHRC, 'Extrajudicial, Summary or Arbitrary Executions', Philip Alston, Report, 8 March 2006, UN Doc. E/CN.4/2006/53, para. 36.
[459] Section I.
[460] Section II.

Many factors and processes have contributed to the evolution to date, and will be decisive to further development. One of them is undoubtedly the dawn of an era of international adjudication. The international criminal tribunals made a crucial contribution on the scope of applicability of IHL through their evolving jurisprudence. The ICJ had a role in putting beyond dispute the applicability of IHRL in armed conflict, and the need to grapple with interrelationship. In turn, a proliferation of human rights adjudication now commonly addresses the nature and scope of States' human rights obligations abroad, including in armed conflicts, international and non-international, and interplay with IHL. The need to interpret human rights law contextually, in a way that renders it practical and effective, and holistically, as part of broader body international law, including IHL, are now recognised across human rights systems. This complements the role national courts increasingly play in the interpretation and application of international law. The future undoubtedly holds an increased volume of conflict-related adjudication before a growing architecture of courts and tribunals.

The contemporary landscape is therefore one that, normatively, institutionally and factually, reveals a certain, inescapable level of complexity. Borrowing a psychological term, it may be time to 'lean in' to this complexity, ignoring neither the challenges nor the opportunities that the evolving landscape represents. One thing on which my co-authors to this volume and I appear to agree is in relation to this complexity, which (as their chapters support) is not unique to, or necessarily a result of, the co-applicability of IHL and IHRL. It is inherent in the effective, contextual and holistic interpretation of each area of applicable law as well as their co-application.

Co-applicability of IHRL and IHL matters. It ensures that human rights can be protected to the greatest extent possible in armed conflict situations where they are most vulnerable, but in a manner that is capable of responding to the realities of conflict scenarios. It ensures avenues for redress internationally for victims through applicable IHRL, at least in respect of State responsibility, currently lacking internationally under IHL; as noted above and emphasised in Chapter 2, IHL may at times be as or more protective than IHRL, but the procedural disparity is inescapable.[461] Co-applicability means that international remedies complement and catalyse individual accountability for crimes derived from serious violations of

[461] Ziv Bohrer claims IHL would have been more protective than the ECHR as applied in ECtHR, *Hassan v. United Kingdom* (n. 4). This may be so, or the ECHR may not have been rigorously applied by the Court on that aspect of the case. Either way, the fact is a case based on IHL would never have been heard internationally.

both IHL and IHRL. It provides the potential to clarify the law in armed conflict as it arises in the context of real concrete situations and cases.

There is, however, also considerable wariness in relation to this unfolding landscape and its implications, which deserves reflection. Undoubtedly, challenges of a legal, political or practical nature (relating to capacity, fact-finding, training and resources, for example) face human rights courts and tribunals as they seek to give effect to co-applicability in practice. Some of the challenges – of interplay of legal regimes – are not new or unique to the IHL/IHRL relationship.[462] But with co-applicability of IHRL and IHL now a recognised legal fact, there is no choice but to grapple with what interplay means in practice.

There has been a sea change towards a more explicit and robust engagement with IHL by human rights courts and bodies; this trend will inevitably continue, and as it does, engagement should become more confident, informed and consistent. The fact is that, while the practice of human rights courts and bodies explored in this chapter has evolved greatly, it remains a young field. Too much practice to date has been opaque and faltering. In particular, it is imperative that human rights bodies address and determine the preliminary question of *applicability* of IHL. Among the most problematic features of past practice has been the reluctance to engage in any analysis of this fundamental question upon which (co-)applicable law depends. However politically sensitive the issue, dodging the question of whether there is a conflict at all, or taking it for granted based on what States say or fail to say, is untenable. The result has at times been overreaching application of IHL to violent exchanges not part of a conflict, and at others underreaching failure to have due regard to IHL in the determination of issues properly regulated by it in conflict situations.

Myriad factors have been identified that influence the approach of human rights bodies; some of these may be inevitable and appropriate, and others arguably more problematic. For example, human rights courts and bodies are naturally constrained by their own jurisdictional limitations, which they should not (and for co-applicability *need* not) exceed. This may change as the competence of some bodies expands obligations more broadly, or becomes more explicit in terms of IHL.[463] Recent practice across systems reflects a generally

[462] E.g., issues such as immunities and sanctions; see, e.g., ECtHR, *Al-Adsani v. United Kingdom* (n. 353) and Section IV on holistic interpretation.

[463] See Section IV, noting some treaties cover IHL and IHRL (CRC), some bodies have jurisdiction over violations under relevant treaties (e.g., African Commission/Court), some bodies expanded their own original jurisdiction (ECOWAS), while others (ECtHR, UNHRC, IACHR) are limited to adjudicating rights under particular treaties.

cautious awareness of these limits, such that courts and bodies now rarely 'apply' or find violations of IHL but interpret and apply IHRL in the light of it.

Likewise, beyond any jurisdictional strictures, the purpose and mandate of human rights courts and bodies, and the nature of proceedings, necessarily influences their approach to some extent at least. While theoretical discussions on approaches to interplay abound, it is worth reflecting on the extent to which, in practice, approaches to applicability depend on who asks, and who answers, the questions, and why.

The fact is that human rights bodies will naturally view the issue first through the prism of their own constituent instruments. The human rights starting point of the analysis of human rights courts may in turn lead them, generally, to take a strict approach to departure from normally applicable human rights standards (at least as far as IHL is seen to lessen protections as will often, but not always, be the case.). As IHRL is the generally applicable law, this starting point, and a rigorous approach to the circumstances in which IHL standard alters the outcome of the case, and ensuring it is no more than is justified under the co-applicable area of law, should not be problematic. What does matter is that there is a robust and nuanced approach to identifying and assessing applicable law, IHL and IHRL, and a willingness to grapple with sometimes difficult questions of what co-applicability means in relation to particular norms and contexts (see further below).

We have also seen how the pleadings of parties and politics play a role. Further careful consideration is due as to whether the positions of States should (as has been suggested by the ECtHR[464]) be determinative of the relevance of IHL standards. The politicisation and selectivity of conflict classification underscore the importance of the role of oversight bodies in these essential legal determinations. More broadly, while judicial 'relief' at avoiding politically sensitive issues of IHL may be understandable, the need to ensure it is not determinative goes without saying.[465]

Despite various formulations, and room for controversy, some things do now seem clearer as regards co-applicability, and need to be embraced by all those seeking to give effect to the law, including adjudicators.

Determining applicable law in an armed conflict depends not only on the existence or not of armed conflict, or its nature, but also on the identification of particular norms, their content and objectives, as they apply to a particular factual scenario within the conflict. As this chapter has shown, assumptions

[464] Section III, ECtHR, *Hassan v. United Kingdom* (n. 4).

[465] Section V, referring to judicial comments in the UK Court of Appeal, *Serdar Mohammed* case 2015 (n. 390).

about applicable law – which area provides norms more specifically targeted towards particular military activity, or which are more detailed or more protective – are best avoided.

Close attention to both identifying particular applicable norms and to context are essential. In particular (but not only), in NIAC there may be no clear norms of IHL in relation to a particular issue at all. There is then no co-applicable law (and obviously no normative conflict), and the applicable norms of IHRL govern. They will, of course, still need to be interpreted in a context-sensitive manner, perhaps informed by reference to the principles of IHL, to ensure that the legal framework does not impose impossible burdens on States, but this is distinct from co-applicability.

Where there *are* relevant norms from each area, hasty and simplistic conclusions on IHL as *lex specialis* must be resisted. The starting point is harmonious interpretation, for which we have seen ample scope and examples where co-applicable norms each inform the interpretation of the other. The limits of harmonious interpretation are also undeniable, where normative conflict cannot be ignored or interpreted away.

The relationship between these norms and context then becomes key in determining whether on the particular facts one or the other norm is more specifically directed to the situation. There is no simple formula, but a considerable body of practice explored in this chapter suggests factors that may determine the weight of norms from one area or the other. One is whether the context is one of 'active hostilities', in particular high-intensity conflict, as opposed to the many scenarios within conflict more akin to 'law enforcement' or other exercise of State power where human rights law is the more relevant norm. The level of *control* exercised by the State in the particular situation is another factor that, within conflict and in the event of conflicting norms, has provided a basis to afford greater prominence to IHRL standards.[466] Thus, in certain circumstances, even in relation to issues where the areas of law are seen to be irreconcilable – the right to life or detention – the control may be such that capturing rather than use of lethal force, or affording higher standards of judicial review than those required by IHL, may be possible in all the circumstances. Put differently, there may be no 'necessity' to depart from the generally applicable standards of human rights law in the particular context.

The case, norm and context-specific analysis that the law requires, explored in this chapter, means that simple solutions are, unfortunately, likely to prove elusive. As human rights courts turn to IHL, they should recognise that many of the perceived problems with co-application to date relate to the way

[466] Section III cases.

interrelationship has been simplistically framed and erroneously approached to justify the wholesale displacement of IHRL. While grappling more confidently and explicitly with IHL, they need to acknowledge that armed conflict and IHL applicability is no magic wand that automatically transforms the factual context or States' obligations. The danger of judicial endorsement of unduly narrow and rigid approaches to *lex specialis* to exclude human rights law are given graphic illustration in the chapter, such as in reliance on 'armed conflict' in Afghanistan to justify the creation of (another) black hole for detainees to be transferred to avoid judicial protection.

The challenges that arise have implications that go far beyond adjudicators. It is essential that all those giving effect to and affected by the law can foresee and conform their behaviour to it. The law needs to serve and protect potential victims but also members of armed forces on the ground, for whom there are implications for added vulnerability and criminal sanction if the requirements of the law are not met. Sufficiently accessible, clear and coherent parameters to applicable law are necessary for legal security and predictability, providing protection against arbitrariness; in other words they are inherent in the principle of legality.

At the same time, it has been noted that the law is not always straightforward, and the quest for predetermined solutions to all scenarios has been described as legal folly.[467] Indeed, normative and contextual complexity and the real challenges posed in armed conflict are not, as some might suggest, a feature of the applicability of IHRL or interplay. As we have seen repeatedly, the applicability of IHL itself raises myriad complexities.[468] It requires careful contextual analysis to ascertain the scope and reach of armed conflict, to identify applicable norms, and to understand how they should apply in any given scenario.[469] The problems reflect the essential challenge of giving effect to evolving, overlapping norms of international law in changing factual contexts. These challenges may be compounded by co-applicability, but they are certainly not born of it.

It is, however, imperative to continue to clarify the undoubtedly complex issues that arise regarding interrelationship in particular situations. The role of adjudication, significant as it may be, is not an alternative (still less a threat) to

[467] See, Iain Scobbie, 'Gaza', in Wilmshurst (ed.), *Classification of Conflicts* 2012 (n. 2), 280–316.

[468] Section II.

[469] As Section II makes clear, these range from when an armed conflict arises, be it from violence or cyber operations, to when the myriad, diverse groups engaged in violence globally might, when considered as a whole, be qualified as parties to such a conflict, the nature of the conflict(s) on the ground in places like Syria, the geographic scope of IHL, among many others.

myriad other processes through which law is developed. States have the key role, alongside other processes of international law and the role of bodies such as the ICRC, in clarifying principles governing the co-applicability of both bodies of law in theory and in practice.

An essential rule of law challenge is to marry up the approaches to applicable law by courts *ex post facto* and training on the law *ex ante*. There are two obvious dimensions to this. The first is more robust engagement with applicable law by international and national courts. The other is the duties of States to provide guidelines, training and support to those on the ground to clarify applicable law, including the interrelationship of IHL and IHRL in relation to particular norms and situations.

It is not, however, a solution to the complexity to apply IHRL or IHL in isolation, as if there were no other relevant applicable law, or to pretend that co-applicability is not now where the law stands. Such an approach was reflected for too long in the broad neglect of human rights norms in military manuals,[470] or the once myopic approach of human rights bodies to IHL.[471] Nor should controversies around the role of human rights bodies, and areas ripe for improvement, be manipulated by those motivated by effectively removing oversight in areas where it is most needed.[472]

This leaves us with little choice but to collectively 'lean in'. We need to grapple together with the normative and factual complexities of applicability of each area of law, and of co-applicability, in order to better understand, clarify and, as appropriate, develop the law. In an era of adjudication, we have reason to be cautiously optimistic about the potential for the law to be given greater effect, but realistic about the challenges.

[470] The *Practitioners' Guide* 2016 (n. 37), discussed in Sections III and V.

[471] Section III.

[472] Alice Donald and Philip Leach, 'A Wolf in Sheep's Clothing: Why the Draft Copenhagen Declaration Must be Rewritten', *EJIL:Talk!*, 21 February 2018, available at: www.ejiltalk.org/a-wolf-in-sheeps-clothing-why-the-draft-copenhagen-declaration-must-be-rewritten, noting the potential impact of proposals to create special 'separate mechanisms' to deal with cases arising from IAC to achieve a 'balanced caseload', divesting the Court of its current role in crucial litigation in conflict regions of Europe such as eastern Ukraine, Crimea, South Ossetia, Abkhazia, Nagorno-Karabakh and northern Cyprus.