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CONSONANCE OR DISSONANCE

The relationship of human rights in armed conflict and
international humanitarian law

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Submitted in fulfilment of the requirements of the LL.M. by research

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Abstract

This thesis discusses the relationship between human rights in armed conflict and international humanitarian law. The topic has the appearance of being somewhat of a Gordian knot in international law scholarship. However, the longstanding character of the dispute surrounding the topic does not diminish its importance. An agreement to disagree is not an option when considering the practical consequences. While it is unsatisfactory from an academic view that a workable solution on applying both legal regimes to armed conflict settings is still lacking, it is deeply troubling on a practical level. The current situation means no less than an uncertainty concerning legal norms in armed conflicts. This has adverse effects on the protection of legal interests such as life, liberty, and due process in the most extreme circumstances, but it also poses the danger of undermining the acceptance of legal standards.

Borrowing from recent judicial developments especially in the jurisprudence of the European Court of Human Rights, this thesis first outlines the background of the topic and then attempts to reconcile the two main opposing theories, one focussing on the complementary relationship between the legal regimes and one focusing on the *lex specialis* characteristic of international humanitarian law, by integrating both into a two-step-approach. This approach features first the attempt to harmonize two applicable norms by way of interpretation and it sees *lex specialis* proper as a subsidiary measure to be applied, when such harmonization fails. However, the respective *lex specialis* maintains a higher weight on the interpretation stage as well. The thesis then tests the approach by applying it to the human right to life and the human right to liberty in international armed conflicts and the much more problematic field of non-international armed conflicts.

This thesis is guided by the hope, that the current state of affairs may offer fertile ground for an end to the decade-long dispute, as state parties now tend to accept the need for legal clarity in armed conflicts and have given up their fundamental opposition towards applying human rights in extraterritorial settings and national and human rights courts have growingly acknowledged that they are not fostering legal protection by treating the actions of armed forces on the battlefield settings like police operations in peacetime.

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Author's declaration

I declare that, except where explicit reference is made to the contributions of others, this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or at any other institution.

Affiliation and disclaimer

The author is a legal advisor to the Federal Armed Forces (Bundeswehr) and is currently seconded to the Federal Constitutional Court (Bundesverfassungsgericht). This thesis has been written in his private capacity. The views and opinions expressed herein are the author's own and do not reflect the views of the institutions he works for.

1. Hypothesis and structure

Applying human rights law in armed conflicts has drawn intense criticism from state actors. Recently, the UK Government even deemed it necessary to announce a future derogation from the European Convention on Human Rights (ECHR, 1950¹) in order “to protect Armed Forces from persistent legal claims in future overseas operations” and to end an “industry of vexatious claims” against military members, which supposedly may “stop our Armed Forces doing their job”.² A Policy Exchange paper that fuelled this development proposed that the armed forces needed saving “from defeat by judicial diktat” and saw international human rights law (IHRL) as benefitting the “country’s adversaries”.³ In such overly hyperbolic and dramatic statements lies if only a grain of truth. They highlight that the question, which legal standard applies to the conduct of hostilities needs answers. It is not the threat of legal claims that may compromise operational capabilities but the continued uncertainty regarding the applicable standards⁴ – as is evidenced by the western response to hybrid warfare, a tactic thriving on the exploitation of legal grey areas.⁵ This uncertainty may at worst lead to a decreasing acceptance of legal standards in the armed forces community.

Armed conflicts need clear rules. The law of armed conflicts needs to bellow normative instructions loud and simple enough for everyone to hear and follow despite the chaotic and life-threatening situations in which they apply. On this basis,

¹ ETS 5, entry into force 3 September 1953.

² Quotes from UK Ministry of Defence & Rt Hon Sir Michael Fallon, ‘Government to protect Armed Forces from persistent legal claims in future overseas operations’ (UK Government 4 October 2016) <<https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations>> last accessed 20 June 2017.

³ Richard Ekins, Jonathan Morgan, and Tom Tugendhat, ‘Clearing the Fog of Law’ (Policy Exchange 2015); see also the open letter of five former UK military chiefs of staff, ‘Combat Zones’ (The Times 7 April 2015) <<https://www.thetimes.co.uk/article/combat-zones-r6k0zjc20wx>> last accessed 20 June 2017, calling “the government to recognise the primacy of the Geneva Conventions in war by derogating from the European Convention on Human Rights in time of war and redefining combat immunity through legislation to ensure that our serving personnel are able to operate in the field without fear of the laws designed for peacetime environments.”; see also the discussion in Marko Milanovic, ‘UK to Derogate from the ECHR in Armed Conflict’ (EJIL:Talk 5 October 2016).

⁴ See also Thomas Winkler, ‘The Copenhagen Process on Detainees: A Necessity’ (2010) 78 Nord. J. Int’l L. 489, 491.

⁵ See Aurel Sari, ‘Legal Aspects of Hybrid Warfare’ (Lawfare 2 October 2015).

the modern law of armed conflict has stood firmly for decades. The internationally accepted rules of the law of armed conflict have been strongholds, protecting fundamental rights in dire circumstances, even though there are deficits in compliance. The unique *ratione materiae* of international humanitarian law (IHL), which gives this body of law the challenging mandate to regulate circumstances seemingly beyond regulation, must be born in mind when discussing the relationship of both fields of law, IHL and IHRL. As it stands, to apply human rights fully and without any reservation in situations of armed conflict means to factually overrule IHL by a body of law much vaguer and not at all designed to regulate the very special circumstances of armed strife. However, not to apply IHRL in armed conflicts at all runs counter to international law as well. The comparatively new regime of IHRL achieves its radiance not through its normative clarity, but because of its vagueness and the all-encompassing universality of its guarantees. After its rise, post-1945, it quickly became clear that the universality of human rights guarantees does not stop short of armed conflicts. Indeed, it is part of the DNA of IHRL to protect fundamental rights in every possible circumstance, including and especially in armed conflicts, since the world wars were the main contributing factor, if not the sole cause, for the rapid rise of human rights.

Thus, it is unsurprising that IHL and IHRL are at odds with each other and their relationship and its translation into practice is complicated at best, as evidenced by the long-lasting academic dispute on the topic.⁶ The conflicting positions are easily explained. One group accentuates the special circumstances of armed conflict and the other insists on the universality of human rights law. The position one takes on the topic tends to depend on the interpretative community one is a member of.⁷ IHL experts tend to argue for a replacement of IHRL by the applicable IHL or for IHRL's inapplicability in armed conflicts, while IHRL scholars will argue for IHRL maintaining a decisive role in armed conflict situations, often regarding IHL as antiquated, ineffective, and thus deserving to be side-lined. Both parties have their set of

⁶ For examples of early works see e.g. Franciszek Przetacznik, 'Protection of Human Rights in Time of Armed Conflict' (1974) 13 *Mil. L. & L. War Rev.* 315-65; 'Human Rights in Armed Conflict' (1964) 21 *Bull. I.C.J.* 1-5.

⁷ For an analysis of interpretative communities see e.g. Michael Waibel, 'Interpretative Communities in International Law' in Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 147-65.

arguments and the deadlocked discussion sometimes seems to consist of their regular repetition.

The guiding hypothesis of this analysis will not be one or the other. It is accepted that IHRL generally applies in situations of armed conflict, as soon as a state actor exercises jurisdiction, even if this exercise should be extraterritorially. The hypothesis regarding its relationship to IHL is the following:

The relationship between IHL and IHRL in armed conflicts is one of coexistence. However, IHL generally takes precedence whenever norms of both bodies of international law conflict – be it in letter or concept.

The long-standing nature of the discussion has caused observers to describe it as “well-worn”⁸. Yet, after a long time of deadlock, recent cases have breathed back some life into the topic and once again a controversial academic discussion ensued. The bottom line is that answers to the relationship between both fields of law are needed, which enable a swift translation into practice and clear guidance on how to apply both bodies of law to a situation in an armed conflict. After all, the law applicable in an armed conflict is not applied by peacetime public administration, where legal uncertainty may be driven back step by step with trial and error and regular assistance of the judiciary, but by armed forces on the battlefield, where there is little room for error or hindsight.

To support the hypothesis, this thesis will first briefly examine the history of both areas of law (2.) and derive from it the development leading up to the status quo. In addition, the practice of the United Nations (UN) and the International Court of Justice (ICJ) will be introduced (3.). This will give the necessary background to understand the controversial nature of the discussion and the following theory concerning the relationship between both bodies of law.

Furthermore, it will be outlined in which situations the relationship between IHRL and IHL is not problematic, either because one of those regimes is inapplicable or because their relationship is determined by international law itself (4.). Afterwards, the normative relationship between both regimes will be analysed and ways will be identified to solve potential conflicts between IHL and IHRL (5.). In the following, the findings will be applied in case studies focussing on the rights to life and liberty in

⁸ Marko Milanovic, ‘Two Articles on the Relationship between IHL and IHRL’ (EJIL:Talk 14 July 2014).

international armed conflicts (IAC) and non-international armed conflicts (NIAC), outlining the way to translate the normative findings of the previous section into practice (6.). This part will also include the current practice of courts on the topic at hand.

The thesis ends with an outlook on the topic including policy considerations the author deems important to ensure continued compliance and international acceptance of legal standards as the academic discussion proceeds.

This work builds upon prior research of the author undertaken for the Deutsches Institut für Menschenrechte in 2015 and publications in German.⁹

2. Historical development of the relationship between IHL and IHRL

The law of war in the sense of *ius in bello* – although applying even more for *ius ad bellum*¹⁰ – precedes human rights law by many centuries. From time immemorial, there have been violent conflicts between groups and since the creation of nations there have been armed conflicts between nation states. Such conflicts have been governed by ideas, concepts, and traditions, which precede even our modern understanding of law. As such, the law of land warfare has been called “one of the oldest subject-matters of public international law.”¹¹ Without venturing too far into history, rules limiting the conduct of armed hostilities can be found in the traditions of most ancient cultures and have been formulated on this basis in the texts of modern religions, including the Bible, the Qur’an and scriptures of Buddhism as well

⁹ Tim R. Salomon, ‘Die Anwendung von Menschenrechten im bewaffneten Konflikt’ (2015) 53(3) ArchVR 322-59; Tim R. Salomon, ‘Zum Verhältnis von Menschenrechten und Humanitärem Völkerrecht’ (2015) 4 HuV-I 153-62.

¹⁰ See David J. Bederman, *International Law in Antiquity* (CUP 2001) 76: “All ancient civilizations had ceremonies for the proper sanctioning of war [...] These customs centred around two distinct, but obviously interrelated, tasks. The first was to decide if war would be sacred, good, and just or if it would be profane, evil, and unjust. Their second duty was to oversee the rites that would invoke the gods’ support for war, and to ensure victory. In the Roman tradition, this procedure was governed by the *ius fetiale*.”

¹¹ Robin Geiß, ‘Land Warfare’ in Rüdiger Wolfrum (ed), *MPEPIL* (OUP online edition 2009) para. 4.

as Hinduism.¹² Some of these ancient rules include early formulations of the prohibition of perfidy¹³, early concepts of reciprocity¹⁴, and the protection of those not bearing arms.¹⁵ These traditions, however, were too diverse and widespread to form into a set of coherent law over time.¹⁶ It took catalysts to form truly universal norms.

One such catalyst was *Dunant's* experience on the "field of honour" after the Battle of Solferino in 1859, which birthed organized humanitarian efforts and eventually led to the adoption of the *Convention for the Amelioration of the Condition of the Wounded in Armies of the Field*^{17, 18}. Parallel to this, then US President Abraham Lincoln signed the *Lieber Code*¹⁹ into effect, which proved to be influential in

¹² Hans-Peter Gasser and Daniel Thürer, 'Humanitarian Law, International' in Rüdiger Wolfrum (ed), *MPEPIL Vol. V* (OUP 2012) 59, 60 (para. 7); see for an in-depth review David J. Bederman, *International Law in Antiquity* (CUP 2001) 242 et seq.

¹³ Ambrosius, *De officiis* (first published 340-397) L. I. c. XXIX, para. 139: "Even warring parties maintain its importance: so, if it has been decided with an enemy that battle will take place at a particular place or on a particular day, it is regarded as a violation of justice to arrive at the place in advance or to bring forward the time.", translation in Ivor J. Davidson (ed), *Ambrose, De officiis, Vol. I* (OUP 2002) 197.

¹⁴ Ambrosius, *De officiis* (first published 340-397), L. I. c. XXIX, para. 139: "for on fiercer enemies, those who prove treacherous and those who are guilty of greater crimes, fiercer vengeance is taken.", translation in Ivor J. Davidson (ed), *Ambrose, De officiis Vol. I* (OUP 2002) 197.

¹⁵ *Xenophon*, who proposes the universality of the law of war by the phrase "law established for all time among all men" (Xen. *Cyrop.* 7.5.73, english translation taken from: <<http://data.perseus.org/citations/urn:cts:greekLit:tlg0032.tlg007.perseus-eng1:7.5.73>> last accessed 20 June 2017) lets his model king Cyrus the Great propose to his enemy "to leave in peace the labourers tilling the land and to do them no harm", if he in turn "would be willing to allow those farmers who had transferred their allegiance to him to work their farms" (Xen. *Cyrop.* 5.4.24, english translation taken from: <<http://data.perseus.org/citations/urn:cts:greekLit:tlg0032.tlg007.perseus-eng1:5.4.24>> last accessed 20 June 2017), see David J. Bederman, *International Law in Antiquity* (CUP 2001) 246.

¹⁶ Wilhelm G. Grewe, *The Epochs of International Law* (De Gruyter 2000) 105.

¹⁷ Signed 22 August 1864, entry into force 22 June 1865, reproduced in Dietrich Schindler and Jiří Toman, *The Laws of Armed Conflicts* (A. W. Sijthoff 1973) 203-206. The Convention was later rewritten twice, first to the 1906 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, signed 6 July 1906, entry into force 9 August 1907, 11 L.N.T.S. 440, and second to the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, signed 29 July 1929, entry into force 19 June 1931, 118 L.N.T.S. 303.

¹⁸ See Hans-Peter Gasser and Daniel Thürer, 'Humanitarian Law, International' in Rüdiger Wolfrum (ed), *MPEPIL Vol. V* (OUP 2012) 59, 61 (para. 8 et seq.).

¹⁹ Instructions for the Government of Armies of the United States in the Field, reproduced in Dietrich Schindler and Jiří Toman, *The Laws of Armed Conflicts* (A. W. Sijthoff 1973) 3-

formulating basic pillars of today's IHL.²⁰ This development ultimately led to the codification of the law of armed conflict in the process of the Hague Peace Conferences of 1899 and 1907, including the convention that proved most influential concerning modern day IHL, the *Convention (IV) respecting the Laws and Customs of War on Land*²¹ and its annex *Regulations respecting the Laws and Customs of War on Land*, which for the first time laid down a specific set of universally acknowledged rules regulating the conduct of armed forces during hostilities. The preamble of the convention was home to the original *Martens Clause*²², an acknowledgment that the rules codified were just the beginning and would not render void prior usages and the laws of humanity as well as public conscience protecting inhabitants and belligerents during hostilities.²³

Of the two World Wars, World War II proved to be a very effective catalyst, as the international community witnessed violations of the law of war and of public conscience on such an immense scale and of such intensity that there was agreement on the need for significant change. First, the Nuremberg Trials saw the 1907 Hague Convention as being “by 1939 [...] recognised by all civilised nations,

23, see also Patryck I. Labuda, ‘Lieber Code’ in Rüdiger Wolfrum (ed), *MPEPIL* (OUP online edition 2014).

²⁰ Principle of military necessity (articles 14-16); treatment of prisoners of war (articles 49-80); differentiation between combatants and partisans (article 81); protection of civilians and private property (articles 31-47); prohibition of certain methods of warfare (article 16 [poison], articles 16 and 80 [torture], articles 16, 63, 65, 101, 117 [perfidy]).

²¹ Signed 18th of October 1907, entry into force 26th of January 1910, 187 Consol. T.S. 227.

²² “Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”, see for an extensive assessment, Rhea Schircks, *Die Marten'sche Klausel* (NOMOS 2001).

²³ For a discussion of the Martens Clause and its influence of the relationship between the two legal regimes see Hans-Joachim Heintze, ‘Theorien zum Verhältnis von Menschenrechten und humanitärem Völkerrecht’ (2011) 24(1) *HuV-I* 4 et seq.; for a discussion of the principle of humanity see Antônio Augusto Cançado Trindade, ‘Some reflections on the principle of humanity in its wide dimension’ in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 188-197; with a critical assessment Yoram Dinstein, ‘The Principle of Proportionality’ in Kjetil Mujezinović Larsen, Camilla Guldahl Cooper, and Gro Nystuen (eds), *Searching for a Principle of Humanity in International Humanitarian Law* (CUP 2013) 72-85.

and [...] regarded as being declaratory of the laws and customs of war”.²⁴ Thus the convention’s norms were seen to be customary law, in effect independent from a state’s consent, signature, and ratification and there were to be individual consequences for violations. Secondly, the four Geneva Conventions of 1949²⁵ were adopted as a reaction to the horrors of the war that was just witnessed, further developing the protection of the wounded, sick, and shipwrecked, of prisoners of war, and – newly added and greatly needed – of civilians in times of war.

Post-1945 is the time, in which the seed for the problematic relationship between IHL and IHRL was sown. While the Geneva Conventions were negotiated under the umbrella of the ICRC, the United Nations set the foundational stone for the transition of human rights from the national to the international level with the Charter of the United Nations²⁶ and the proclamation of the Universal Declaration of Human Rights in 1948.²⁷ Both regimes developed independently with no real link between the two – even the members of the delegations negotiating the instruments at around the same time were different.²⁸ Seemingly, the international community failed to see the need to harmonize both regimes, delineate their areas of application or at least address their relationship.

²⁴ Nuremberg judgment, *France and ors v Göring (Hermann) and ors*, Judgment and Sentence (1946) 41 Am. J. Int’l L. 172, 248-49.

²⁵ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), 5 U.N.T.S. 31, entry into force 21 October 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), 75 U.N.T.S. 85, entry into force 21 October 1950; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), 75 U.N.T.S. 135, entry into force 21 October 1950; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), 75 U.N.T.S. 287, entry into force 21 October 1950.

²⁶ Charter of the United Nations (UN Charter), 24 October 1945, 1 U.N.T.S. XVI; see Gary D. Solis, *The Law of Armed Conflict* (CUP 2010) 24 et seq.

²⁷ UNGA Res 217 A (III) (10 December 1948) UN Doc. A/RES/217 (III); see Gregor Schotten, ‘Das Verhältnis von humanitärem Völkerrecht und Menschenrechten aus historischer Perspektive’ (2013) 3 HuV-I 112, 113 et seq. Human rights did not suddenly come into existence after World War II, but rest on a long tradition including the Magna Charta of 1225. The new aspect that came to pass post-1945 was the internationalisation of human rights, see e.g. Ute Erberich, *Auslandseinsätze der Bundeswehr und Europäische Menschenrechtskonvention* (Carl Heymanns 2004) 37.

²⁸ See Gregor Schotten, ‘Das Verhältnis von humanitärem Völkerrecht und Menschenrechten aus historischer Perspektive’ (2013) 3 HuV-I 112, 113 et seq.

The 1949 Geneva Conventions set a sudden end to the drastic development of IHL, which after having twice failed to effectively govern behaviour in armed conflicts fell from the international community's grace, as its attention shifted to IHRL as a new body of law in place to prevent war from now on. This new *ius contra bellum* followed the equally new paradigm of international law as not merely governing the relation of states and affecting individuals merely in a mediated sense through the proxy of a state actor e.g. pursuant to the rules of diplomatic protection.²⁹ With the rise of IHRL, the individual was all of a sudden more or less recognized as a carrier of rights under international law and its rights were codified by a growing number of treaties – chief amongst them being (from a European perspective) the ECHR (1950), the International Covenant on Civil and Political Rights (ICCPR, 1966³⁰) and the International Covenant on Economic, Social and Cultural Rights (1966³¹). These human rights were universal not only in the sense that everyone falling under the jurisdiction of a signatory would enjoy them, but they also quite clearly would not fall short of regulating situations of armed conflict.³²

The fact that they do not contain explicit rules concerning armed conflicts, apart from the rules on derogations to be addressed in due course, was owed to the very understandable and humane fact that human rights were supposed to prevent war. It was the unequivocal focus on peace of the United Nations and the international community in the time after 1945 that let them shy away from dealing with guarantees in situations of armed conflict, not wanting to undermine the peace agenda by acknowledging the possibility of another war.³³ Nevertheless, article 4 of

²⁹ See Thomas Buergenthal, 'Human Rights' in Rüdiger Wolfrum (ed), *MPEPIL Vol. IV* (OUP 2012) 1021-1031.

³⁰ 999 U.N.T.S. 171, entry into force 23 March 1976.

³¹ 993 U.N.T.S. 3, entry into force 3 January 1976.

³² Today this view is beyond major discussion. Of the two voices that have until recently disputed that human rights apply in armed conflicts, the USA has recently admitted to their application in armed conflicts under the administration of President Barack Obama, 'Consideration of reports submitted by States parties under article 40 of the Covenant, Fourth periodic report, United States of America' (22 May 2012) UN. Doc. CCPR/C/USA/4, para. 507. As of today, only Israel seems to uphold the view that human rights are indeed peacetime-law and do not govern situations in armed conflicts, a view that is in stark contrast to the practice of the United Nations but also to the normative content of both IHL and IHRL, see e.g. Iliia Maria Siatitsa and Maia Titberidze, 'Human Rights in Armed Conflict' (2012) 3(2) *J Int'l Human. Legal Stud.* 233, 238 et seq.

³³ Hans-Joachim Heintze, 'Theorien zum Verhältnis von Menschenrechten und humanitärem Völkerrecht' (2011) 24(1) *HuV-I* 4, 5; Godofredo Torreblanca, 'The ICRC and

the ICCPR and article 15 of the ECHR bear unequivocal witness that at least the non-derogable guarantees of IHRL apply in times of public emergency (see para. 2 of both norms), even if states declare a state of emergency and derogate from other human rights in accordance with the procedure outlined in para. 3 of both norms.³⁴ Article 15 para. 1 ECHR even explicitly mentions “war” as an example of such public emergency.³⁵ Article 15 ECHR was introduced at a later stage during the treaty negotiations not to clarify that IHRL applies in times of war – this was seen as self-evident –, but to offer a process to attenuate the human rights guarantees in situations of war so that states would not arbitrarily – and illegally – waive their obligations in such cases. A previous draft did not leave any room for derogating from the ECHR guarantees in those circumstances.³⁶ The continued applicability of

human rights law’ in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 540, 550. See the ‘Annotation on the Draft International Covenants on Human Rights prepared by the United Nations Secretary-General’ (1 July 1955) UN Doc. A/2929, 65, 67: “While it was recognised that one of the most important public emergencies was the outbreak of war, it was felt that the covenant should not envisage, even by implication, the possibility of war, as the United Nations was established with the object of preventing war.”

³⁴ See Godofredo Torreblanca, ‘The ICRC and human rights law’ in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 540, 551 on the original intention that IHRL would apply in times of war; see Richard Ekins, Jonathan Morgan, and Tom Tugendhat, ‘Clearing the Fog of Law’ (Policy Exchange 2015) 9, 26 et seq. and the justifiably critical answer thereto Eirik Bjorge, ‘The Fogmachine of War’ (EJIL:Talk 13 April 2015); some authors indeed maintain that the drafters and state parties deemed the ICCPR to be inapplicable during war, see e.g. Christian Tomuschat, ‘Human Rights and International Humanitarian Law’ (2010) 21 Eur. J. Int’l L. 15, 16. The proximity of these treaties to the time of World War II as well as the wording of the ECHR as well as the *travaux préparatoires*, which clearly dealt with the application of IHRL during wartime strongly suggest otherwise. See the ‘Annotation on the Draft International Covenants on Human Rights prepared by the United Nations Secretary-General’ (1 July 1955) UN Doc. A/2929, 65, 66 (para. 37): “The opinion was expressed, however, that it was necessary to envisage possible conditions of emergency in which States would be compelled to impose limitations upon certain human rights. In time of war, for example, States could not be strictly bound by obligations assumed under a convention unless the convention contained provisions to the contrary.”

³⁵ Article 4 ICCPR is read along the same lines, see Human Rights Committee, ‘General Comment No. 29’ (2001) UN Doc. CCPR/C/21/Rev.1/Add.11, para. 3 “The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.”; see also OHCHR, ‘International Legal Protection of Human Rights in Armed Conflict’ (United Nations 2011) 46 et seq. The drafters thought it inappropriate to include the word “war” for the reason mentioned above (fn 34).

³⁶ See Heike Krieger, ‘Notstand’ in Oliver Dörr, Rainer Grote, and Thilo Marauhn (eds), *EMRK/GG Konkordanzkommentar Vol. I* (Mohr Siebeck 2nd ed. 2013) 417, 418 with further references.

human rights guarantees even during times of war was thus an agreed upon position in the negotiations, which found a clear expression in article 15 ECHR.

Consequently, the problems that exist today concerning the relationship between IHRL and IHL are due to a birth defect of human rights instruments. Whilst they quite clearly are meant to govern the conduct of states in armed conflicts, they are mostly silent on their interplay with the already existing rules governing state conduct in such situations – those of the Hague and Geneva conventions and the customs and rules preceding and applying parallel to those treaties. However, the same defect is part of modern IHL, since at the time when the 1949 Geneva Conventions were negotiated, the rise of human rights could have been anticipated. Yet no rule on the interplay of both regimes was conceptualized – apart from the already mentioned *Martens Clause*, which, however, predated IHRL significantly and thus can hardly be seen as being specifically designed to solve conflicts between the two regimes. In hindsight, the state parties negotiating the 1949 Geneva Conventions seem to have deliberately put their conventions on a collision course with human rights by altering the direction of humanitarian law from a state-centred approach to a conception closer to IHRL. This is especially clear in Common article 3, which – just as human rights – regulates first and foremost the relationship between a state and its nationals.³⁷ The outside factor that aggravated the situation even further was the rising number of internal and non-international conflicts – situations representing not really peace and not really war in the traditional sense.³⁸

Facing this situation, progress in the development of IHL, this time fuelled by the Vietnam War³⁹, provided for a slight harmonization of the relationship of both legal

³⁷ The character of Common article 3 as a minimum standard does, however, alleviate the tension with the parallel human rights regime, see also Cordula Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40(2) *Isr. L. Rev.* 310, 313.

³⁸ See e.g. Godofredo Torreblanca, 'The ICRC and human rights law' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 540, 553.

³⁹ See Gerd Oberleitner, 'Humanitarian Law as a Source of Human Rights Law' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 275, 290.

regimes with the 1977 Additional Protocols to the 1949 Conventions (AP I⁴⁰, AP II⁴¹). AP I continued along the route of the *Martens Clause* by opening IHL towards human rights in its article 72 providing that

“[t]he provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.”⁴²

In its article 75, AP I quite plainly adopts fundamental guarantees otherwise found in IHRL treaties, specifically important in situations of armed conflicts and – because the concept of derogation is foreign to IHL – fully non-derogable.⁴³

Along the same lines, modern human rights treaties have included provisions dealing with armed conflict. The Convention on the Rights of the Child (CRC, 1989⁴⁴) may serve as an example, although its references to armed conflicts add little to IHL, as they mostly just refer to IHL rules.⁴⁵

Despite these slight developments towards a harmonization, which arguably has not become a trend,⁴⁶ the general relationship between both fields of law is still unclear

⁴⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3, entry into force 7 December 1978.

⁴¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 609, entry into force 7 December 1978.

⁴² Article 72 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I, 1125 U.N.T.S. 3) (emphasis added); cf. also Article 49 para. 4 AP I, see Hans-Joachim Heintze, ‘Theorien zum Verhältnis von Menschenrechten und humanitärem Völkerrecht’ (2011) 24(1) HuV-I 4.

⁴³ See Kenneth Watkin, *Fighting at the Legal Boundaries* (OUP 2016) 142-3 for a further discussion.

⁴⁴ 1577 U.N.T.S. 3, entry into force 2 September 1990.

⁴⁵ See e.g. article 38 paras 1 and 4 CRC; for an in-depth analysis see J. A. Robinson, ‘Children in Armed Conflict’ (2002) J. S. Afr. L. 697; Heintze seems to see more in the CRC rules on armed conflicts, see Hans-Joachim Heintze, ‘Veränderungen im Verhältnis von Humanitärem Völkerrecht und Menschenrechtsschutz’ (2015) 28(4) HuV-I 149, 150-51; see also the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (UNGA Res 263 (25 May 2000) UN Doc. A/RES/54/263, entry into force 12 February 2002) which, however, does not so much contain regulations regarding the behaviour of state parties in armed conflicts rather than measures to prevent involving children in armed conflicts, e.g. by raising age limits for recruitment.

⁴⁶ Kenneth Watkin, *Fighting at the Legal Boundaries* (OUP 2016) 143-52, who sees the 1977 Additional Protocols as a high-water mark for the integration of IHRL concepts into

and has been so since the rise of IHRL. Do both systems apply in armed conflicts, which one takes precedent when two norms give conflicting directions? Do IHL and IHRL ever conflict at all?

3. The practice of the United Nations and the ICJ regarding IHRL in armed conflicts

The international community and the United Nations have begun to deal with the armed conflict dimension of IHRL about twenty years after the Universal Declaration of Human Rights^{47, 48}. However, they have failed to give guidance on how to solve conflicts between IHRL and IHL or clarify the relationship between both legal regimes. In 1967, the United Nations Security Council, while addressing the Six Day War decided that “essential and inalienable human rights should be respected even during the vicissitudes of war.”⁴⁹ In 1968, the International Conference on Human Rights used the Proclamation of Teheran to draw attention to the fact that: “[m]assive denials of human rights, arising out of aggression or any armed conflict with their tragic consequences, and resulting in untold human misery, engender reactions which could engulf the world in ever growing hostilities.”⁵⁰ The General Assembly reacted by putting on its agenda the topic “Respect for human rights in armed conflicts”⁵¹ and acknowledging in 1970 that “[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to

IHL, after which a new divergence took place, followed by a somewhat more reconciliatory phase.

⁴⁷ UNGA Res 217 A(III) (10 December 1948) UN Doc. A/RES/3/217 A.

⁴⁸ See Elisabeth Strüwer, *Zum Zusammenspiel von humanitärem Völkerrecht und den Menschenrechten am Beispiel des Targeted Killing* (Peter Lang 2010) 189-91.

⁴⁹ UNSC Res 237 (14 June 1967) UN Doc. S/RES/237, preamb. para. 2; see Cordula Droege, ‘The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict’ (2007) 40(2) *Isr. L. Rev.* 310, 315.

⁵⁰ ‘Proclamation of Teheran, Resolution XXIII’, International Conference on Human Rights (12 May 1968) UN Doc. A/CONF.32/41, para. 10.

⁵¹ UNGA Res 2444 (XXIII) (19 December 1968) UN Doc. A/RES/2444.

apply fully in situations of armed conflict.”⁵² This statement has been echoed in substance by the UN Security Council, which regularly stresses the importance of IHRL and IHL in armed conflict scenarios⁵³ and by other international organs and institutions.⁵⁴ This practice evidences the solidified acknowledgment of the continued application of human rights in situations of armed conflicts. It does, however, little to clarify the relationship between IHL and IHRL.

An early statement going beyond the mere acknowledgment of a continued application of IHRL was a report of the UN Secretary General, as he then was, *Sithu U Thant*, who in 1970 argued that there were human rights norms that overlap IHL in armed conflicts, e.g. the prohibition of retroactive criminal laws, the prohibition of slavery and the prohibition of the death penalty vis a vis pregnant women and children.⁵⁵ However, the real catalyst for the academic discussion on the relationship between IHL and IHRL was the *Nuclear Weapons Advisory Opinion* of the ICJ, in which the court famously acknowledged that the ICCPR governs situations of armed conflict, unless the state party issued a derogation, but explaining

⁵² UNGA Res 2675 (XXV) (9 December 1970) UN Doc. A/RES/2675; for an assessment of the development see also OHCHR, ‘International Legal Protection of Human Rights in Armed Conflict’ (United Nations 2011) 93 et seq.

⁵³ See extensively OHCHR, ‘International Legal Protection of Human Rights in Armed Conflict’ (United Nations 2011) 97 et seq. with an assessment of the resolutions regarding Yugoslavia, Afghanistan, Congo, Somalia, and Darfur; for an assessment concerning the practice concerning UN missions Daphna Shrager, ‘The interplay between human rights and international humanitarian law in UN operations’ in Erika de Wet and Jann Klefner (eds), *Convergence and Conflicts* (PULP 2014) 211-226; in its very recent practice, the Security Council has given IHL a sometimes greater emphasis, see UNSC Res 2286 (2016) UN Doc. S/RES/2286 op. para. 2 “Demands that all parties to armed conflicts fully comply with their obligations under international law, including international human rights law, as applicable, and international humanitarian law”.

⁵⁴ See e.g. OHCHR, ‘International Legal Protection of Human Rights in Armed Conflict’ (United Nations 2011) 104 et seq.; UNHCHR, ‘Report of the High Commissioner for Human Rights’ (13 March 2015) UN Doc. A/HRC/28/18, para. 13 the report mentions violations, but does not state under what regime (para. 50 et seq.); ‘Reports of the UN Support Mission for Libya, Overview of Violations of International Human Rights and Humanitarian Law during the Ongoing Violence in Libya’ (4 September 2014) and ‘Update on Violations of International Human Rights and Humanitarian Law during the Ongoing Violence in Libya’ (23 December 2014); ‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’ (5 February 2015) UN Doc. A/HRC/28/69.

⁵⁵ UN Secretary General ‘Respect for Human Rights in Armed Conflict’ (18 September 1970) UN Doc. A/8052, paras 27 et seq. (especially concerning NIACs). See also OHCHR, ‘International Legal Protection of Human Rights in Armed Conflict’ (United Nations 2011) 101.

“[t]he test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.”⁵⁶

It developed on its position in 2004 in its Advisory Opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* by again acknowledging that IHRL protection applies in armed conflicts, but

“[a]s regards the relationship between international humanitarian law and human rights law, there are [...] three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”⁵⁷

The ICJ reiterated the latter part in its judgment in *Armed Activities in Congo* in 2005.⁵⁸

It is safe to say that the ICJ has not answered all the questions concerning the interaction between IHL and IHRL – especially with its sibylline statement “some rights may exclusively be matters of international humanitarian law; others may exclusively be matters of human rights law; yet others may be matters of both these branches of international law.” However, the ICJ has unequivocally supported the continued applicability of IHRL in armed conflict situations, while upholding the

⁵⁶ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 240 (para. 25).

⁵⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 178 (para. 106).

⁵⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, 242-3 (para. 216). With a critical assessment of the ICJ's jurisprudence on the issue see John Tobin, 'Seeking Clarity in Relation to the Principle of Complementarity' (2007) 8 *Melb. J. Int'l L.* 356; Naz K. Modirzadeh, 'The Dark Sides of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict' (2010) 86 *US Naval War College ILS* 349, 368; Francoise J. Hampson, 'The relationship between international humanitarian law and international human rights law' in Scott Sheeran and Sir Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 185, 192 et seq.

material principles of IHL, which it explicitly categorizes as *lex specialis*. The ICTY has treated the relationship between IHL and IHRL similarly.⁵⁹

Following those leading cases from the ICJ, the Human Rights Commission and the Human Rights Committee have argued for a complementary relationship between IHL and IHRL, where both legal regimes are “not mutually exclusive”, but possibly “mutually reinforcing”, while accepting that the rules of IHL, if applicable, bear a significant importance when interpreting IHRL norms.⁶⁰

All these statements are helpful to a certain degree, however, they are easily made in the abstract and limited insofar as they do not actually shed light on the question, how the relationship between both regimes would translate to practice.

The practice of bodies that work a little closer to the practical situations shed a little more light on the topic. An example is the UN Fact Finding Mission on the Gaza Conflict, which in its 2009 report analysed specific conflict situations.⁶¹ It examined both IHL and IHRL guarantees, but went beyond only mentioning them as applicable guarantees. When examining the use of missiles in densely populated areas, it saw a violation of IHL due to insufficient precautions against civilian casualties. Following this, it also accepted that the human right to life was violated by the same act.⁶²

⁵⁹ “The laws of war do not necessarily displace the laws regulating a peacetime situation; the former may add elements requisite to the protection which needs to be afforded to victims in a wartime situation.”, *Prosecutor v Kunarac, Kovac and Vukovic (Appeals Chamber)*, ICTY-IT-96-23& ICTY-IT-96-23/1-A (12 June 2002) para. 60. The ICTY sometimes goes further than that into the direction of a convergence between both regimes (*Prosecutor v Kunarac, Kovac and Vukovic*, ICTY-IT-96-23 & ICTY-IT-96-23/1-T (22 February 2001) para. 467); see Gentian Zyberi, ‘The Jurisprudence of the International Court of Justice and International Criminal Courts and Tribunals’ in Erika de Wet and Jann Klefner (eds), *Convergence and Conflicts* (PULP 2014) 395, 401; Robert Cryer, ‘The Interplay of Human Rights and Humanitarian Law: The Approach of the ICTY’ (2010) 14(3) *J. Conflict & Sec. L.* 511.

⁶⁰ ‘Resolution 2005/63 on Protection of the Human Rights of Civilians in Armed Conflicts’ (20 April 2005) UN Doc. E/CN.4/RES/2005/63; see OHCHR, ‘International Legal Protection of Human Rights in Armed Conflict’ (United Nations 2011) 102 et seq.; see also UNHRC ‘General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (2004) UN Doc. CCPR/C/21/Rev.1/Add.13, para. 11: “While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially [sic] relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”

⁶¹ ‘Report of the United Nations Fact Finding Mission on the Gaza Conflict’ (25 September 2009) UN Doc. A/HRC/12/48, paras 294 et seq.

⁶² ‘Report of the United Nations Fact Finding Mission on the Gaza Conflict’ (25 September 2009) UN Doc. A/HRC/12/48, para. 496.

Likewise, the use of mortar in densely populated areas was held to violate article 57 para. 2 lit. a (ii) und (iii) AP I as well as the human right to life.⁶³ As such, human rights violations were held to have taken place when IHL was violated. Consequently, the UN Fact Finding Mission seems to see IHL as a body of law that takes precedent in the situations it governs, one may say *lex specialis* to a certain degree. Where IHL is violated, IHRL is violated likewise, however, if IHL is followed, the mission does not seem to see human rights guarantees overlapping the applicable IHL. The statement of the Human Rights Council in its resolution 9/9 that “conduct that violates international humanitarian law [...] may also constitute a gross violation of human rights”⁶⁴ goes into a similar direction.

Consequently, the history of IHL and IHRL as well as the UN practice on the topic, while being largely inconclusive concerning a detailed approach to the relationship between both bodies of law, suggest a parallel application of both regimes in armed conflicts. This illustrates the potential for conflict between IHL and IHRL.

4. Applicability of IHRL and situations of potential conflicts with IHL

However, such conflict between both regimes is not automatic. There are instances, in which conflict is either prevented or solved by existing international law before it can cause problems. Accordingly, in the following it will be outlined in which situations the relationship between IHRL and IHL is not problematic either because one of those regimes does not apply or because their relationship is determined by international law itself.

With the rise of universal and regional human rights instruments came about stronger and more specific guarantees and the growing acceptance that such instruments apply to the extraterritorial exercise of jurisdiction and are not limited to the acts of a member state on its territory. If it was not for this extraterritorial

⁶³ ‘Report of the United Nations Fact Finding Mission on the Gaza Conflict’ (25 September 2009) UN Doc. A/HRC/12/48, para. 701.

⁶⁴ ‘Protection of the human rights of civilians in armed conflict’ (18 September 2008) UN Doc. A/HRC/RES/9/9, op. para. 1.

application of human rights law, the relationship between IHRL and IHL would rarely cause problems, at least for European states. European armies have recently been deployed mainly in scenarios, in which they act outside of their territory. A lot has been written on the extraterritorial application of human rights treaties⁶⁵ and similarly on the issue of when to attribute a certain action to a nation state and when to an international organization, e.g. in NATO or UN deployments.⁶⁶ This thesis will not delve deeper into the interpretation of “jurisdiction” pursuant to article 1 ECHR and the ICCPR’s “within its territory and subject to its jurisdiction” (article 2 para 1 ICCPR), but will – if only for the sake of the argument – accept in the following that human rights do in fact apply extraterritorially in many instances, so that there are potential conflicts between norms of IHL and IHRL. This mirrors the controversial tendency of the European Court of Human Rights (ECtHR).⁶⁷ IHL is not subject to a comparable applicability test, but will apply, whenever armed forces act in an armed conflict regardless of jurisdiction exercised or not.⁶⁸ Most would agree that the force with which IHL and IHRL concepts collide in modern-day deployments of armed forces was not foreseeable by the parties to the IHRL instruments at the time of their drafting, since the extraterritorial application of IHRL was hardly anticipated to the extent it is presumed to exist today.

Apart from its extraterritorial application, the better arguments support the position that IHRL continues to apply in situations of armed conflict, as analysed above. As stated, this is evidenced most clearly by the norms allowing for derogations of certain human rights in times of war and has been almost universally acknowledged by state actors and international organizations as well as national and international

⁶⁵ See e.g. Ralph Wilde, ‘Human Rights Beyond Borders at the World Court’ (2013) 12 *Chin. J. Int’l L.* 639-77; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (OUP 2011).

⁶⁶ See e.g. Julia-Pia Schütze, *Die Zurechenbarkeit von Völkerrechtsverstößen im Rahmen mandatierter Friedensmissionen der Vereinten Nationen* (Duncker & Humblot 2011); André Nollkämper, ‘Dual Attribution’ (2011) 9 *J. Int’l Crim. Just.* 1143-57. See also Responsibility of international organizations (27 February 2012) UN Doc. A/RES/66/100; for a further assessment see Tim R. Salomon, *Die internationale Strafverfolgungsstrategie gegenüber somalischen Piraten* (Springer 2016) 291-3.

⁶⁷ For a quick overview of the court’s jurisprudence see ECtHR Press Unit, ‘Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights’ (February 2016).

⁶⁸ See e.g. Peter Rowe, *The Impact of Human Rights on Armed Forces* (OUP 2006) 122 et seq.

courts. This result also goes in accord with the object and purpose of IHRL.⁶⁹ The main objectors regarding the application of human rights in armed conflicts have traditionally been the USA and Israel; however, the USA has shifted toward accepting that the ICCPR indeed does apply in armed conflicts under the Obama administration.⁷⁰ The “displacement-theory” advanced by Israel and formerly by the USA to establish the primacy of IHL is based on an overly aggressive application of the *lex specialis* concept, proposing the displacement of IHRL by IHL in all situations of armed conflict.⁷¹ However, *lex specialis* is in place to solve conflicts of single norms not to brush aside whole legal regimes, whose norms may or may not conflict with more specific rules of another regime.⁷² The only way leading to the *a priori* primacy of IHL over IHRL would be to support the (antiquated) position that all treaties – including IHRL treaties – are implicitly restricted to peacetime.⁷³ This is unconvincing in itself, but all the more so since the derogation clauses quite clearly speak for an explicit inclusion of armed conflicts into the *ratione materiae* of human rights.

In the same vein, the derogation clauses also speak against the sometimes-proposed teeter-totter-relationship between IHRL and IHL. Proponents of this position answer the question, whether IHL or IHRL apply in a given armed conflict

⁶⁹ See Marko Milanovic, ‘Norm Conflicts, IHL and IHRL’ in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011) 95, 97 et seq. for further reference.

⁷⁰ For the traditional view see the U.S. submission in Inter-American Commission on Human Rights *Coard et al. v United States of America* (29 September 1999), Report N. 109/99 - Case 10.951, para. 38; see also ‘Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba’ (May 10, 2006) 16; see however now the ‘Consideration of reports submitted by States parties under article 40 of the Covenant, Fourth periodic report, United States of America’ (22 May 2012) UN. Doc. CCPR/C/USA/4, para. 507: “it is important to bear in mind that international human rights law and the law of armed conflict are in many respects complementary and mutually reinforcing”, see also Kenneth Watkin, *Fighting at the Legal Boundaries* (OUP 2016) 124 with a discussion of the US approach.

⁷¹ See Kenneth Watkin, *Fighting at the Legal Boundaries* (OUP 2016) 124.

⁷² See Marko Milanovic, ‘Norm Conflicts, IHL and IHRL’ in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011) 95, 98 et seq.

⁷³ See article 3 of the Draft articles on the effects of armed conflicts on treaties (UN Doc. A/CN.4/L.777) and the commentary (<http://legal.un.org/ilc/texts/instruments/english/commentaries/1_10_2011.pdf> last accessed 20 June 2017); for a discussion see Silja Vönecky, ‘Armed Conflict, Effect on Treaties’ in Rüdiger Wolfrum (ed), *MPEPIL* (OUP online edition 2011).

scenario by reference to the proximity of the situation at hand to a typical situation of armed conflict or to a situation of peacetime administration. If a given situation would be close in nature to peacetime administration then IHRL would apply fully even in armed conflict settings, whereas IHL would apply when the situation at hand is one of armed combat. However, at the same time IHL and IHRL are supposed to remain distinct and separated without one having a bearing on the other.⁷⁴ This position is unfounded in law and would clearly cause more problems than it solves. Most situations in the reality of armed combat are not clear-cut and such a solution would result in grave uncertainties as to which legal regime applies when. This uncertainty contravenes the object and purpose of IHL and IHRL to effect a practical protection of life, bodily integrity, etc. It has to be underlined that such “to’ing and fro’ing between different regimes is completely unworkable in practice.”⁷⁵ Moreover, there is simply no rule, written or unwritten, which would back the replacement of either IHRL or IHL with the other regime if the situation at hand is comparable to peacetime administration or armed combat, apart from the application threshold of IHL.⁷⁶ With its rules on occupation, IHL quite specifically regulates situations close to peacetime administration, which begs the question, why in such a case, which is specifically regulated by IHL, IHRL should replace IHL.

Consequently, IHL and IHRL generally apply parallel in situations of armed conflict. Yet, there are situations in which IHRL and IHL will collide neither in letter nor in concept. A case in point is the conduct of armed opposition groups involved in armed conflicts. While such groups are bound by IHL by virtue of being a party to the conflict, they are not (yet) widely held to be bound by IHRL as those obligations address state actors first and foremost.⁷⁷

⁷⁴ See e.g. Pascal Hector, ‘Das Humanitäre Völkerrecht als *lex specialis*’ in Christian Calliess (ed), *Herausforderung an Staat und Verfassung, Liber Amicorum Torsten Stein* (NOMOS 2015) 956, 971.

⁷⁵ Françoise J. Hampson, ‘The relationship between international humanitarian law and international human rights law’ in Scott Sheeran and Sir Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 185, 211.

⁷⁶ For the same reason, the distinction based on the actor (if police then law enforcement and IHRL; if military then conduct of hostilities and IHL) is widely rejected, see e.g. ICRC, ‘The Use of Force in Armed Conflicts – Expert Meeting’ (2013) 12

⁷⁷ See e.g. Wolfgang Heinz, ‘Zum Umgang des VN-Sicherheitsrates mit Menschenrechtspflichten bewaffneter Oppositionsgruppen’ (2013) 1 HuV-I 4 et seq.; for a position in favour of non-state actors being bound by human rights Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006); for the opposed position see

Furthermore, the uncertainty regarding the relationship between IHL and IHRL does not arise in a situation of non-international armed struggle, which does not surpass the applicability threshold of IHL, either because the armed struggle is of lesser intensity or because it is short-lived. The threshold for the application of Common article 3 is deemed to be fulfilled in cases of "...protracted armed violence between governmental authorities and organized armed groups or between such groups within a State"⁷⁸. Below this threshold, a conflict will be subject to national law and will be dealt with as an internal disturbance of public order with the exercise of public authority being regulated by IHRL alone.⁷⁹

If such a conflict intensifies and the threshold of Common article 3 is surpassed, the question of how IHL relates to IHRL does arise in principle, but not automatically with full force. When Common article 3 applies, it quite clearly establishes a minimum standard, which will not conflict with IHRL.⁸⁰ The nature of Common article 3 as a minimum guarantee is unequivocally supported by its wording: "each Party [...] shall be bound to apply, as a minimum, the following provisions".⁸¹ In such circumstances, Common article 3 establishes an explicit rule mandating the parallel

Nigel Rodley, 'Can armed opposition groups violate human rights standards?' in Kathleen E. Mahoney and Paul Mahoney (eds), *Human Rights in the 21st Century: A Global Challenge* (Martinus Nijhoff 1993) 297-318; Marco Sassòli and Laura Olson, The relationship between international humanitarian and human rights law where it matters (2008) 90(871) *Int'l Rev. Red Cross* 599, 615 et seq.; cf. also ICRC, 'The Use of Force in Armed Conflicts – Expert Meeting' (2013) 10.

⁷⁸ *Prosecutor v Tadic* ICTY-IT-94-1-AR72 (2 October 1995) para. 70; see e.g. Claus Kreß, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' (2000) 30 *Isr. Yb Hum. Rts* 116 et seq.; David Turns, 'The Law of Armed Conflict' (International Humanitarian Law) in Malcolm D. Evans (ed), *International Law* (OUP 3rd ed 2010) 814, 819; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (CUP 2010) 117 et seq.; William J. Fenrick, 'The Development of the Law of Armed Conflict through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (1998) 3 *JACL* 197-232. Further indicators include "the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones", see *Prosecutor v Haradinaj et al.* (Trial Chamber Judgment) ICTY-IT-04-84 (3 April 2008) para. 49 (p. 27).

⁷⁹ See article 1 para. 2 AP II; Robin Geiß, *Failed States* (Duncker & Humblot 2005) 229 et seq. with further references.

⁸⁰ Gary D. Solis, *The Law of Armed Conflict* (CUP 2010) 237.

⁸¹ See Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (CUP 2010) 29 et seq.

application of its guarantees and IHRL. However, it will be argued, that this does not prejudice the existence of customary IHL norms or implicit rights of a state actor that is party to such a conflict. As an example of such a constellation, the acknowledged right of armed forces to target armed opposition fighters in international as well as non-international armed conflicts has an influence on the interpretation and application of the human right to life in such a situation.⁸²

In the same vein, the applicability of AP II to a conflict⁸³ would have more bearing on the question, which norms govern a given case, since AP II does establish specific and tailor-made guarantees for NIACs that have an influence on the interpretation of IHRL.⁸⁴

Even if IHRL and IHL apply parallel to each other, the relationship between both regimes is sometimes specifically regulated by norms of international law. Although there is strictly speaking no hierarchy of norms in international law, there are exceptions to that rule. The solution of some conflicts can be achieved by recourse to the principle of *lex superior*.⁸⁵ Examples are article 53 Vienna Convention on the Law of Treaties (VCLT⁸⁶) and article 103 UN Charter⁸⁷ in combination with article 30 para. 1 VCLT.⁸⁸

⁸² See below 6.3.1.

⁸³ This is the case, when the “dissident armed forces or other organized armed groups” involved in the conflict are “under responsible command” and “exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement” the guarantees of AP II, see article 1 para. 1 AP II.

⁸⁴ For an analysis of the relationship of AP II to human rights law, see below especially regarding deprivations of liberty 6.3.2.

⁸⁵ It is a topic of dispute, if article 103 UN Charter indeed is *lex superior* or even reflective of a constitutional character of the UN Charter (in favour Bardo Fassbender, ‘The United Nations Charter as Constitution of the International Community’ (1997) 36 Colum. J. Transnat’l. L. 529-619) or merely a conflict clause, see extensively Antonios Tzanakopolous, ‘Collective Security and Human Rights’ in Erika de Wet and Jure Vidmar (eds) *Hierarchy in International Law* (OUP 2012) 42-70; Rain Liivoja, ‘The Scope of the Supremacy Clause of the United Nations Charter’ (2008) 57 ICLQ 583-612. The practical differences of this dispute are negligible for the topic at hand.

⁸⁶ 1155 U.N.T.S. 331, entry into force 27 January 1980.

⁸⁷ Charter of the United Nations, 24 October 1945, 1 U.N.T.S. XVI.

⁸⁸ The rule of *lex posterior*, which has found an at least rudimentary expression in article 30 of the VCLT has no bearing on the situation at hand. The application of that rule is ultimately bound to an interpretation of the parties’ intent to derogate from the earlier treaty (see ILC, ‘Fragmentation in International Law, Report of the Study Group of the International Law Commission’ (13 April 2006) UN Doc. A/CN.4/L.682, para. 230), an intent that can be

Article 53 VCLT contains rules of *ius cogens* – peremptory norms in international law.⁸⁹ Applicable *ius cogens* will not be replaced or restricted in their scope by other rules, more specific or not, as they are compulsory. A violation of a *ius cogens* norm is legally unjustifiable.⁹⁰ Moreover, the material content of such a norm cannot be weakened by a harmonizing interpretation with norms of another legal regime, unless this is allowed by the compelling norm itself.⁹¹ A real conflict between a norm of IHL and a *ius cogens* guarantee is, however, unlikely to arise in the IHL/IHRL conundrum. *Ius cogens* norms, such as the prohibition of torture⁹², presuppose a universal acknowledgment. This factually prevents a parallel rule allowing such conduct in an IHL treaty.⁹³

A further rule with possible effect on norm conflicts is article 103 UN Charter, which – when read in conjunction with article 30 para. 1 VCLT – orders the primacy of UN Charter obligations vis a vis obligations under other international agreements in case of a conflict. This rule, which also grants primacy to Security Council resolutions⁹⁴, gives the Security Council the option to “inject rules of its own making

claimed neither for IHL nor for IHRL. Additionally, the conclusion of a later *inter se* agreement between warring state parties rendering IHL or IHRL inapplicable would run counter to article 41 para. 1a VCLT, since such an agreement would be “incompatible with the effective execution of the object and purpose of the treaty as a whole”.

⁸⁹ See for an in-depth analysis Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006); Jerzy Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties* (Springer 1974).

⁹⁰ See e.g. Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 133 et seq.

⁹¹ See e.g. Jordan J. Paust, ‘Human Rights on the Battlefield’ (2015) 47(3) *Geo. Wash. Int’l L. Rev.* 509, 557 et seq.; while convincing on norms with *ius cogens*-status, Paust goes further and sees article 103 UN Charter as establishing “the primacy of Charter-based human rights duties”. This seems to go a bit far seeing that the UN Charter itself does not guarantee specific human rights in a material sense. The juridification of human rights was a development that occurred well after the UN Charter.

⁹² See e.g. Erika de Wet, ‘The Prohibition of Torture as an International Norm of *jus cogens* and its Implications for National and Customary Law’ (2004) 15 *Eur. J. Int’l L.* 97 et seq.

⁹³ See for a further discussion on the irrelevance of *ius cogens* in the discussion at hand Marko Milanovic, ‘Norm Conflicts, IHL and IHRL’ in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011) 95, 103 et seq.

⁹⁴ See e.g. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)*, Request for the Indication of Provisional Measures (Order) [1992] ICJ Rep 114, 126 (para. 42); see also Andreas Paulus and Johann Ruben Leiß, ‘Art. 103’ in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus (eds), *The Charter of the United Nations* (OUP 3rd ed 2012) para. 38 with further reference; José Alvarez, ‘The

into the IHL/IHRL calculus”.⁹⁵ It is still subject to debate, however, how this would translate to practice. By authorizing states to use “all necessary means” in a chapter VII resolution, the Security Council can regularly not be held to seek to depart from existing IHL and IHRL obligations. As such, chapter VII authorizations may well allow e.g. deprivations of liberty, when these are necessary means,⁹⁶ by creating a normative basis for such actions in the realm of international law, to be accommodated by the existing legal regimes e.g. by way of including this case in the narrow catalogue of article 5 para. 1 ECHR. However, beyond establishing a legal basis for such a measure, a resolution will regularly not specify details, such as procedural guarantees of detention, prerequisites, maximum duration, etc., so that IHL and IHRL still apply in that regard and their relationship must be addressed to that extent. Indeed, the Security Council regularly includes in its resolutions allowing for the use of all necessary means, clauses urging the contingents “to abide by international humanitarian [and] human rights [...] law”.⁹⁷ By doing so, the Security Council clearly documents that it generally does not intend to alter the applicable norms of IHL and IHRL or set them aside.

Last but not least, norm conflicts can be anticipated by the legal regimes themselves and dealt with by conflict clauses in the respective treaties, which establish the primacy of one regime over the other or that lay down basic rules concerning the relationship of the regime at hand with other rules.⁹⁸ As stated above, it is a birth

Security Council’s War on Terrorism: Problems and Policy Options’ in Erika de Wet and André Nollkaemper (eds), *Review of the Security Council by Member States* (Intersentia 2003) 119, 133; critically Alexander Orakhelashvili, ‘The Acts of the Security Council: Meaning and Standards of Review’ (2007) 11 Max Planck UNYb 143, 149-51.

⁹⁵ Marko Milanovic, ‘Norm Conflicts, IHL and IHRL’ in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011) 95, 104.

⁹⁶ See e.g. *R (on the applicant of Al-Jedda) (FC) v Secretary of State for Defence* [2007] UKHL 58.

⁹⁷ See e.g. UNSC Res 2295 (2016) UN Doc. S/RES/2295, op. para 38; see also UNSC Res 1851 (2008) UN Doc S/RES/1851, op. para. 6: “any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law”.

⁹⁸ Nele Matz-Lück, ‘Treaties, Conflict Clauses’ in Rüdiger Wolfrum (ed), *MPEPIL* (OUP online edition 2006); Marko Milanovic, ‘Norm Conflicts, IHL and IHRL’ in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011) 95, 104 et seq.

defect of IHRL and Geneva IHL that such conflict clauses, delineating IHRL and IHL or at least clarifying their relationship, are absent in the treaties. Some see the already addressed derogation clauses of human rights treaties such as article 15 ECHR as conflict clauses.⁹⁹ These derogation clauses, it is argued here, are one (limited) way of solving (some) conflicts, but their actual importance – theoretically and practically – is easily and widely overstated. Practically, derogations play no role whatsoever in modern extraterritorial deployments. The reason is easily guessed: States have simply been reluctant to actively acknowledge the extraterritorial applicability of human rights treaties in armed conflicts and beyond.¹⁰⁰ But even theoretically, the answers provided by derogation clauses are limited. Article 15 ECHR may serve as an example. It allows for derogations “[i]n time of war or other public emergency threatening the life of the nation” “to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”. Its para. 2 limits possibilities of derogations from article 2 ECHR to “deaths resulting from lawful acts of war” and excepts articles 3, 4 (paragraph 1) and 7 from the derogable rights altogether. Some argue that the mere existence of this norm bars any possibility to consider IHL, when applying IHRL to an armed conflict, based on the fact that the derogation procedure was intended to be the only way to replace IHRL guarantees.¹⁰¹ However, contrary to that, it is submitted that article 15 ECHR should be taken at face value. It merely allows for derogations of the ECHR obligation and article 15 para. 2 ECHR merely defines the circle of non-derogable human rights, i.e. such rights which continue to apply in situations of public emergency. Article 15

⁹⁹ Marko Milanovic, ‘Norm Conflicts, IHL and IHRL’ in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011) 95, 104 et seq.

¹⁰⁰ This is the most plausible explanation for the lack of derogations, while it seems highly unlikely that states have not gone down that road due to considerations of legal methodology, see however Pascal Hector, ‘Das Humanitäre Völkerrecht als *lex specialis*’ in Christian Calliess (ed), *Herausforderung an Staat und Verfassung, Liber Amicorum Torsten Stein* (NOMOS 2015) 956, 960 et seq.

¹⁰¹ To that effect Silvia Borelli, ‘Jaloud v Netherlands and Hassan v United Kingdom: Time for a principled approach in the application of the ECHR to military action abroad’ (2015) 2(16) QIL 25; see also Anna Gebhardt, ‘Menschenrechtsschutz oder Humanitäres Völkerrecht’ in Matthias Gillner and Volker Stümke (eds), *Kollateralschaden* (NOMOS 2015) 57, 67; Christian Johann, *Menschenrechte im internationalen bewaffneten Konflikt* (Berliner Wissenschaftsverlag 2012) 214 et seq.; see also the dissent by Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva in *Hassan v UK* App no 29750/09 (ECHR Grand Chamber Judgment 16 September 2014) para. 16 of the dissent.

ECHR, however, falls significantly short of barring *a priori* any attempt to interpret human rights in accordance with the accepted methods of interpretation, including article 31 para. 3 lit. c of the VCLT. Likewise, it does not mandate a departure from other rules of legal methodology such as the concept of *lex specialis derogat legi generalis*. While an interpretation would naturally need to give effect to the IHRL rule and cannot water it down *ad libitum*,¹⁰² recourse to the interpretative process and other rules of legal methodology is simply not barred by the existence of a derogation clause.

It has thus been established when conflicts between IHL and IHRL will not occur. It has furthermore been addressed when conflicts will be solved by existing rules establishing the primacy of one rule over another. In the following, the thesis will turn to cases in which both regimes do in fact conflict and it will be outlined, how such cases should be dealt with.

5. Normative analysis of the relationship between IHL and IHRL and ways of conflict solution

5.1 Key assumptions of the following analysis

At the outset, a number of observations will be made on which the following analysis is based.

It has already been stated that IHL does not set aside IHRL in armed conflicts. Accordingly, the analysis will be based on the following assumption: IHL is not a self-contained regime in the sense that it sets aside all norms of IHRL.¹⁰³ While there is significant uncertainty surrounding the notion of self-contained regimes and the consequences of characterising a legal regime as self-contained, this term generally refers to a legal system that lays “down the rights and duties of the actors within the regime (primary rules)” as well as provides “for means and mechanisms to enforce compliance, to settle disputes [...] and to react to breaches (secondary rules), with

¹⁰² This is the fear expressed by Marko Milanovic, ‘Norm Conflicts, IHL and IHRL’ in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011) 95, 97.

¹⁰³ See Dorota Marianna Banaszewska, ‘Lex Specialis’ in Rüdiger Wolfrum (ed), *MPEPIL* (OUP online edition 2015) para. 21 for the strict definition “legal regimes whose *lex specialis* system would in no case allow recourse to the general rules”.

the intention to replace and through this to exclude the application of general international law”.¹⁰⁴ IHL, especially the IHL applicable to IACs, bears some resemblance to such a regime. It is based (and its international acceptance hinges) “on a subtle balance of military necessity and considerations of humanity”.¹⁰⁵ Furthermore, it regulates situations of very specific character and excludes as unfit – at least to a degree – general rules of international law, e.g. in cases of belligerent reprisals.¹⁰⁶ As such, some see IHL as a self-contained regime proper and because of that, IHRL as well as all other general rules as excluded in armed conflicts.¹⁰⁷ Such a view is fundamentally misguided. Proponents of it would not only have to argue that the derogation clauses of IHRL treaties, especially that of article 15 ECHR explicitly referring to “war”, are not only superfluous, but based on a flawed understanding of the law, it would have to characterise the Martens Clause, which

¹⁰⁴ Eckart Klein, ‘Self-contained regimes’ in Rüdiger Wolfrum (ed), *MPEPIL* (OUP online edition 2006) para. 1; see also *Case concerning the United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, 40 (para. 86): “The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving States to counter any such abuse.”; Article 55 of the ILC Articles on State Responsibility (UN Doc. A/56/10, chapter V) also regulates that in case of a special regime, which supplies its own secondary rules, the ILC articles do not apply.

¹⁰⁵ Robin Geiß, ‘Land Warfare’ in Rüdiger Wolfrum (ed), *MPEPIL* (OUP online edition 2009) para. 21.

¹⁰⁶ See ICRC, ‘Rule 145, Reprisals’ in Customary International Humanitarian Law Database <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule145> last accessed 20 June 2017.

¹⁰⁷ See Wolff Heintschel v. Heinegg who allows for no role of IHRL in international armed conflicts, ‘Factors in war to peace transitions’ (2004) 27 Harv. J. L. & Pub. Pol’y 843, 871 and sees the progressive development of IHL by states even after the rise of human rights as evidence that it prevails over IHRL; the same result is reached by Michelle A Hansen, ‘Preventing the Emasculation of Warfare’ (2007) 194 Mil. L. Rev. 1 et seq. by arguing human rights apply only to the citizens of the acting state for historical reasons. See also Barry A. Feinstein, ‘The Applicability of the Regime of Human Rights in Times of Armed Conflict and Particularly to Occupied Territories’ (2005) 4(2) Nw. J. Int’l Hum. Rts 238, 243: “mutually exclusive regimes”, which seems to go against the fact that IHL contains provisions applicable during peacetime, as evidenced by Common article 2 para. 1 and article 3 of AP I.

was again and again (1899¹⁰⁸, 1907¹⁰⁹ and 1977¹¹⁰) consciously included in the IHL treaties and which acknowledges the openness of IHL towards “the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience” as irrelevant. Also, it would have to blatantly ignore the references to IHRL in IHL provisions such as article 72 AP I explicitly referring to “rules of international law relating to the protection of fundamental human rights during international armed conflict” and the rules in IHRL treaties that explicitly apply in times of armed conflict.¹¹¹ While being at it, this position would also have to turn a blind eye to the jurisprudence of the ICJ and the ECtHR as well as other UN- and state practice. However, what can be (and has been recently) said of IHL is that it is a “special regime”, which for interpretative purposes “may often be considered in [its] entirety”.¹¹² This means that an IHL rule will be interpreted in connection with all other rules of IHL and its underlying concepts as well as the “unified object and purpose” of IHL. Furthermore, while IHL is not a self-contained regime to the effect that it excludes IHRL from armed conflicts, this does not exclude the possibility that some aspects of IHL may be self-contained regimes. This has been proposed for sets of rules relating to a specific subject matter such as “a treaty on the regulation of the uses of a particular weapon”.¹¹³

¹⁰⁸ Convention (II) with Respect to the Laws and Customs of War on Land, adopted 29 July 1899, entry into force 4 September 1900, 187 Consol. T.S. 429.

¹⁰⁹ Convention (IV) respecting the Laws and Customs of War on Land, signed 18 October 1907, entry into force 26 January 1910, 187 Consol. T.S. 227.

¹¹⁰ Article 1 para. 2 of AP I and article 1 paragraph 4 of AP II.

¹¹¹ See e.g. article 38 of the CRC; Protocol 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances, ETS 187, entry into force 1 July 2003; article 2 of the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (15 December 1989) UN Doc. A/RES/44/128, entry into force 11 July 1991. For a convincing discussion of IHL as a self-contained regime see Christian Johann, *Menschenrechte im internationalen bewaffneten Konflikt* (Berliner Wissenschaftsverlag 2012) 142 et seq.; Gerd Oberleitner, *Human Rights in Armed Conflict* (CUP 2015) 83 et seq.

¹¹² ILC, ‘Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’ (2006) 4.

¹¹³ *Ibid.* with reference to the *Case of the S.S. “Wimbledon”*, PCIJ Rep Series A, No 1 (1923) 23-24, in which the Permanent Court of International Justice noted that the provisions on the Kiel Canal in the Treaty of Versailles of 1919 “differ [...] from those to which other

Secondly, the following analysis is based on the understanding that IHL and IHRL norms can conflict and do so. This has sometimes been disputed. The challenge to the notion of norm conflicts between IHL and IHRL is based on a very restrictive understanding of the term norm conflict, referring only to cases in which one norm compels the addressee to act in a certain way, when – at the same time – another norm forbids such action.¹¹⁴ It is submitted that while such cases would indeed be rare, if at all existent regarding IHL and IHRL, there is a significant area of overlap between IHL and IHRL in which both regimes sometimes contradict each other in concept. When IHL permits the taking of prisoners of war and IHRL allows the deprivation of liberty only in a limited number of cases, not including prisoner of war cases¹¹⁵, such a situation will for the purposes of this study be treated as a conflict of legal norms and concepts triggering the toolbox of means to avoid and ultimately solve such conflicts, i.e. the interpretation of the norms (including the interpretation pursuant to article 31 para. 3 lit. c VCLT), but also the concept of *lex specialis derogat legi generalis*.¹¹⁶ Such a solution has sometimes been attacked on the grounds that IHL is prohibitive in nature and does not actually allow the capture of persons or the use of force against combatants, just as IHRL is prohibitive in nature, so that there is no conflict.¹¹⁷ While this argument is technically coherent, it seems unconvincing, when one sees where IHL comes from. Of course, IHL is prohibitive in nature, because the state parties when negotiating IHL treaties quite clearly came

internal navigable waterways of the [German] Empire are subjected [...] The provisions of the Kiel Canal are therefore self-contained”.

¹¹⁴ See Jean d’Aspremont and Elodie Tranchez, ‘The quest for a non-conflictual coexistence of international human rights and humanitarian law: which role for the *lex specialis* principle?’ in Robert Kolb and Gloria Gaggioli (eds) *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 223, 231 et seq.; see also Christian Johann, *Menschenrechte im internationalen bewaffneten Konflikt* (Berliner Wissenschaftsverlag 2012) 176 et seq.

¹¹⁵ This conflict was the main problem of *Hassan v UK* App no 29750/09 (ECHR Grand Chamber Judgment 16 September 2014).

¹¹⁶ As stated above, this rule was never intended to replace whole regimes. In the modern understanding applied here, *lex specialis* is both a concept governing interpretation (with a role in the process of the interpretations pursuant to article 31 para. 3 lit. c VCLT) and a concept solving *norm-* (not *regime-*) conflicts in favour of the more specific rule.

¹¹⁷ See e.g. Christian Johann, *Menschenrechte im internationalen bewaffneten Konflikt* (Berliner Wissenschaftsverlag 2012) 183 and 196 et seq.

from a place where all was fair in (love and) war.¹¹⁸ That is not to say that IHL allows all behaviour it does not explicitly prohibit, but there are instances in which IHL does offer a legal basis for state actions.¹¹⁹ Furthermore, there are examples where IHL's silence on certain guarantees such as procedural guarantees accompanying detentions of prisoners of war is deliberate, normative in nature, and an expression of allowing in this instance the deprivation of liberty without those procedural guarantees.¹²⁰

Thirdly, *lex specialis* is an accepted part of legal methodology. It is true that it is hard to pin down in content as well as legal nature. Consequently, it has been assigned different legal status over the time encompassing "principle of legal logic, positive rule of law, general principle of law, interpretative rule, and presumption rule to legal proverbs".¹²¹ The difficulties in pinning down the legal nature of the rule should, however, not distract from the fact that the rule is and remains "a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts" with "a long history".¹²² It dates back to Roman law and as such has been a "compelling technique of solving normative conflicts within [Public International Law]" ever since the nascence of international law.¹²³ Consequently, the contention that the concept *lex specialis derogat legi generali* was "not part of mainstream thinking on the relationship between IHL and IHRL" prior to the ICJ *Nuclear*

¹¹⁸ See also *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 240 (para. 25); Wolfrum and Matz-Lück also argue for a broader approach to the topic of norm conflicts, see Rüdiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Springer 2003) 6 et seq.

¹¹⁹ See below 6.

¹²⁰ Cf. Pascal Hector, 'Das Humanitäre Völkerrecht als *lex specialis*' in Christian Calliess (ed), *Herausforderung an Staat und Verfassung, Liber Amicorum Torsten Stein* (NOMOS 2015) 956, 966; Sandesh Sivakumaran, *The Law of Non-International Armed Conflicts* (OUP 2012) 92; see below 6.2 and 6.3.2.

¹²¹ Dorota Marianna Banaszewska, 'Lex Specialis' in Rüdiger Wolfrum (ed), *MPEPIL* (OUP online edition 2015) para. 7; Erich Vranes, 'Lex Superior, Lex Specialis, Lex Posterior' (2005) 65 ZaöRV 391 392 et seq.

¹²² ILC, 'Fragmentation in International Law, Report of the Study Group of the International Law Commission' (13 April 2006) UN Doc. A/CN.4/L.682, para. 56 (and fn 57).

¹²³ Dorota Marianna Banaszewska, 'Lex Specialis' in Rüdiger Wolfrum (ed), *MPEPIL* (OUP online edition 2015) para. 2; ILC, 'Fragmentation in International Law, Report of the Study Group of the International Law Commission' (13 April 2006) UN Doc. A/CN.4/L.682, para. 56-62 for an in-depth study of the concept in international jurisprudence and the writing of influential authors such as Pufendorf, Grotius, Vattel, etc.

Weapons Advisory Opinion may be true.¹²⁴ This does, however, not result in a successful challenge to its validity or its applicability to the IHL/IHRL relationship. This result is backed up by the fact that reference to the rule of *lex specialis* has been quite commonplace in the verbal practice of states and in legal discourse after the ICJ's jurisprudence on the relationship between IHL and IHRL. The practice and discourse from 1996 until today is arguably more relevant for the relationship between IHL and IHRL than the practice between 1949 and 1996, when the problem at hand was generally ignored.

Fourthly, applying the *lex specialis* concept is not barred by the nature of IHRL. It has been argued that when human rights forbid a certain action in armed conflict, norm conflicts arise between IHL and IHRL that are unresolvable.¹²⁵ The situation has been compared to a norm conflict between a duty to extradite stemming from a bilateral extradition treaty and the prohibition to extradite stemming from IHRL – a situation of a norm conflict in the restrictive sense. In such a situation, it would be self-defeating to argue that the obligation stemming from the extradition treaty – regulating more specifically the case at hand – is *lex specialis* and thus the extradition may proceed as IHRL will be set aside being the *lex generalis*. The protective nature of IHRL would clearly forbid such a solution. This logic does, however, not apply to the IHL/IHRL situation. While it is well established that when a bilateral obligation such as one to extradite from an extradition treaty conflicts with an obligation with a humanitarian object such as the IHRL obligation of non refoulement, the latter prevails regardless of the specificity of the former.¹²⁶ Regarding IHL and IHRL, however, the norms in potential conflict both serve a humanitarian object, so that the cases differ significantly.¹²⁷ Indeed, this is the

¹²⁴ For this observation see Marko Milanovic, 'The Lost Origins of *Lex Specialis*' in Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016) 78, 101.

¹²⁵ See for this by reference to the bilateral extradition treaties Marko Milanovic, 'Norm Conflicts, IHL and IHRL' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011) 95, 108 et seq.

¹²⁶ Cf. article 60 para. 5 VCLT; with further references Alexander Orakhelashvili, 'Article 30 Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties, Vol. I* (OUP 2011) para. 76 (p. 793).

¹²⁷ See however Marko Milanovic, 'Norm Conflicts, IHL and IHRL' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011) 95, 108 et seq.

reason why the method introduced in this thesis¹²⁸ works for IHL and IHRL, but is not transferable to the relationship of IHRL with other legal regimes with no humanitarian purpose, such as international economic law.

Fifthly, in the following, norms of IHL will generally be taken to constitute *lex specialis* in relation to norms of IHRL as long as IHL applies, i.e. as long as situations in an armed conflict are to be assessed. IHL is – in the vast majority of cases – the more specific regime vis a vis IHRL in armed conflicts. Of course, this is a generalization, which does not necessarily hold true in every instance. The term *lex specialis* refers to the norm that “is ‘special’ i.e. the rule with a more precisely delimited scope of application”¹²⁹ compared to another norm, the *lex generalis*. IHL applies chiefly to armed conflicts, while IHRL applies in times of armed conflict *and* peace. Consequently, IHL is *a priori* narrower in its scope and contains (mostly) rules specific and tailored to situations of armed conflict. However, this categorization of IHL does not bar the possibility to create more specific IHRL in armed conflict. An example at hand would be children’s rights. The CRC has come close to formulating provisions of legal protection for children during armed conflicts, although those mainly reference existing IHL norms. A hypothetical IHRL norm that formulates an explicit legal standard how to treat children in armed conflicts and what to do to guarantee their safety during hostilities, which goes beyond IHL would logically be the *lex specialis* vis a vis the more general IHL norm. However, beyond this possibility, the proposition that existing IHRL could be more specific in situations of armed conflict is deeply problematic.¹³⁰ Human rights have been argued to become *lex specialis* when a state exercises effective control over a territory, if the circumstances of the use of force allow e.g. a capture of a combatant instead of killing that person, if there is a law enforcement operation in an armed conflict, during situations of occupation, etc.¹³¹ Apart from the fact that such propositions fail to

¹²⁸ See below 5.3.

¹²⁹ ILC, ‘Fragmentation in International Law, Report of the Study Group of the International Law Commission’ (13 April 2006) UN Doc. A/CN.4/L.682, para. 57.

¹³⁰ See however OHCHR, ‘International Legal Protection of Human Rights in Armed Conflict’ (United Nations 2011) 62 with further references; Oona A. Hathaway, Rebecca Crootof, Philip Levitz, Haley Nix, William Perdue, Chelsea Purvis, and Julia Spiegel, ‘Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law’ (2011/2012) 96 *Minn. Law Rev.* 1883, 1907 et seq.

¹³¹ Marco Sassòli and Laura M. Olson, ‘The relationship between international humanitarian and human rights law where it matters’ (September 2008) 90(871) *Int’l Rev. Red Cross* 599,

recognize that IHL does not only regulate the specific conduct of hostilities, but also contains general rules on upholding order and maintaining security in times of armed conflict at large,¹³² none of these proposals offer a convincing and practical way to distinguish between a case in which IHL would apply primarily and a case in which IHRL should apply. It is granted that it seems to be intuitively preferable to apply IHRL exclusively whenever possible. But the challenge to be addressed is the need for a clear and practical differentiation between the cases. Should IHRL trump IHL, if the actor in question is at all able to adhere to IHRL standards? Should it apply, if its application does not counteract deliberations of military necessity? The distinction between IHRL and IHL and the question, which legal standard applies in a specific situation must be clear in order to be translatable into practice and to enable compliance. None of the suggestions mentioned offer such a solution. Moreover, none of these proposals have a basis in the law as it stands. An IHRL norm does not suddenly become more specific than one of IHL, when a state exercises effective control or when a state occupies a territory pursuant to IHL – it remains the more general set of rules compared to the norms of IHL simply by virtue of their wider area of application.

5.2 Brief overview over the current state of discussion

With this prologue, this work will now provide a closer look to how norms of IHL and IHRL apply in a situation of armed conflict, whenever norms of both regimes are applicable and if no other of the above-mentioned rules of primacy, such as article 53 VCLT or article 103 of the UN Charter, or of conflict-resolution applies.

This question has been at the centre of the academic discussion and the dispute is complex as well as ridden with differences in terminology, which further complicates

614 et seq. in cases of effective control and the possibility to act pursuant to human rights); OHCHR, 'International Legal Protection of Human Rights in Armed Conflict' (United Nations 2011) 63 (the more effective the control exercised the more primacy should human rights have); Cordula Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40(2) *Isr. L. Rev.* 310, 344 (law enforcement in armed conflicts subject to human rights).

¹³² Kenneth Watkin, *Fighting at the Legal Boundaries* (OUP 2016) 130.

the situation.¹³³ The *lex specialis* concept is an especially good example for that. While every jurist, especially one with a focus on international law, has a general understanding of this concept, pinning it down and explaining its exact content and the consequences attached to it is quite a task, as evidenced by the efforts of the ILC Study Group on Fragmentation.¹³⁴ As such, the reference of the *Nuclear Weapons Advisory Opinion*, in which the ICJ stated that IHL is *lex specialis* to IHRL in armed conflicts, left many puzzled.¹³⁵ Indeed, by saying that IHL is *lex specialis* not much is said and one might justifiably ask what that means for IHRL.¹³⁶ It has also been questioned, if the wording of the Court was appropriate, seeing that it characterized the whole of IHL as *lex specialis* in relation to IHRL, whereas the *lex specialis* rule regulates the solution of norm conflicts not conflicts of whole regimes.¹³⁷

For the purposes of this thesis, reference to the Working Group on Fragmentation will have to suffice. The Working Group, which authored the most recent and exhaustive work on the topic *lex specialis* “suggests that whenever two or more [dispositive] norms deal with the same subject matter, priority should be given to the norm that is more specific”, as “special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any

¹³³ See for other assessments of this topic Bernhard Schäfer, *Zum Verhältnis Menschenrechte und humanitäres Völkerrecht* (Universitätsverlag Potsdam 2006) 35 et seq.; Gentian Zyberi, ‘The Jurisprudence of the International Court of Justice and International Criminal Courts and Tribunals’ in Erika de Wet and Jann Klefner (eds), *Convergence and Conflicts* (PULP 2014) 395, 400 et seq.

¹³⁴ See ILC, ‘Fragmentation in International Law, Report of the Study Group of the International Law Commission’ (13 April 2006) UN Doc. A/CN.4/L.682; see also OHCHR, ‘International Legal Protection of Human Rights in Armed Conflict’ (United Nations 2011) 59 et seq.; Erich Vranes, ‘Lex Superior, Lex Specialis, Lex Posterior’ (2005) 65 *ZaöRV* 391 et seq.

¹³⁵ See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 240 (para. 25); for a further discussion of the ICJ jurisprudence in that regard see Bernhard Schäfer, *Zum Verhältnis Menschenrechte und humanitäres Völkerrecht* (Universitätsverlag Potsdam 2006) 43 et seq.

¹³⁶ See also Francoise J. Hampson, ‘Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?’ (2009) 85 *US Naval War College ILS* 485, 497.

¹³⁷ See Silvia Borelli, ‘The (Mis)-Use of General Principles of Law: *Lex Specialis* and the Relationship between International Human Rights Law and the Laws of Armed Conflict’ in Laura Pineschi (ed), *General Principles of Law: The Role of the Judiciary* (Springer 2015) 265, 266 et seq.; Marko Milanovic, ‘The Lost Origins of *Lex Specialis*’ in Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016) 78.

applicable general law.”¹³⁸ As such, *lex specialis* “may be used to apply, clarify, update or modify as well as set aside general law”.¹³⁹ However, general law will not normally be extinguished, but will remain “valid and applicable and will [...] continue to give direction for the interpretation and application of the relevant special law” becoming fully applicable “in situations not provided for by the” *lex specialis*.¹⁴⁰

5.2.1 Conflict solution by recourse to the *lex specialis* concept

There have been numerous academic positions regarding the question of how to translate the concept of *lex specialis* to the topic at hand. This has sometimes been taken very far. For example, it has been argued that IHRL is indeed *a priori* replaced by the IHL regime in situations of armed conflict no matter the situation at hand.¹⁴¹ This represents the traditional position on the relationship between IHL and IHRL.¹⁴²

The position that in case of a conflict between an IHL norm and an IHRL norm, the IHRL norm would be replaced by the IHL norm is much closer to the actual content

¹³⁸ ILC, ‘Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’ (2006) 1 et seq.

¹³⁹ ILC, ‘Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’ (2006) 2.

¹⁴⁰ ILC, ‘Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’ (2006) 2 et seq.

¹⁴¹ With reference to these positions Hans-Joachim Heintze, ‘Theorien zum Verhältnis von Menschenrechten und humanitärem Völkerrecht’ (2011) 24(1) *HuV-I* 4, 5 et seq.; Robert Kolb, ‘Human Rights and Humanitarian Law’ in Rüdiger Wolfrum (ed), *MPEPIL* (OUP online edition 2013) para. 28; Oona A. Hathaway, Rebecca Crotoof, Philip Levitz, Haley Nix, William Perdue, Chelsea Purvis, and Julia Spiegel, ‘Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law’ (2011/2012) 96 *Minn. Law Rev.* 1883, 1894 et seq.; Christopher Greenwood, ‘Human Rights and Humanitarian Law: Conflict or Convergence (2010-2011) 43 *Case W. Res. J. Int’l L.* 491, 500 et seq.; see also Kenneth W. Watkin, ‘Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict’ (2004) 98 *Am. J. Int’l L.* 1, 22; in favour Richard Ekins, Jonathan Morgan, and Tom Tugendhat, ‘Clearing the Fog of Law’ (Policy Exchange 2015); Michael J. Dennis, ‘Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict’ (2007) 40 *Isr. L. Rev.* 453-502.

¹⁴² E.g. Wilfred Jenks, ‘The Conflict of Law-Making Treaties’ (1953) 30 *Brit. Yb Int’l L.* 401, 446.

of *lex specialis*, since it is in place to solve conflicts of norms not of regimes.¹⁴³ The importance of this principle has received a significant boost by the ICJ's verdict in its *Nuclear Weapons Advisory Opinion*. As outlined above, the ICJ clearly did not argue for a replacement of IHRL by IHL on the regime level. On the contrary, it deemed article 6 ICCPR applicable and only afterwards arrived at its famous conclusion that IHL is *lex specialis*.¹⁴⁴ The ICJ only concluded that the examination, if a deprivation of life was indeed arbitrary would need to be performed on the basis of IHL rules.¹⁴⁵ So mere replacement of the conflicting regime or even of the specific norm is not the content the ICJ prescribed for *lex specialis*. It saw both regimes and its norms as applicable, but granted one, the *lex specialis*, a guiding effect to a certain degree.

5.2.2 IHL and IHRL as complementary regimes

Other authors and institutions focus less on the specificity of IHL and the separate nature of IHL and IHRL by arguing for a complementary relationship between the individual norms of IHRL and IHL. Proponents of this position see IHRL as applicable in armed conflicts and not generally replaced by IHL. They continue by giving human rights an effect in the interpretation of IHL and *vice versa*.¹⁴⁶ As such, IHRL guarantees surrounding the deprivation of liberty will be considered when

¹⁴³ See e.g. Jochen Abr. Frowein, 'Probleme des allgemeinen Völkerrechts vor der Europäischen Kommission für Menschenrechte' in Ingo von Münch (ed), *Staatsrecht - Völkerrecht - Europarecht: Festschrift für Schlochauer* (De Gruyter 1981) 288, 295; in a similar direction Ute Erberich, *Auslandseinsätze der Bundeswehr und Europäische Menschenrechtskonvention* (Carl Heymanns 2004) 35 et seq.

¹⁴⁴ Oona A. Hathaway, Rebecca Crootof, Philip Levitz, Haley Nix, William Perdue, Chelsea Purvis, and Julia Spiegel, 'Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law' (2011/2012) 96 *Minn. Law Rev.* 1883, 1894 et seq., characterize this interpretation as an "aggressive reading" of the ICJ's position.

¹⁴⁵ For a similar approach see Inter-American Commission on Human Rights *Coard et al. v United States of America* (29 September 1999), Report N. 109/99, Case 10.951, para. 42, in which the Commission, however, went further and saw itself bound to give effect to the normative standard which best safeguards the rights of the individual.

¹⁴⁶ See the positions referred to above of the UN institutions; see also 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* (Edward Elgar 2013) 441, 443 et seq.

interpreting deprivations of liberty as allowed by IHL and IHL norms allowing deprivations of liberty will be read into IHRL in the process of interpreting its applicable guarantees. This mutual acknowledgment of the other regime is (explicitly or implicitly) based on the rule of article 31 para. 3 lit. c VCLT¹⁴⁷ (interpretation of a norm in accordance with other existing norms) and corresponding customary international law.¹⁴⁸ Article 31 para. 3 lit. c VCLT and its mandate for a harmonizing interpretation is an expression of the principle of systemic integration and has its premise on the assumption (or fiction) that despite the fragmented nature of international law, rules come into existence in the knowledge of other existing rules on the matter and the applicable norms are not meant to collide, but to be in formal unity with each other.¹⁴⁹ Consequently, it prescribes the interpretation of a treaty “by reference to its ‘normative environment’ which includes all sources of international law” leading to an interpretation that to the greatest extent possible, give rise to a single set of compatible obligations, when several norms apply to a case.¹⁵⁰ The ICJ has developed its position on IHL and IHRL into that direction, as outlined above.

¹⁴⁷ See extensively Andreas Paulus and Johann Ruben Leiß, ‘Art. 103’ in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus (eds), *The Charter of the United Nations* (OUP 3rd ed 2012) para. 17 et seq. This article and its underlying principles have received a considerable amount of scholarly attention. A recent example is Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration* (Brill 2015); for the purposes of this thesis, it suffices to see in article 31 para. 3 lit. c VCLT a rule allowing for the harmonization of two or more norms that apply to the same situation; for an example of such an interpretation see *Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep 161, 182 (paras 41 et seq), see below fn 230 for a discussion of the criticism this decision received.

¹⁴⁸ For the customary international law status of article 31 para. 3 lit. c VCLT see with further reference Jean d’Aspremont, ‘The Systemic Integration of International Law by Domestic Courts’, in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Bloomsbury 2014) 141, 151.

¹⁴⁹ See e.g. Jean d’Aspremont, ‘The Systemic Integration of International Law by Domestic Courts’, in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Bloomsbury 2014) 141, 148; further on the rule and the underlying principle Oliver Dörr, ‘Article 31’, in Oliver Dörr and Kerstin Schmalenbach (eds), *Vienna Convention on the Law of Treaties: Commentary* (Springer 2012) 521, 560-8 (paras 89-104).

¹⁵⁰ Jean d’Aspremont, ‘The Systemic Integration of International Law by Domestic Courts’, in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Bloomsbury 2014) 141, 148; see also the analysis of the Inter-American Court of Human Rights’ jurisprudence Hélène Tigroudja, ‘The Inter-American Court of Human Rights and international

Such reciprocal effects of IHL and IHRL on the interpretation of norms of the other regime are sometimes denied with the argument that both regimes stand for themselves and e.g. the use of force against an enemy combatant may be deemed legal under IHL, but – absent a declaration of derogation – at the same time illegal under IHRL.¹⁵¹ This result is then justified by the argument that the right to life and the right to use force against enemy combatants are in an unresolvable norm conflict leaving the state to decide on the basis of policy considerations and value judgments if it violates the IHRL obligation.¹⁵² This situation was again likened to the situation of bilateral extradition treaties regulating a duty to extradite and the human rights guarantee of non refoulement – a comparison, which – as explained above – falls flat due to the fact that unlike extradition treaty obligations, IHL has a humanitarian object and thus does not fall under article 60 para. 5 VCLT.¹⁵³ The proposition that IHRL and IHL stand side by side and have to be viewed independently from one another, albeit theoretically coherent, ignores the fact that despite the problems in applying it, *lex specialis* is a generally accepted concept in international law, as is the rule included in article 31 para. 3 lit. c VCLT. As such, interactions between different legal regimes are the rule rather than the exception. Furthermore, it is submitted that the translation of legal guarantees into practice, especially in situations most likely not foreseen by state parties at the time of conclusion of a treaty, sometimes calls for an eye for the actual circumstances, the aim to arrive at a conclusion, which gives effect to all applicable rules and a solution, which is translatable into the real world and palatable to the bearers of the obligations. The object and purpose of IHRL and IHL is not maximum-theoretical protection of individuals on paper, but the maximum-practical protection in the real world under

humanitarian law' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 466-479.

¹⁵¹ See e.g. Marko Milanovic, 'Norm Conflicts, IHL and IHRL' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011) 95.

¹⁵² Marko Milanovic, 'Norm Conflicts, IHL and IHRL' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011) 95, 118-121 and 123 et seq.

¹⁵³ See e.g. Alexander Orakhelashvili, 'Article 30 Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties, Vol. I* (OUP 2011) para. 76.

the given circumstances.¹⁵⁴ As such, leaving IHRL guarantees fully applicable during armed conflicts and not even acknowledging the more specific norms of IHL in the process of interpreting human rights would essentially do away with the regime of IHL, a result never intended by the international community and entirely lacking of its backing. Thus, such a view would result in little other than a growing disregard for legal standards by the international community at large with potentially dramatic consequences for the protection of the individual in armed conflicts. Consequently, this thesis supports the view that reciprocal effects of IHL and IHRL in the interpretative process of norms of both regimes are indeed possible.

5.2.3 Derogations as tools of norm conflict solution

A rising number of scholars focus on the derogation process in order to solve conflicts between IHL and IHRL. They argue that the only way to prevent a replacement of IHL by IHRL would be a declaration of derogation under the derogation procedure of the human rights treaties.¹⁵⁵ This overstates the importance and normative content of the derogation procedure greatly, as outlined above. After the *Hassan*-judgment of the ECtHR, which will be discussed below, this position does not even have the backing of the ECtHR anymore.¹⁵⁶ It has been argued already that the fact that IHRL treaties allow for a process of derogation does not bar the interpretation of human rights. The articles allowing for derogations from human rights define the circle of non-derogable and derogable human rights and outline the procedure for state parties to derogate from human rights guarantees. This exhausts their normative content. They were never intended to make IHRL uninterpretable. The acknowledged methods of interpretation include article 31 para. 3 lit. c of the VCLT, which enables a harmonization of IHRL with IHL. Furthermore, the position arguing that the derogation procedure means IHL has no effect at all on IHRL, unless a state derogates from IHRL, regularly tends to

¹⁵⁴ See also Stefan Oeter, 'Fortschrittsnarrative im Humanitären Völkerrecht' in Christian Calliess (ed), *Herausforderung an Staat und Verfassung, Liber Amicorum Torsten Stein* (NOMOS 2015) 1025, 1043 on the "colonialization of IHL by IHRL" and with the warning that IHL is meant to work, not look good on paper.

¹⁵⁵ See above fn 101.

¹⁵⁶ *Hassan v UK* App no 29750/09 (ECHR Grand Chamber Judgment 16 September 2014) para. 101; for a further analysis see below 6.2.

overstate the legal consequences of a derogation and thus its fitness as a conflict-solution-mechanism. Indeed, a derogation from the ECHR would have limited effect on the problems caused by uncertain legal standards in extraterritorial deployments. This also exposes the announcements by the UK government threatening a derogation from the ECHR for deployments to come as mere populism.¹⁵⁷ Indeed, the UK – to stay with the example – could derogate from article 2 para. 1 ECHR for lawful acts of war, but what would it stand to win apart from the cheap political signal. The ECtHR has already proven to be willing to accommodate IHL in international armed conflicts into the ECHR even without a derogation declaration. This effectively renders a derogation from article 2 para. 1 ECHR useless in international armed conflict settings.¹⁵⁸ Moreover, such a derogation declaration¹⁵⁹ would fall well short of its aim, to silence the ECtHR and curtail its practical influence. Even if a derogation would fulfil the formal requirements, the Court would maintain a vital role in adjudicating on the acts of armed forces. It would not be side-lined, but would still be able to assess e.g. if a use of force was a “lawful act of war” and thus falls under the derogable content of article 2 para. 1 ECHR.¹⁶⁰ If the state is found to have violated IHL with its lethal use of force, the court could assess the act as usual

¹⁵⁷ See the references in the introduction. Even *Marko Milanovic*, who very much supports the idea of derogating from the ECHR alludes to the exaggerated rhetoric and expectations, see ‘UK to Derogate from the ECHR in Armed Conflict’ (EJIL:Talk 5 October 2016).

¹⁵⁸ *Hassan v UK* App no 29750/09 (ECHR Grand Chamber Judgment 16 September 2014) para. 101.

¹⁵⁹ The formalities as foreseen by article 15 para. 3 ECHR tend to be treated as binding, so that there is no implied derogation. Cf. *Cyprus v Turkey* App nos 6780/74 and 6950/75 (EComHR 10 July 1976) para. 66-8, where the Commission stated that “it could not, in the absence of some formal and public act of derogation by Turkey, apply Art 15 of the Convention...” (para. 67); see Jens Meyer-Ladewig and Christiane Schmaltz, ‘Art. 15’ in Jens Meyer-Ladewig, Martin Nettesheim and Stefan von Raumer (eds) *Europäische Menschenrechtskonvention* (4th ed, NOMOS 2017) para. 11; Karin Oellers-Frahm, ‘A regional perspective on the convergence and conflicts of human rights and international humanitarian law in military operations: The European Court of Human Rights’ in Erika de Wet and Jann Klefner (eds), *Convergence and Conflicts* (PULP 2014) 333, 340; *Ashauer* argues that the notification is a mere formal obligation, whose violation does not bar the member state from relying on the derogation, as long as a state of emergency exists, see Christoph Ashauer, ‘Die Menschenrechte im Notstand’ (2007) 45 ArchVR 400, 410.

¹⁶⁰ See also Heike Krieger, ‘After Al-Jedda: Detention, Derogation, and an Enduring Dilemma’ (2011) 50 Mil. L. & L. War Rev. 419, 438-9.

without the derogation having any legal effect, since a derogation from the right to life is only possible for lawful acts of war pursuant to article 15 para. 2 ECHR.¹⁶¹

Moreover, a derogation is seen by the Court as an “exceptional” right, only possible under strict conditions, which are to be interpreted narrowly¹⁶² and for which the member state relying on the derogation has the burden of proof.¹⁶³ There is significant doubt, if these requirements are fulfilled in those modern-day deployment of troops abroad that have sparked the alarmist political statements referred to above.

For a derogation to be successful pursuant to article 15 ECHR there has to be an actual or imminent exceptional situation of crisis or emergency of which “war” is an example. This emergency has to “affect the whole nation to the extent that the continuance of the organised life of the community was threatened.”¹⁶⁴ Furthermore,

¹⁶¹ The exact function of a derogation is still unclear, so that it cannot be said with certainty whether article 2 would not apply at all for the lawful use of force, or if there is no interference with the right or if such an interference would be justified by the derogation, see Heike Krieger, ‘Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslandseinsatz’ (2002) 62 ZaöRV 669, 694 who seems to be in favour of a justification, while Grabenwarther and Pabel argue for a partial inapplicability of the convention to the situation, Christoph Grabenwarther/ Katharina Pabel, *Europäische Menschenrechtskonvention* (C.H. Beck 6th ed 2016) 10; in the same direction Christoph Ashauer, ‘Die Menschenrechte im Notstand’ (2007) 45 ArchVR 400, 411.

¹⁶² *Lawless v Ireland* App no 332/57 (ECHR 1 July 1961) para. 22 et seq.

¹⁶³ EComHR, *Greek Case*, Report of the Sub-Commission, Vol. I, Part 1, p. 70, para. 114; see in general Christoph Ashauer, ‘Die Menschenrechte im Notstand’ (2007) 45 ArchVR 400, 416 et seq.

¹⁶⁴ *Lawless v Ireland* App no 332/57 (ECHR 1 July 1961) para. 28; for the requirements of a derogation from the ICCPR see UN Commission on Human Rights, ‘The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’ (28 September 1984) UN Doc. E/CN.4/1985/4; Johann argues that “threatening the life of the nation” may only refer to “other public emergency” and not to “time of war” with the result that the ECtHR may have lower material standards for a derogation in times of war, Christian Johann, *Menschenrechte im internationalen bewaffneten Konflikt* (Berliner Wissenschaftsverlag 2012) 242 et seq. He, however, also concedes that apart from the ambiguous wording of the authoritative texts, this position cannot really be backed up. Indeed, the wording goes against that proposition, since “other public emergency” (emphasis added) suggests that “time of war” is indeed seen only as an example of a public emergency. Moreover, seeing that article 15 ECHR is an exception, it is to be interpreted narrowly, as done by the ECtHR. Furthermore, the object and purpose of the Convention also point in the direction of a narrow interpretation and high standards for a derogation; see also Christoph Grabenwarther and Katharina Pabel, *Europäische Menschenrechtskonvention* (C.H. Beck 6th ed 2016) 11; Heike Krieger, ‘Notstand’ in Oliver Dörr, Rainer Grote, and Thilo Marauhn (eds), *EMRK/GG Konkordanzkommentar Vol. I* (Mohr Siebeck 2nd ed. 2013) 417, 427.

the crisis or danger has to be “exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health, and order, were plainly inadequate.”¹⁶⁵ Derogations may also only be declared “to the extent strictly required by the exigencies of the situation”¹⁶⁶, resulting in the possibility of the ECtHR to review the acts regarding their necessity.¹⁶⁷ Lastly, derogations and the measures taken thereafter have to be consistent with other obligations under international law. If one of these circumstances is not met, a derogation would fail to exert legal effect.

It seems doubtful, whether the ECtHR will see the criterion of a threat to the “life of the nation” as being met in the reality of the current extraterritorial deployments of armed forces. The state parties negotiating article 15 ECHR likely did not envision a situation in an extraterritorial deployment of the military, but a war or emergency on the territory of the ECHR member state. The current reality of deployments of the armed forces of European nations is very distant from such a situation not concerning the intensity of warfare, but the proximity of the conflict to the territory of the member state and thus the immediacy of the threat to the population and the nation at large.¹⁶⁸ So far, the ECtHR had to decide on the prerequisites of a

¹⁶⁵ EComHR, *Greek Case*, Report of the Sub-Commission, Vol. I, Part 1, p. 70, para. 113: “The crisis or danger must be exceptional, in that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate.”

¹⁶⁶ *Aksoy v Turkey* App no 21987/93 (ECHR 18 December 1996) para. 68; *Brannigan and McBride v United Kingdom* App nos 14553/89 and 14554/89 (ECHR 26 May 1993) para. 43; the Court adopts a three-pronged test aptly described by Bernadette Rainey, Elizabeth Wilcks, and Clare Ovey, ‘Reservations & Derogations’ in Jacobs, White & Ovey, *The European Convention of Human Rights* (OUP 6th ed 2014) 118: “First, are the derogations necessary to cope with the threat to the life of the nation? Secondly, are the measures taken no greater than those required to deal with the emergency? This is a test of proportionality. Finally, how long have the derogations been applied”. It is a subject of academic dispute, if every act undertaken after a derogation has to be “strictly required”, establishing a strict proportionality standard for each act (see Hartmut Henninger, *Menschenrechte und Frieden als Rechtsprinzipien des Völkerrechts* (Mohr Siebeck 2013) 344-5). This result would devalue derogations even further as instruments to regulate the relationship between IHL and IHRL. The alternative would be that the derogation lifts the human rights obligations, to which it applies from the state and gives the state a legal ground to interfere with those human rights, Christoph Ashauer, ‘Die Menschenrechte im Notstand’ (2007) 45 ArchVR 400, 410 et seq.

¹⁶⁷ See *Aksoy v Turkey* App no 21987/93 (ECHR 18 December 1996) para. 87; see for the ongoing judicial control exercised by the ECtHR Heike Krieger, ‘After Al-Jedda: Detention, Derogation, and an Enduring Dilemma’ (2011) 50 Mil. L. & L. War Rev. 419, 438-9.

¹⁶⁸ See also Heike Krieger, ‘Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslandseinsatz’ (2002) 62 ZaöRV 669, 690; see however Bart van der

derogation only concerning internal threats or conflicts such as the fight against terrorism in Northern Ireland¹⁶⁹, activities of the PKK in the southeast of Turkey¹⁷⁰ as well as post 9/11 England¹⁷¹. A possible future case, which is just as domestic in nature, is the French derogation from the ECHR in the wake of the Paris attacks of the 13th of November 2015, which (problematically) continues to be in effect until today. The ECtHR has accepted the derogations it had to decide on as being in accordance with article 15 ECHR.¹⁷² These cases, however, all came closer to the notion of a member state being immediately threatened than is the case in extraterritorial deployments. This is not to say that extraterritorial deployments may never justify a derogation. An extraterritorial deployment of troops in the ongoing fight against international terrorism after the so-called Islamic State has attacked European nations may be said to fulfil the prerequisites, as a member state can be seen to be under a direct and immediate threat. In other cases, however, western nations are involved in foreign countries to counter first and foremost regional threats, which have the potential to destabilize a region or may even have global effects.¹⁷³ Of course, one could argue, that it would suffice for a derogation, when the Security Council sees a situation as a threat to world peace and acts pursuant to Chapter VII of the UN Charter. However, such a view would be very distant from the criteria established by the ECtHR mandating that the continuance of the organised life of the community (in the member state!) has to be threatened in order for a derogation to be justified. It would also, arguably, not be in keeping with the object and purpose of the ECHR and its article 15. For the (almost) parallel criteria of a derogation under the ICCPR, member of the Human Rights Committee of the United Nations *Walter Kälin* has indeed rejected that the requirement “threat to the

Slout, 'Is All Fair in Love and War? An Analysis of the Case Law on Article 15 ECHR', (2014) 53 Mil. L. & L. War Rev. 319, 346, who sees the fact that the ECtHR addressed the fact that the government did not „purport to derogate under Article 15“, *Al Jedda v UK* App No 27021/08 (ECHR Grand Chamber Judgment 7 July 2011) para. 100.

¹⁶⁹ *Ireland v UK* App no 5310/71 (ECHR 18 January 1978).

¹⁷⁰ *Aksoy v Turkey* App no 21987/93 (ECHR 18 December 1996).

¹⁷¹ *A. and others v UK* App no 3455/05 (ECHR 19 February 2009).

¹⁷² With an analysis of the case-law Bart van der Sloot, 'Is All Fair in Love and War? An Analysis of the Case Law on Article 15 ECHR', (2014) 53 Mil. L. & L. War Rev. 319, 348-9 who observes a widening of the prerequisites in the court's jurisprudence

¹⁷³ See also Heike Krieger, 'Notstand' in Oliver Dörr, Rainer Grote, and Thilo Marauhn (eds), *EMRK/GG Konkordanzkommentar Vol. I* (Mohr Siebeck 2nd ed. 2013) 417, 429.

life of a nation” is fulfilled “if a State is conducting military operations in foreign lands, be it as an aggressor and occupier or as a participant in a peace-enforcing or peace-keeping mission.”¹⁷⁴ It might be said that this view would result in the derogation process not keeping pace with the ever extending spacial application of IHRL, however, the counterargument to that may well be that a derogation process is not needed for deployments to foreign countries, since IHRL does not foresee a possibility to derogate, when the member state can in fact fulfil its IHRL obligations. In the case of an extraterritorial deployment one could – although this would be isolationist and potentially cynical in nature – always argue that the member state has the option to stay at home and by that fulfil its human rights obligations (although potentially fail a responsibility to protect).

While the Court acknowledges that ECHR member states have a wide discretion or margin of appreciation¹⁷⁵ concerning the question, if the prerequisites of a derogation are met, it also emphasises that there are limits and ultimately, the Court is the arbiter and decides if a member state’s derogation goes beyond of what is “strictly required” in the specific situation.¹⁷⁶ This criterion also clearly shows that member states do not have the option to issue a general derogation and thus simply make the dispositive human rights standards disappear, which exposes every political statement suggesting the contrary as a dramatic misrepresentation of the law.¹⁷⁷

¹⁷⁴ See the presentation of *Walter Kälin*, The Covenant on Civil and Political Rights and its relationship with international humanitarian law, in the Expert Meeting on the Supervision of the Lawfulness of Detention during Armed Conflict, pp. 25 et seq. (27); see also Heike Krieger, ‘Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslandseinsatz’ (2002) 62 ZaöRV 669, 690.

¹⁷⁵ *Aksoy v Turkey* App no 21987/93 (ECHR 18 December 1996) para. 68; EComHR, Greek Case, Report of the Sub-Commission, Vol. I, Part 1, p. 70, para. 114; cf regarding the concept of margin of appreciation in the jurisprudence of the ECtHR with further references Meinhard Hilf and Tim R. Salomon, ‘Margin of Appreciation Revisited: The Balancing Pole of Multilevel Governance’ in Marise Cremona, Peter Hilpold, Nikos Lavranos, Stefan Staiger Schneider, and Andreas R. Ziegler (eds), *Reflections on the Constitutionalisation of International Economic Law*, Liber Amicorum for Ernst-Ulrich Petersmann (Brill 2014) 37, 43 et seq.

¹⁷⁶ Cf. EComHR, Greek Case, Report of the Sub-Commission, Vol. I, Part 1, p. 87 et seq., para. 145 et seq.; *Lawless v Ireland* App no 332/57 (ECHR 1 July 1961) paras 31 et seq.

¹⁷⁷ This is, however, the result proponents for derogations at times attempt to reach see Richard Ekins, Jonathan Morgan, and Tom Tugendhat, ‘Clearing the Fog of Law’ (Policy Exchange 2015).

Consequently, due to the lacking jurisprudence of the ECtHR concerning derogations pursuant to article 15 ECHR in the case of current extraterritorial deployments it is far from certain that it will accept derogations in such cases.¹⁷⁸ Even if it would, this would have a limited effect. As outlined, derogations are in place for emergency situations, in which the IHRL guarantees cannot be complied with or a state needs to suspend those guarantees to counteract an immediate threat against itself and its people. They are not at all suited to regulate or indeed solve the complex relationship between IHL and IHRL. For this, the methods of interpretation and the *lex specialis* concept are much better qualified, because they enable a fine-tuning in each specific case. This is not to say that derogations will play no part at all in solving singular cases, e.g. in NIACs,¹⁷⁹ but their role most likely will remain in the background.

5.3 Two-step-approach: First harmonize then apply *lex specialis*

5.3.1 Fundamentals of the suggested approach

The interpretation of a norm, including by recourse to article 31 para. 3 lit. c VCLT is a logical first step when applying an IHRL guarantee in an armed conflict scenario, where a parallel IHL norm applies. This step logically precedes the application of the *lex-specialis*-concept in the traditional sense i.e. setting aside a more general

¹⁷⁸ See Karin Oellers-Frahm, 'A regional perspective on the convergence and conflicts of human rights and international humanitarian law in military operations: The European Court of Human Rights' in Erika de Wet and Jann Klefner (eds), *Convergence and Conflicts* (PULP 2014) 333, 339 et seq.; the Al-Jedda decision of the ECtHR has been seen as indicative of a readiness of the court to do so, Heike Krieger, 'After Al-Jedda: Detention, Derogation, and an Enduring Dilemma' (2011) 50 Mil. L. & L. War Rev. 419, 436. In *Al Jedda v UK* App No 27021/08 (ECHR Grand Chamber Judgment 7 July 2011) para. 99 the court has referenced article 15 ECHR stating that "[n]o deprivation of liberty will be compatible with Article 5 § 1 unless it falls within one of those grounds or unless it is provided for by a lawful derogation under Article 15 of the Convention, which allows for a State 'in time of war or other public emergency threatening the life of the nation' to take measures derogating from its obligations under Article 5 'to the extent strictly required by the exigencies of the situation'". While this statement might be a hint towards member states to consider derogations, this has likely been rendered outdated by *Hassan v UK* App no 29750/09 (ECHR Grand Chamber Judgment 16 September 2014) para. 101, in which the court observed that "no State has ever made a derogation pursuant to Article 15 of the Convention in respect of" "military missions involving Contracting States acting extra-territorially" and effectively sidelined derogations as a tool for considering IHL integration.

¹⁷⁹ See below 6.3.2.

norm. Article 31 para. 3 lit. c VCLT is based on the presumption that two or more norms of international law applicable to one situation are in accordance with each other.¹⁸⁰ Consequently, the rule provides for an interpretation method that avoids a possible norm conflict by harmonizing the applicable norms.¹⁸¹ Lex specialis proper, i.e. the process of replacing the general norm with a more specific would – in case of a successful harmonizing interpretation – be superfluous as the interpretation result would be the compatibility of both norms with each other and a single set of compatible obligations originating from both IHL and IHRL in the case at hand.

However, what if the interpretative process fails to produce such a set of compatible obligations and instead results in the incompatibility of two norms? It is submitted that if this is the case, then lex specialis proper would apply, solving the conflict between the two incompatible norms by giving primacy to the more specific one.¹⁸²

This two-step-approach to the IHL/IHRL situation exposes that the two main competing academic opinions on the relationship between IHL and IHRL are likely not really competing theories, but merely two separate steps of the process of transferring the legal standard stemming from two distinct legal regimes to a situation in the real world: First, the process of interpretation with the aim to arrive at the result that two norms are compatible and complement each other and second, in case this fails, the application of the lex specialis concept. The ICJ's jurisprudence, albeit not very helpful in many regards, actually supports such a solution. The ICJ in its *Nuclear Weapons Advisory Opinion* did not apply the lex

¹⁸⁰ Andreas Paulus and Johann Ruben Leiß, 'Art. 103' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus (eds), *The Charter of the United Nations* (OUP 3rd ed 2012) para. 17.

¹⁸¹ See the principle of harmonization as referred to in the Fragmentation report "It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations." (ILC, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (2006) 1 <http://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf> last accessed 20 June 2017).

¹⁸² See also Andreas Paulus and Johann Ruben Leiß, 'Art. 103' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus (eds), *The Charter of the United Nations* (OUP 3rd ed 2012) para. 12 et seq.

specialis rule (although it said it did),¹⁸³ but interpreted the norms of IHL and article 6 ICCPR in a successful harmonizing interpretation pursuant to article 31 para. 3 lit. c VCLT. In doing so, it arrived at the result that both article 6 ICCPR and the legal standards on lawful use of force in armed conflict are pertinent to the case at hand. They were held to be compatible insofar the standard for arbitrariness in the IHRL guarantee is interpreted by reference to the IHL standards on the use of force.¹⁸⁴ As such, in that case there was no room for applying the concept of *lex specialis* – although the court said this is what it did apply. Would the ICJ have concluded that the applicable norms of IHL and IHRL are incompatible and in conflict, the *lex specialis*, in this case the IHL norm would have prevailed?¹⁸⁵

Moreover, as evidenced in the Fragmentation Report, the concept of *lex specialis* does not only have the dimension of setting aside the more general norm. Indeed, it “may be used to apply, clarify, update or modify as well as set aside general law”¹⁸⁶. Consequently, it does have a place not only after the harmonizing interpretation but within the interpretation process as well. That the *lex specialis* concept may indeed influence the interpretation is generally acknowledged today.¹⁸⁷ It is submitted that in the interpretative process, especially when harmonizing the applicable norms, the more specific norm carries more weight, since it would replace the norm it conflicts with, in case the harmonization should fail. An applicable IHL

¹⁸³ See William A. Schabas, ‘Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum’ (2007) 40 *Isr. L. Rev.* 595, 597-8.

¹⁸⁴ See Jordan J. Paust, ‘Human Rights on the Battlefield’ (2015) 47(3) *Geo. Wash. Int’l L. Rev.* 509, 532 et seq.

¹⁸⁵ Consequently, the criticism of *Hathaway et al.*, that seeing IHL and IHRL in a relationship of complementarity presupposes that conflicts can always be solved by recourse to article 31 para. 3 lit. c VCLT seems unfounded, see Oona A. Hathaway, Rebecca Crotoof, Philip Levitz, Haley Nix, William Perdue, Chelsea Purvis, and Julia Spiegel, ‘Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law’ (2011/2012) 96 *Minn. Law Rev.* 1883, 1901 et seq.; it is indeed a possible result of the interpretative process that the interpretation cannot solve a conflict. Then the primacy of *lex specialis* would follow.

¹⁸⁶ ILC, ‘Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’ (2006) 2.

¹⁸⁷ See e.g. Dorota Marianna Banaszewska, ‘Lex Specialis’ in Rüdiger Wolfrum (ed), *MPEPIL* (OUP online edition 2015) para. 21; ILC, ‘Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’ (2006) 1 et seq.

norm would thus be given a greater weight when interpreting and attempting to harmonize the IHRL guarantee applicable to the same situation in case of an armed conflict. This results in a dominant role of IHL, when interpreting the legal standard of state action in armed conflicts. It does, however, not mean that the interpretative process is a mere one-way street.¹⁸⁸ In fact, IHRL also influences the interpretation of IHL norms. The effect it has is, however, mainly limited to cases of non-derogable IHRL (which will be addressed in the following) and notions which IHL does not regulate or define. A case in point is the interpretation of the prohibition of torture, a notion not defined by IHL. The prohibition of torture in IHL will be interpreted in accordance with the definition of torture as explicated by IHRL and the Convention against Torture.¹⁸⁹ IHRL will, however, not fill conscious omissions left in the IHL legal framework. When IHL e.g. allows the taking of prisoners of war and outlines a detailed procedure for doing so as well as an exhaustive standard on how to treat them, its silence on other guarantees is in many instances normative in nature and a conscious decision to not have these guarantees apply to the case at hand.¹⁹⁰ While these IHL norms also may refer to IHRL standards¹⁹¹ and IHL may influence instances not deliberated by IHL,¹⁹² when conscious omissions are concerned, IHRL cannot be used to fill gaps, because there are no normative gaps.

¹⁸⁸ See the criticism expressed by Matthias Lippold, 'Between Humanization and Humanitarization? Detention in Armed Conflicts and the European Convention on Human Rights' (2016) 76 *ZaöRV* 53 et seq.

¹⁸⁹ See Sandesh Sivakumaran, *The Law of Non-International Armed Conflicts* (OUP 2012) 88-89.

¹⁹⁰ Cf. Pascal Hector, 'Das Humanitäre Völkerrecht als *lex specialis*' in Christian Calliess (ed), *Herausforderung an Staat und Verfassung, Liber Amicorum Torsten Stein* (NOMOS 2015) 956, 966; Sandesh Sivakumaran, *The Law of Non-International Armed Conflicts* (OUP 2012) 92.

¹⁹¹ See e.g. article 84 Geneva Convention III referring to the prohibition to try a prisoner of war „by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized“, Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 *Am. J. Int'l L.* 239, 266.

¹⁹² See Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 *Am. J. Int'l L.* 239, 253-6 for a role of IHRL in cases of repatriation of POWs, who genuinely and without pressure refuse to be repatriated, particularly because they fear persecution in their country.

5.3.2 Applying the approach to non-derogable IHRL guarantees

When discussing the weight of each norm in the process of a harmonizing interpretation, the issue of non-derogable rights needs to be addressed. The traditional human rights instruments exclude some guarantees from the possibility of derogation (article 15 para. 2 ECHR or article 4 para. 2 ICCPR).¹⁹³ Technically, the normative content of those rules is exhausted in the fact that the derogation process under both treaties does not apply for the guarantees excluded from it. It is argued in the following, that the fact that a human right is non-derogable does not – in principle – exclude that human right from being interpreted. Indeed, the position that non-derogable human rights stand alone and will not be influenced by other norms of international law, including IHL at all cannot be sustained, as evidenced by how the ICJ handled the interpretation of the non-derogable article 6 ICCPR, which it interpreted in accordance with the applicable humanitarian law norms.¹⁹⁴ However, the idea behind non-derogable rights is quite clearly that they will be materially guaranteed in times of emergency no matter what. In the following, a position on the interpretation of non-derogable human rights in armed conflict is proposed, first concerning the ECHR and second addressing the ICCPR.

Article 15 ECHR explicitly mentions the derogation procedure as being in place for “time[s] of war”. Thus, it seems in keeping with the object and purpose of the derogation rules to grant the non-derogable ECHR guarantees a higher standing than usual in relation to the more specific IHL. This already follows from the fact that the *lex specialis* characteristic of IHL is devalued, if not fully negated, when the

¹⁹³ Article 15 para. 2 ECHR: right to life pursuant to article 2, unless caused by legitimate use of force; prohibition of torture and inhuman or degrading punishment or treatment pursuant to article 3; prohibition of slavery pursuant to article 4 para. 1; *nulla crimen sine lege* pursuant to article 7.

Article 4 para. 2 ICCPR: right to life in article 6; prohibition of torture and cruel, inhuman and degrading treatment or punishment in article 7; prohibition of slavery and servitude in article 8 paras 1 and 2; prohibition of detention for debt in article 11; *nulla crimen sine lege*, especially the prohibition of retroactive criminal laws in article 15; recognition of legal personality in article 16 and the freedom of thought, conscience, religion and belief in article 18.

¹⁹⁴ *Paust* argues that this is only due to the fact that article 6 has a “limiting criterion” with its notion of arbitrariness, Jordan J. Paust, ‘Human Rights on the Battlefield’ (2015) 47(3) *Geo. Wash. Int’l L. Rev.* 509, 522. Surely, the arbitrariness provides the open door for IHL, but it can nevertheless be stated that by its interpretation the ICJ modified the usual standard of arbitrariness and as such modified the regulatory content of a non-derogable rule.

wording of the treaty itself describes that certain human rights norms are meant to specifically apply unadulterated in armed conflicts. An exception to this rule is article 2 ECHR which article 15 para. 2 ECHR explicitly deems derogable in cases of “lawful acts of war”. In doing so, the ECHR foresees potential conflicts with IHL and solves them by enabling a member state to derogate from the right to life, as long, as its actions are in keeping with IHL. However, the ECHR guarantees under articles 3, 4 para. 1 and 7 ECHR will carry a higher weight in the process of interpretation. Article 7 ECHR (null crime sine legi) is unlikely to cause any friction in practice, because its content finds itself in IHL and IHRL alike.¹⁹⁵ Article 4 para. 1 ECHR (prohibition of slavery and servitude) may, at first sight, run counter to articles 49 and 50 of the Third Geneva Convention allowing for the utilization of the labour of prisoners of war for non-military work. However, only article 4 para. 1 ECHR is non-derogable and while the utilization of labour of prisoners of war may be deemed to be compulsory or forced labour, this falls under the (derogable) article 4 para. 2 ECHR.¹⁹⁶ Consequently, article 4 para. 1 ECHR will in practice not conflict with IHL since IHL does not come close to allowing slavery or servitude. The guarantees and prohibitions contained in article 3 ECHR also have a counterpart in IHL.¹⁹⁷ However, it must be noted that there may be instances – e.g. when taking prisoners of war – in which the very specific guarantees read into the prohibition of inhuman treatment by the ECtHR, such as the minimum size of prison cells etc.¹⁹⁸, are not transferable

¹⁹⁵ See article 99 para. 1 Geneva Convention III; article 67 Geneva Convention IV; article 75 para. 4 lit. c AP I; article 6 para. 2 lit. c AP II; with further references ICRC, ‘Rule 101, The Principle of Legality’ in Customary International Humanitarian Law Database <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule101> last accessed 20 June 2017.

¹⁹⁶ The Court has addressed article 4 as non-derogable in a singular case, see *Rantsev v Cyprus and Russia* App no 25965/04 (ECHR 7 January 2010) para. 283. Since this is contrary to the clear wording of article 15 para. 2 ECHR, it is not clear whether this was a simple mistake or reflective of a progressive reading of article 15 para. 2 ECHR by the Court, see also Jens Meyer-Ladewig and Christiane Schmaltz, ‘Art. 15’ in Jens Meyer-Ladewig, Martin Nettesheim, and Stefan von Raumer (eds) *Europäische Menschenrechtskonvention* (4th ed, NOMOS 2017) para. 1.

¹⁹⁷ See Common article 3; article 12 para. 2 Geneva Convention I; article 12 para. 2 Geneva Convention II, articles 17 para. 4, 87 para. 3, 89 (end) Geneva Convention III; article 32 Geneva Convention IV with further references ICRC, ‘Rule 90, Torture and Cruel, Inhuman or Degrading Treatment’ in Customary International Humanitarian Law Database <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule90> last accessed 20 June 2017.

¹⁹⁸ See e.g. *Mursic v Croatia* App no 7334/13 (ECHR Grand Chamber Judgment 20 October 2016).

to situations of armed conflicts. Cases of deprivation of liberty in armed conflicts are distinguishable on a factual and legal basis from deprivation of liberty in the penal system. Consequently, when the prohibition of inhuman treatment is applied in the context of an armed conflict, much of the ECtHR jurisprudence may not be transferred to the new situation, but a separate standard will have to be formulated for these cases. This standard will have to take into account the IHL rules, e.g. on prisoners of war and the legal standards for prisoner of war camps pursuant to IHL, and the circumstances of each singular case.

The ICCPR includes a much longer list of non-derogable rights. Adding to that, while article 15 para. 2 ECHR explicitly addresses times of war and indeed gives guidance, how to deal with lawful acts of war, article 4 para. 2 ICCPR is silent in that regard. An explicit reference to war was struck during the treaty negotiations to avoid the “impression that the United Nations accepted war”.¹⁹⁹ Nevertheless, the ICCPR derogation possibility applies, when armed conflicts “constitute a threat to the life of the nation”.²⁰⁰ In practice, the non-derogable guarantees of articles 11 (prohibition of detention for debt) and 16 (recognition of legal personality) regularly will not conflict with IHL. For the guarantees of articles 7 (prohibition of torture and cruel, inhuman and degrading treatment or punishment), 8 paras 1 and 2 (prohibition of slavery and servitude), and 15 (nullum crimen sine lege) the same applies that has been outlined for the parallel ECHR provisions. The freedom of thought, conscience, religion and belief in article 18 ICCPR is part of IHL as well and e.g. the Third Geneva Convention even offers clear guidance on how to realize this right.²⁰¹ The most practical conflict seems to be the non-derogable character of the right to life in article 6 ICCPR. Since article 4 para. 2 ICCPR features no exclusion to the non-derogability for lawful acts of war, as article 15 para. 2 ECHR does, one might argue that this means the death of civilians as part of collateral damage or even the killing

¹⁹⁹ See above fn 34.

²⁰⁰ Human Rights Committee, ‘General Comment No. 29’ (2001) UN Doc. CCPR/C/21/Rev.1/Add.11, para. 3: “The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation”.

²⁰¹ See also articles 34 et seq. of Geneva Convention III; see also with further references ICRC, ‘Rule 104, Respect for Convictions and Religious Practices’ in Customary International Humanitarian Law Database <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule104> last accessed 20 June 2017.

of a combatant always violates the guarantee of article 6 ICCPR. However, article 6 ICCPR, while acknowledging the right to life of every human being, prohibits only the arbitrary deprivation of life. Here, the ICJ has, as outlined above, taken IHL and its standards for lawfulness of acts in armed conflicts and read those into the standard of arbitrariness of article 6 ICCPR to the effect that a deprivation of life is not arbitrary, if it is lawful pursuant to IHL. Indeed, the fact that article 6 para. 1 ICCPR with its standard of arbitrariness is open for such interpretative measures provides a methodologically sound way of reading IHL into article 6 ICCPR.²⁰²

5.3.3 Remaining effect of IHRL in case of a recourse to the *lex specialis* concept

In the rare event of a failed attempt of harmonization, when an IHL norm actually set aside a norm of IHRL, IHRL may nevertheless retain an effect on IHL. According to the Fragmentation Report,

“the application of the special law does not normally extinguish the relevant general law. That general law will remain valid and applicable and will, in accordance with the principle of harmonization [...], continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter.”²⁰³

For the topic at hand this means a replaced IHRL norm retains an effect on the interpretation of the IHL norm and may in certain situations guide its application.²⁰⁴ This will most likely be reserved to rare cases, since its humanitarian object and purpose often guides the application of IHL in the direction of more protection anyways.

²⁰² For a further discussion see below 6.1.

²⁰³ ILC, ‘Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’ (2006) 1-2. [references deleted]; see also Alexander Orakhelashvili, ‘The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?’ (2008) 19(1) Eur. J. Int’l L. 161-182.

²⁰⁴ See below 6.3.1.

5.3.4 Acknowledgment of criticism

It is acknowledged that many have and will continue to take issue with the view that IHL needs to be the decisive yardstick in armed conflicts, although IHRL continues to apply. The radiance of human rights and the dark and generally unwanted situations IHL governs all too easily lead to the humane reaction that applying IHRL is thought to be the answer. However, factually replacing IHL with IHRL when this runs counter to the will of state actors will lead not to more protection in armed conflicts, it will lead to less and, which is worse, it may lead to a decrease in human rights compliance beyond the area of armed conflicts, as the acceptance for IHRL could erode. There are real problems with applying IHRL standards to armed conflicts without giving effect to IHL. Arguing that IHRL should apply fully necessitates showing the actors a way how to do it, which is far from easy in situations in which even the tailor-made IHL norms sometimes fail to encourage compliance. The articles of the modern IHL treaties contain clear rules of what to do and what not to do in specific situations. The Geneva provisions on prisoners of war basically enable legal laymen and -women to set up a prisoner camp in accordance with IHL and still enable the respective commanders to carry out their mission, which is exactly what is needed in armed conflict. In doing so, those IHL rules protect the dignity, life and wellbeing of potential prisoners of war. Human rights are not as easy to handle. Peacetime administrations often fail to implement IHRL standards properly, as the treaties do not spell out the exact content of their guarantees. The characteristic weighing of legal goods in the abstract and in concrete before deciding, if a legitimate state interest is sufficiently important to rectify an interference in the human rights of an individual is something peacetime public administration and bureaucracy are able to handle, but it is a time-intensive process. In armed conflict, clarity of legal standards is needed more than elsewhere to enable compliant behaviour.²⁰⁵ IHL enables a swift translation of legal norms to operation plans, rules of engagement or, quite simply, orders. This is what characterizes the specificity of IHL. It is tailor-made to situations of armed conflict not only in its

²⁰⁵ On the importance of clarity Silvia Borelli, 'Jaloud v Netherlands and Hassan v United Kingdom: Time for a principled approach in the application of the ECHR to military action abroad' (2015) 2(16) QIL 25, 26; John Tobin, 'Seeking Clarity in Relation to the Principle of Complementarity' (2007) 8 Melb. J. Int'l L. 356-372; Michael J. Kelly, 'Critical Analysis of the International Court of Justice Ruling on Israel's Security Barrier' (2005) 29 Fordham Int'l L. J. 181, 188.

content, but in its clarity of norms and in its easy-to-understand systematics. Its norms prohibiting excessive collateral damage²⁰⁶ are the practical translation of the peacetime-standard of proportionality into armed conflict.²⁰⁷ Introducing the much more complex IHRL proportionality standard into armed conflict will lead to grave practical problems. It would also shut out any deliberations of military necessity, an aspect central to IHL. One may understandably shudder at the thought of military necessity trumping individual rights, especially of civilians, but such aspects are essential to IHL and of key importance to retain the acceptance of state actors for legal standards in armed conflicts, which ultimately safeguards the protection of the individual.

6. Translating theory to practice: How to apply specific IHRL guarantees in armed conflicts

The measure for a solution on the relationship between IHL and IHRL is not only its theoretical coherence, but also the possibility to translate it into practice as well as the need for results which give effect to the applicable legal standards and which are acceptable to the international community during armed conflicts. In the following, the approach suggested above will be measured by these standards addressing first the human right to life in IACs, secondly the human right to liberty in IACs and thirdly NIAC scenarios featuring both rights.

6.1 The human right to life in IACs

The right to life is an obvious starting point and a well-suited litmus test for a theory on how to apply IHRL norms in armed conflicts. It is also a fairly straight forward –

²⁰⁶ Jean-Marie Henckaerts and Louise Doswald-Beck, 'Rule 14' in *Customary International Humanitarian Law Vol. I* (CUP 2005) 46; see also article 51 para. 5 lit. b AP I. A (qualified) violation of the prohibition of excessive damage is a war crime pursuant to article 8 para. 2 lit. b, iv of the Rome Statute of the International Criminal Court.

²⁰⁷ See Yoram Dinstein, 'The Principle of Proportionality' in Kjetil Mujezinović Larsen, Camilla Guldahl Cooper, and Gro Nystuen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (CUP 2013) 72, 74 et seq.; cf. Thomas Winkler, 'The Copenhagen Process on Detainees: A Necessity' (2010) 78 Nord. J. Int'l L. 489, 495-6.

and commonly discussed – example since the ICJ has already sketched it out in part. Using force against legitimate targets is a key feature of IHL. IHL grants combatants the right to use lethal force against a legitimate military objective, i.e. an enemy combatant.²⁰⁸ It also “allows, or at least tolerates, the killing and wounding of innocent human beings not participating in an armed conflict, such as civilian victims of lawful collateral damage.”²⁰⁹

Applying the human right to life without modification would be in stark contrast to the content of IHL and would – in fact practically set aside IHL.²¹⁰ The use of lethal force against an enemy combatant, even though conducted with the necessary precautions and without the expectance of excessive incidental loss of civilian life, would be rendered unlawful.²¹¹ Here IHRL arguably clashes most violently with IHL, since pursuant to the conception of IHRL “killing a person can only be an exceptional means to save life, but never a lawful end in itself, and has furthermore to meet a strict proportionality test in each individual case”²¹². To apply this rule to armed conflicts would lead to the methodologically and practically unsound result that the

²⁰⁸ See article 43 para. 2 AP I, “Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities”; see also article 52 para. 2 AP I; for further reference Peter Rowe, ‘Is There a Right to Detain Civilians by Foreign Armed Forces During a Non-International Armed Conflict?’ (2012) 61 ICLQ 697, 701 et seq.

²⁰⁹ Theodor Meron, ‘The Humanization of Humanitarian Law’ (2000) 94 Am. J. Int’l L. 239; see also Article 51 para. 5 lit. b and 85 para. 3 lit. b AP I.

²¹⁰ Insofar the report of Richard Ekins, Jonathan Morgan, and Tom Tugendhat, ‘Clearing the Fog of Law’ (Policy Exchange 2015) 26 rightly raises an issue.

²¹¹ As such, the Inter-American Commission on Human Rights deserves criticism for *Coard, et al. v the United States* (29 September 1999) Case 10.951, Report No. 109/99, para. 42 in which it acknowledged the role IHL needs to play in interpreting the regional human rights guarantees, but still argued that it is “bound by its Charter-based mandate to give effect to the normative standard which best safeguards the rights of the individual.”; see with further references Oona A. Hathaway, Rebecca Crotofof, Philip Levitz, Haley Nix, William Perdue, Chelsea Purvis, and Julia Spiegel, ‘Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law’ (2011/2012) 96 Minn. Law Rev. 1883, 1909 et seq.

²¹² Matthias Lippold, ‘Between Humanization and Humanitarization? Detention in Armed Conflicts and the European Convention on Human Rights’ (2016) 76 ZaöRV 53, 64; see *McCann and Others v UK* App no 18984/91 (ECHR Grand Chamber Judgment 27 September 1995) paras 146-150, 156 and 194.

norms of the more specific legal regime of international law would be replaced in full, at least in practice, by the more general.²¹³

There are two options to give effect to IHL: The first, derogations, has been addressed. As argued above, this seems to be an overly crude tool for such a complex task and one, which is unlikely to succeed. The second is the one submitted here: to interpret the human rights guarantee in accordance with the rule in article 31 para. 3 lit. c VCLT. A use of force depriving a human being of his or her life, which is lawful pursuant to IHL, would fall within the scope of protection of article 2 ECHR and would interfere with the right to life. However, due to the fact that the interfering act is a “lawful act of war” and as such falls outside of article 2’s non-derogable content, the rule of IHL that allows this use of force would prevail in the harmonizing interpretation and article 2 ECHR would be modified to allow the deprivation of life when lawful pursuant to IHL. This constellation would be read into the otherwise exhaustive catalogue of cases in article 2 para. 2 ECHR, in which the deprivation of life can be justified. A further deviation from the regular position of the ECtHR has to be made concerning the proportionality test. The Court has established in *McCann et al. v United Kingdom* that the wording of under article 2 para. 2 ECHR (“absolutely necessary”) calls for a stricter proportionality standard for deprivations of life, resulting in a measure having to be “strictly proportionate to the achievement of the aims”²¹⁴. This test would need to be amended in situations of IACs so that interfering with the human right to life by using force in an IAC would be a priori proportionate, if the use of force is lawful pursuant to IHL, rendering lethal force against military objectives and use of force not excessive in relation to the concrete and direct military advantage legal pursuant to IHRL.²¹⁵ Concerning article 6 of the ICCPR, the approach adopted by the ICJ would be taken. Because article 6 ICCPR outlaws the arbitrary deprivation of life only, and the test of arbitrariness will – at

²¹³ See Christopher Greenwood, ‘Human Rights and Humanitarian Law: Conflict or Convergence (2010-2011) 43 Case W. Res. J. Int’l L. 491, 501 et seq.; Louise Doswald-Beck, ‘The Right to Life in Armed Conflict’ (December 2006) 88(864) Int’l Rev. Red Cross 881, 903 et seq.

²¹⁴ See *McCann et al. v United Kingdom* App no 18984/91 (ECHR Grand Chamber Judgment 27 September 1995) para. 149.

²¹⁵ ICRC, ‘Rule 14, Proportionality in Attack’ in Customary International Humanitarian Law Database <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14> last accessed 20 June 2017.

least in the context of an international armed conflict – be conducted pursuant to the applicable IHL, a lawful deprivation of life pursuant to IHL would not be an arbitrary deprivation of life pursuant to IHRL.²¹⁶ Article 6 ICCPR also is a case in point of IHL possibly establishing a higher degree of protection. What constitutes arbitrary behaviour pursuant to article 6 ICCPR has been a topic of significant controversy.²¹⁷ The arbitrariness standard is said to include elements of unlawfulness, injustice, capriciousness and unreasonableness, but it has also been described as not understandable in the abstract.²¹⁸ At the core of the prohibition of an arbitrary deprivation of life is the deprivation of life without an objective reason. Indeed, this is rather general and circumstances are easily envisioned, where a deprivation of life would happen with an objective reason – and thus not arbitrary. IHL adds significant contours to the arbitrariness standard e.g. with its clear duties of precaution before using force.²¹⁹

This leads to a follow-up problem that needs to be addressed. If it is said that article 2 ECHR and article 6 ICCPR are violated as soon as the deprivation of life is unlawful pursuant to IHL, this begs the question of how narrow conformity with IHL is to be understood. Take the case of the duty to cancel or suspend an attack pursuant to article 57 para. 2 lit. b AP I, “if it becomes apparent that the objective is not a military one...”. In a case, in which it becomes apparent during an attack that the attack targets civilians instead of combatants, IHL would mandate an immediate suspension of the attack. What happens in such a situation when it is nevertheless decided – for whatever reasons – to continue the attack and in the end, it turns out that – unlike expected during the attack – the persons targeted were indeed combatants and not civilians. The attacking party would have violated article 57 para. 2 lit. b AP I by not suspending the attack, when it thought that the objective

²¹⁶ See Christopher Greenwood, ‘Human Rights and Humanitarian Law: Conflict or Convergence (2010-2011) 43 Case W. Res. J. Int’l L. 491, 505; see also *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 240 (para. 25).

²¹⁷ See Manfred Nowak, *UN Covenant on Civil and Political Rights, Commentary* (Engel 1993), article 6, para. 12 et seq.

²¹⁸ Manfred Nowak, *UN Covenant on Civil and Political Rights, Commentary* (Engel 1993), article 6, para. 14.

²¹⁹ Jordan J. Paust, ‘Human Rights on the Battlefield’ (2015) 47(3) *Geo. Wash. Int’l L. Rev.* 509, 533 et seq.

was not a military one. However, the result achieved by the attack would be lawful pursuant to IHL, because the attack targeted combatants in the end, although IHL was violated on the way. The question then becomes: was the deprivation of the life of a combatant during the attack arbitrary pursuant to article 6 para. 1 ICCPR. The same question arises in case of a breach of the duty to take precautions to minimize injuries to civilians, to give effective warning of an attack, which may affect the civilian population, etc., which then turns out not to have practical consequences, since only hostile combatants, i.e. legitimate targets, and no civilians were harmed as a result of the attack. It is proposed that not every violation of IHL renders a deprivation of life arbitrary or illegal pursuant to IHRL. The purpose of the IHL norm to suspend the attack, when the objective turns out to be civilian in nature, is to protect the civilian objective. The duties of precaution referred to have the same purpose. In the given example, this protective purpose is not interfered with in the end, since combatants fall outside of its scope. As such, it seems sensible to look at the protective purpose of the IHL norm that was violated and analyse, if this protective purpose is interfered with. Adopting this method, the killing of a combatant with unlawful methods, e.g. by way of a perfidious attack would be an arbitrary deprivation of life, since the combatant falls within the protective purpose of the norm, which forbids perfidy.²²⁰

6.2 The human right to liberty in IACs

Deprivations of liberty have been the most practical examples of measures undertaken in armed conflicts, which have come before the courts in recent years. It suffices to say for the purposes of this thesis that the IHL of IACs allows for the taking of prisoners of war and internment of civilians in specific circumstances.²²¹

²²⁰ This paragraph follows an approach suggested for the application of German criminal law to acts by German soldiers in armed conflicts, see Stefan Sohm and Tim R. Salomon, 'Völkerrechtsakzessorietät des StGB beim Einsatz deutscher Streitkräfte' (2014) *NZWehr* 133-153.

²²¹ See e.g. article 43 para. 2 AP I read in conjunction with article 4 Geneva Convention III, as well as articles 42 para. 1, article 68 para. 1, 78 para. 1 Geneva Convention IV, see Chris Jenks, 'Detention under the law of armed conflict' in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 301-316; Alex Conte, 'The legality of detention in armed conflict' in Annyssa Bellal (ed), *The War Report: Armed Conflict in 2014* (OUP 2015) 476, 489 et seq.; Peter Rowe, 'Is There a Right to Detain

The ICCPR again offers an easy way to accommodate IHL, since article 9 ICCPR prohibits only arbitrary deprivations of liberty, as does IHL.²²² Consequently, as is the case for article 6 ICCPR, a deprivation of liberty in accordance with IHL, will not be arbitrary pursuant to article 9 ICCPR and is allowed as such.²²³

Article 5 ECHR poses more problems.²²⁴ On its face, article 5 para. 1 ECHR contains an exhaustive catalogue of cases in which a deprivation of liberty may be conducted lawfully. These cases do not include cases of internment²²⁵ or detention²²⁶, which are lawful pursuant to IHL. However, this does not mean that deprivations of liberty pursuant to IHL are automatically unjustifiable violations of the right to liberty under the ECHR. If a deprivation of liberty in an (international) armed conflict setting is conducted lawfully pursuant to IHL, then the IHL norm allowing that conduct and article 5 ECHR seemingly disallowing it, since it does not fall under the article 5 para. 1 ECHR catalogue, conflict in concept and result. Consequently, in the interpretative process – as outlined above – attempts will need to be made to reconcile both norms by interpretation as article 31 para. 3 lit. c VCLT proposes. This thesis takes the position that such harmonization is indeed achievable in the case mentioned by reading into the catalogue of article 5 para. 1 lit. a-f ECHR the case of deprivations of liberty pursuant to IHL. It is accepted that this is subject to

Civilians by Foreign Armed Forces During a Non-International Armed Conflict?’ (2012) 61 ICLQ 697, 701 et seq.; Ashley S. Deeks, ‘Administrative Detention in Armed Conflict’ (2009) 40 Case W. Res. J. Int’l L. 403, 406 et seq.

²²² See ICRC, ‘Rule 99, Deprivation of Liberty’ in Customary International Humanitarian Law Database <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule99 > last accessed 20 June 2017.

²²³ See Human Rights Committee, ‘General Comment No. 35’ (16 December 2014) UN Doc. CCPR/C/GC/35, para. 64 “Security detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary.”; see also Alex Conte, ‘The legality of detention in armed conflict’ in Annyssa Bellal (ed), *The War Report: Armed Conflict in 2014* (OUP 2015) 476, 487; Christopher Greenwood, ‘Human Rights and Humanitarian Law: Conflict or Convergence (2010-2011) 43 Case W. Res. J. Int’l L. 491, 506.

²²⁴ See e.g. Christopher Greenwood, ‘Human Rights and Humanitarian Law: Conflict or Convergence (2010-2011) 43 Case W. Res. J. Int’l L. 491, 506; Bernhard Schäfer, *Zum Verhältnis Menschenrechte und humanitäres Völkerrecht* (Universitätsverlag Potsdam 2006) 46.

²²⁵ See article 42 and 78 Geneva Convention IV (internment for reasons of security).

²²⁶ See articles 28, 30, and 32 Geneva Convention I (retention and detention of medical and religious personnel); articles 36 and 37 Geneva convention II (retention and detention of medical and religious personnel on hospital ships); articles 21 and 118 Geneva Convention III (prisoners of war); article 44 AP I (prisoners of war).

challenge, since such an interpretation would depart from the wording of article 5 para. 1 ECHR in a way, which may be criticized as *contra legem*. As argued above, IHL does have a significant weight in the harmonizing interpretation, as the applicable *lex specialis* in such a case. Since article 5 ECHR is derogable, it is open to accommodate the rules of IHL. The alternative to a solution by interpretation would be the result that article 5 ECHR and the IHL norm allowing the deprivation of liberty are indeed in unresolvable conflict. Consequently, article 5 ECHR would be set aside by the *lex specialis*, at least insofar as it would disallow actions that are allowed pursuant to IHL. It could be argued that article 5 ECHR having been replaced does not apply to the situation any longer, meaning that the ECtHR would not be able to exercise judicial oversight over such a measure. It would thus seem to be in keeping with the object and purpose of article 5 ECHR to generally uphold the human right to liberty modified to the extent that a deprivation of liberty lawful pursuant to IHL is justifiable and not to replace it.

The ECtHR had to address this issue in the case of *Hassan v UK*. The case dealt with the security detention of an Iraqi national in Camp Bucca, who was arrested during an operation, which had the aim to arrest his brother, a General of the Quds Force. During this operation, Tarek Hassan was found armed with an AK-47 rifle on the roof of the home of his brother and was subsequently detained as posing a threat to security.²²⁷

The ECtHR did not exactly have a clean slate when this case came before it. On the contrary, it has had a chequered history with the topic IHL. The European Commission on Human Rights had acknowledged IHL as *lex specialis* in the traditional sense in *Cyprus v Turkey*²²⁸, a case dealing with the occupation of parts of Cyprus by Turkey in 1974, in which it decided that the taking of prisoners of war was subject to the Third Geneva Convention to which both parties of the conflict were bound and as such, the Commission “has not found it necessary to examine the question of a breach of article 5 of the European Convention on Human Rights with regard to persons accorded the status of prisoners of war.”²²⁹ The ECtHR did

²²⁷ *Hassan v UK* App no 29750/09 (ECHR Grand Chamber Judgment 16 September 2014) para. 104.

²²⁸ *Cyprus v Turkey* App nos 6780/74 and 6950/75 (EComHR 10 July 1976).

²²⁹ *Cyprus v Turkey* App nos 6780/74 and 6950/75 (EComHR 10 July 1976) para. 313.

not adopt such a clear cut approach. At times, the ECtHR seems to have ignored IHL because of article 32 ECHR, which extends the jurisdiction of the Court to “all matters concerning the interpretation and application of the Convention”.²³⁰ While, of course, addressing IHL would have been part of the “interpretation of the Convention”²³¹, in some cases the Court flat out dodged the issue, while in other cases, in which IHL was not even applicable, it did address it.²³² In the case *Al Jedda v UK* (security internment in Basrah from 2004 to 2007), the Court – simply put – decided to ignore IHL and the applicable UN Security Council resolutions in the process of interpretation and indeed rejected both as a legal ground to detain a person posing a threat, arguing that they only gave a *right* to detain and did not include an *obligation* to do so.²³³ *Hassan v UK* now represents a significant improvement over this stance. In this case, the ECtHR decided to read into the catalogue of article 5 para. 1 ECHR the unwritten case of a detention lawful pursuant to IHL. It argued:

²³⁰ Karin Oellers-Frahm, ‘A regional perspective on the convergence and conflicts of human rights and international humanitarian law in military operations: The European Court of Human Rights’ in Erika de Wet and Jann Klefner (eds), *Convergence and Conflicts* (PULP 2014) 333, 348.

²³¹ Article 32 ECHR; it is granted that there are some grey areas concerning the application of article 31 para. 3 lit. c VCLT in circumstances of limited jurisdiction. The ICJ has faced criticism sparked by its decision in *Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep 161, in which it applied general rules of international law, especially norms regulating the use of force, to analyze, if certain measures were justified pursuant to a friendship treaty between the USA and Iran, allowing for measures necessary for the protection of a state’s essential security interests (paras 41 et seq.). The decision has been met with unease, since the ICJ was deemed to have expanded its jurisdiction by applying this interpretation method, see Jean d’Aspremont, ‘The Systemic Integration of International Law by Domestic Courts’, in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Bloomsbury 2014) 141, 149 with further reference. However, while it is accepted that recourse to article 31 para. 3 lit. c VCLT may not “go as far as displacing the applicable law” (ibid 149), it is argued that when a court has jurisdiction to interpret a norm, it has jurisdiction to do so with reference to all interpretation methods, including the principle of systemic integration. Otherwise it runs the risk to come to a false result, simply because it was by way of its limited jurisdiction prevented to take into account other pertinent rules.

²³² See Gerd Oberleitner, *Human Rights in Armed Conflict* (CUP 2015) 309 with reference to *Kononov v Latvia* App no 36376/04 (ECHR Grand Chamber Judgment 17 May 2010); *Engel et al. v Netherlands* App nos 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECHR 8 June 1976).

²³³ *Al Jedda v UK* App no 27021/08 (ECHR Grand Chamber Judgment 7 July 2011) para. 107; see with a justifiably critical assessment Jelena Pejic, ‘The European Court of Human Rights’ *Al-Jedda* judgment: the oversight of international humanitarian law’ (September 2011) 93(883) *Int’l Rev. Red Cross* 837, 842 et seq.

“By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. [...] As with the grounds of permitted detention already set out in those subparagraphs, deprivation of liberty pursuant to powers under international humanitarian law must be “lawful” to preclude a violation of Article 5 § 1. This means that the detention must comply with the rules of international humanitarian law and, most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness.”²³⁴

The ECtHR justified this fresh start concerning human rights in armed conflicts with the argument that in *Hassan v UK* a state party had for the first time “requested the Court to disapply its obligations under Article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law”²³⁵, which the UK failed to do in *Al-Jedda v UK*. It continued in the same direction, when it decided that its approach would hinge on the applicability of IHL being “specifically pleaded by the respondent State”.²³⁶ With this the Court seemingly tried to save its face and blame its incoherent jurisprudence on IHL incorporation on the member states’ failure to raise the issue. This passage is a weakness of the judgment. Contrary to the court’s decision, which explains that 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”, it indeed is the court’s solemn responsibility to interpret, apply and give effect to the law and make use of the universally accepted methods of interpretation, including article 31 para. 3 lit. c VCLT, independent of a member state’s will or consent.²³⁷

²³⁴ *Hassan v UK* App no 29750/09 (ECHR Grand Chamber Judgment 16 September 2014) para. 104-5 (References omitted).

²³⁵ *Hassan v UK* App no 29750/09 (ECHR Grand Chamber Judgment 16 September 2014) para. 99.

²³⁶ *Hassan v UK* App no 29750/09 (ECHR Grand Chamber Judgment 16 September 2014) para. 107.

²³⁷ Cf. Stefan Oeter, ‘Fortschrittsnarrative im Humanitären Völkerrecht’ in Christian Calliess (ed), *Herausforderung an Staat und Verfassung, Liber Amicorum Torsten Stein* (NOMOS 2015) 1025, 1041, who ties this attitude of the ECtHR (although pre-*Hassan*) back to a tendency of every monitoring body or court to base its assessment on its own material

However, in general the Court deserves praise for *Hassan v UK*. It freed itself from the chains of needing a derogation to address IHL, although its justification for doing so seems a bit odd.²³⁸ The court can be seen as being on track to build a foundation for a workable approach to the topic human rights in armed conflicts. With *Hassan v UK* it has also deferred to IHL, when it comes to the duration of imprisonment, which is regularly for an uncertain amount of time, since IHL allows the imprisonment of a prisoner of war until the cessation of hostilities, where after a prisoner will be entitled to repatriation.²³⁹ Indeed, the Court acknowledges the significant role of IHL in interpreting human rights in armed conflict scenarios by deciding IHL should be “accommodated as far as possible.” It does so by also modifying article 5 para. 4 ECHR, which guarantees the *habeas corpus* right, to the degree that it deems a “competent body”²⁴⁰ performing the review procedure – as IHL foresees in articles 43 and 78 of the Fourth Geneva Convention – as sufficient.²⁴¹

An additional tool in the toolbox needed to apply human rights to armed conflict scenarios was hinted at by the Court in *Jaloud v Netherlands*, where the Court accepted that armed conflicts regularly mean that state actors act in “relatively difficult conditions”. It stressed that it is prepared to make reasonable allowances

sources of law, e.g. the ECHR. He also rightly points to the obliqueness of the interpretative result so achieved.

²³⁸ The simple justification would have been that article 15 ECHR never intended to bar the interpretation of human rights guarantees, whereas the Court referred to the ongoing state practice of not derogating in extraterritorial military operations (*Hassan v UK* App no 29750/09 (ECHR Grand Chamber Judgment 16 September 2014) para. 101). It used this practice as relevant pursuant to article 31 para. 3 lit. b VCLT to decide that drawing on IHL would be possible even without a formal derogation, see the criticism of this approach in the separate opinion of Judges *Spano, Nicolaou, Bianku* and *Kalaydjieva* (para. 12); see with further criticism Lawrence Hill-Cawthorne, ‘The Grand Chamber Judgment in *Hassan v UK*’ (EJIL:Talk 16 September 2014).

²³⁹ Article 118 Geneva Convention III, see Peter Rowe, *The Impact of Human Rights on Armed Forces* (OUP 2006) 149, who mentions this feature of IHL as being “difficult to fit within the regime of human rights”.

²⁴⁰ See articles 43, 78 Geneva Convention IV; see Lawrence Hill-Cawthorne, ‘The Grand Chamber Judgment in *Hassan v UK*’ (EJIL:Talk 16 September 2014).

²⁴¹ *Hassan v UK* App no 29750/09 (ECHR Grand Chamber Judgment 16 September 2014) para. 106; cf. Peter Rowe, *The Impact of Human Rights on Armed Forces* (OUP 2006) 150 et seq.

for this factor.²⁴² It remains to be seen, if the Court merely sought to soften the force of the judgment in the specific case, which found for a violation of the ECHR, or if it follows up on this idea in future cases.

6.3 The case of NIACs

While the IHL applicable in IAC scenarios is rather detailed, NIACs currently pose the most practical and legal questions, resulting from the much less regulated legal framework. This has consequences for the relationship of the IHL of NIACs and IHRL. A less detailed IHL clearly means that in NIACs, human rights have a more influential role, since “general law will remain valid and applicable”, even when there is a regime containing *lex specialis* norms and will “become fully applicable in situations not provided for by the latter.”²⁴³ At the same time, the situation is complicated by the fact that one must differentiate between gaps of IHL, which are left intentionally and those which may be filled by the *lex generalis*. Moreover, the IHL of NIACs takes on a different terminology due to the larger role of domestic law.²⁴⁴

6.3.1 The human right to life in NIACs

It is a basic rule of IHL that a state actor, when using force has to distinguish between combatants and civilians.²⁴⁵ This principle of distinction applies in non-

²⁴² *Jaloud v Netherlands* App no 47708/08 (ECHR 20 November 2014) para. 226; see also *Al Skeini et al. v UK* App no 55721/07 (ECHR Grand Chamber Judgment 7 July 2011) para. 168.

²⁴³ ILC, ‘Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’ (2006) 1 et seq. [references deleted]; see also Knut Dörmann, *Detention in Non-International Armed Conflicts* (2012) 88 US Naval War College ILS 347, 348-9.

²⁴⁴ Peter Rowe, ‘Is There a Right to Detain Civilians by Foreign Armed Forces During a Non-International Armed Conflict?’ (2012) 61 ICLQ 697, 702 et seq.

²⁴⁵ See e.g. ICRC, ‘Rule 1, The Principle of Distinction between Civilians and Combatants’ in Customary International Humanitarian Law Database <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1> last accessed 20 June 2017 with further references. The principle of distinction is one of the most basic and fundamental pillars of modern IHL.

international settings as well.²⁴⁶ In NIACs the opponent of a state actor is a non-state actor, whose members do not possess the status of a combatant in the sense of having the right to use force.²⁴⁷ Yet, a hostile fighter in a NIAC may still be targeted. This is suggested by the principle of distinction as well as Common article 3 of the Geneva Conventions, which excludes persons participating directly in hostilities from its protection, and article 13 para. 3 of the AP II, clarifying the immunity of civilians from direct attacks “unless and for such time as they take a direct part in hostilities”. It is a subject of dispute whether a right to use force against civilians engaging in hostilities follows from these provisions. Regulating an act (e.g. the use of force against civilians) may be said to be different from authorizing such an act.²⁴⁸ Indeed, if everything IHL regulates is deemed to be authorized by it, it would have to be argued that IHL authorizes compulsory work vis a vis detained civilians in NIACs with its article 5 para. 1 lit. e AP II, a position that would rightly be subject to challenge. Consequently, the opinion that IHL does not actually authorize the use of force in NIACs by regulating it is strongly represented in literature.²⁴⁹ There are some strong aspects of this view. One might well argue that in NIACs legal authorizations for the actions of the state party are not based on international law – a NIAC is after all by its nature more domestic than international – but must

²⁴⁶ See e.g. ICRC, ‘Rule 1, The Principle of Distinction between Civilians and Combatants’ in Customary International Humanitarian Law Database <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1> last accessed 20 June 2017.

²⁴⁷ See e.g. Sandesh Sivakumaran, *The Law of Non-International Armed Conflicts* (OUP 2012) 71.

²⁴⁸ See regarding detentions extensively Ryan Goodman, ‘Authorization versus Regulation of Detentions in Non-International Armed Conflicts’ (2015) 91 US Naval War College ILS 155.

²⁴⁹ See Marco Sassòli and Laura M. Olson, ‘The relationship between international humanitarian and human rights law where it matters’ (September 2008) 90(871) Int’l Rev. Red Cross 599, 610 et seq.; see also J. Cerone, ‘Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context’ (2007) 40 Isr. L. Rev. 396, 411; Sandesh Sivakumaran, *The Law of Non-International Armed Conflicts* (OUP 2012) 71 “the law of non-international armed conflict does not provide the parties to the conflict with a right to undertake certain actions. Rather, it prohibits certain actions and regulates other conduct should the parties choose to engage in particular endeavours”; see also the discussion between Aurel Sari, Lawrence Hill-Cawthorne and Dapo Akande on EJIL:Talk Lawrence Hill-Cawthorne and Dapo Akande, ‘Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?’ (EJIL:Talk 7 May 2014); Aurel Sari, ‘Sorry Sir, We’re All Non-State Actors Now: A Reply to Hill-Cawthorne and Akande on the Authority to Kill and Detain in NIAC’ (EJIL:Talk 9 May 2014); Lawrence Hill-Cawthorne/Dapo Akande, Locating the Legal Basis for Detention in Non-International Armed Conflicts: A Rejoinder to Aurel Sari (EJIL:Talk 2 June 2014).

be sought in domestic law, or, in Security Council resolutions pursuant to Chapter VII.²⁵⁰ In addition, the wording of the Geneva Conventions and of AP II does not explicitly specify a legal basis to target hostile fighters in NIACs. Furthermore, it can be argued that Common article 3 and the IHL of NIACs in general are norms, whose object and purpose is the protection of individual rights. In the case of Common article 3 they fulfil this purpose by partially protecting civilians, i.e. as long as they do not participate in hostilities. To read from this partial protection a legal basis to use force against individuals not falling under the protection has drawn criticism.²⁵¹ Indeed, if one would perceive this as a gap of IHL, insofar it does not regulate the protection of persons involved in hostilities, one might argue that this gap needs to be filled by recourse to IHRL. One would then have to argue that hostile fighters are protected by human rights, pursuant to which killing a person can only be an exceptional means to save life and has to be strictly proportional in each case.²⁵² This would undercut the conception of Common article 3, which awards protection first and foremost to persons not involved in hostilities.

However, it is submitted that there is sufficient evidence for an actual authorization of the use of force against hostile fighters in NIACs. *Mačák* has rightly alluded to the fact that a “legal basis authorizing specific conduct may be implied from the relevant treaty text or found in customary international law.”²⁵³ While it could be argued that the legal basis for the use of force is implied in AP II and Common article 3, such a position would have to overcome their vague wording and their overall protective object and purpose. A way to still arrive at this conclusion would be to interpret

²⁵⁰ Peter Rowe, ‘Is There a Right to Detain Civilians by Foreign Armed Forces During a Non-International Armed Conflict?’ (2012) 61 ICLQ 697, 706 et seq.

²⁵¹ *Els Debuf* argues on the basis of the humanitarian purpose of IHL, *Captured in War: Lawful Internment in Armed Conflict* (Hart Publ 2013) 469; see however Kubo Mačák, ‘A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict’ (2015) 45 Isr. Yb Hum. Rts 87, 97, who convincingly argues for a broader object and purpose of IHL as “a dialectical compromise between (...) two opposing forces: humanity and military necessity” with reference to Michael N. Schmitt, ‘Military Necessity and Humanity in International Humanitarian Law’ (2010) 50 Va. J. Int’l L. 795, 798.

²⁵² See Matthias Lippold, ‘Between Humanization and Humanitarization? Detention in Armed Conflicts and the European Convention on Human Rights’ (2016) 76 ZaöRV 53, 64; *McCann and Others v UK* App no 18984/91 (ECHR Grand Chamber Judgment 27 September 1995) paras 146-150, 156 and 194.

²⁵³ Kubo Mačák, ‘A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict’ (2015) 45 Isr. Yb Hum. Rts 87, 90.

Common article 3 and article 13 para. 3 AP II in accordance with article 31 para. 3 lit. b VCLT, since the subsequent practice of the state parties strongly suggests for a legal basis of the right to use force in IHL.²⁵⁴ A similar way would be to argue for a customary authorization of state parties to use force in NIACs. It is submitted that the requirements for the emergence of a norm of customary law²⁵⁵, *consuetudo* (congruent state practice) and *opinio juris sive necessitatis* are met concerning a legal norm that authorizes the use of force against civilians participating directly in hostilities in NIACs.²⁵⁶ There is widespread state practice to the point that civilians taking part in hostilities not only lose their protection, but “become legitimate targets”, which “may be attacked”²⁵⁷. This can be drawn from an assessment of the military manuals, relying on the well-established fact that state practice can be drawn from verbal practice.²⁵⁸ There is no practice to the contrary, since those states

²⁵⁴ See Tim R. Salomon, ‘Die Anwendung von Menschenrechten im bewaffneten Konflikt’ (2015) 53(3) ArchVR 322, 351.

²⁵⁵ See Article 38 para. 1 lit. b of the ICJ Statute: “evidence of a general practice accepted as law”; see further *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark/Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3, 42 et seq (paras 70 et seq.).

²⁵⁶ Michael N. Schmitt, ‘Targeting in Operational Law’ in Terry D. Gill and Dieter Fleck (eds), *The Handbook of International Military Operations* (OUP 2010) 245 et seq. (para. 16.02: “those who directly participate in hostilities may be attacked for such times as they do so. Codified in Article 51(3) of API and Article 13(3) of AP II, this principle reflects customary international humanitarian law in both international and non-international armed conflict”).

²⁵⁷ See Jean-Marie Henckaerts and Louise Doswald-Beck, ‘Distinction between Civilians and Combatants’ in *Customary International Humanitarian Law Vol. II Part 1* (CUP 2005) 108 et seq. (paras 762 et seq.), see especially the Military Manuals of Belgium (para. 821); Canada (para. 764: “They lose their protection and become legitimate targets for such time as they take direct part in hostilities”); Colombia (para. 840: “They thus become combatants”); Croatia (para. 766: “civilians may not be attacked, unless they participate directly in hostilities”); the Dominican Republic (para. 767: “all persons who participate in military operations or activities are considered combatants”); Ecuador (para. 768: “civilians who participate directly in hostilities [...] lose their immunity and may be attacked”); France (para. 769); India (para. 771; 824: “may be treated as combatants”); Indonesia (para. 772 “unlawful combatant and is considered a military objective”); Lebanon (para. 847: “lose their civilian status and become military objectives liable to attack”); Madagascar (para. 775); Philippines (para. 849: “can be the object of a direct attack”) Spain (para. 782); Togo (para. 784); USA (para. 788 “lose their immunity and may be attacked”; 829: “liable to attack”); Yugoslavia (para. 789 “permitted to directly attack”); see also para. 805 for reference to a US memorandum of law stating that “there is general agreement among law-of-war experts that civilians who participate in hostilities may be regarded as combatants”).

²⁵⁸ Jean-Marie Henckaerts and Louise Doswald-Beck, ‘Introduction’ in *Customary International Humanitarian Law Vol. I* (CUP 2005) xxxviii; see the practice of the ICJ in *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, 100 (para. 190); *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, 39-46 (paras 49-58); for the

that do not explicitly outline in their military manuals a right to use force, do not negate this right, but merely focus on the fact that civilians, who engage in hostilities, lose their protection.

Much suggests that there is also sufficient *opinio juris*. *Opinio juris* is notoriously hard to ascertain. *Opinio juris* on the “existence of a rule that allows a certain conduct [...] can be found in acts that recognise the right to behave in such a way without actually requiring such behaviour. This will typically take the form of States undertaking such action, together with the absence of protests by other States.”²⁵⁹ In practice, it is hardly separable from state practice. The verbal acts alluded to above are not only evidence for state practice but also reflective of “the legal conviction of the State[s].”²⁶⁰ This is especially clear in those examples, where the states explicitly use legal terminology, such as civilians becoming “legitimate targets” or “military objectives”, when they participate in hostilities. This terminology matters greatly. There are different legal bases for the use of force against hostile fighters in NIACs that states could rely on. Aside from IHL, there is the right to self-defence as established pursuant to domestic law, domestic laws establishing the right of police and possibly military to use force in domestic contexts, and quite possibly UN resolutions pursuant to chapter VII allowing for “all necessary means”. Which legal basis a state relies on is often difficult to analyse. However, when a state uses IHL terminology such as “legitimate target”, “military objectives” or “may be attacked like combatants”, it shows that it has the legal conviction that its right to use force is based on IHL. An additional case, which makes for a very clear example of *opinio juris*, is the Argentinian *La Tablada*-case. The Inter-American Commission on Human Rights had to assess the use of force of the military against civilians attacking a military base. The Commission made explicit that civilians, who take direct part in hostilities become “legitimate military targets” and are “subject to direct

explicit acceptance of military manuals as state practice see *Prosecutor v Tadic* ICTY-IT-94-1-AR72 (2 October 1995) para. 99; while the ICRC Customary International Humanitarian Law study has been attacked for its definition of “verbal practice” being too wide (see e.g. Leah M. Nicholls, ‘The Humanitarian Monarchy legislates’ (2006-07) 17 *Duke J. Comp. & Int’l L.* 223, 238), the use of military manuals has not been challenged (*ibid.*, 238 set seq.)

²⁵⁹ Jean-Marie Henckaerts and Louise Doswald-Beck, ‘Introduction’ in *Customary International Humanitarian Law Vol. I* (CUP 2005) xlvi.

²⁶⁰ Jean-Marie Henckaerts and Louise Doswald-Beck, ‘Introduction’ in *Customary International Humanitarian Law Vol. I* (CUP 2005) xlvi.

individualized attack to the same extent as combatants.”²⁶¹ Therefore, deaths and wounds inflicted on them by state actors “did not constitute violations of the American Convention or of the applicable provisions of humanitarian law rules.”²⁶² This statement by a regional human rights body read together with the verbal state practice referred to above is persuasive evidence for the fact that there is sufficient *opinio juris* to establish the use of force in NIACs as a customary rule of IHL.

As such, the (customary) IHL applicable in NIACs also contains a right to target hostile fighters. This right is by virtue of its comparably smaller scope of application (situations of NIACs) *lex specialis* to the human right to life and as such influences its interpretation in the way outlined above.

Regarding article 2 ECHR there is the potential additional problem that article 15 para. 2 ECHR gives article 2 ECHR the status of a non-derogable norm, “except in respect of deaths resulting from lawful acts of war”. One might argue that the targeting of hostile fighters in NIACs is not a “lawful act of war”, because a NIAC is not a war. The legal importance of the term “war” has diminished drastically after the end of World War II, but “war” in the narrow sense, albeit subject to diverging interpretations and contestations²⁶³, refers to a declared international armed conflict.²⁶⁴ If that would be the case, then pursuant to the method suggested here, the *lex specialis* character of IHL would be devalued and the human right to life would most likely prevail in interpretation and application. However, by accepting deprivations of the right to life by “lawful acts of war” as derogable, the Convention’s aim was to accommodate the more specific rules of IHL on the use of force against

²⁶¹ Inter-American Commission on Human Rights *Juan Carlos Abella v Argentina* Case 11.137, Report No. 55/97 (18 November 1997) para. 178; see also Peter Rowe, *The Impact of Human Rights on Armed Forces* (OUP 2006) 174 et seq.

²⁶² Inter-American Commission on Human Rights *Juan Carlos Abella v Argentina* Case 11.137, Report No. 55/97 (18 November 1997) para. 188; the African Commission on Human and Peoples’ Rights hints into the same direction in its ‘General Comment No. 3 On The African Charter On Human And Peoples’ Rights: The Right To Life (Article 4)’ (2015) paras 32-35.

²⁶³ See Matthias Lippold, ‘Between Humanization and Humanitarization? Detention in Armed Conflicts and the European Convention on Human Rights’ (2016) 76 *ZaöRV* 53, 58 with reference to Jean S. Pictet (ed), *Commentary on the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC 1952) 32.

²⁶⁴ See Common article 2 “the present Convention shall apply to all cases of declared war or of any other armed conflict”.

hostile combatants.²⁶⁵ The purpose of the phrase “lawful acts of war” is to avoid collisions between IHL and IHRL.²⁶⁶ Where the IHL of NIACs contains the right to use force, there is the potential of such a collision. It thus seems to be in keeping with the telos of article 15 para. 2 ECHR to include uses of force in NIACs that are lawful pursuant to IHL in the phrase “lawful acts of war”.

This leads to the result that the right to target hostile fighters influences the guarantee of article 2 ECHR, which accommodates IHL by giving way to the IHL norm insofar the use of force is legal pursuant to IHL.

The ECtHR has so far not acknowledged the influence of the IHL applicable to NIACs on the interpretation of human rights guarantees. It tends to analyse these situations only by reference to human rights and turns a blind eye to the more specific IHL.²⁶⁷ In doing so, it applies the standards outlined above, that a lethal use of force must be “absolutely necessary” and adhere to a strict proportionality standard. By the same token, further duties accepted under article 2 ECHR are also deemed applicable. Consequently, IHRL would also govern the phase of the planning of a military operation.²⁶⁸ Furthermore, it would not fall short of regulating the weapons used in an operation.²⁶⁹ However, the same dismissive stance of the

²⁶⁵ See Heike Krieger, ‘Notstand’ in Oliver Dörr, Rainer Grote, and Thilo Marauhn (eds), *EMRK/GG Konkordanzkommentar Vol. I* (Mohr Siebeck 2nd ed. 2013) 417, 439; Jochen Abr. Frowein, ‘Probleme des allgemeinen Völkerrechts vor der Europäischen Kommission für Menschenrechte’ in Ingo von Münch (ed), *Staatsrecht - Völkerrecht - Europarecht: Festschrift für Schlochauer* (De Gruyter 1981) 288, 295, who argues that article 5 ECHR is not applicable when the law of war provides for the right to detain. He continues stating – in coherence with the opinion expressed in this thesis – that the protection of civilians and detained persons is more detailed, and insofar sharper and more effective in the Geneva Conventions, since those rules have a focus on the specific problems in military operations.

²⁶⁶ Cf. Heinz-Eberhard Kitz, *Die Notstandsklausel des Art. 15 der europäischen Menschenrechtskonvention* (Duncker & Humblot 1982) 59 et seq.

²⁶⁷ See with further references Lindsay Moir, ‘The European Court of Human Rights and international humanitarian law’ in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 480, 481 et seq.; this is rightly criticized by Robert Kolb, ‘Human Rights and Humanitarian Law’ in Rüdiger Wolfrum (ed), *MPEPIL* (OUP online edition 2013) para. 44.

²⁶⁸ See e.g. *Ergi v Turkey*, 66/1997/850/1057 (ECHR 28 July 1998) para. 79-81 (79: „...the responsibility of the State [...] may also be engaged where they fail to take all 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.“).

²⁶⁹ See for all of these effects Peter Rowe, *The Impact of Human Rights on Armed Forces* (OUP 2006) 185 et seq.; for the use of weapons being an issue before the ECtHR see e.g.

ECtHR regarding IHL has been traditionally true for international armed conflicts as well up until the *Hassan*-decision opened the gates for an appropriate role of IHL in such cases.²⁷⁰ Consequently, it remains to be seen, if the ECtHR will grant IHL a stronger role in NIAC scenarios in the cases that will undoubtedly come.

A separate problem of the right to target hostile fighters in NIACs has been how long the right to use force lasts, i.e., if the use of force is only allowed during the actual participation in the hostilities or if an ongoing membership in an armed opposition group and ongoing functions are sufficient to establish a continued right of the state actor to use force and thus an exception from the protection of Common article 3 and article 13 para. 2 AP II. While the wording “*direct* participation in hostilities” suggests that participation is qualified and once the immediate participation ceases the use of force is disallowed, the ICRC and state practice have adopted a broader approach.²⁷¹ It could be contended that the wording of Common article 3 (“Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause...”) means that seizing participation in hostilities has to have a similar quality and intensity as laying down arms or being placed ‘hors de combat’, especially if a person directly participates in hostilities on a regular basis. Indeed, any other result would be problematic since it would encourage guerrilla tactics with pinprick attacks and swift retreats.²⁷² The ICRC has published an interpretative aid for “direct participation in hostilities” in 2009, which – although being highly controversial – offers some insights.²⁷³ It advances the thesis that participation in hostilities is made up from three criteria:

Tagayeva et al. v Russia App nos 26562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11 and 37096/11 (ECHR 13 April 2017).

²⁷⁰ See above 6.2.

²⁷¹ See e.g. Sylvie-S. Junod, ‘Article 13 AP II’ in Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds) *Commentary on the Additional Protocols of 8 June 1977* (ICRC 1987) 1453 (para. 4789: “Those belonging to armed forces or armed groups may be attacked at any time.”)

²⁷² See however the criticism of Marco Sassòli and Laura M. Olson, ‘The relationship between international humanitarian and human rights law where it matters’ (September 2008) 90(871) *Int’l Rev. Red Cross* 599, 607 et seq.

²⁷³ Nils Melzer, *Interpretative guidance on the notion of direct participation in hostilities* (ICRC 2009).

“1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).”²⁷⁴

Acts of preparation (e.g. loading bombs in an airplane) and acts subsequent to a hostile act (e.g. tactical retreat) are included, if these are integral parts of the hostile act.²⁷⁵ It suggests that a distinction be drawn between civilians, who take part in hostilities and who lose the protection of Common article 3 and article 13 para. 2 AP II only for the duration of their participation and members of organized armed groups, who lose their protection for the duration of their membership “by virtue of their continuous combat function”.²⁷⁶

When accepting this interpretation and the reading of article 15 para. 2 ECHR proposed above, the human right to life under article 2 ECHR would not prevent the use of force lawful pursuant to IHL of NIACs i.e. the use of force against members of organized armed groups with a continuous combat function and the use of force against other civilians directly participating in a hostile act. The same overall result would hold true for the ICCPR, in which the lawful use of force pursuant to IHL would not be an arbitrary deprivation of the right to life and as such not outlawed by article 6 ICCPR.

Three additions warrant brief attention:

First, it must be added that, when involved in extraterritorial NIAC operations, member states of the ECHR regularly fight side by side with the territorial state. In

²⁷⁴ Nils Melzer, *Interpretative guidance on the notion of direct participation in hostilities* (ICRC 2009) 46; for an extensive discussion see Nina Kapaun, *Völkerrechtliche Bewertung gezielter Tötungen nicht-staatlicher Akteure* (Norderstedt BoD 2014) 231 et seq.

²⁷⁵ Nils Melzer, *Interpretative guidance on the notion of direct participation in hostilities* (ICRC 2009) 65 et seq.

²⁷⁶ Nils Melzer, *Interpretative guidance on the notion of direct participation in hostilities* (ICRC 2009) 69 et seq.; with a critical assessment of the interpretative guidance see Daniel von Devivere, ‘Unmittelbare Teilnahme an Feindseligkeiten: Kniefall des humanitären Völkerrechts vor der Wirklichkeit?’ (2008) 41(1) Krit. J. 24, 32 et seq.; for a consideration of riots during a NIAC see ICRC, ‘The Use of Force in Armed Conflicts – Expert Meeting’ (2013) 24-5.

this case, the territorial state and a foreign nation fighting alongside the territorial state may make lawful use of the right to use force, to the extent described above.

Secondly, at least in case of an attack against the armed forces of an ECHR member state, the right to use force of that state's armed forces will regularly not only follow from IHL and possibly article 2 para. 2 lit. c ECHR, allowing measures taken to quell a riot or an insurrection, but also from the right of private self-defence, which is explicitly acknowledged by article 2 para. 2 lit. a ECHR. In most cases of armed attacks in NIAC scenarios, armed and even lethal self-defence will be "absolutely necessary" even by the strict standard of the ECHR, which explains why self-defence plays a very important role in the legal education of soldiers and in their preparatory training leading up to a deployment.

Thirdly, some argue that human rights establish further duties not necessarily part of IHL, such as duties to investigate the use of lethal force²⁷⁷, the duty to investigate, if there is an actual case of direct participation before using force²⁷⁸, and the duty to use armed force as a measure of absolute last resort. A duty to investigate after having used lethal force, if possible in the circumstances, may be an instance in which the *lex generalis* retains an effect on the *lex specialis*, either because of a gap in the IHL applicable to NIACs or because it guides the interpretation of IHL. In contrast thereto, the duty to investigate, if there is an actual case of direct participation before using force, does not follow from human rights, but from IHL and its fundamental principle of distinction referred to above. The proposition that IHRL influences IHL in the sense that the use of armed force is limited to a measure of absolute last resort, e.g. if the capture is impossible, etc., and as such transferring the oft-referred-to rules of police operations to armed conflicts has to be rejected. In the view advanced here, there simply is no legal ground to alter the existing standards of the *lex specialis* to accommodate IHRL. This suggestion follows an understandable sentiment; however, transferring the human right standards to such a situation will mean to introduce inadequate legal standards to armed conflict

²⁷⁷ Marco Sassòli and Laura M. Olson, 'The relationship between international humanitarian and human rights law where it matters' (September 2008) 90(871) *Int'l Rev. Red Cross* 599, 615 with further references.

²⁷⁸ See Louise Doswald-Beck, 'The Right to Life in Armed Conflict' (December 2006) 88(864) *Int'l Rev. Red Cross* 881, 887 et seq.

scenarios. The soft law for police operations²⁷⁹ that is sometimes mentioned in this context, is inadequate for armed conflict settings, in that it is written for situations that are simply not comparable to the armed conflicts, in which having to repel attacks by armed groups with armed force is a real possibility and becoming a regular reality of troops abroad.

In conclusion, it is argued that NIAC scenarios are to be treated according to the general method proposed in this thesis: When the IHL applicable to NIACs contains norms applicable to the situation at hand, in the process of harmonizing interpretation of the applicable human right, significant weight needs to be given to the more specific norms of IHL. Where the IHL of NIACs contains no rules for a situation, human rights apply. That being said, attention has to be given to the regulatory framework of IHL, which regularly, while being “prohibitive in nature”²⁸⁰, presupposes rights of state parties to NIACs.

The approach suggested in this thesis is further supported by the African Commission on Human and Peoples’ Rights (ACHPR), which in its General Comment No. 3²⁸¹ on the right to life issued in November 2015,²⁸² argues that human rights remain applicable during armed conflicts and may influence the interpretation of IHL,²⁸³ however, during armed conflicts – of international or *non-international character*²⁸⁴ – deprivations of the right of life are “determined by

²⁷⁹ Cf. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (1990).

²⁸⁰ Christian Johann, *Menschenrechte im internationalen bewaffneten Konflikt* (Berliner Wissenschaftsverlag 2012) 183 et seq.

²⁸¹ African Commission on Human and Peoples’ Rights, ‘General Comment No. 3 On The African Charter On Human And Peoples’ Rights: The Right To Life (Article 4)’ (2015).

²⁸² See Vito Todeschini, ‘The Relationship between International Humanitarian Law and Human Rights Law in the African Commission’s General Comment on the Right to Life’ (EJIL:Talk 7 June 2016).

²⁸³ African Commission on Human and Peoples’ Rights, ‘General Comment No. 3 On The African Charter On Human And Peoples’ Rights: The Right To Life (Article 4)’ (2015) paras 32-35.

²⁸⁴ African Commission on Human and Peoples’ Rights, ‘General Comment No. 3 On The African Charter On Human And Peoples’ Rights: The Right To Life (Article 4)’ (2015) para. 33, emphasis added.

reference to international humanitarian law.”²⁸⁵ Where military actions cause deprivations of life, the human right to life will not be held to have been violated, if the military action was in accordance with IHL. On the other hand, if such action goes along with a violation of IHL, it will be seen as a violation of the human right to life as well as a breach of the law of armed conflict. Yet, the Commission goes further and deliberates the duty to capture instead of kill a hostile fighter or combatant, if military necessity does not require the use of lethal force.²⁸⁶ Such a rule has regularly been rejected. Indeed, it has been alluded to the fact that the enemy fighter “has the means to achieve the same result [as a capture before kill rule] by surrendering, since those who surrender are hors de combat and cannot be attacked [...]”.²⁸⁷ This works in IAC as well as NIAC scenarios. A rule prohibiting an attack, when a capture is possible “would shift the burden from the fighter to the attacker in a way that warfighting states would have been, and remain, unlikely to countenance.”²⁸⁸ It may be added that while it is not inconceivable that a capture-first-rule could be established, such a rule would have to grant a wide margin of appreciation for the state party regarding aspects of military necessity and viability of capture. It seems unlikely that such a rule would in reality add anything to the protection of individual rights in armed conflict. Moreover, a small blemish on the General Comment is the clear *de lege ferenda* notion that new weapon technologies shall only be developed when they strengthen the protection of the right to life. This seems to be a bit out of place and unfounded in law.²⁸⁹

²⁸⁵ African Commission on Human and Peoples’ Rights, ‘General Comment No. 3 On The African Charter On Human And Peoples’ Rights: The Right To Life (Article 4)’ (2015) para. 32.

²⁸⁶ African Commission on Human and Peoples’ Rights, ‘General Comment No. 3 On The African Charter On Human And Peoples’ Rights: The Right To Life (Article 4)’ (2015) para. 34.

²⁸⁷ Michael N. Schmitt, ‘Wound, Capture, or Kill’ (2013) 24(3) Eur. J. Int’l L. 855, 858; see however Ryan Goodman, ‘The Power to Kill or Capture Enemy Combatants’ (2013) 24(3) Eur. J. Int’l L. 819 et seq., who advances in a thought-provoking way *inter alia* the thesis that the decision to kill instead of capture (combatants in IAC) needs to be backed up by military necessity.

²⁸⁸ Michael N. Schmitt, ‘Wound, Capture, or Kill’ (2013) 24(3) Eur. J. Int’l L. 855, 858.

²⁸⁹ This statement by the Commission is likely meant to strengthen the understandable proposition that meaningful human control should be exercisable and exercised over machine autonomy in the selection of human targets African Commission on Human and Peoples’ Rights, ‘General Comment No. 3 On The African Charter On Human And Peoples’ Rights: The Right To Life (Article 4)’ (2015) para. 35.

6.3.2 The human right to liberty in NIACs

The human right to liberty in NIACs has been especially surrounded by problems and controversial discussions. The ECtHR has explicitly decided in *Hassan v UK* that the approach it adopted there would not apply in cases of NIACs. This warrants criticism. The ECtHR assumes that “[i]t can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are *accepted features of international humanitarian law*, that Article 5 could be interpreted as permitting the exercise of such broad powers.”²⁹⁰ The statement is clearly obiter dictum and the “accepted feature”-phrase seems to be misleading at best and false at worst. Such a conclusion presupposes an analysis, if detention or rather internment measures indeed are “accepted features” of the IHL of NIACs. While it is uncertain what is needed to fulfil that standard, the fact that AP II to the Geneva Conventions²⁹¹ explicitly mentions cases of internment and detention of civilians and that the Standard Operating Procedures (SOPs) in NATO military operations echo this seems to suggest that the deprivation of liberty is at least a well-known feature that states regularly resort to in NIACs.²⁹²

Is there a legal basis for deprivations of liberty in IHL?

There has been a lively debate on the question, if there are legal bases to be found in IHL for deprivations of liberty in NIACs. This has been sparked mainly by the UK case of *Serdar Mohammed*, a case concerning the detention of a person suspected of being a Taliban commander in Afghanistan for the duration of 110 days without

²⁹⁰ *Hassan v UK* App no 29750/09 (ECHR Grand Chamber Judgment 16 September 2014) para. 104 (emphasis added).

²⁹¹ For the area of application, see Article 1 para. 1 AP II.

²⁹² See Articles 4, 5, and 6 AP II. Internment refers to the deprivation of liberty for security reasons, while detention regularly refers to the deprivation of liberty before or during a criminal proceeding, see ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC 2nd ed. 2016), Common article 3, para. 717 et seq.; see also ICRC, *Internment in Armed Conflict: Basic Rules and Challenges, Opinion Paper* (ICRC November 2014) 6 et seq. for a discussion of internment in NIACs; see also the discussion in Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflicts* (OUP 2016) 68 et seq.; for the SOP see NATO/ISAF Standard Operating Procedures Detention of Non-ISAF Personnel SOP 362, 31 August 2006, para. 4; see Jacques Hartmann, ‘Detention in International Military Operations: Problems and Process’ (2013) 52 *Mil. L. & L. War Rev.* 303, 305.

charge and without access to a lawyer.²⁹³ The majority opinion in academic writing denies a legal basis for detentions or internments in NIACs pursuant to IHL.²⁹⁴ This might seem to be surprising at first, since it is generally acknowledged that such measures are constant features of NIAC scenarios. Would one conclude that there is no legal basis in IHL then, in order for the measure to be legal, a valid legal basis would have to be found in domestic law or possibly in UN Security Council resolutions pursuant to Chapter VII.²⁹⁵ Detaining people without a legal basis would lead to the measure being arbitrary and thus illegal under IHRL as well as IHL²⁹⁶ and, in addition, the domestic criminal law of many countries.²⁹⁷

As outlined above, the (customary) IHL of NIACs does indeed contain legal bases for state action, as has been explicated concerning the right to use force against civilians directly participating in hostilities. Consequently, it is not unthinkable that IHL offers a basis for deprivations of liberty as well. To go even further, as a matter of policy it could be said that it would be highly problematic, if there was a customary right to use force against a civilian, while a right to detain such an individual would

²⁹³ *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB); [2015] EWCA Civ 843; [2017] UKSC 1 and 2.

²⁹⁴ For the majority view Alex Conte, 'The legality of detention in armed conflict' in Annyssa Bellal (ed), *The War Report: Armed Conflict in 2014* (OUP 2015) 476, 493 et seq.; Peter Rowe, 'Is There a Right to Detain Civilians by Foreign Armed Forces During a Non-International Armed Conflict?' (2012) 61 ICLQ 697, 702 et seq.; Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflicts* (OUP 2016) 66 et seq.; Sandesh Sivakumaran, *The Law of Non-International Armed Conflicts* (OUP 2012) 71; see however in favour of a legal basis in IHL Jann Kleffner, 'Operational Detention and the Treatment of Detainees' in Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (OUP 2010) 465, 471; Jelena Pejic, 'Procedural Principles and Safeguards for Internment/administrative Detention in Armed Conflicts and Other Situations of Violence' (2005) 87(858) Int'l Rev. Red Cross 375, 377; Knut Dörmann, 'Detention in Non-International Armed Conflicts' (2012) 88 US Naval War College ILS 347, 349: "Deprivation of liberty is an inevitable and lawful occurrence in armed conflict, including in NIAC."; Kubo Mačák, 'A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict' (2015) 45 Isr. Yb Hum. Rts 87; David Tuck, 'Detention by Armed Groups' (2011) 93(883) Int'l Rev. Red Cross 759, 765.

²⁹⁵ It is beyond the scope of this thesis to address the issue, if a Security Council resolution would suffice in the different domestic law regimes or if an additional legal basis would be needed.

²⁹⁶ ICRC, 'Rule 99, Deprivation of Liberty' in Customary International Humanitarian Law Database <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule99> last accessed 20 June 2017.

²⁹⁷ Kubo Mačák, 'A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict' (2015) 45 Isr. Yb Hum. Rts 87, 95-6.

be lacking. This is especially so, since quarter must be given in IHL and a lacking legal basis for detention or internment would disincentivize using non-lethal force against individuals that are known threats.²⁹⁸ However, wishful thinking is not a method of norm interpretation and a policy argument or the fact that it would be nice to have a norm with a certain content cannot compensate for the lack of said norm. Instead, it may well be said that states may regularly have legal bases for deprivations of liberty, however these are found in their domestic law or conferred to them by Chapter VII resolutions.²⁹⁹

The arguments in favour of a treaty-based implied authorization of deprivations of liberty in the IHL applicable to NIACs are thin and ultimately unconvincing. The UK Supreme Court has rightly alluded to the fact that the IHL of NIACs originally was not supposed to grant rights to state parties involved in NIACs. The IHL of NIACs first and foremost – and to a much greater extent than the IHL applicable to IACs – is supposed to limit state action. The references to internments and detentions in AP II and Common article 3 are easily explained as being reflective of a widespread practice of states to deprive people of their liberty in NIACs. For this situation, IHL sought to establish minimum guarantees. In doing so, it acknowledged deprivations of liberty as ongoing, but can hardly be interpreted to authorize them.³⁰⁰ Indeed, when comparing AP II and Common article 3 to the provisions actually authorizing deprivations of liberty in the IHL applicable in IACs, the latter are much more express in conferring legal bases and more detailed concerning the prerequisites of and the

²⁹⁸ The longstanding rule that ordering no quarter is prohibited is explicitly part of the IHL of NIACs as well, see Article 4 of AP II. The UK government has tried to argued with an *a fortiori* argument in *Serdar Mohammed v Ministry of Defence* that a power to kill “logically encompassed operational detention” ([2015] EWCA Civ 843, para. 207). In a very technical approach, one could argue that such a right would end in the second in which the person would be detained, since that person would then be *hors de combat* and not involved directly in hostilities anymore thus ending the right to use force and with it any other rights that it may encompass ([2015] EWCA Civ 843, paras 211 with further references). The court rejected the argument on other grounds [2015] EWCA Civ 843, paras 214 et seq. First and foremost, it found the nonexistence of procedural guarantees problematic. The UK Supreme Court seems to deny that IHL in NIACs contains legal bases for any state actions, as such it rejected the argument of the UK government flat out, see *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, para. 265.

²⁹⁹ *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, para. 265, on the topic see also Gabor Rona, ‘Is there a Way Out of the Non-International Armed Conflict Dilemma?’ (2015) 91 US Naval War College ILS 32, 37 et seq.

³⁰⁰ *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, para. 264.

procedure governing such measures.³⁰¹ The IHL for NIACs is lacking not so much regarding the guarantees applicable in cases of deprivations of liberty, which AP II does address³⁰², but regarding the prerequisites that have to be met for a deprivation of liberty to be lawful and regarding the maximum duration of such a measure.³⁰³ While this shortfall is not conclusive to sustain the finding that there is no legal basis in IHL. A more detailed regulation may be preferable, but – as stated above – matters of policy do not make or break norms of international law. However, the lack of details and express wording are suggestive towards the position that the IHL of NIACs confers no legal basis for deprivations of liberty on the state actors.

Moreover, the solution that is sometimes proposed, to apply the norms applicable in IACs by way of an analogy to NIACs has to be rejected as well. Such a proposition has been made expressly for deprivations of liberty.³⁰⁴ There are two ways to arrive at that conclusion and both ultimately fail:

³⁰¹ See article 21 sentences 1 and 2 Geneva Convention III: “The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter.”; Article 42 sentence 1 Geneva Convention IV: “The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.”; Article 68 sentence 1 Geneva Convention IV: “Protected persons who commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed.”; article 78 sentence 1 Geneva Convention IV: “If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.”; see also *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, para. 260.

³⁰² See below 6.3.2.

³⁰³ See the criticism in *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB) para. 246 “I do not see how CA3 or AP2 could possibly have been intended to provide a power to detain, nor how they could reasonably be interpreted as doing so, unless it was possible to identify the scope of the power. However, neither CA3 nor AP2 specifies who may be detained, on what grounds, in accordance with what procedures, or for how long.”; for a discussion of the duration of detention measures see Yuval Shany, ‘A Human Rights Perspective to Global Battlefield Detention: Time to Reconsider Indefinite Detention’ (2017) 93 US Naval War College ILS 102.

³⁰⁴ Marco Sassòli and Laura M. Olson, ‘The relationship between international humanitarian and human rights law where it matters’ (September 2008) 90(871) Int’l Rev. Red Cross 599, 623 et seq.

The first would be to argue that the prerequisites for an analogy are met. The use of analogies in international law is disputed.³⁰⁵ Some argue that the existence of a gap simply means a non-regulation of the issue under international law, leading to the general freedom to act accepted by the Permanent Court of International Justice in the *Case of the SS Lotus*.³⁰⁶ Others maintain that an area of non-regulation means neither a permission nor a prohibition.³⁰⁷ Proponents for the use of analogies argue on the basis of “considerations of justice” that similar cases have to be treated similarly.³⁰⁸ If one were to accept analogies in international law, one would nevertheless have to prove a similarity between two cases and an unintended lacuna in the regulation of one of these.³⁰⁹ It is submitted that NIACs are not similar to IACs, but rather distinctly different in that the latter is a traditional topic of international law, regulating the relationship between states, while the prior regulates first and foremost the relationship between a state and a non-state actor regularly made up of the state’s citizens. Also, one can hardly argue that the topic of detentions was an unintended lacuna in the IHL applicable to NIACs, as states expressly regulated and established a legal basis for detentions in IACs, while only regulating, but stopping short of establishing an explicit legal basis for such measures in NIACs. Moreover, IHRL applies in NIACs. Even if the rules regarding deprivations of liberty in IACs could be transferred by way of an analogy to NIACs, they would hardly influence the interpretation of IHRL, since a rule transferred by

³⁰⁵ See with an overview Albert Bleckmann, ‘Analogie im Völkerrecht’ (1977/78) 17 ArchVR 161.

³⁰⁶ S.S. “*Lotus*” (*France v Turkey*) (1927) PCIJ Rep Series A No 10; Silja Vönecky, ‘Analogy in International Law’ in Rüdiger Wolfrum (ed), *MPEPIL, Vol. I* (OUP 2012) 374, 376 with further references; Alfred Verdross and Bruno Simma, *Universelles Völkerrecht* (Duncker & Humblot 3rd ed 1984) 387-8.

³⁰⁷ Silja Vönecky, ‘Analogy in International Law’ in Rüdiger Wolfrum (ed), *MPEPIL, Vol. I* (OUP 2012) 374, 376 with further references.

³⁰⁸ Silja Vönecky, ‘Analogy in International Law’ in Rüdiger Wolfrum (ed), *MPEPIL, Vol. I* (OUP 2012) 374, 376-7) with further references; Georg Dahm, Jost Delbrück and Rüdiger Wolfrum, *Völkerrecht Die Grundlagen, Die Völkerrechtssubjekte I/1* (De Gruyter 2nd ed. 1989) 80-83.

³⁰⁹ Silja Vönecky, ‘Analogy in International Law’ in Rüdiger Wolfrum (ed), *MPEPIL, Vol. I* (OUP 2012) 374, 377.

way of analogy cannot claim a *lex specialis* status in relation to the directly applicable IHRL.³¹⁰

A second way to render the rules of IACs applicable to NIAC scenarios would be if their application would be backed by *consuetudo* and *opinio juris*, i.e. the regime of IACs would apply to NIACs by virtue of a customary norm to that effect. However, there is quite plainly insufficient state practice and *opinio juris* to allow such a conclusion as most states pronounce the differences of law between both regimes.

Consequently, the only way to construe a legal basis for deprivations of liberty under the IHL of NIACs is to establish sufficient state practice and *opinio juris* to justify a customary legal basis for such measures, as has been done for the use of force.

There is some state practice to that extent. Even critics of the customary status of such a norm do not deny that deprivations of liberty are a regular feature of NIACs.³¹¹ However, it has been argued convincingly that the finding that such detentions are based on IHL is unsustainable, seeing that alternative legal bases are available to states in most cases, be it in their domestic law, the domestic law of the territorial state or in applicable Chapter VII resolutions.³¹² Take the example of the International Security Assistance Force (ISAF), where much of the recent state practice concerning detentions originates, the Security Council Resolution regime offers a legal basis for detention measures.³¹³ For state practice and *opinio juris* to be substantiated, it has to be proven that states rely on IHL as a legal basis for detentions. There is only limited verbal practice suggestive towards a customary

³¹⁰ See also Heike Krieger, 'After Al-Jedda: Detention, Derogation, and an Enduring Dilemma' (2011) 50 *Mil. L. & L. War Rev.* 419, 426-32; see however Chris Jenks, 'Detention under the law of armed conflict' in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 301-16, who argues for a transfer of the rules of IACs as a matter of policy. Of course, such an approach would not provide a legal basis for detention.

³¹¹ *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, para. 272.

³¹² See Lawrence Hill-Cawthorne and Dapo Akande, *Locating the Legal Basis for Detention in Non-International Armed Conflicts: A Rejoinder to Aurel Sari* (EJIL:Talk 2 June 2014).

³¹³ This is reflected in the NATO/ISAF Standard Operating Procedures Detention of Non-ISAF Personnel SOP 362, 31 August 2006, para. 4: "The only grounds upon which a person may be detained under current ISAF Rules of Engagement (ROE) are: if the detention is necessary for ISAF force protection; for the self-defence of ISAF or its personnel; for accomplishment of the ISAF mission".

norm offering a legal basis for detentions in IHL.³¹⁴ The United Kingdom has stated that the power to intern in NIACs can be “derived from a UNSCR, *from the Law of Armed Conflict* or from host nation law”.³¹⁵ It has repeated this position in the case of *Serdar Mohammed*, although the UK courts ultimately rejected it.³¹⁶ Similar statements have been issued by the Netherlands³¹⁷ and the United States of America.³¹⁸ The *Copenhagen Principles and Guidelines*³¹⁹ could be a document of

³¹⁴ The Human Rights Committee has acknowledged that security detention in NIACs may be resorted to “under the most exceptional circumstances”, when a number of prerequisites are met, ‘General Comment No. 35’ (16 December 2014) UN Doc. CCPR/C/GC/35, para. 15. The Committee does not mention a legal basis for such a measure, but merely accepts that there may be a possibility to detain in extreme situations. This opinion seems to be more an acknowledgment of the need for security detentions than an expression of *opinio juris* that IHL allows deprivations of liberty, see Alex Conte, ‘The legality of detention in armed conflict’ in Annyssa Bellal (ed), *The War Report: Armed Conflict in 2014* (OUP 2015) 476, 497 et seq.

³¹⁵ *United Kingdom*, Joint Doctrine Publication 1-10, Captured Persons (CPERS) (3rd ed. 2015) para. 148 (emphasis added); see Kubo Mačák, ‘A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict’ (2015) 45 *Isr. Yb Hum. Rts* 87, 98.

³¹⁶ *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB); [2015] EWCA Civ 843; [2017] UKSC 1 and 2.

³¹⁷ *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, para. 272 refers to a “letter dated 21 July 2006, headed ‘Combating international terrorism’, sent by the Foreign Minister, the Minister of Defence and the Minister for Development Cooperation to the President of the House of Representatives (KST 99753, 27 225 Nr 221)” with said content.

³¹⁸ United States of America, ‘Second Periodic Report to the Committee against Torture’ (13 January 2006) UN Doc. CAT/C/48/Add.3/Rev.1, Annex 1, at 48: “*under the law of armed conflict, the United States has the authority to detain persons who have engaged in unlawful belligerence until the cessation of hostilities*”; This position has been upheld under the Obama administration, see United States Department of State, ‘Speech by the Legal Adviser, The Obama Administration and International Law, Annual Meeting of the American Society of International Law, Washington D.C.’ (25 March 2010): “As a nation at war, we must comply with the laws of war, but detention of enemy belligerents to prevent them from returning to hostilities is a *well-recognized feature of the conduct of armed conflict*, as the drafters of Common Article 3 and Additional Protocol II recognized and as our own Supreme Court recognized in *Hamdi v Rumsfeld*.” see with these examples also Kubo Mačák, ‘A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict’ (2015) 45 *Isr. Yb Hum. Rts* 87, 102, who also lays out that the UK position used to be that IHL offers no such legal basis. Kubo Mačák, ‘A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict’ (2015) 45 *Isr. Yb Hum. Rts* 87, 102 furthermore refers to the US Supreme Court in *Hamdi v Rumsfeld*, 542 U.S. 507 (2004). That case, however, does not contain the acknowledgment of a right to detain under IHL in NIACs. While the Court decided “the authority to detain for the duration of the relevant conflict” was indeed in line with “longstanding law-of-war principles”, it also clearly stated that the authorization to detain came from Congress’ Authorization for Use of Military Force (115 Stat. 224) and not from IHL.

³¹⁹ (2012) 51 ILM 1368-80.

consequence in that regard. These principles were formulated by the *Copenhagen Process on the Handling of Detainees in International Military Operations*, a multinational initiative in which states, international and regional organizations were involved.³²⁰ The initiative intended to set standards for deprivations of liberty in NIACs and other military operations not conducted in an IAC setting³²¹ and recognized that “detention is a necessary, *lawful and legitimate* means of achieving the objectives of international military operations”³²². While the wording a first sight seems to suggest *opinio juris* in favour of a legal basis for detentions in IHL, it likely cannot be construed as such.³²³ First, the principles are silent on where they locate the legal basis for detentions. While it is one reading of the text to see the cited phrase as a reference to IHL, it is by far not the only one, especially since the principles deal with “international military operations in the context of non-international armed conflict situations and peace operations”³²⁴. As such they are consciously not limited in scope to military operations in which the IHL of NIACs applies, due to the fact that the categorization of the conflict may be subject to change or a situation may escape certain legal classification.³²⁵ Secondly, the commentary by the chairman, acknowledging that the principles lack “a legally

³²⁰ “Representatives from Argentina, Australia, Belgium, Canada, China, Denmark, Finland, France, Germany, India, Malaysia, New Zealand, Nigeria, Norway, Pakistan, Russia, South Africa, Sweden, Tanzania, the Netherlands, Turkey, Uganda, the United Kingdom, and the United States of America participated in The Copenhagen Process meetings. Representatives of the African Union (AU), the European Union (EU), the North Atlantic Treaty Organisation (NATO), the United Nations (UN), and the International Committee of the Red Cross (ICRC) also attended The Copenhagen Process meetings as observers. Representatives of civil society were also consulted...”, (2012) 51 ILM 1368. However, the stakeholder participation process has drawn criticism since it apparently consisted of a “brief meeting” less than 48 hours before the final meeting of the states involved was to begin, see Amnesty International, *Copenhagen ‘Principles’ on military detainees undermine human rights*, 22 October 2012; for a justification see Bruce “Ossie” Oswald and Thomas Winkler, ‘Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations’ (2012) 16(39) ASIL Insights.

³²¹ See para. VII of the preamble (2012) 51 ILM 1368.

³²² Para. III of the preamble (2012) 51 ILM 1368, emphasis added.

³²³ With the same conclusion *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, para. 272.

³²⁴ (2012) 51 ILM 1368.

³²⁵ Thomas Winkler, ‘The Copenhagen Process on Detainees: A Necessity’ (2010) 78 Nord. J. Int’l L. 489, 493.

binding nature”³²⁶ outlines that the principles “cannot constitute a legal basis”³²⁷ for detentions and states that “the mere inclusion of a practice in the Copenhagen Process Principles and Guidelines should not be taken as evidence that States regard the practice as required out of a sense of legal obligation”³²⁸. Strictly speaking, this does not preclude reading into the principles *opinio juris* for a legal basis in IHL, since the chairman only precludes the reading of *opinio juris* for legal obligations and the legal basis would be an *authorization* rather than an obligation. However, it has rightly been observed that such a reading looks a bit like the participants would try to have their cake and eat it too by stating *opinio juris* for a legal basis for detentions in IHL, while not accepting the obligations that potentially go along with the document.³²⁹ A legal basis for deprivations of liberty in IHL has furthermore been explicitly acknowledged by the International Committee of the Red Cross:

“One view is that a legal basis for internment would have to be explicit, as it is in the Fourth Geneva Convention; in the absence of such a rule, IHL cannot provide it implicitly. *Another view, shared by the ICRC, is that both customary and treaty IHL contain an inherent power to intern and may in this respect be said to provide a legal basis for internment in NIAC.* This position is based on the fact that internment is a form of deprivation of liberty which is a common occurrence in armed conflict, not prohibited by Common Article 3, and that Additional Protocol II – which has been ratified by 167 States – refers explicitly to internment.”³³⁰

³²⁶ Para. 16.2 (2012) 51 ILM 1368, 1379.

³²⁷ Para. 16.2 (2012) 51 ILM 1368, 1379.

³²⁸ Para. 16.2 (2012) 51 ILM 1368, 1379-80.

³²⁹ Jacques Hartmann, ‘The Copenhagen Process: Principles and Guidelines’ (EJIL:Talk 3 November 2012).

³³⁰ ICRC, *Internment in Armed Conflict: Basic Rules and Challenges, Opinion Paper* (ICRC November 2014), emphasis added. With a similar approach Jelena Pejic/Cordula Droeger, ‘The Legal Regime Governing Treatment and Procedural Guarantees for Persons Detained in the Fight against Terrorism’ in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order Meeting the Challenges* (CUP 2013) 527, 548: “there is no doubt that internment is a lawful incidence of armed conflict, as reflected in the considerable number of rules devoted to this form of deprivation of liberty”. The ICRC is a bit unclear concerning the scope of its view, because it distinguishes between traditional NIACs and extraterritorial NIACs, in which other states or organizations fight alongside the territorial state. The wording of the opinion paper has caused some confusion, see Kevin Jon Heller, What Exactly Is the ICRC’s Position on Detention in NIAC? (Opinio Juris 6 February 2015).

As already submitted, the fact that detention is a common occurrence in NIACs is insufficient evidence for a customary norm, since such practice could easily be based on alternative legal bases. Practice supported by *opinio juris* for detentions based on IHL in NIACs seems, however, to be limited to the United Kingdom, the Netherlands and the United States of America. This seems insufficient to substantiate a customary norm.

Such practice also does not follow from the verbal practice supportive of a customary norm to use force, as outlined above. One might argue that the verbal practice on how to deal with civilians engaged in hostilities suggests that the customary norm allowing the use of force also covers the deprivation of liberty. Indeed, states describe civilians taking up arms as “military objectives” and “legitimate targets”, who “may be treated as combatants”, suggesting that it is not only allowed to use force in these cases, but also to detain them, as this would be allowed by IHL against people who are “combatants” or “legitimate targets”.³³¹ However, the right to detain and the right to use force are inherently different actions and it is striking that the verbal practice of states alluded to above refers only to the use of force and not to the right to detain.³³²

All of these reasons are likely the explanation, why the ICRC has not referred to the customary norm allowing for deprivations of liberty – which it now claims exists in the publication mentioned above – in its extensive analysis of Customary International Humanitarian Law.³³³

While a customary legal basis for detentions in situations of NIACs can be seen to be developing in IHL – especially if the Copenhagen Principles are elaborated further and clarified in the sense that they are to be understood in that regard – an analysis of present state practice and *opinio juris* fails to support the finding that such a customary norm is already in existence. Consequently, the IHL applicable to NIACs does not provide a legal basis for deprivations of liberty.

³³¹ Kubo Mačák, ‘A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict’ (2015) 45 *Isr. Yb Hum. Rts* 87, 101 goes further and argues that it has been accepted by the drafters, as evidenced by the travaux préparatoires, that a right to detain was accepted for both parties to a NIAC.

³³² See however Sean Aughey and Aurel Sari, ‘Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence’ (2015) 91 *US Naval War College ILS* 60.

³³³ See also *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, para. 271.

Alternative legal bases for deprivations of liberty in NIACs

The lacking legal basis in IHL means in principle that IHRL, especially article 5 ECHR, does not need to accommodate detentions in NIACs in the catalogue of article 5 para. 1 ECHR by way of a harmonizing interpretation with IHL. However, IHRL cannot turn a blind eye to other legal bases. If a deprivation of liberty would be based on a Chapter VII resolution, IHRL would have to accommodate for the possibility to detain pursuant to the *lex superior* as established by article 103 UN Charter, since authorizations by the Security Council fall under article 103 UN Charter.³³⁴ As UN resolutions rarely specify detailed guarantees, the maximum duration of detentions that are “necessary means” will have to be guided by deliberations of objective necessity. Regarding procedural and material guarantees, a resolution will most likely reference IHRL and IHL, making clear that while it provides a legal basis for the measure itself, IHL and IHRL instruments remain applicable concerning the procedural and material guarantees. The ECtHR could accommodate such a detention pursuant to a Chapter VII resolution by applying its *Hassan*-solution and thus expanding the catalogue of article 5 para. 1 ECHR to include cases of deprivations of liberty authorized by the Security Council.

In contrast to this, a deprivation of liberty in a NIAC based on domestic law would have to fall under the catalogue of article 5 para. 1 ECHR in order to be lawful. Article 5 para. 1 lit. c ECHR offers room for such cases in that it allows deprivations of liberty in cases of “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”.

Since civilians participating in hostilities do not fall under the combatant privilege³³⁵, they will regularly commit crimes by participating in hostilities. Any person that is

³³⁴ See above 4.; Robert Kolb, ‘Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations adopted by the Security Council?’ (2004) 64 *ZaöRV* 21-35; see also *R (on the applicant of Al-Jedda) (FC) v Secretary of State for Defence* [2007] UKHL 58, para. 33 with further references; however, the ECtHR did – as already described – take a contrary view, *Al Jedda v UK* App no 27021/08 (ECHR Grand Chamber Judgment 7 July 2011) para. 107. See extensively Alex Conte, ‘The legality of detention in armed conflict’ in Annyssa Bellal (ed), *The War Report: Armed Conflict in 2014* (OUP 2015) 476, 499 et seq.; Gabor Rona, ‘Is there a Way Out of the Non-International Armed Conflict Dilemma?’ (2015) 91 *US Naval War College ILS* 32, 57.

³³⁵ Sandesh Sivakumaran, *The Law of Non-International Armed Conflicts* (OUP 2012) 71.

detained after having committed an attack or even after having joined a criminal group can be deprived of their liberty to effect their prosecution, if their action is deemed to be a crime pursuant to domestic criminal law and if domestic law contains a legal basis e.g. for pre-trial detention, which it will regularly do. In these cases, article 5 ECHR as well as Common article 3, articles 4, 5 and 6 AP II apply side by side, mutually protecting the detainee. This legally sound way to handle detentions in NIACs will, however, be subject to practical issues. When applied to the kind of extraterritorial NIACs in which European states are currently involved – take the example of Afghanistan – transferring detainees for purposes of criminal prosecutions to the territorial states will often be limited by article 3 ECHR and the domestic law of the European state as far as applicable.³³⁶ While criminal prosecutions by the European state that detained an attacker will likely be lawful pursuant to international law, at least, when the armed forces of that state were the subject of the attack,³³⁷ this will surely be an option the state in question will regularly have no interest to pursue. Such scenarios will have to be considered by European states before they enter into NIACs or other military operations short of IACs³³⁸, which may well reduce their intention to do so.

Interpretation of guarantees regarding deprivations of liberty

Although the IHL applicable to NIACs does not yet offer with sufficient certainty a customary basis concerning the “if” of detentions, with regard to the interpretation of applicable IHRL governing the “how” of detentions, especially the procedural and material guarantees, e.g. the right to be brought promptly before a judge pursuant

³³⁶ See for a review of the situation in the context of the fight against piracy Tim R. Salomon, *Die internationale Strafverfolgungsstrategie gegenüber somalischen Piraten* (Springer 2016) 258 et seq.; see also more generally Peter Rowe, ‘Is There a Right to Detain Civilians by Foreign Armed Forces During a Non-International Armed Conflict?’ (2012) 61 ICLQ 697, 709 et seq.

³³⁷ While the passive personality principle, applicable to cases, in which the state whose citizens have been the victim of an act wished to exercise jurisdiction, is disputed in international law (see Florian Jeßberger, *Der transnationale Geltungsbereich des deutschen Strafrechts* (Mohr 2011) 253 et seq. with further references; see also Michael Akehurst, ‘Jurisdiction in International Law’ (1972-73 Brit. Yb Int’l L. 145, 164), the state actor chiefly involved in the conflict, whose citizens have taken up arms against him will regularly not object to the exercise of criminal jurisdiction by his allied state actors.

³³⁸ Peter Rowe, ‘Is There a Right to Detain Civilians by Foreign Armed Forces During a Non-International Armed Conflict?’ (2012) 61 ICLQ 697, 709 et seq.

to article 5 para. 3 ECHR and article 9 para 3 ICCPR or the *habeas corpus* rights pursuant to article 5 para. 4 ECHR and article 9 para. 4 ICCPR, IHL maintains a decisive role.

First, in the singular cases, in which the prerequisites may be deemed to be fulfilled, derogations may play a limited role in NIACs, since the pertinent articles 5 ECHR just as articles 9 and 10 ICCPR are derogable guarantees, although the above-mentioned drawbacks of derogations limit the practicality of this approach.

Secondly, it is submitted that IHL does maintain a weighty role in the interpretation of IHRL in the case of detentions and internment in NIACs. Articles 4 and 5 (and possibly article 6 concerning criminal prosecutions) AP II strike an important balance between a high legal standard of protection of interned or detained persons, while still offering the possibility of compliance to the state conducting these measures and prioritizing those guarantees safeguarding the wellbeing of the detainee in a NIAC situation. It is submitted that these norms maintain their status as *lex specialis* in relation to IHRL and thus their significant interpretative influence in cases of deprivations of liberty, although IHL does not offer a legal basis for deprivations of liberty. Consequently, while the legal basis for detention or internment has to be found elsewhere, IHL still represents the most specific standard for deprivations of liberty in NIAC scenarios and will influence the interpretation of applicable IHRL guarantees and potentially *vice versa*. This will be elaborated in the following.

While Common article 3 is explicitly open to any other legal regime providing guarantees by stating that parties “to the conflict shall be bound to apply, as a minimum, the following provisions”, articles 4 and 5 AP II may be said to be a special regime for deprivations of liberty in NIACs, which for interpretative purposes may “be considered in [its] entirety”³³⁹. Naturally, this does not preclude the applicability of IHRL, but it does give IHL norms significant weight in the interpretative process.

The regulatory systematic of AP II concerning internments is as follows³⁴⁰:

³³⁹ See above fn 112.

³⁴⁰ Article 6 AP II, which regulates detentions leading to criminal procedures is relevant to deprivations of liberty in NIACs as well, but will be left out in the following in order to concentrate on one regime and illustrate the regulatory systematics of IHL to that effect in greater detail.

Article 4 AP II contains fundamental guarantees applicable to “[a]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted”³⁴¹. It provides they are “entitled to respect for their person, honour and convictions and religious practices” and shall “in all circumstances be treated humanely, without any adverse distinction.” It further prohibits “at any time and in any place whatsoever”

“(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) slavery and the slave trade in all their forms; (g) pillage; (h) threats to commit any of the foregoing acts.”

Article 4 AP II furthermore contains specific protections for children surpassing in specificity and arguably in its standard of treatment IHRL instruments such as the ECHR by giving children the right to “an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care”, obliges the state to take “all appropriate steps [...] to facilitate the reunion of families temporarily separated”, prohibits the recruitment of children “who have not attained the age of fifteen years”, and obliges a state “to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.”³⁴²

Article 5 AP II contains specific guarantees for persons detained or interned. In its paragraph 1 it contains minimum guarantees (“the following provisions shall be respected as a minimum”). However, this wording does not open the guarantees of AP II towards any other regimes containing guarantees, in the same way the wording of Common article 3 does.³⁴³ The “minimum” set by para. 1 is a minimum in relation to article 5 para. 2 AP II, which contains a higher standard of treatment to be guaranteed by the state parties “within the limits of their capabilities”, and not vis a vis other regimes of international law. The minimum standard set by para. 1

³⁴¹ Article 4 para. 1 AP II.

³⁴² Article 4 para. 3 AP II.

³⁴³ See above 4.

regarding persons deprived of their liberty includes the treatment of the wounded and the sick, the provision of food and drinking water “to the same extent as the local civilian population”, “safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict”, the guarantee to be able to receive individual or collective relief³⁴⁴, a guarantee that they are allowed to “practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions” and the obligation of the party depriving them of their liberty to give them, “if made to work” “the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.” This catalogue guarantees those rights that have to be adhered to even in the most dire and dangerous NIAC settings.

Art. 5 para. 2 AP II further obliges “[t]hose responsible for the internment or detention” “within the limits of their capabilities” to adhere to further guarantees including the separate detention of men and women except in cases of families accommodated together, enabling the detained persons “to send and receive letters and cards”, the duty to locate “places of internment and detention [...] not [...] close to the combat zone” and to evacuate the persons deprived of their liberty, when the places are “particularly exposed to danger arising out of the armed conflict”, if the safety of the persons allows for such measure. Furthermore, the persons deprived of their liberty “shall have the benefit of medical examinations” and “their physical or mental health and integrity shall not be endangered by any unjustified act or omission”, especially prohibiting “any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances.”

In addition, article 5 para. 4 AP II obliges the conflict party to take necessary measures to ensure the safety of persons being released from the place of internment or detention.

³⁴⁴ This right guarantees that detained and interned persons may receive either individual relief, i.e. “parcels sent by a donor” or collective relief sent to detainees in general “either in standard anonymous parcels, or in the form of bulk shipments”. Moreover, “detainees must be allowed to benefit from relief actions for the civilian population.”, see Sylvie-S. Junod, ‘Article 5 AP II’ in Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds) *Commentary on the Additional Protocols of 8 June 1977* (ICRC 1987) 1388 (para. 4577).

With this regulatory system, AP II prioritizes those rights most important in situations of armed conflict in articles 4 and 5 para. 1 AP II to ensure that persons deprived of their liberty in NIACs stay alive and maintain a dignified existence. In fact, the material content of those articles may well be said to succeed that of IHRL in many aspects, e.g. with its rules regarding children in armed conflict, the right to receive “individual or collective relief”, and the guarantee to the “benefit of working conditions and safeguards similar to those enjoyed by the local civilian population”. Those guarantees have the highest standard of obligation and apply independently from “limits of capabilities”. Consequently, if these cannot be fulfilled by the conflict party, then that party is disallowed to detain or intern persons. AP II is, however, not satisfied with these minimum obligations. Thus, as soon as the situation allows, conflict parties are obliged to adhere to the guarantees outlined in article 5 para. 2 AP II. These guarantees again surpass IHRL norms in material content, e.g. regarding the obligation to separate women and men and have women be supervised by women.³⁴⁵ With its system of obligations, articles 4 and 5 AP II contain a tailor-made solution for guarantees of deprivations of liberty in NIACs.

It is argued, that this prioritization benefits the person detained or interned in a NIAC scenario by safeguarding their most important rights to dignity and life when it obliges the conflict party to first and foremost adhere to obligations serving that purpose. Insofar IHL influences IHRL guarantees that apply in these circumstances. The right to “be brought promptly before a judge or other officer authorised by law to exercise judicial power”, to “trial within a reasonable time or to release pending trial” (art. 5 para. 3 ECHR) as well as the right “to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful” (art. 5 para. 4 ECHR) are not referred to in article 5 AP II. There are two explanations for this: First, a conflict party is not necessarily a state actor and thus will not (necessarily) have judicial systems in place. Secondly, these rights are foreseeably problematic to realize in armed conflict situations and AP II acknowledges that by omission. State parties regularly do not have judges that tag along in military deployments. As such, AP II’s silence in that regard is likely deliberate.³⁴⁶ It seems to be in keeping with the object and purpose

³⁴⁵ Article 5 para. 2 lit. a AP II.

³⁴⁶ Cf. Pascal Hector, ‘Das Humanitäre Völkerrecht als *lex specialis*’ in Christian Calliess (ed), *Herausforderung an Staat und Verfassung, Liber Amicorum Torsten Stein* (NOMOS

of IHL, but also of IHRL, to see the IHL obligations as prioritized obligations. How IHRL will be able to accommodate this normative content of the IHL of NIACs is up for debate. One may interpret the human rights guarantees as obligations to be fulfilled within the limits of the capabilities of a state party to a NIAC and modified to a degree that has yet to be ascertained. The *Copenhagen Principles* may offer some guidance. They depart from the IHRL standard guaranteeing a prompt review by a “judge or other officer authorised by law to exercise judicial power”³⁴⁷ and speedy court proceeding to decide on the lawfulness of the detention³⁴⁸, by laying down in principle 12 that a “detainee whose liberty has been deprived for security reasons is to, in addition to a prompt initial review, have the decision to detain reconsidered periodically by an impartial and objective authority that is authorised to determine the lawfulness and appropriateness of continued detention.”³⁴⁹ This seems to be a standard that balances well the rights of the persons deprived of their liberty with aspects of military necessity. The ECtHR has gone into a similar direction with *Hassan*, albeit in cases of IACs. It has stated *obiter dictum*:

“Articles 43 and 78 of the Fourth Geneva Convention provide that internment ,shall be subject to periodical review, if possible every six months, by a competent body’. Whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent ,court’ in the sense generally required by Article 5 § 4, nonetheless, if the Contracting State is to comply with its obligations under Article 5 § 4 in this context, the ,competent body’ should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay.”³⁵⁰

Although the ECtHR has shown reluctance in *Hassan* to apply these principles in NIAC scenarios, it is submitted that there are no methodological differences

2015) 956, 966; Sandesh Sivakumaran, *The Law of Non-International Armed Conflicts* (OUP 2012) 92 with further references.

³⁴⁷ Art. 5 para. 3 ECHR.

³⁴⁸ Art. 5 para. 4 ECHR.

³⁴⁹ Copenhagen Principles, Principle 12, 51 ILM 1368, 1369-70.

³⁵⁰ *Hassan v UK* App no 29750/09 (ECHR Grand Chamber Judgment 16 September 2014) para. 106.

between the IHL rules regulating detentions in IACs and articles 4 and 5 AP II that would mandate such a different treatment.³⁵¹

The ECtHR has acknowledged the fact that member states acting in armed conflicts are in difficult situations, which make compliance with ECHR guarantees extremely burdensome. In addition to the position taken above, the statement of the Court may be seen as opening a possibility for member states to invoke the difficult situation that lead to a possible noncompliant behaviour. The ECtHR has hinted into the direction that it would possibly make “reasonable allowances”³⁵² for the specific circumstances in an armed conflict and would apply ECHR provisions such as the procedural duty under Article 2 “realistically, to take account of specific problems”.³⁵³ Consequently, in cases of detentions in NIAC scenarios, the member state will be well-advised to not only to argue for the interpretative influence of AP II on its IHRL

³⁵¹ See however the ‘United Nations Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court’ that apply the human rights standard without even acknowledging the more specific IHL norms, (4 May 2015) UN Doc. WGAD/CRP.1/2015, para. 115. The Basic Principles offer an exception, if the “government of the State affected by the non-international armed conflict claimed for itself belligerent rights”. Then captured combatants should be treated as prisoners of war and civilians should be granted the same treatment as afforded to civilians in IACs pursuant to Geneva Convention IV. This seems to hint in the direction, that the IHL of IAC would completely set aside IHRL, a rather peculiar position coming from that direction.

³⁵² *Jaloud v Netherlands* App no 47708/08 (ECHR 20 November 2014) para. 226. This has to be seen in light of the controversial (and not yet final) decision in *Tagayeva et al. v Russia* App nos 26562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11 and 37096/11 (ECHR 13 April 2017). The case concerned failings of the Russian security forces concerning the terrorist attack by Chechen militants directed against a school in Beslan in September 2004. The court found that Russia had violated article 2 ECHR (1) by failure to protect the life of the hostages (paras 481 et seq. the first time that court actually found for a violation of the duty to protect life), (2) by violating the duty to investigate (paras 496 et seq.), (3) by failing to minimise risk for the hostages in the operation of the security forces (paras 562 et seq.), and (4) by using lethal force, contributing to casualties among hostages (paras 584 et seq.). While IHL was not applicable to the case - although the applicants alluded to IHL to strengthen their case, arguing that the Russian actions would have failed to meet legal standards even under IHL (para. 577) - the main topic of controversy following from that judgment will likely be that the ECtHR may have failed to take into account the extraordinary difficulties of security forces in such situations, especially when adjudicating on the obligation to plan and control the operation involving the use of lethal force so as to minimise the risk to life, see the dissent of Judges *Hajiyev* and *Dedov*, paras 3 et seq. However, the inapplicability of IHL in this case may well mean that the *Jaloud*-promise of the Court still stands in cases of armed conflicts.

³⁵³ *Al Skeini et al. v UK* App no 55721/07 (ECHR Grand Chamber Judgment 7 July 2011) para. 168.

obligations, but also to allude to the specific situation accompanying the deprivation of liberty and how its ability to comply with the ECHR was adversely affected by it.

6.3.3 Conclusion

In conclusion, it is submitted that IHL retains an interpretative influence on IHRL guarantees in NIAC scenarios insofar both apply side by side. This does not depend on the question whether the IHL applicable in NIACs offers a legal basis for a state action or not. Even if it does not, IHL may still regulate such actions and will impact the interpretation of IHRL guarantees. The ECtHR has yet to acknowledge this influence. In cases of NIACs it has underlined that absent a declaration of derogation the “*normal legal background*” (meaning IHRL) will be the only yardstick, with which it will measure the acts of member states.³⁵⁴ While this has been subject to criticism, e.g. by its own *Judge Malinverdi*, who found fault in the fact that the court did not even mention the more specific standards in Common article 3 and AP II,³⁵⁵ the court at large has until now remained unconvinced.³⁵⁶

7. Conclusion and outlook

The days are long gone that one could confidently be of the opinion of the forefathers of international law, such as Hugo Grotius, and state that in war, the law of war applies exclusively and in peace merely the law of peace applies or, in more learned

³⁵⁴ *Isayeva v Russia* App no 57950/00 (ECHR 24 February 2005) para. 191; also Gerd Oberleitner, *Human Rights in Armed Conflict* (CUP 2015) 304; see however William A. Schabas, ‘Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum’ (2007) 40 *Isr. L. Rev.* 595, 605, who highlights that the ECtHR may actually have moved into the direction of IHL with the *Isayeva* decision, when it stated that lethal force may have been permissible, if government planes would be attacked by illegal armed groups.

³⁵⁵ *Abuyeva et al. v Russia* App no 27065/05 (ECHR 2 December 2010), Concurring opinion of Judge Malinverni, para. 3.

³⁵⁶ See also Gerd Oberleitner, *Human Rights in Armed Conflict* (CUP 2015) 304 et seq. with further references.

words, “*inter pacem et bellum nihil est medium*”³⁵⁷ – effectively imagining peacetime and wartime as mutually exclusive blocks, separated by a watershed.³⁵⁸ Today, where once was a watershed, one has to wade in knee-deep bog and the distinction between peace and war has recently been muddied even further – with full intention to gain operative advantages.³⁵⁹

The issues posed by the uncertain relationship between IHL and IHRL are pressing. Finding solutions has been difficult over the years. This thesis can at most strive to give an impulse to the discussion by suggesting a methodology that could produce workable results. Beyond this, significant stumbling blocks have to be overcome to find a solution. This is currently impeded by many factors.

One such factor that has continuously made sure that a solution will not be found is the failure of IHL and IHRL scholars and practitioners to be at the same table. This has been the root cause of the problem, since modern IHL and IHRL were negotiated at around the same time in close proximity, yet by different people at different tables. This continues to hinder progress until today. Assessing the literature on the topic, one cannot help to get the impression that when someone accentuates the importance of IHL, IHRL scholars feel threatened and vice versa. This culture of distrust between the opposing interpretative communities is certainly counterproductive. It may, however, be easily explained as it comes down to different mind-sets. Human rights proponents continue to share the vision that the United Nations had in its founding years. After years of dreadful armed conflict and the endless human suffering it brought, the international community came together and set an end to it, the pinnacle of this development being the rise of IHRL – the new *ius contra bellum*. Consequently, every argument in favour of IHL vis a vis IHRL

³⁵⁷ The phrase coined by *Cicero* was used by *Grotius* in his foundational work *De Iure Belli ac Pacis Libri Tres* (original 1625, Liberty Fund 2005) cap. XXI, para. 1 to explain the legal regime of truce in armed conflicts. That international law indeed saw peacetime law and wartime law as two mutually exclusive blocks is clearly evidenced e.g. by the title of *Grotius*' work. See Robert Kolb, 'Human Rights and Humanitarian Law' in Rüdiger Wolfrum (ed), *MPEPIL* (OUP online edition 2013) para. 12.

³⁵⁸ Robert Kolb, 'Human Rights and Humanitarian Law' in Rüdiger Wolfrum (ed), *MPEPIL* (OUP online edition 2013) para. 12.

³⁵⁹ See the observation by *General Valeri Wassiljewitsch Gerassimow*, Chief of the General Staff of the Russian Federation in “The Value of Science is in the Foresight”, translated in (2016) 1 *Military Review* 23: “In the twenty-first century we have seen a tendency toward blurring the lines between the states of war and peace. Wars are no longer declared and, having begun, proceed according to an unfamiliar template.”, for a discussion see Charles K. Bartles, 'Getting Gerasimov Right' (2016) 1 *Military Review* 30-38.

and every invocation of military necessity is perceived as a potential threat to the IHRL stronghold. Some are – emotionally justifiably, when one looks at the past – very wary of the military at large. IHL scholars and practitioners often have a closer connection to the military and are at least acquainted to a certain degree with their mind-set. While the military may be just as wary when it comes to the use of force – knowing that their lives will be on the line – they know that all else has failed, when they come into play. Being in that position, there is very little room for indecision and insecurity. While they know that it is the continued duty of their state to reach a peaceful conclusion of the conflict via diplomacy, their focus clearly is on what has to be done to achieve their objectives while the conflict persists. IHL is adapted to this kind of thinking. It guides the practitioner, weighing his or her objectives with the need to protect civilians and others as far as possible and realistic in the circumstances. Also, IHL scholars today tend to see a failure of IHRL as a *ius contra bellum*, when observing armed conflicts continuing to engulf many parts of the world. With this comes the reluctant acceptance of armed conflict as a – regrettable, but seemingly unavoidable – fact of human life, needing IHL to alleviate human suffering in these circumstances. Consequently, most IHL proponents just seek workable and realistic solutions. The voices and institutions arguing for a stronger role of IHRL in armed conflicts have a burden to present such workable solutions that translate to practice – situations in armed conflicts. Concerning the relationship between IHL and IHRL, progress will only be made by bringing together those different perspectives, finding answers that are

“capable of being applied in situations of conflict and delivering what is seen as an acceptable solution by all [...] players. A solution which does not satisfy such a test will not result in greater application of [human rights law]. It will result, at best, in the exclusive application of IHL [...] [and] in deadlock between states and human rights bodies.”³⁶⁰

In international law, the acceptance of rules by those having to comply with them is a value in its own. This does not mean that the interpretation of norms bow to the will of state actors, but when the law continuously progresses into a direction, to which state actors are unwilling to follow, this is a potentially dangerous

³⁶⁰ Françoise J. Hampson, ‘The relationship between international humanitarian law and international human rights law’ in Scott Sheeran and Sir Nigel Rodley (eds) *Routledge Handbook of International Human Rights Law* (Routledge 2013) 185, 187.

development.³⁶¹ Consequently, the observation that the progressing humanization of the law of armed conflict is hailed mainly by international and regional organizations, which are not directly involved in armed conflicts, while being criticized by the state actors who are, carries weight.³⁶² The rise of IHRL has profited IHL. One of the main deficiencies of IHL – that it has no effective enforcement structure – is today remedied by the courts and institutions established to safeguard IHRL compliance.³⁶³ The ECtHR, which plays an important role in that regard, now itself stands to profit and rise in importance even further, if it manages to incorporate IHL coherently into its assessments. In contrast, by ignoring IHL in cases concerning armed conflicts, the court will likely continue to suffer from its member states' growing unwillingness to accept its authority and judgments.

On the other hand, member states also have been too hesitant when it comes to IHRL in armed conflicts. They have apparently failed to see that they may play a decisive role in shaping the relationship between IHL and IHRL. In doing so, they have basically let the ECtHR and UN institutions become the bodies in which the relationship between IHL and IHRL is shaped and decided, whilst being reduced to (increasingly disgruntled) commentators and observers. With soft law instruments such as the *Copenhagen Principles on the Handling of Detainees in International Military Operations* state actors have every opportunity to influence the debate. Such instruments evidence state practice as well as *opinio juris* and – short of forming customary law – play a part in interpreting existing obligations under IHRL and IHL pursuant to article 31 para. 3 lit. b VCLT. Moreover, seeing the jurisprudence of the ECtHR on the topic of IHL incorporation, one cannot help to get

³⁶¹ For this observation Stefan Oeter, 'Fortschrittsnarrative im Humanitären Völkerrecht' in Christian Calliess (ed), *Herausforderung an Staat und Verfassung, Liber Amicorum Torsten Stein* (NOMOS 2015) 1025, 1043; in the same direction Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 Am. J. Int'l L. 239, 241, who extends this to the acceptance of legal rules in the armed forces community: "'Excessive' humanization might exceed the limits acceptable to armed forces, provoke their resistance, and thus erode the credibility of the rules."; see also Thomas Winkler, 'The Copenhagen Process on Detainees: A Necessity' (2010) 78 Nord. J. Int'l L. 489, 495 „the 'humanisation' of war should not lead to a naive denial of the harsh realities of warfare”.

³⁶² Pascal Hector, 'Das Humanitäre Völkerrecht als lex specialis' in Christian Calliess (ed), *Herausforderung an Staat und Verfassung, Liber Amicorum Torsten Stein* (NOMOS 2015) 956, 967.

³⁶³ Dominik Steiger, 'Enforcing IHL through Human Rights Bodies' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (CUP 2015) 263-299.

the impression that the Court might have welcomed a bit of such input by its member states when it stood to decide those cases. Consequently, the announcement by the UK government that it will derogate from the ECHR in coming deployments is fundamentally misguided. This strategy only ensures that the citizens and members of the armed forces continue to (wrongly) blame the ECtHR and European human rights for perceived deficiencies in the law as it stands and safeguards that the UK will stay at the side-line and not play a productive part in solving the issues at hand. The UK and the other European states would be much better advised, if they were to enter into the discussion and bring their expertise to the table.

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