The duty to investigate in situations of armed conflict: an examination under international humanitarian law, international human rights law, and their interplay

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9 The interplay between IHL and IHRL – a roadmap

1 INTRODUCTION

This Chapter aims to provide a roadmap for issues of interplay. Not only as a stepping stone for resolving the interplay with respect to duties of investigation, but also for other instances where both IHL and IHRL apply. In order to do so, the Chapter delves into the secondary rules under general international law, which guide the interaction of two branches of international law.

To facilitate the discussion on interplay, section 2 starts out by briefly explaining the background to the discussion, being the fragmentation of international law. Section 3 translates this discussion to the IHL – IHRL context, and sets out the state of the debate and the most controversial issues which are now at the heart of the discussion on interplay. Section 4 develops a step-by-step methodology for resolving issues of interplay, based primarily on secondary rules of international law regulating normative overlap. Section 5 starts fleshing out this methodology by determining the various normative relations that may arise out of situations of interplay, and it articulates three such situations: situations of convergence, of conflict, and of competition. Section 6 then explains how normative overlap in each of these situations can be resolved, through harmonious interpretation, systemic integration, and conflict resolution – and potentially combinations thereof.

2 CONTEXT AND BACKGROUND: THE NATURE OF INTERNATIONAL LAW

2.1 A polycentric legal system

The international legal system lacks centralised legislative, judiciary, and executive powers. Instead, rules are enacted by sovereign States, not uncommonly on an *ad hoc* basis, dependent on States' needs at that specific time, and between varying States and groups of States.[1] It is, in a word, polycentric.[2]

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1 ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the ILC, finalised by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682 (hereafter: 'ILC Report 2006'), p. 10-17; Christopher Greenwood, 'Unity and Diversity in International Law' in Eirik Bjorge and Mads Andenas

The absence of a central legislative power has given rise to an extensive patchwork of partly overlapping treaty regimes: some are bilateral, others multilateral, and some overlap in parties and subject-matter, others not. Groups of States may come up with multilateral regulations with varying levels of ratification, sometimes with global aspirations and at other times meant for regional ratification only – giving rise to competing normative solutions to similar issues. If a State for instance wishes to restrict trade in fossil fuel to reduce its carbon footprint, it will be bound simultaneously by norms of international environmental law, and of international trade law.[3] Such overlap in rules dealing with the same subject-matter is very common under international law, and is a form of legal pluralism.

Crucially, the pluralism in the international legal system is *not coupled with a formal hierarchy of norms*, meaning that any primary source of law is in principle valued the same.[4] With the exceptions of *ius cogens* and the UN Charter, any rule of international law is therefore afforded the same status, and in case of overlapping obligations, there is no *a priori* solution as normally exists in domestic legal systems.[5] In such systems, a hierarchy normally prescribes the precedence of the Constitution over Acts of Parliament for instance, with the Constitution trumping any lower legislation conflicting therewith. No such equivalent exists on the international plane. With legal norms flowing from numerous different actors often also on the same subject-matter, as is for instance the case for the various systems of human rights protection, and with no formal hierarchy of norms to resolve issues of overlap or conflict, this has given rise to what is often termed the fragmentation of international law.[6]

Fragmentation, moreover, goes beyond the mere plurality of rules with no formal hierarchical relationship between them (substantive fragmentation).[7] It permeates the international legal system as a whole, because similar to the applicable rules, there is also a multitude of legal institutions and adjudicators,

(eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015) 40.

2 See Joost Pauwelyn, 'Fragmentation of International Law', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2006).

3 ILC Report 2006, p. 17ff.

4 E.g. Cordula Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Israel Law Review 310, 339.

5 Cf. Anja Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis' (2005) 74 Nordic Journal of International Law 27.

6 This is also understood as 'substantive fragmentation', see Mads Andenas and Eirik Bjorge, 'Introduction: From Fragmentation to Convergence in International Law' in Eirik Bjorge and Mads Andenas (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015) 4–5.

7 Andenas and Bjorge (n 6) 4–5.

between which no hierarchy exists (institutional fragmentation).[8] This means that decisions by various international courts in principle carry equal weight, which potentially leads to further fragmentation when their decisions diverge. A case in point is the famous divergence between the ICJ's and the ICTY's approach in the context of State responsibility, and whether the standard of 'effective control' or of 'overall control' determines the attributability of conduct of a non-State actor to a State.[9] Because formally there is no hierarchy between the ICJ and the ICTY and despite the ICJ's status as principal organ of the UN, both interpretations therefore strictly speaking carry equal weight.

Whether fragmentation is to be viewed as problematic or not, is subject to debate. Whereas to some it threatens the nature of international law as a legal 'system',[10] to others it simply presents a form of plurality which has formed part of international law since its inception.[11] Interestingly, as Martti Koskenniemi and Päivi Leino describe, a number of presidents of the ICJ has warned against fragmentation, and stressed the importance of unity in international law.[12] In line with this strong view of the unity of international law, one may point to the ICJ's finding in 1957, that: 'it is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it'.[13] This finding by the Court would seem to indicate a propensity towards unity, even going so far as identifying a rule of interpretation stipulating the legal fiction that governmental statements are made in full awareness of, and in line with, international law. Perhaps more importantly, the finding can also be read as supporting the idea that *when enacting*

8 Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden Journal of International Law 553. Further on 'institutional fragmentation', see Andenas and Bjorge (n 6) 6–7.

9 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment (27 June 1986), *I.C.J. Reports* 1986, p. 14 [115]; *Prosecutor v Duško Tadić*, ICTY (Appeals Chamber) Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) IT-94-1-AR72, A. Ch. [131], [137]. Further, see ILC Report 2006, p. 31; further Andrea Varga, *Establishing State Responsibility in the Absence of Effective Government* (dissertation Leiden University 2020) 124–37.

10 For an insightful discussion, see Carsten Stahn and Larissa van den Herik, '"Fragmentation", Diversification and "3D" Legal Pluralism: International Criminal Law as the Jack-in-the-Box?' in Carsten Stahn and Larissa van den Herik (eds), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff 2012).

11 See Greenwood (n 1); Koskenniemi and Leino (n 8). Emphasising the positive side of institutional fragmentation, see Lucas Lixinski, 'Choice of Forum in International Human Rights Adjudication and the Unity/Fragmentation Debate: Is Plurality the Way Forward?' (2008) 18 Italian Yearbook of International Law 183, 197.

12 Koskenniemi and Leino (n 8).

13 *Case concerning the Right of Passage over Indian Territory (Portugal v. India)*, Preliminary Objects (26 November 1957), *I.C.J. Reports* 1957, p. 125, p. 142.

new rules, States are presumed to act in full awareness of international law, and presumed not to derogate therefrom.[14]

At the time of this pronouncement, admittedly international law was less prolific than it is now. Contemporary scholarship has pointed out a problem of 'non-absorption' in international law, indicating actors cannot keep up with the 'uncontrolled' expansion of primary norms in the international legal system.[15] In the same vein, and in seeming contrast with its previous finding, is the ICJ's more recent 2015 judgment in the *Genocide (Croatia v Serbia) case*, where it held:

> 'There can be no doubt that, as a general rule, a particular act may be perfectly lawful under one body of legal rules and unlawful under another. Thus it cannot be excluded in principle that an act carried out during an armed conflict and lawful under international humanitarian law can at the same time constitute a violation by the State in question of some other international obligation incumbent upon it.'[16]

Thus, the Court appears to accept pluralism in international law, subscribing to the idea that State responsibility may arise from actions which are simultaneously lawful and unlawful under international law. In fact, it views this situation as 'a general rule'.

There is an ostensible tension between both findings by the ICJ. On the one hand, States must when contracting into new obligations be presumed to be fully aware of existing rules of international law, and to remain within the confines of such rules. On the other hand, the ICJ fully accepts that States may be subject to divergent obligations, and that their conduct may therefore be simultaneously lawful and unlawful under different rules of international law. It is submitted that there is, however, no contradiction between these findings. The presumption that States do not mean to derogate from their previous international obligations when taking on new obligations, is strengthened by the finding that States may simultaneously be bound by legal regimes viewing the same conduct simultaneously as lawful and unlawful. This view accepts the reality that the international legal order as essentially pluralistic. Yet, it also conforms to the international practice which, according to the International Law Commission, carries 'a strong presumption against normative conflict'.[17]

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14 ILC Report 2006, p. 26, para. 38. See also Campbell A McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 International and Comparative Law Quarterly 279, 311.

15 Jean d'Aspremont and Elodie Tranchez, 'The Quest for a Non-Conflictual Coexistence of International Human Rights Law 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 Publishing 2013) 229.

16 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment (3 February 2015), *I.C.J. Reports* 2015, p. 3 [474].

17 ILC Report 2006, p. 25.

In brief, the international legal system consists of a multitude of norms which can apply simultaneously to the same situations. This legal pluralism, and fragmentation, has been embraced by some, and is combated by others. Yet, whether efforts are expended to interpret rules of international law in harmony with one another and as part of a 'unified' system of international law, or whether pluralism is accepted as an intrinsic characteristic of the international legal order which might therefore more readily give rise to conflicts of norms, the fact remains that the simultaneous applicability of rules between which no hierarchy exists, can give rise to practical problems. It leads to uncertainty for both those who must apply the law, as well as those who the law is meant to protect.

2.2 Of trees and octopuses: articulating the nature of the international legal system

The above paints the picture of various branches and sub-branches of international law operating semi-autonomously, with the system of general international law functioning to loosely bind these systems together. General international law thus sets limits to what the specialised branches may do and provides the secondary rules and general framework, whilst the substantive legal regimes at times operate largely autonomously, and at times fall back on the general system. This is what makes international law into a pluralistic legal order: multiple lawmakers operate on multiple levels to create multiple legal regimes, which operate partially autonomously and partially as part of a larger system.[18] The pluralistic nature of the legal order makes it difficult to comprehend at times, because various legal fields and regimes are both at once connected and separate, and interact in various and dynamic ways. In this sense, the analogy of the 'branches of international law', which would indicate that general international law is akin to a tree trunk with various branches, has a somewhat more static feel to it than the dynamic nature of international law represents.

A better, more dynamic, analogy may be found by moving beyond flora. There is one animal who perfectly fits the somewhat schizophrenic sense of having to constantly shift between various perspectives. Octopuses. Biologists have found that an octopus' tentacles are 'curiously divorced' from its brain; that they operate semi-autonomously, with the brain only partly aware of what its tentacles are up to.[19] Each arm thus has a sensory system and a 'will' of

18 Marjan Ajevski, 'Fragmentation in International Human Rights Law – Beyond Conflict of Laws' (2014) 32 Nordic Journal of Human Rights 87.

19 Roger T Hanlon and John B Messenger, *Cephalopod Behaviour* (2nd edn, Cambridge University Press 2018).

its own, though there is some guidance from the central brain. As put by Peter Godfrey-Smith,

> 'There may be a mixture of two forms of control here: central control of the arm's general path and fine-tuning of the search by the arm itself. Another possibility is that, by means of attention of some kind, the octopus is exerting control over all the details of movements that might usually be more autonomous. (...) In the octopus, if the mixed-control interpretation is right, central guidance of the movements is never complete, and the peripheral system always has its say.'[20]

This creature therefore consists of eight semi-autonomous arms, wriggling about and finding their way in the ocean, with the central brain being semi-aware and partly in control, though never being able to fully overrule the peripheral system. It is almost impossible to understand how a creature like an octopus functions, if rather than having one consciousness, it has nine which are in important aspects autonomous. Yet, this is eerily similar to the interaction between general international law and its various 'arms',[21] all seeking their way autonomously though remaining part of a larger 'creature', but often lacking the awareness of this bigger picture. As will be seen below, a coherent understanding of interplay requires the constant shifting of perspectives, from IHL, to IHRL, to general international law, to all at once.

Admittedly, the analogy has its limits. Likely, an octopus' various tentacles do not normally clash and arm-wrestle for precedence. Also, the peripheral system's autonomy in octopuses is guided by their own sensory abilities, meaning they use the chemical sensors in their suckers to 'taste' the world around them – which it must be admitted does not immediately come to mind when thinking of the 'peripheral' branches of international law, such as international humanitarian and human rights law. Still, the schizophrenic sense of trying to understand how a creature works who consists of nine parts who are only partly aware of each other, would seem to correspond perfectly with the attempt to penetrate the pluralistic nature of general international law and its various specialised regimes.

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20 Peter Godfrey-Smith, 'On Being an Octopus: Deep Diving in Search of the Human Mind' *Boston Review* (3 June 2013) http://bostonreview.net/books-ideas/peter-godfrey-smith-being-octopus (last accessed 15 July 2021).

21 For an in-depth exploration of how for instance IHL has influenced general international law, see the special issue on 'The Relationship between International Humanitarian Law and General International Law' of the *Journal of Conflict & Security Law* (2018) 321ff.

3 FROM FRAGMENTATION TO INTERPLAY: CONCURRENT APPLICATION OF IHL AND IHRL

3.1 IHL and IHRL against the background of fragmentation

The fragmentation and pluralism of international law provide the background for the debate on the interplay between international humanitarian law and international human rights law, which is the subject of this Chapter. Protection of the individual has thus become the subject-matter of multiple branches of law, in part due to the decentralised nature of law-making on the international level. In fact, it has been remarked that protection of the individual may be subject to 'too many rules' compared with the previous dearth of regulation,[22] and indeed we now have a plurality of legal branches concerned with individual protections. Beyond IHL and IHRL, one might also point to international refugee law, and other branches which at the very least have as a subsidiary aim the protection of individuals, such as international criminal law.[23]

Whereas both IHL and IHRL have the protection of individuals as their subject-matter, they remain separate branches of international law. While the 1948 Universal Declaration of Human Rights and 1949 Geneva Conventions were drafted simultaneously in Geneva, there was only relatively limited cross-fertilisation between the two.[24] IHL ultimately is a pragmatic field of law, which acknowledges the existence of armed conflict and is concerned with regulating such conflicts.[25] Still, there is undoubtedly a humanising factor to IHL, in the protection it grants to combatants and civilians.[26] Importantly though, these protections under IHL form part of the inter-State relationship, expressed in the granting of protection to *enemy* combatants and civilians.[27] IHRL, on the other hand, has veered away from the traditionally heavy inter-

22 d'Aspremont and Tranchez (n 15) 223.

23 Cf. Antônio Augusto Cançado Trindade, 'Reflections on the International Adjudication of Cases of Grave Violations of Rights of the Human Person' (2018) 9 Journal of International Humanitarian Legal Studies 98, 122–5.

24 Boyd Van Dijk, 'Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions' (2018) 112 The American Journal of International Law 553; Lawrence Hill-Cawthorne, 'Rights under International Humanitarian Law' (2017) 28 European Journal of International Law 1187.

25 See e.g. Karima Bennoune, 'Toward a Human Rights Approach to Armed Conflict: Iraq 2003' (2004) 11 University of California Davis Journal of International Law & Policy 171, 174.

26 Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 American Journal of International Law 239.

27 Lawrence Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' in Eirik Bjorge and Mads Andenas (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015).

State focus of international law,[28] and primarily regulates the intra-State relation of States with their own citizens – and any other (group of) individuals under their jurisdiction.[29] Thus we are faced with two branches of international law which partly overlap in their granting of individual protection, though with distinct geneses and protective regimes.[30]

The co-existence of multiple bodies of law partially regulating the same subject-matter, is the core of fragmentation and is also at the core of the debate underlying the interplay between IHL and IHRL. As was demonstrated in Chapter 4,[31] IHRL continues to apply during armed conflict. It was shown that the dominant narrative that IHRL was not initially meant to govern during armed conflict, is incorrect. IHRL *is* meant to govern during armed conflict, and international judicial practice moreover overwhelmingly supports this view. Thus, we may move on from the question *whether* IHL and IHRL co-apply, to the question *how* they do.

Two developments in particular have put the overlap between IHL and IHRL at the forefront of the debate. Firstly, the instances where IHL and IHRL indeed apply simultaneously have increased. This obviously has to do with the finding *that* human rights law continues to apply during armed conflict, but is also the consequence of a widening of the scope of application of IHRL through extraterritorial application.[32] Perceiving human rights as applying outside States' territories brings within the scope of application many situations of armed conflict which previously did not, such as many situations of international armed conflict and occupation.[33] This is potentially also the case for extraterritorial non-international armed conflicts where States engage non-State armed groups abroad, such as the involvement of Russia, Iran and various NATO members in the conflict in Syria.[34] Secondly, the interplay debate has

28 Compare Arnold Wolfers' 'billiard ball model', where he compares the international community to a billiard table. The States represent the balls, and international law traditionally regulates the clashes between these balls, without however delving into the inner workings of the balls themselves. See Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* (Johns Hopkins Press 1962) 19–24.

29 Dinah Shelton, 'Introduction' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 1–2.

30 David Kretzmer, 'Rethinking the Application of IHL in Non-International Armed Conflicts' (2009) 42 Israel Law Review 8, 15.

31 Chapter 4, §4.6.

32 Jean-Marie Henckaerts and Ellen Nohle, 'Concurrent Application of International Humanitarian Law and International Human Rights Law Revisited' (2018) 12 Human Rights & International Legal Discourse 23, 24–7.

33 Françoise J Hampson, 'Article 2 of the Convention and Military Operations during Armed Conflict' in Lawrence Early and others (eds), *The Right to Life under Article 2 of the European Convention on Human Rights. Twenty Years of Legal Developments since McCann v. the United Kingdom. In Honour of Michael O'Boyle* (Wolf Legal Publishers 2016) 192.

34 Further on the extraterritorial application of IHRL, see Chapter 4, §4.5. On the various conflicts in Syria, see Terry D Gill, 'Classifying the Conflict in Syria' (2016) 92 International Law Studies 353.

come to the forefront because individual victims of wartime violence and abuses increasingly find their way to domestic and international courts, basing their claims primarily on violations of their human rights.[35] This has to do with a difference in the institutional context of both legal regimes: IHRL has set up judicial enforcement mechanisms with a right of individual petition, whereas IHL does not provide recourse to such. Further, IHRL explicitly confers rights on individuals, which they can claim against the State, whereas under IHL there is a complete absence of judicial enforcement mechanisms, and there is moreover continued discussion on whether IHL confers rights on individuals in the first place.[36] Thus individuals searching for a legal remedy naturally frame their claims as human rights violations, which again due to the lack of judicial avenues under IHL, has meant IHRL courts and bodies have increasingly shaped the interplay debate.[37] This to the discontent of a number of IHL and military lawyers and practitioners.

3.2 The fear of co-existing and co-applying: a polarised debate

The discourse on interplay is seemingly divided by those approaching it from a law of armed conflict perspective, and those approaching it from a human rights perspective. The varying backgrounds of scholars and practitioners has resulted in heated discussions, because for both parties there is a lot at stake. Jean-Marie Henckaerts and Ellen Nohle explain how for both, it can appear their field of law is at risk of being diluted and rendered obsolete:[38]

> 'There are risks both to ignoring humanitarian law and the realities of armed conflict and to watering down the requirements of human rights law in an effort to make them practicable in time of armed conflict. The former could result in unrealistic obligations on States in situations of armed conflict. This could, in the

35 Henckaerts and Nohle (n 32) 24–7; Jean-Marie Henckaerts, 'Concurrent Application of International Humanitarian Law and Human Rights Law: A Victim Perspective' in Noelle NR Quenivet and Roberta Arnold (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Brill Nijhoff 2008).

36 For recent contributions, see Hill-Cawthorne, 'Rights under International Humanitarian Law' (n 24); Anne Peters, 'Direct Rights of Individuals in the International Law of Armed Conflict' (2019) 2019–23 <https://ssrn.com/abstract=3506742> (last accessed 15 July 2021); Christián Correa, Shuichi Furuya and Clara Sandoval, *Reparation for Victims of Armed Conflict* (Cambridge University Press 2020). This discussion has a longer pedigree however, see e.g. Meron (n 26).

37 The classic fear of institutional fragmentation is that several institutions can pronounce on an issue without any hierarchy between them, which potentially leads to divergent interpretations of international law. Interestingly, the problem here is not that there are too many institutions dealing with interplay, but that it is (almost) exclusively human rights courts and bodies dealing with these issues, thus not so much giving rise to fragmentation, rather than a lopsided interpretation of the issue.

38 Henckaerts and Nohle (n 32) 35.

> long run, make States 'less inclined to comply with the law, and possibly with more basic rules of other branches of law, in particular IHL'.[39] The latter could undermine the critical protections of human rights law in time of armed conflict and could, moreover, have reverberating effects on its protective force in peace time.'[40]

To illustrate these fears, two Grand Chamber cases at the European Court of Human Rights – already discussed in Chapter 7 – come to mind. Firstly, in the case of *Hassan v UK*, the Court had to consider whether the UK's recourse to security detention during the conflict in Iraq had been in compliance with the right to liberty and security, with Article 5 of the ECHR listing exhaustively the permissible grounds for detention.[41] It was clear that internment for reasons of the conflict could not be brought under such grounds, and the UK relied on the Geneva Conventions in justification. The Court then famously decided to open up the permissible grounds for detention in case of international armed conflict and under a number of conditions, and therefore accommodated the legal basis that IHL provides for detention in these situations. Interestingly and tellingly, the judgment has been equally reviled and hailed, with many on the one hand chastising the Court for watering down fundamental human rights standards,[42] and with others applauding the Court's reconciliatory and pragmatic approach.[43] In the case of *Jaloud v the Netherlands*, also concerning the conflict in Iraq, it was the other way around.[44] The Court found the Netherlands had failed to effectively investigate the death of an Iraqi citizen, allegedly at the hands of a Dutch lieutenant, because it had handed the body over to Iraqi authorities for autopsy, and because it had not conformed to all the investigative standards normally applicable when State agents use lethal force. Following this case, IHL lawyers lamented the Court

39 Claire Landais and Léa Bass, 'Reconciling the Rules of International Humanitarian Law with the Rules of European Human Rights Law' [2015] International Review of the Red Cross 1295, 1296.

40 Marko Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2010) 14 Journal of Conflict and Security Law 459; Oona A Hathaway and others, 'Which Law Governs during Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law' (2012) 96 Minnesota Law Review 1883.

41 *Hassan v the United Kingdom*, ECtHR [GC] 16 September 2014, Appl No 29750/09.

42 Rick A Lawson, 'Si Vis Pacem, Para Bellum. Application of the European Convention on Human Rights in Situations of Armed Conflict' in Lawrence Early and others (eds), *The Right to Life under Article 2 of the European Convention on Human Rights. Twenty Years of Legal Developments since McCann v. the United Kingdom. In Honour of Michael O'Boyle* (Wolf Legal Publishers 2016); Peter Kempees, *'Hard Power' and the European Convention on Human Rights* (Brill Nijhoff 2020). See in particular also the partly dissenting opinion of Judge Spano, joined by Judges Niclaou, Bianku, and Kalaydjieva, appended to *Hassan v UK* (ibid).

43 Françoise J Hampson, 'An Investigation of Alleged Violations of the Law of Armed Conflict' (2016) 46 Israel Yearbook on Human Rights 1, 26–7.

44 *Jaloud v the Netherlands*, ECtHR [GC] 20 November 2014, Appl No 47708/08.

applied unrealistic standards to a high pressure and high intensity situation, and human rights standards which are not meant for conflict situations.[45]

These cases illustrate why the stakes are perceived to be high by the various stakeholders, and discussions have at times been heated. So heated in fact, that certain commentators wishing to provide an overview of the debate, have focused on describing the dialogue between both groups in equal measure to their assessment of the legal issues at stake.[46] In the heat of these exchanges, shots are at times fired at the opposing camp. Marko Milanović captures the sentiment particularly well, in dividing both parties into sceptics and enthusiasts, respectively, who make caricatures out of each other's positions:

> 'the enthusiasts accuse the sceptics of being morally inconsistent apologists for state power who only wish to facilitate the exercise of that power by making wholly arbitrary distinctions with regard to who is protected by human rights and who is not. The sceptics, on the other hand, accuse the enthusiasts of being a utopian, dovish bunch of fluffy, mushy-wushy do-gooders, who know nothing about the realities on the ground in wartime and who risk compromising both human rights and IHL with their relentless and illegitimate action.'[47]

With such polarised positions in the debate and such opposing outlooks, it should come as no surprise that satisfactory solutions for situations of interplay have proved out of reach. Nevertheless, caricatures aside, many very insightful contributions to the debate have been made, with some scholars and practitioners on both sides showing a willingness to go beyond their traditional doctrinal positions. In this light, an often used analogy for the two camps has been to describe them as a couple who although they have had their differences, have learned to live together and depend on one another.[48]

Finally, an interesting addition to the debate has been the involvement of scholars belonging to neither of the camps, who prefer to approach the

45 See e.g Friederycke Haijer and Cedric Ryngaert, 'Reflections on Jaloud v. the Netherlands. Jurisdictional Consequences and Resonance in Dutch Society' (2015) 19 Journal of International Peacekeeping 174; Noëlle Quénivet, 'The Obligation to Investigate After a Potential Breach of Article 2 ECHR in an Extra-Territorial Context: Mission Impossible for the Armed Forces?' (2019) 37 Netherlands Quarterly of Human Rights 119.

46 Andrew Clapham, 'Human Rights in Armed Conflict: Metaphors, Maxims, and the Move to Interoperability' (2018) 12 Human Rights & International Legal Discourse 9.

47 Marko Milanović, 'The Lost Origins of Lex Specialis' in Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge University Press 2016).

48 Clapham (n 46) 10; Noam Lubell, 'Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate' (2007) 40 Israel Law Review 648; Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 International Review of the Red Cross 501.

interplay puzzle from a general international law perspective.[49] If IHL and IHRL are indeed 'branches' of law, then general international law must be the tree which has grown them, and to see how the two are connected, how they have become intertwined, and how they branch out in different directions, it may therefore prove useful to have a closer look at the trunk rather than to focus solely on the branches themselves. Similarly if the pluralistic international legal order is more akin to an octopus, then it makes sense to not concern ourselves only with instances of the arms bumping into one another when feeling their way around, but to also view them as forming part of a larger being, which normally coordinates them well enough to prevent clashes from happening. Before moving on to such perspectives in section 4, section 3.3 explores the state of the debate.

3.3 Contemporary controversies

3.3.1 The ICJ and lex specialis

Readers may wonder why the interplay debate between IHL and IHRL remains so controversial. After all, hasn't the International Court of Justice resolved this issue, by ruling on it no less than three times? Indeed, the ICJ in two Advisory Opinions and one contentious case, ruled on issues of interplay. And indeed, the ICJ's findings still present the starting point for discussions, even twenty-five years after the ICJ's opinion in *Nuclear Weapons* and fifteen years after its judgment in *Armed Activities on the Territory of the Congo*. What seems now most uncontroversial in these rulings is that the ICJ found that the ICCPR, and human rights treaties more generally, continue to apply during armed conflicts. A main reason the debate has not subsided, however, is that the ICJ's introduction of *lex specialis* as the key for deciding how IHL and IHRL are then to relate, is open to multiple interpretations.

In its Opinion on *Nuclear Weapons* the Court, after affirming the continued application of the ICCPR during armed conflict, famously framed the question of what is to be considered an 'arbitrary deprivation of life' under Article 6 of the ICCPR, as one that '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'.[50] Thus the ICJ read the IHRL right to life in light of IHL, and determined the meaning of an arbitrary deprivation thereof by reference

49 See, amongst others, Christopher Greenwood, 'Human Rights and Humanitarian Law – Conflict or Convergence' (2015) 43 Case Western Reserve Journal of International Law 491; Lawrence Hill-Cawthorne, 'Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict' (2015) 64 International and Comparative Law Quarterly 293.

50 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996) *I.C.J. Reports* 1996, p. 226 [25].

of IHL, the *lex specialis*. Eight years later, in its Opinion on *The Wall*, the Court phrased its approach to interplay somewhat more generally, pronouncing that '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'.[51] In other words, the Court seemed to expand the application of IHL as *lex specialis* from the context of the right to life only, to the operation between both legal regimes as a whole.[52] This raises the question whether *lex specialis* operates on the level of norms, or of regimes in their entirety. Nonetheless, in *The Wall* Opinion, the Court went on to examine the compatibility of the construction of the wall with both IHL and IHRL, and found violations of both.[53] Meanwhile, the exact legal effects of the application of *lex specialis* were not alluded to, leaving open whether the principle is to be used as a method of conflict resolution, or rather as an interpretive tool which ultimately harmonises both branches. It also did not explain further any methodology for deciding which norm is to be viewed as *specialis* and which as *generalis*, other than its general reference to the law *designed to regulate* a certain situation. How to determine this, however, remains undecided and has spawned new scholarly debate.[54]

Further fanning the flames of the discussion, is the Court's selective citation of *The Wall* opinion in the contentious *Armed Activities* case.[55] There, the Court cited verbatim its earlier opinion in *The Wall* on the co-application of human rights and international humanitarian law, reiterating that three situations may be envisioned: situations governed exclusively by IHL, situations governed exclusively by IHRL, and situations governed by both. It then, however, conspicuously left out the last sentence of this consideration in *The Wall*, thereby omitting the reference to *lex specialis*. How the Court ultimately considers the interplay between IHL and IHRL therefore remains somewhat obscure. This is also because the facts of the case led it to find violations of both IHL and IHRL, since the killings, torture, destruction of villages and massacres in question clearly violated both[56] – leaving it unnecessary for the Court to attempt to resolve any normative conflict.[57] Both bodies of law in this case, after all, prohibited the conduct in question, as simple as that.

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51 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004) *I.C.J. Reports* 2004, p. 136 [106].

52 See further Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' (n 27).

53 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 51) [137].

54 E.g. Lindroos (n 5); Milanović, 'The Lost Origins of Lex Specialis' (n 47).

55 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment (19 December 2005) *I.C.J. Reports* 2005, p. 168 [216].

56 Ibid [206]-[221].

57 See also Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' (n 27).

3.3.2 *Theoretical models for interplay*

The ambiguities flowing from the ICJ's case-law have left scholars and practitioners theorising over the various ways the interplay between IHL and IHRL can be conceived. Essentially, three main views or models have been put forward, though some variations exist. Initially, a strict separation between both bodies of law was widely considered to be the most apt approach.[58] In this view, IHRL is considered the law of peace, IHL the law of war;[59] both operating on a mutually exclusive basis.[60] This approach has also been dubbed the displacement model, because in this view, once IHL is applicable, it displaces IHRL in its entirety.[61] On the other end of the spectrum, an 'integrationist' approach has been proposed. In this model, the rule that applies is the one providing the most extensive protection in a specific case regardless of whether it is a rule of IHL or IHRL,[62] because both are predicated on protecting human dignity.[63] Taking up a middle ground is the complementarity model, which posits that both bodies of law apply concurrently, with harmonious interpretation or systemic integration as the key factor for interplay.[64] Several variations and nuances exist within this model, but the essence would appear to be a situation-by-situation assessment of interplay, interpreting both bodies of law in light of one another, and determining on the facts of the situation which body of law is to serve as the primary frame of reference, and which remains to operate in the background. This also means that which norm is to be considered 'more specific' can vary,[65] with for instance in the abovementioned examples of the ICJ, the rules on the deprivation of life under IHL informing and 'colouring in' the meaning of an 'arbitrary' deprivation of life under IHRL. In other situations this could be the other way around, with for instance IHL's requirements of 'judicial guarantees which are recognized as

58 E.g. GIAD Draper, 'Humanitarian Law and Human Rights' [1979] Acta Juridica 193.

59 Nehal Bhuta, 'States of Exception: Regulated Targeted Killing in a "Global Civil War"' in Philip Alston and Euan McDonald (eds), *Human Rights, Intervention, and the Use of Force* (Oxford University Press 2008) 245–6.

60 Hans-Joachim Heintze, 'Theories on the Relationship between International Humanitarian Law and Human Rights Law' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2013) 55.

61 Hathaway and others (n 40) 1894–7.

62 Bhuta (n 59) 251–2.

63 E.g. Meron (n 26); Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012). See also *Prosecutor v Anto Furundžija*, ICTY (Trial Chamber) Judgment (10 December 1998) IT-95-17/1 [183].

64 Heintze (n 60) 57; Bhuta (n 59) 252; Greenwood (n 49) 503–8.

65 Marco Sassòli, *International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 439.

indispensable by civilized peoples',[66] being coloured in by the more specific fair trial requirements as formulated under human rights law.[67]

The basis of the complementarity model is thus the harmonious interpretation of IHL and IHRL, without necessarily a predetermined relationship between the two. Depending on the situation, either the one or the other provides the primary frame of reference. What the model of harmonious interpretation does not solve, however, is situations of 'unavoidable normative conflict',[68] in other words cases where both legal regimes require opposite things. An example of this is the requirement under Geneva Convention III, that prisoners of war *must* be repatriated as soon as hostilities end,[69] whereas in certain situations IHRL will prohibit such pursuant to the principle of *non-refoulement*.[70] In such situations, there is a clear-cut conflict between a positive obligation under IHL, and a prohibition under IHRL, which harmonious interpretation cannot solve without resorting to *contra legem* interpretations.[71] The same could be said for situations of occupation, where on the one hand the law of occupation requires States to keep in force domestic legislation unless insofar they threaten security,[72] whereas such legislation may well clash with a State's human rights obligations for instance to abolish discriminatory practices.[73] In such situations of unavoidable conflict, there is therefore still a need for conflict resolution, which certain authors have distinguished as a separate model, dubbed the 'conflict resolution model'.[74]

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66 See AP I, art 75(4) and 85(4)(e), as well as more generally, Common Article 3.

67 See also Droege (n 4); Greenwood (n 49); Milanović, 'The Lost Origins of Lex Specialis' (n 47).

68 Terminology based on Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 40) 470. I opt for the term 'unavoidable' over the ILC's use of 'genuine normative conflict' (see ILC Report 2006, p. 27), because that to me would intimate other conflicts not being genuine, or perhaps even disingenuous.

69 GC III, art 118.

70 Marco Sassòli, 'Le Droit International Humanitaire, Une Lex Specialis Par Rapport Aux Droits Humains?' in Andreas Auer, Alexandre Flückiger and Michel Hottelier (eds), *Les Droits de l'Homme et la Constitution. Etudes en l'Honneur du Professeur Giorgio Malinverni* (Schulthess 2007) 392.

71 It has been submitted that IHL has developed in this field, no longer strictly requiring repatriation against the will of the individual and in cases where the individual would be at risk of inhuman treatment or unfair trial on their return. The example is merely meant to illustrate a situation of unresolvable conflict. See further Sassòli, *International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare* (n 65) 271.

72 GC IV, art 64; see also 1907 Hague Regulations, art 43.

73 Also giving this example, see Marko Milanović, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford University Press 2011) 121–3; Greenwood (n 49) 507.

74 Hathaway and others (n 40).

3.3.3 *Resolving conflicts and the move towards operational law*

When deciding how to resolve normative conflict, recourse must normally be had to general international law. Within a certain legal regime, specialised rules and methods for conflict resolution may exist,[75] but as this situation concerns a conflict between norms belonging to two branches of international law, and unless these branches regulate how to resolve such conflicts between themselves, a solution must be found under general international law.[76] Perhaps ironically, however, this brings us back to the maxim of *lex specialis derogat legi generali*, the model espoused by the ICJ in its Advisory Opinions to mould the relationship between IHL and IHRL, and thus also brings us back to the controversies briefly alluded to above. This is all the more clear when one considers that the complementarity model, in attempting to reconcile IHL and IHRL, already makes use of a form of *lex specialis* (as an interpretive tool) to decide which rule provides the 'primary frame of reference' in a certain situation – after all, the primary rule will normally be the one most specifically meant to govern the situation in question. All of this will be explored further in-depth in the remainder of this Chapter, but it is precisely because of these various meanings of *lex specialis*, that one strand of contemporary scholarship is moving away from the maxim. Such scholars argue that resorting to *lex specialis* is more likely to obfuscate the issues at hand than to present a clear-cut resolution.[77] In fact, because of its various meanings, and because most lawyers have at least some sort of understanding of what the term means, *lex specialis* provides a false sense of resolving the issues, when very likely everyone is not talking about the same thing.[78] This also informs a tendency by some contemporary scholars to move away from the *lex specialis* terminology, even if they do not argue doing away with the *method*, they oppose the *terminology*.[79]

A shift in contemporary thinking about interplay goes beyond the use of *lex specialis* terminology only. Scholarship also showcases a move towards

75 Under the ECHR, for instance, the ECtHR has relied on a systematic interpretation of the Convention to read the scope of application of the *ne bis in idem* rule in line with the duty to investigate under the right to life and the prohibition of torture, see *Marguš v Croatia*, ECtHR [GC] 27 May 2014, Appl No 4455/10 [128ff].

76 Jan B Mus, 'Conflicts between Treaties in International Law' (1998) 45 Netherlands International Law Review 208, 211.

77 Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 40) 476.

78 See also Françoise J Hampson, 'The Relationship between International Humanitarian Law and International Human Rights Law' in Scott Sheeran and Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013).

79 Milanović, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law' (n 73) 113–6; Nancie Prud'homme, 'Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40 Israel Law Review 356; d'Aspremont and Tranchez (n 15) 242.

operational law,[80] and the interoperability of both legal regimes, to find solutions in a very practical way – and in a clear attempt to move beyond the swamp of theoretical discussion.[81] Whereas such an endeavour does not remove the necessity of a theory on interplay *per se*, the focus on specific practical issues in all sorts of operational situations does advance the discussion beyond the realm of theory alone. In doing so, the *Practitioners' Guide to Human Rights Law in Armed Conflict* advances a model consisting of two paradigms: 'active hostilities' and 'security operations'.[82] When applying the former paradigm, IHL is the primary frame of reference, with human rights law informing its application, but ultimately playing a secondary role. In the latter, it is the other way around, with human rights law providing the primary frame of reference and with IHL operating in the background. Whereas this approach is not necessarily completely new,[83] the move towards an assessment based on the type of operational situation one might encounter, does lift the discussion to a new level.

A final complicating factor in the interplay debate, is the concept of 'normative conflict'. How IHL and IHRL relate naturally depends on the extent to which they are thought to conflict. Whereas contemporary debates have moved away from perceiving both legal regimes as conflictual *as such* towards a more norm-by-norm and situation-by-situation assessment, determining whether two specific norms conflict in a specific situation, remains crucial. Whether to view a certain situation as one of normative conflict, decides in large measure the toolbox for further defining, refining, and resolving this situation. When there is a conflict of norms, certain tools for conflict resolution become available, such as conflict clauses in treaties, and the conflict resolution mechanisms of *lex superior derogat legi inferiori*, *lex specialis derogat legi generali* and *lex posterior derogat legi priori*.[84] These maxims, in their capacity as tools for conflict resolution,[85] resolve normative conflict by derogating one norm in favour of the

80 Clapham (n 46) 18–20.

81 Daragh Murray and others, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford University Press 2016).

82 Murray and others (n 81) Chapter 4.

83 See e.g. Lawrence Hill-Cawthorne, 'The Role of Necessity in International Humanitarian and Human Rights Law' (2014) 47 Israel Law Review 225; Terry D Gill, 'Some Thoughts on the Relationship Between International Humanitarian Law and International Human Rights Law: A Plea for Mutual Respect and a Common-Sense Approach' (2013) 16 Yearbook of International Humanitarian Law 251; Kenneth Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict* (Oxford University Press 2016); Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98 American Journal of International Law 1.

84 Mus (n 76).

85 On the various capacities of e.g. *lex specialis* also in the context of conflict avoidance, harmonious interpretation and systemic integration, see below. For further analysis, see

other, and thus grant precedence to the higher norm over the lower, the special norm over the general, and the newer norm over the older one.[86] These tools cannot in principle be used when no conflict of norms exists. Moreover, the determination of the existence of a conflict determines when a potential attempt of harmonious interpretation and systemic integration ends, and resort must be had to conflict resolution.

What precisely constitutes a normative conflict, however, remains subject to debate. Views vary from a very strict approach recognising normative conflict only where complying with one norm necessarily violates the other,[87] and wider approaches where conflict is also thought to exist where two norms pull in different directions.[88] What conception of conflict is used is crucial for a proper understanding of the interplay of IHL and IHRL, precisely because many of the more controversial divergences between both bodies might *not* qualify as a conflict of norms in the strict sense. This is explored in-depth in section 5.1, but to give the clearest example of this: the *main* issues in the interplay debate, deprivation of life and liberty, do not lead to normative conflict in the strict conception of that term. The prohibitions under human rights law of depriving individuals of their lives or liberty subject to certain strict conditions strictly speaking do not conflict with IHL *permitting* States to kill and capture combatants and under certain circumstances civilians. After all, one can simply comply with both norms, by *not* killing and capturing, as IHL in no way *obligates* States to do so. This illustrates the difficulties in resolving issues of interplay where both legal regimes clearly pull in different directions, but the rules for the resolution of normative conflict are not available because strictly speaking, there is no conflict.

The above illustrates the many controversies surrounding interplay of IHL and IHRL. Not only has the ICJ's submission of using *lex specialis* proved unable to resolve the debate on the various theoretical models of interplay, even if one is able to choose a model to apply, new controversies lie in waiting. Especially the important role played by the lens of 'normative conflict' is determinative of how interplay is shaped, but with the definition of normative conflict perhaps proving too narrow to be of much help. The present chapter aims to shed light on the debate, by further exploring the types of situations where IHL and IHRL overlap based on a typology of *how their norms interact*, that is, whether they converge, conflict, or perhaps rather fall somewhere in-between the two.

Milanović, 'The Lost Origins of Lex Specialis' (n 47); d'Aspremont and Tranchez (n 15); Lindroos (n 5).

86 ILC Report 2006.

87 C Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 British Yearbook of International Law 401.

88 ILC Report 2006, para. 25.

4 DEVELOPING AN INTERPLAY METHODOLOGY

4.1 Introduction

Given the controversies surrounding the interplay debate as outlined above, there is a manifest need for clarity. With two overlapping fields of law which at times pull in different directions, States are left uncertain how to instruct their agents and courts are equally faced with complex issues of interplay. This complexity may moreover provide disingenuous States with an excuse to take a somewhat 'looser' approach to the law, or to abuse uncertainties under applicable law, under the pretext that what the law requires is simply unclear.[89] At the same time, State agents and armed forces are also in dire need of clarity, as they need to be able to react immediately in situations of conflict, without having the luxury of pondering the precise interplay of IHL and IHRL for their situation. Moreover, State forces are best served by clarity also because of the increased tendency to pursue *ex post facto* accountability for violations of the law. The uncertainty of retroactive investigations and enforcement measures looming when the law itself lacks clarity could clearly harm morale, and in the context of potential criminal accountability could also give rise to fair trial issues.[90] The interests of all involved in armed conflict, whether they are State authorities, individual members of armed forces, insurgents or civilians and war victims, are therefore served with a clear articulation of the interplay regime.

Finding solutions for the problems raised by situations of interplay requires a methodology which takes account of the specific context of a case. This section sets out how such a methodology can be derived from the international legal system. Section 4.2 sets out the regulation of overlapping legal regimes under international law, and section 4.3 a step-by-step approach to solve issues of interplay. The outline of the methodology, at this junction, remains a framework only, which is fleshed out further in the subsequent sections.

4.2 Interaction of norms in the international legal system

Inevitable clashes of norms resulting from the fragmentation of international law, are not unambiguously regulated by international law. First and foremost, general international law functions as a 'fall-back system', meaning that specialised legal regimes such as IHL and IHRL are free to deviate from general international law, and in regulating conflicts amongst them.[91] If they do not,

89 Henckaerts and Nohle (n 32) 35; Landais and Bass (n 39) 1296.
90 Hampson, 'An Investigation of Alleged Violations of the Law of Armed Conflict' (n 43) 3.
91 Mus (n 76) 211. Further, see ILC Report 2006, p. 135ff.

general international law does contain rules and principles for the regulation of concurrently applicable legal regimes, but these are nowhere near as developed as is often the case in domestic legal systems.[92]

The International Law Commission has convincingly set out that the relationship between two applicable norms stemming from different branches of international law, can be divided into relationships of interpretation, and relationships of conflict.[93] The former indicates normative overlaps where both norms can be applied in conjunction, with one norm serving as an interpretive aid for the other.[94] The latter indicates a normative overlap where 'two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them'.[95] This means there are in essence two paradigms for normative overlaps under international law, which therefore also apply to the relationship between IHL and IHRL: either there is a situation of conflict, or there is not, and the existence of normative conflict determines what tools are available to harmonise both norms, or to resolve a conflict between them.

Section 6 delves deeper into what both types of relations mean, but a brief overview is helpful here. *Situations of interpretation* concern those where there is normative overlap, but where both norms can be applied concurrently without leading to conflicting outcomes. To give but one example in the field of the interplay of IHL and IHRL, both prohibit torture. Even if the meaning of the term 'torture' is not precisely the same under both regimes,[96] States are not faced with contrary obligations, and can therefore easily comply with both norms. In such instances, there is in a fact a form of convergence between both legal regimes.[97] When two norms prescribe the exact same conduct, such as not to torture those deprived of their liberty, there is no normative tension whatsoever and no real questions of interplay arise. This may be different where whereas both legal regimes prescribe a certain conduct, the exact requirements under both fields diverge. So long as both norms do not require directly opposite things, however, often resort can be had to treaty interpretation to interpret both norms as pointing in the same direction, without violating one of the two norms in the process. A famous example of such is the already

92 Jenks (n 87).

93 Report of the International Law Commission, Fifty-eights session (1 May-9 June and 3 July-11 August 2006), *General Assembly Official Records, Sixty-first session*, Supplement No. 10, A/61/10, p. 407-8.

94 Ibid 407.

95 Ibid 408.

96 Manfred Nowak, 'Torture and Other Cruel Inhuman or Degrading Treatment or Punishment' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014).

97 Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015).

mentioned finding by the International Court of Justice that in the context of armed conflict, the meaning of what is an 'arbitrary' deprivation of life falls to be determined by the applicable IHL.[98] Even though there is an ostensible divergence in the rules, with IHL allowing the targeting and killing of combatants and civilians taking a direct part in hostilities, and IHRL forbidding any intentional deprivation of life save in case of absolute necessity, the Court thus through *harmonious interpretation* resolved this instance of normative overlap.[99]

The legal basis for such harmonious interpretation is to be found in the concept of 'systemic integration', as enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT). Article 31, which is reflective of customary international law,[100] provides that a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. It then expands on this, with paragraph (3) stating circumstances that must be 'taken into account' together with the context, which according to sub (c) includes 'any relevant rules of international law applicable in the relations between the parties'. The exact meaning of the interpretive principle is difficult to determine from its brief wording alone, but it is apparent that in situations where IHL and IHRL both apply, it can serve to alleviate discrepancies between the two. In fact, international practice has been to interpret two norms in line with one another, and in a way that they do not conflict, as much as possible. As the International Law Commission has noted in its Fragmentation Report, '[i]n international law, there is a strong presumption against normative conflict'.[101] This has meant that in most instances, if there is any possible interpretation which does not give rise to normative conflict and can be solved through harmonious interpretation, such approach has been preferred. Harmonious interpretation and systemic integration are thus also referred to as methods of *conflict avoidance*, as opposed to conflict resolution, and this interpretive tool thus in part has served to advance the unity of international law. In this context it has even been referred to as a 'constitutional norm within the international legal system',[102] because of the capacity of the principle to tie together all the various sources within the system.

When it comes to *situations of conflict*, the international legal system provides for a number of ways to resolve such conflict. If two obligations under international law, binding on the same legal subject (often a State), cannot be

98 *Legality of the Threat or Use of Nuclear Weapons* (n 50) [25].
99 d'Aspremont and Tranchez (n 15).
100 *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment (13 December 1999), *I.C.J. Reports* 1999, p. 1045 [18]. See further Malgosia Fitzmaurice, 'The Practical Working of the Law of Treaties' in Malcolm D Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 170.
101 ILC Report 2006, p. 25.
102 McLachlan (n 14).

obeyed at the same time because they are mutually exclusive, a choice has to be made between the two.[103] This means one norm must be given priority over the other.[104] As will be explored below there are also broader conceptions of what constitutes a normative conflict, but the archetype is where we have two obligations which are mutually exclusive. The international legal system provides some guidance as to how to determine which norm will have to give way, and which takes precedence.

First, as was mentioned above, specialised regimes may themselves regulate how normative conflicts with norms from other regimes must be resolved. Provisions referred to as 'conflict clauses' can regulate the relationship with other legal fields. Many treaties for instance provide the treaty applies 'without prejudice to', or 'subject to' other international obligations, meaning that in case of conflicting obligations, this treaty will give way to the other obligations.[105] Also the other way around, treaties can claim priority in case of conflict, the most famous example being Article 103 of the UN Charter, providing as it does that obligations under the Charter prevail over other international obligations of the UN's members. Many treaties, however, do not provide for a conflict clause, in which case general international law regulates the conflict of norms.

In the absence of a conflict clause, international law provides three main avenues for the resolution of normative conflict: a rule of a higher normative status trumps the lower (*lex superior derogat legi inferiori*), a rule more specifically tailored to the situation trumps the more general rule (*lex specialis derogat legi generali*), and the later rule trumps the older rule (*lex posterior derogat legi priori*).[106] The first principle is of a limited scope, as it principally applies to conflicts involving a rule of *ius cogens* or Article 103 of the UN Charter.[107] *Lex specialis*, as was explained, takes up a major role in the debate on the interplay between IHL and IHRL, and will therefore be explored further below.[108] *Lex posterior*, meanwhile, provides that newer rules take precedence over older ones, though this ought not to be seen as too absolute. The ILC has explored the principles of conflict resolution in-depth in 2006, and has concluded their application relies primarily on context. For instance, the *lex posterior* rule – as stipulated in Article 30 VCLT – applies primarily in cases where all States party to a treaty decide to adopt a new treaty, meant to regulate the same subject-matter. It does *not* mean that in case of conflict, for instance, between the 1951 ECHR and the 1966 ICCPR, the ICCPR must be con-

103 Stahn and van den Herik (n 10).
104 Mus (n 76) 227.
105 Mus (n 76) 214–5. See also VCLT, art 30(2), which provides: 'When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.'
106 ILC Report 2006, p. 16. See further Lindroos (n 5).
107 ILC Report 2006, p. 205; Lindroos (n 5).
108 See in particular §6.3.2.

sidered to derogate the ECHR, or that the adoption of the ICCPR must be considered to have repealed the ECHR.

The precise effects of resorting to these principles of conflict resolution remains subject to debate. As the Latin maxims reveal, they rely on *derogation*. According to Hans Kelsen, to resolve a conflict between two norms, a third norm must exist providing for the derogation of one norm in favour of the other. Derogation itself is then taken to mean the *repealing* or *invalidation* of a norm.[109] Whereas our three maxims indeed present secondary rules providing for derogation, they do not do so, in principle, in a Kelsenian sense. According to the ILC, only in the operation of the *lex superior* rule, when a norm of international law clashes with a norm of *ius cogens*, is the norm repealed as such.[110] In fact, according to the VCLT, the entire treaty of which the inferior norm forms part is void.[111] In other situations, however, the methods for conflict resolution merely provide for *precedence*, meaning that in the specific context of that conflict, one norm takes precedence over the other, without however invalidating the other norm. How this works precisely depends on the context in which these tools are applied. In the context of *lex specialis*, we may for instance distinguish between situations where the special law merely articulates a specific application of the general law, and situations where the special law truly contradicts the general law. The first situation can be exemplified by the case-law of the European Court of Human Rights, when it considers the right to compensation for unlawful detention to be a specific iteration of the more general right to an effective remedy enshrined in Article 13.[112] The second situation concerns for instance the unavoidable conflict between the IHL obligation to respect the laws of an occupied State and the IHRL obligation to effectively protect and fulfil the right to equal treatment to everyone within their jurisdiction. Should it be decided in this situation that a law conditioning the admittance to schools on sex, for instance, must be upheld due to the specific situation of occupation, which is more closely and particularly regulated by the applicable IHL, then this would not mean that the IHRL right to non-discriminatory treatment is thereby invalidated. It merely means that *in this specific instance*, IHL takes precedence, though IHRL remains applicable, and might take precedence in other cases of normative conflict.

109 Hans Kelsen, 'Derogation' in Ralph A Newman (ed), *Essays in Jurisprudence in Honor of Roscoe Pound* (Bobbs-Merill 1962).
110 ILC Report 2006, p. 184-8.
111 VCLT, artt 53 and 64.
112 *A. and Others v United Kingdom*, ECtHR [GC] 19 February 2009, Appl No 3455/05 [202].

4.3 Articulating a methodology for interplay: a step-by-step approach

The international legal system, as set out above, provides generally that in cases potentially falling under both IHL and IHRL, a number of steps must be taken to determine the exact relationship between the two. First, it must be determined whether both legal regimes indeed apply to the situation at hand. This step requires first a determination of the applicability of both legal regimes (based on the criteria for applicability as set out in Chapters 2 and 4), and second a determination of whether the specific *incident* at issue is governed by both IHL and IHRL.[113] There is an important difference between a *situation* and a specific *incident*, and applicability of IHL and IHRL must be assessed for both.[114] The broader situation concerns the broader applicability of these legal regimes, for instance the existence of a non-international armed conflict (NIAC) on the territory of the State, which gives rise to applicability of IHL. Even if such is the case, this does not mean that IHL regulates each and every incident – many aspects of the State's conduct do not have a nexus with the armed conflict. As Andrew Clapham explains, if the incident in question is violence used against a checkpoint, this could be covered by IHL if it is carried out by armed insurgents, whereas it is covered by IHRL if it is a demonstration turned violent, by civilians.[115] Thus, the incident must be distinguished from the broader situation.

If IHL and IHRL are indeed applicable to the situation and the incident, second, the existence and operation of a conflict clause must be explored. The relevance of conflict clauses for the relationship between IHL and IHRL is explored further in section 6.2. If a conflict clause does regulate the relationship between IHL and IHRL, the solutions provided by this system have to be followed. If not, or if no conflict clause is in operation, the third step is to assess whether the various applicable norms of IHL and IHRL conflict. If they do not, step 4, the overlap may be solved through harmonious interpretation and systemic integration, pursuant to Article 30(3)(c) VCLT. If they do, resort must be had to methods of conflict resolution.

Shown schematically, this means that in analysing the relationship between IHL and IHRL, we can discern the following steps:[116]

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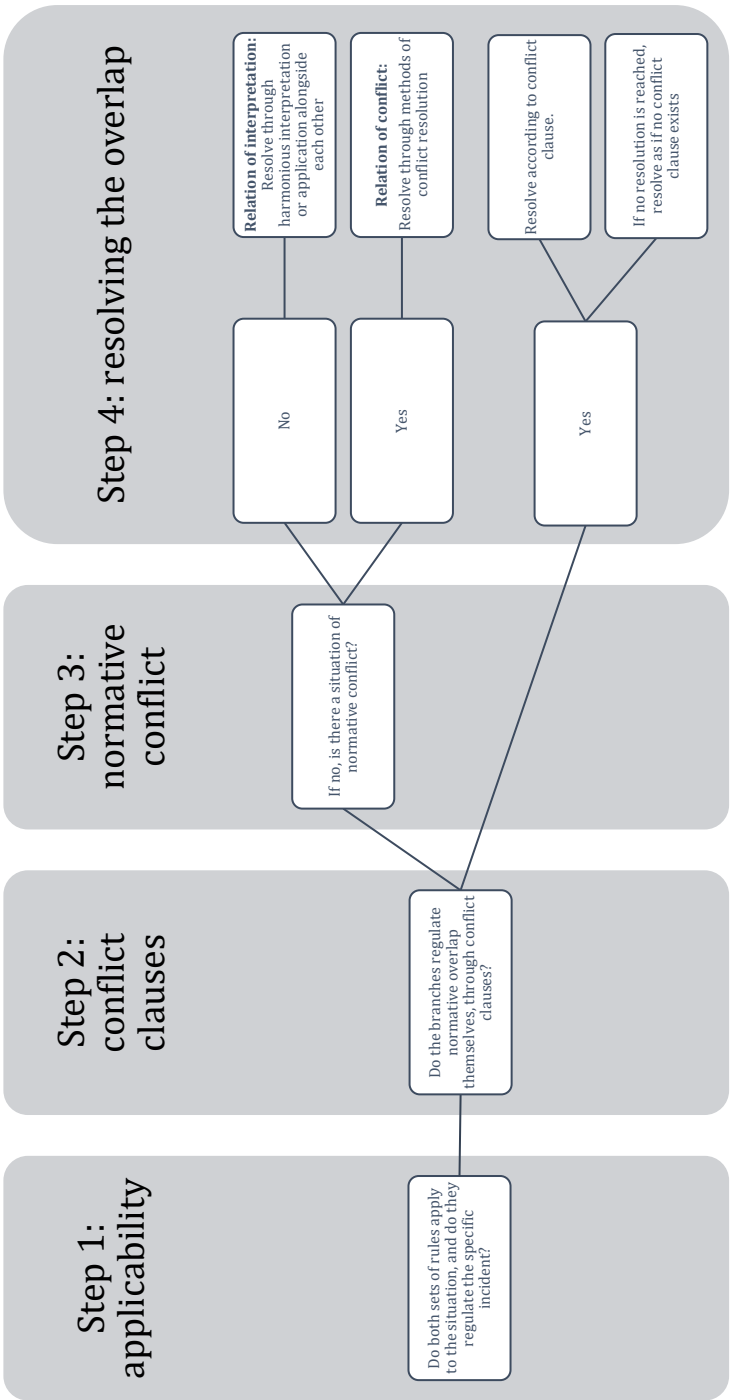
113 On the distinction between applicability to a *situation* and to an *incident*, see Hampson, 'The Relationship between International Humanitarian Law and International Human Rights Law' (n 78) 209.

114 Hampson, 'The Relationship between International Humanitarian Law and International Human Rights Law' (n 78) 209.

115 Clapham (n 46) 19.

116 This schematic overview in part coincides with the 'conflict resolution model' as proposed by Hathaway and others (n 40) 1905.

Figure 1: A bare bones methodology for interplay



This figure is hoped to provide insight in the various steps involved when assessing the applicable legal regime in case of interplay. It does not yet show *how* conflicts of norms can be resolved, or *how* harmonious interpretation can serve to come to a coherent outcome for a case of normative overlap. The subsequent sections are dedicated to further fleshing out steps 3 and 4 in the flowchart: section 5 discusses what constitutes a normative conflict under international law and articulates the various factual and contextual situations giving rise to interplay in terms of whether they conflict, converge, or perhaps compete without necessarily conflicting. Section 6 then explores how harmonious interpretation and conflict resolution solve issues of normative overlap.

5 Articulating situations of interplay in normative terms

5.1 Conflicting conceptions of conflict

As transpires from the secondary rules of international law regulating normative overlaps, much depends on whether a normative conflict is found to exist or not. If there is a conflict, this means recourse may be had to the various methods for conflict resolution, whereas if there is not, the only available method to regulate interplay is systemic integration and harmonious interpretation. Thus, a strong emphasis is placed on the existence or not of conflict, which brings us to the question what is to be understood as 'conflict'. This is a contentious issue, with some supporting a very narrow conception of a conflict of norms, in line with the ILC's finding that 'there is a strong presumption against normative conflict' under international law.[117] Yet, if such an approach is adopted, this leads to the awkward conclusion that certain main points of tension between IHL and IHRL, such as IHL's permission to deprive individuals of their lives and liberty, do not conflict with IHRL's rights to life and liberty. This section explores such discussions, in order to come up with a useful definition of normative conflict.

5.1.1 The strict approach

The classical view, which has garnered support in both practice and academia,[118] is a strict interpretation of conflict. This in essence means that two norms only conflict when it is logically impossible to comply with both norms

117 ILC Report 2006, p. 25.

118 E.g. WTO Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS59/R, WT/DS64/R, adopted on 23 July 1998, at note 649; *Al-Jedda v the United Kingdom*, ECtHR [GC] 7 July 2011, Appl No 27021/08 [101]-[105]; *Netherlands Supreme Court (Hoge Raad) 14 December 2012, ECLI:NL:HR:2012:BX8351 (Sanctions against Iran)* [3.6.1]-[3.7.6].

at the same time; when complying with the one norm necessarily violates the other. This was phrased particularly clearly in a WTO Panel Report concerning *Indonesia – Certain Measures Affecting the Automobile Industry*, finding that for two provisions to conflict, they 'must impose mutually exclusive obligations (…) there is conflict when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously'.[119] This is the case where one norm requires a State to do something which the other norm prohibits, such as in the example of the IHL obligation to repatriate POWs, which is under certain circumstances prohibited by IHRL. Such a conception of normative conflict renders conflicts rare, and thus leaves wide margins for methods of conflict avoidance. This is sometimes thought to also support the unity of international law as a legal system, because a coherent legal system ought not contain an excessive amount of internal conflicts.[120]

The central issue in the strict approach to normative conflict is thus whether it is materially impossible to comply with both norms. To illustrate, the Grand Chamber of the European Court of Human Rights in *Al-Jedda v the United Kingdom* was faced with a situation where the UK had detained individuals during the conflict in Iraq, according to the UK pursuant to a UN Security Council Resolution which under Article 103 of the UN Charter ought to be prioritised over obligations flowing from the ECHR.[121] The Court, rather than engaging with the question whether Article 103 indeed took priority, looked in detail at the Security Council Resolution, and concluded that the Resolution granting 'the authority to take all necessary measures' did not *oblige* the UK, or any other State for that matter, to engage in indefinite internment.[122] Moreover, because one of the main aims of the UN Charter is to protect human rights, it held that the Resolution must be interpreted insofar as possible in line with IHRL.[123] Given the lack of an *obligation*, and given the opportunity for harmonious interpretation, it found that there was no normative conflict in this situation. This thus prevented the operation of Article 103, and ultimately led to a finding of a violation of the right to liberty by the UK.

A strict approach to what constitutes normative conflict provides relative clarity, because the definition is relatively simple. Moreover, it fits well with the ICJ's presumption of States acting in full knowledge of the applicable international law when entering into new international obligations. If a State is fully conscious of all its obligations whenever entering into new ones, then it is surely reasonable to require States whenever possible to comply with all

119 *Indonesia – Certain Measures Affecting the Automobile Industry* (ibid) 1428 at note 649. Also referencing this Panel Report, see ILC Report 2006, p. 43 and Erich Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theory' (2006) 17 European Journal of International Law 395, 399–400.

120 To an extent combating this idea, see Greenwood (n 1).

121 *Al-Jedda v the United Kingdom* (n 118) [101]-[105].

122 Ibid [104]-[105].

123 Ibid [102].

their obligations, and not to let them derogate certain obligations by virtue of 'conflicting' other obligations. Nevertheless, this approach has its shortcomings.

5.1.2 *The underinclusiveness of the strict approach*

The strict approach of restricting normative conflict to norms which are mutually exclusive, may render it overly strict, and therefore underinclusive. It excludes many situations from consideration, and from the application of the tools for conflict resolution. Perceiving of conflict as two or more *mutually exclusive* norms, means that conflict can exist only between an obligation to do something, and a prohibition to do this same thing. An example would be the IHRL obligation to ensure non-discriminatory treatment and legislation to all within a State's jurisdiction, and the prohibition under the law of occupation to alter applicable domestic law. Other situations of normative overlap, however, are likely to fall outside the scope of the narrow definition of conflict. Where for instance IHL requires an 'administrative board' or 'competent body' to review the necessity of the internment of civilians,[124] and IHRL requires a 'court' to review the lawfulness of detention measures, strictly speaking there is no conflict as these obligations are not mutually exclusive: simply having a court carry out the review in no way *violates* IHL.[125] Strict application of the conflict paradigm then means States must simply comply with the higher IHRL standards, with IHL being pushed to the background – despite a potential claim it presents the law meant specifically to govern such situations. Even if in this situation the two obligations to an extent drive in the same direction, there is therefore definite tension.

Similarly, a major argument against the narrow conception of conflict is that it prevents a *permissive norm* from conflicting with any other norm, as it will never in the strict sense clash with a norm prescribing or proscribing certain conduct.[126] For example, the main issues in the interplay debate such as deprivation of life and liberty, do not lead to normative conflict between both regimes in the strict conception of that term. The prohibitions under human rights law of depriving individuals of their lives or liberty subject to certain strict conditions do not conflict with IHL permitting States to kill and capture combatants and under certain circumstances civilians in the sense that these norms are *mutually exclusive*. After all, one can simply comply with both norms, by *not* killing and capturing, as IHL in no way *obligates* States to do

124 GC IV, art 43 and 78.

125 Helen Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law 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* (Cambridge University Press 2013).

126 Vranes (n 119) 403–15; Kelsen (n 109).

so. This is a relatively absurd conclusion in light of the object and purpose of IHL. It shows the obvious shortcomings of a very narrow conception of normative conflict: even in case of the archetype situation where IHL and IHRL pull in different directions, they would not qualify as conflictual. This approach would therefore on most occasions prioritise IHRL over IHL, because complying with the IHRL standard does not violate IHL. As C. Wilfred Jenks has noted, such tensions not covered by the strict definition, 'may render inapplicable provisions designed to give one of the divergent instruments a measure of flexibility of operation which was thought necessary to its practicability', which may be equally serious as other conflicts.[127] This certainly holds true for the relationship between IHL and IHRL, where IHL often means to provide a certain flexibility, which simple recourse to IHRL standards may frustrate, even if it does not technically violate IHL.

What the strict approach thus fails to take into account is the *balance* IHL means to strike between humanitarian considerations and military necessity. If that body of law indeed strikes this balance in a way which is meant to safeguard human dignity *and* the practical necessities of waging war, then finding that 'the rules do not conflict' does not at all help in solving the issues raised by interplay. Simply importing higher IHRL standards because they do not strictly speaking conflict with those under IHL in this sense misses the point. A true non-conflictual approach may be viable for situations where either IHRL already accounts for the exigencies of a particular situation, or where both bodies of law simply point in the same direction, but the strict approach to normative conflict leaves out many situations of genuine tension between the two. Several authors have therefore argued IHL and IHRL conflict also beyond the strict conception of conflict: 'a relationship of conflict can be said to exist not only when two applicable rules require different courses of action, but also when a particular conduct is lawful under [IHL] but unlawful under [IHRL].'[128]

Viewing permissive norms as irrelevant when it comes to the determination of the existence of normative conflict, renders them obsolete whenever there is a multitude of rules regulating the same subject matter because obligatory and prohibitive rules will always trump permissive rules. This calls for a broader conception of what constitutes a normative conflict, which the International Law Commission for instance has simply defined as 'a situation where two rules or principles suggest different ways of dealing with a problem'.[129]

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127 Jenks (n 87).

128 Henckaerts and Nohle (n 32); Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 40). Also employing a broader conception of conflict, see, among many others, Sean Aughey and Aurel Sari, 'Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence' (2015) 91 International Law Studies 60; Gill (n 83).

129 ILC Report 2006, para. 25.

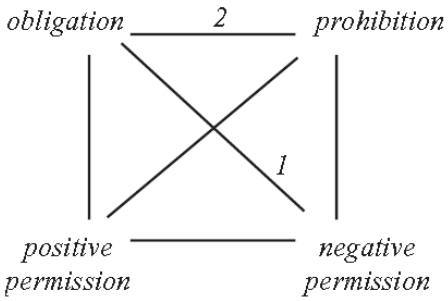
Conflict then becomes much more an issue of actual tension between norms,[130] because '[a] treaty may sometimes frustrate the goals of another treaty without there being any strict incompatibility between their provisions. Two treaties or sets of rules may possess different background justifications or emerge from different legislative policies or aim at divergent ends'.[131] This therefore calls for the formulation of a broader concept of normative conflict.

5.1.3 Expanding the scope of conflict

If the strict approach to normative conflict is unsatisfactory because it does not account for the normative tension and conflict involving permissive norms, as well as diverging obligations such as in the case of the review of detention measures, then a broader conception must include such situations. Erich Vranes has come up with a broader definition of normative conflict in a 2006 article in *The European Journal of International Law*, for which he draws from legal theory and 'deontic logic'. His account is briefly summarised below, with as an important remark that he distinguishes between three functions of norms: obligating, prohibiting and permitting.[132] This means that where he speaks about 'obligation' or 'obligating', he refers to obligations *to act*, which can be distinguished from prohibitions and permissions.

Vranes uses a deontic square[133] to show the various relations between prohibitive, obligatory and permissive norms:

Figure 2: The 'deontic square'



130 On the distinction between conflict and competition, see d'Aspremont and Tranchez (n 15).

131 ILC Report 2006, para. 24.

132 Vranes (n 119) 398. These three categories of norms are based on Jeremy Bentham's reduction of complex sets of norms to these three basic sets of conduct. See Jeremy Bentham, *Of Laws in General* (HLA Hart ed, University of London, Athlone Press 1970). Further, see Valentin Jeutner, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma* (Oxford University Press 2017) 28–30.

133 Similarly see Jeutner, who moreover explains that whereas the use of deontic logic in law is disputed, it is viewed as essential even by critics for defining normative conflict; Jeutner (n 132) 28-30 and fn93.

> 'The relation between the obligation to adopt a given conduct C and the permission not to adopt this conduct (designated as *1* in the graph) is commonly referred to as a *contradictory conflict* in legal theory, since negating the obligation to do C yields a permission not to do C, i.e. its contradictory opposite, and *vice versa*. The same is true for the relation between a prohibition to do C and a permission to do C: negating either modality yields the contradictory opposite (…).
>
> The relation between obligation and prohibition (designated as *2* in the square) is termed *contrary conflict*, since both norms cannot be applied at the same time. There is no conflict between a permission to adopt a given conduct and a permission to adopt the opposite conduct: the conjunction of positive and negation permission (permission to do something and to refrain from doing the same thing) can be defined as liberty in the legal sense.'[134]

He explains how deontic logic dictates that a conflict must exist between a permissive norm and an obligatory/prohibitive norm when it can be shown they are each other's opposites through negation. Norms are each other's opposite if when negating the one norm, it becomes the other. This is the case for the relationships between an obligation and a negative permission (a permission not to do something), and for a prohibition and a positive permission (permission to do something). Take by way of example the IHRL prohibition to kill, and the IHL permission to do so. They are one another's contradictory opposites, which can be shown through an exercise of negation. Negating the logical construction of the prohibition to take life, turns it into a non-prohibition to take life, in other words a positive permission to do so.[135] The same goes for the relationship between obligations and negative permissions. By way of example, the IHRL obligation to provide *habeas corpus* is the contradictory opposite of the IHL permission not to do so, because when negated, the obligation to provide *habeas corpus* becomes a non-obligation, which amounts to a permission not to do so. If, then, these norms are one another's opposites, this must according to deontic logic mean they *conflict*.[136] Such an approach including permissive norms into the definition of normative conflict, accounts for the very real tensions which can and do arise, in the IHL – IHRL relationship, as stipulated above.

Moreover, in Vranes' view, the definition of conflict also encompasses situations of what he terms 'unilateral incompatibilities'.[137] This concerns situations where two norms require a certain, similar conduct, but to different degrees – for example where one norm sets higher standards than the other. This may often be the case where IHL and IHRL regulate the same situation or conduct, and where IHRL might impose higher standards than IHL. The example introduced above, of IHL prescribing review of internment of civilians

134 Vranes (n 119) 409.
135 Vranes (n 119) 408.
136 Jeutner (n 132) 28–30.
137 Vranes (n 119) 414.

must be carried out by a 'competent body', or an 'appropriate court or administrative board', while IHRL strictly requires such review to be carried out by courts, would be an instance of such 'unilateral incompatibility'. Such instances constitute normative conflicts, because the norm setting the *lower* standard, *implicitly permits* doing no more than what it requires. In other words, in *requiring* an administrative board, IHL also implicitly *permits* not doing more than organising review through administrative boards.[138] Conceiving of the norm setting a lower standard as a simultaneously obligatory and *implicitly permissive* norm, brings such situations within the paradigm of normative conflict as it was set out above: the positive permission to do no more than have an administrative board review internment measures, conflicts with the IHRL obligation to have courts review such measures. The contours of 'normative conflict' thus include most situations of actual normative tension between IHL and IHRL, and allow for the resolution of such tensions through conflict resolution mechanisms.

Beyond the deontic, logical argument underlying the broader definition, Vranes relies on the *telos* of norms to come to the conclusion that these situations ought in legal practice to be considered as conflicts. The *telos* of norms generally is to regulate behaviour, and the simultaneous prohibition and permission of the same behaviour is ultimately contradictory and does not achieve the aim of unequivocal regulation of conduct.[139] This is certainly true, and the continuous attention in scholarship, at conferences and in legal practice shows that the divergences between IHL and IHRL, even if not conflicting in the strict definition, raise numerous issues which obfuscate the clear and unequivocal regulation of State behaviour.[140] Because contradictory conflicts, just like contrary conflicts, stand in the way of effective regulation of behaviour, they ought to be recognised as conflicting, so mechanisms for conflict resolution can be operationalised.

This broader conceptualisation of normative conflict better accounts for the realities of interplay. After all, there are very real tensions between permissive rules on the one hand, and obligatory and prohibitive rules on the other hand. It does not make sense to conceive of conflict in an artificially narrow way, which denies and camouflages actual normative tensions.[141] Employing this

138 Vranes uses the example of two obligations, where one requires an individual to pay an indemnity of 100 USD, whereas another norm requires a sum of $200. The norm setting the lower amount *permits* paying *no more* than 100 USD, Vranes (n 119) 398.

139 Vranes (n 119) 410.

140 See e.g. the special issue in the *Journal of Human Rights and International Legal Discourse* 2018, vol. 12, issue 1, edited by Steven Dewulf and Katharine Fortin; Mark Lattimer and Philippe Sands (eds), *The Grey Zone: Civilian Protection between Human Rights and the Laws of War* (Hart Publishing 2018); Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford University Press 2011).

141 See also ILC Report 2006, p. 17-20.

broader concept of normative conflict allows for the resolution of tensions between such norms through tools for conflict resolution. Thus, the IHL permission to engage in status-based targeting in this conception conflicts with the IHRL right to life (except insofar as what constitutes an 'arbitrary' deprivation of life can be read in light of applicable IHL), and such conflict can be resolved through derogating one norm in favour of the other. Moreover, another archetype situation where there is tension between IHL and IHRL, where they both explicitly regulate a situation, but where one of the two (often IHRL) sets higher standards, can also fall under the definition of 'conflict'. This approach therefore recognises the realities of normative tensions between IHL and IHRL.

5.2 A typology of normative overlap: conflict, convergence and competition

5.2.1 The ICJ's categorisation of normative overlap

There are numerous ways to articulate the relationship between IHL and IHRL in normative terms. The main idea is to come to a typology of situations which *usefully* distinguishes between different situations, and which informs the subsequent assessment of the applicable law. In its Advisory Opinion on *The Wall*, the ICJ articulated three different situations when it comes to the application of IHL and IHRL. It held

> 'the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. (…)'[142]

Thus, the International Court envisages three situations. Situations covered solely by IHRL, situations covered solely by IHL, and situations covered by both. Crucially though, this consideration concerns situations where *both bodies of law have already been found to apply*. *Within* the situation where both IHL and IHRL apply, the Court finds, one can still distinguish between situations where there is actual normative overlap, and situations where although both legal regimes apply, the *right* in question is enshrined in one of the two alone. The Court thus also seemingly considers we ought to consider the normative relationship between the two legal regimes on the level of *specific norms*, rather

142 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 51) [106].

than as two legal fields as such.[143] Further, the Court apparently accepts the idea of situations of 1) normative overlap, and 2) 'normative neutrality', where although both bodies of law apply, only one regulates the specific situation. In the *Armed Activities* case, the Court cites this consideration, thereby confirming the distinction into the three categories, namely those of 1) normative overlap, and 2) exclusive regulation by IHL or 3) IHRL.[144] The International Court of Justice thus provides a basis, a starting point, for articulating the precise normative overlap in a specific situation, but its typology of situations remains rather rudimentary.

Broken down to the logical possibilities for co-application, what the Court finds comes down to the following. For both IHL and IHRL, there are two possibilities: either they regulate a situation and incident (or a 'right'), or they do not. This leads to four potential situations, or normative relations:

Figure 3:

All the ICJ therefore does, in its categorisation, is explain that these four options lead to three situations of interplay: either both regulate, or one of the two does. The option where both do not regulate is ultimately irrelevant for interplay, as there will then be discretion for the State to act as it sees fit within the confines of potential other international obligations. This very rudimentary way of breaking down interplay certainly makes sense, but because the situation the ICJ describes as rights that are 'matters of both these branches of international law' remains very broad and abstract, a further in-depth analysis of such situations is necessary to inform a useful model for interplay.

5.2.2 *Beyond conflict and convergence: the competition of norms*

Legal scholarship has attempted to complement this rudimentary categorisation of types of overlap, by dividing them into categories depending on their

143 Emphasising the importance of an assessment on the level of norms rather than regimes, see e.g. Helen Duffy, 'International Human Rights Law and Terrorism: An Overview' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar 2014); Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 40).

144 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (n 55) [216].

normative relationship. In line with the ILC's finding that international norms can be either in a relationship of interpretation, or a relationship of conflict, many scholars have looked in particular at two categories: conflict, and convergence.[145] Above, it was shown that the definition of what constitutes a normative conflict, is often construed as overly narrow. Even if it is expanded, however, it may be wondered whether all other situations ought to be construed as 'convergence', or 'harmonious'. After all, as the ICJ's categorisation shows, there are many situations in which either IHL or IHRL may not provide any rules, or may not regulate a situation in detail. This is most often the case when IHL does not regulate a certain situation, or does so only on a very rudimentary level. In such situations, if IHRL does regulate a situation, and moreover does so in a more detailed manner, then a 'gap-filling' approach might seem logical: simply apply IHRL to fill in the gaps left by IHL.[146] And as IHL does not provide anything, or does not regulate a situation in detail, there is moreover no conflict when IHRL is simply applied. As will be explored further below, this may however still distort the equilibrium IHL means to strike between humanitarian considerations and military necessity. There may thus be a *competition of norms* in such instances, because there is a real tension between what IHL purports to achieve, and what IHRL requires – even though IHL does not specifically regulate the situation. This reality militates against a 'gap-filling' approach, where IHRL fills gaps left by IHL, because if IHRL does

145 Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' (n 125); Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 40); Eirik Bjorge and Mads Andenas (eds), 'A Farewell to Fragmentation', *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015); Frans Viljoen, 'The Relationship between International Human Rights and Humanitarian Law in the African Human Rights System: An Institutional Approach' in Erika De Wet and Jann K Kleffner (eds), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations* (Pretoria University Law Press (PULP) 2014); Andrea Carcano, 'On the Relationship between International Humanitarian Law and Human Rights Law in Times of Belligerent Occupation: Not yet a Coherent Framework' in Erika De Wet and Jann K Kleffner (eds), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations* (Pretoria University Law Press (PULP) 2014); Vito Todeschini, 'Investigations in Armed Conflict: Understanding the Interaction between International Humanitarian Law and Human Rights Law' in Paul De Hert, Stefaan Smis and Mathias Holvoet (eds), *Convergences and Divergences Between International Human Rights, International Humanitarian and International Criminal Law* (Intersentia 2018); 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 K Kleffner (eds), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations* (Pretoria University Law Press (PULP) 2014); Greenwood (n 49); Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 European Journal of International Law 161.

146 See e.g. Robert Kolb, 'Human Rights and Humanitarian Law', *Max Planck Encyclopdia of Public International Law* (Edward Elgar Publishing 2013).

so in an unqualified manner, it may very well impose IHRL standards which conform much more to the 'humanitarian considerations' side of the equation than it does the military necessity side.

The *Practitioners' Guide to Human Rights Law in Armed Conflict* therefore moves beyond the categories of conflict and convergence, and distinguishes the following situations: 'First, [(i) IHL and IHRL] may establish complementary obligations. Second, [ii] one body of law may be silent with respect to an issue addressed by the other body of law. Third, [iii] there may be circumstances where one body of law specifically allows a course of action that may, at first sight, appear to be prohibited by the other body of law.' In a footnote, a fourth situation is alluded to, where '[iv] one body of law may require a party to do something prohibited by the other body of law'.[147] What the *Guide* therefore describes in its categories, are (i) situations of normative harmony and convergence, a (ii) category which is in principle non-conflictual because one body does not regulate the situation, and two types of situations of normative conflict ((iii) and (iv)).

It is submitted that based on this categorisation, and accounting for situations in which one body of law may regulate a situation in more detail than the other, or where the other may be silent altogether, that three overarching situations of normative overlap cast in terms of normative tensions must be distinguished. They conflict, they converge (or are in harmony), or they are in competition. This basic typology is illustrated by examples, and fleshed out further by exploring the various potential situations of overlap in light of this typology.

'*Conflict*' means that two norms are in conflict in the way that was explained in the previous section: they point in different directions, because the requirements under both norms are mutually exclusive, because one norm (implicitly) permits what the other prohibits, or because one norm (implicitly) permits not to do what the other requires. '*Convergence*' means that the norms in IHL and IHRL are in harmony with one another – they point in the same direction. It may be the case that they regulate the same situation in different degrees of detail, or even that one of the two contains no explicit rules, but either way there is no real tension between both norms. The idea of harmony here presupposes more than the simple absence of conflict: application of a norm also does not frustrate the object and purpose of the other. '*Competition*' means that whereas the two norms do not conflict, IHL and IHRL nevertheless pull in different directions. As was explained above, filling gaps in IHL through reliance on IHRL may readily lead to such tensions because it may distort IHL's balance between humanitarian considerations, and military necessity. The

147 Murray and others (n 81) 100–1, fn 101.

competition paradigm thus takes up a middle ground between conflict and convergence.

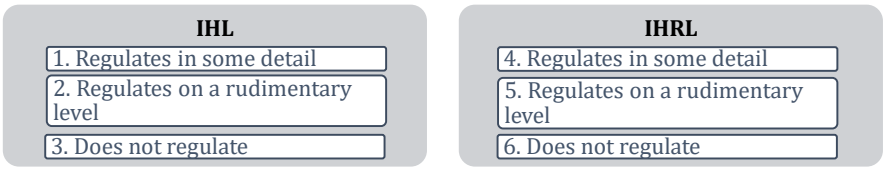
5.2.3 Theoretical situations of overlap

Typifying the normative relationship between norms of IHL and IHRL as 'converging', 'conflicting', or 'competing' provides an important, yet abstract understanding of interplay. In order to make this understanding more concrete, it must be applied to practical situations of interplay. In order to ensure the typology is sufficiently comprehensive, this requires an overview of the various ways in which norms can overlap. It is submitted there are eight relevant ways in which IHL and IHRL can co-regulate a situation – as opposed to the ICJ's three general categories.

It is submitted this rudimentary idea can be refined further, by accounting for the *level of specificity* with which a field regulates a situation. Taking account of situations where IHL or IHRL regulates a situation on a rudimentary level only, is important to meaningfully address many instances of interplay. After all, even though IHL is generally characterised by a high level of codification and detail,[148] IHRL's institutional supervision through human rights courts and bodies has given rise to a rich body of case-law which goes beyond any treaty regime. This means that in more than a few situations, both bodies do regulate a situation, but one does so in more detail than the other. By *rudimentary*, I thus mean relatively vague or open norms, which have not been fleshed out in any great detail. A prominent example of this would be investigations, where IHRL sets investigative standards in some degree of specificity, whilst IHL only provides very rudimentary instructions. The reality of interplay therefore makes it useful and necessary to take account of such situations – and therefore to come up with a slightly more refined categorisation than that proposed by the ICJ.

In broad strokes, this means we can sketch out situations where IHL and IHRL i) regulate a situation in detail, ii) regulate a situation in a more rudimentary fashion, and iii) where they do not regulate a situation:

Figure 4:



148 Robert Kolb, *Advanced Introduction to International Humanitarian Law* (Edward Elgar 2014) 76–7.

Logically, this means that there are a total of nine situations when combining each of these potential forms of regulation. If we list these situations, it looks as such:

i.	IHL regulates in some detail	– IHRL regulates in some detail
ii.	IHL regulates in some detail	– IHRL regulates on a rudimentary level
iii.	IHL regulates in some detail	– IHRL does not regulate
iv.	IHL regulates on a rudimentary level	– IHRL regulates in some detail
v.	IHL regulates on a rudimentary level	– IHRL regulates on a rudimentary level
vi.	IHL regulates on a rudimentary level	– IHRL does not regulate
vii.	IHL does not regulate	– IHRL regulates in some detail
viii.	IHL does not regulate	– IHRL regulates on a rudimentary level
ix.	IHL does not regulate	- IHRL does not regulate

Not all of these situations, however, are equally relevant to establishing a model for interplay. Situation ix, where neither regime regulates a situation, is irrelevant. Equally however, we may wonder whether the category of 'regulates on a rudimentary level' is really applicable to human rights law. Whereas human rights treaties certainly regulate most situations only in a very rudimentary fashion, the case-law of treaty bodies and courts fleshes out these obligations in great detail and arguably covers most issues of human rights law. The category of rudimentary regulation by IHRL is thus less relevant in practice, though as will be seen below, there are certainly situations in which IHL specifies obligations to be found in IHRL.[149]

Of course, it is possible to refine this categorisation even further. The distinction 'regulates in some detail' and 'regulates on a rudimentary level' is relatively vague, and the grey area between these categories could be subdivided into further categories. As the next section will show, however, for a useful typology of situations according to the extent to which they conflict, the present groupings suffice. What is left now, is to combine this list of potential situations of interplay with our typology of normative relations, in other words whether they conflict, converge, or compete. In doing so, examples are also provided to make these rather theoretical contemplations more concrete.

149 See also Sassòli, 'Le Droit International Humanitaire, Une Lex Specialis Par Rapport Aux Droits Humains?' (n 70) 385–95; Marco Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford University Press 2011) 72–8.

5.2.4 *Putting the framework together: situations of interplay articulated in normative terms*

Conflict

Normative conflicts between IHL and IHRL can arise roughly in three situations. First, quite obviously, when IHL and IHRL both regulate a situation in some matter of detail but in diverging ways, this can lead to conflict. An example is detention, where IHL in IACs provides a permission to detain combatants for the duration of hostilities, and where especially the ECHR contrarily prohibits deprivations of liberty, regulating exhaustively when such deprivation may exceptionally be lawful, which does not include internment. As explained, such tensions between positive permissions and prohibitions constitute a normative conflict. Similarly, instances where both legal regimes set similar standards but to different degrees, the situation of unilateral incompatibility, conflicts can arise. For instance, in the example of the administrative body reviewing internment measures, this would appear to be a system deliberately set up by IHL to regulate civilian internment during international armed conflict and occupation. There is then a lot to say for finding such regulation to conflict with the IHRL requirement of review by a regularly constituted and independent court, because IHL deliberately sets a lower threshold which accommodates the combat reality of detainees regularly numbering in excess of 100.000 individuals.[150] Viewing IHL as not only obligating review by an administrative board, but also as implicitly permitting not doing more than that, allows for the recognition of a conflict in such situations. If the situation is classified as conflictual, it can be resolved through the application of tools for conflict resolution which *can* (though not necessarily) provide precedence of the IHL standard over the more demanding IHRL requirement of a regularly constituted court.[151]

Second, instances of conflict can also arise where both bodies of law regulate a situation, and one does so in detail and the other does so in a more rudimentary fashion. This is in essence the situation where normally one body of law is used to specify open norms in the other legal regime. This has for instance been the case where the right not to be *arbitrarily* deprived of life as it is codified in the ICCPR and the ACHR, was interpreted during armed conflict to fall to be determined by rules of IHL. The ICJ thus held that what is an

150 Ashley S Deeks, 'Predicting Enemies' (2018) 104 Virginia Law Review 1529, 1534.

151 Cf. the Grand Chamber of the ECtHR's ruling in *Hassan v UK*, where it held that whereas a 'competent body' under IHL may satisfy the standards under art 5 ECHR, the body will need to provide 'sufficient guarantees of impartiality and fair procedure', *Hassan v UK* (n 41) [106]. IHRL standards can therefore still inform the application of IHL, even if the IHL norm here is given precedence.

'arbitrary' deprivation during armed conflict is dependent on IHL,[152] but as Lawrence Hill-Cawthorne explains, in doing so set aside the Human Rights Committee's case-law stipulating when deprivations of life are lawful.[153] Thus, even if this approach can formally be viewed as one of harmonious interpretation[154] – an open norm is interpreted in light of other applicable law – this may camouflage the actual conflict between the standards for the protection of the right to life *as fleshed out in jurisprudence* and the rules for status-based targeting under IHL. Thus in certain instances, where IHL informs the interpretation of an open treaty norm in IHRL, this may in fact concern a situation of conflict. This may similarly be the case where IHRL regulates a situation in more detail, such as is the case for torture.[155] While torture is prohibited under both IHL and IHRL, under IHRL there is a large body of case-law interpreting that prohibition and defining it subject to strict criteria. It may seem that the more detailed rules of IHRL ought to then be used to interpret the IHL prohibition of torture, but as it turns out this could lead to normative conflict. Under IHRL, torture is generally defined as requiring the involvement or presence of a State agent,[156] whereas under IHL it is important not to exclude conduct perpetrated by non-State armed groups.[157] Simply applying the IHRL standards, which arguably are more detailed than IHL on the issue of torture, may thus conflict with what IHL aims to achieve: binding all parties to a conflict, equally.

Third and finally, conflicts may also arise when IHL is silent on a certain subject which is regulated by IHRL. Normally, one might assume that in such situations IHRL can simply be used to fill the gaps left by IHL, and no conflict arises. And in fact, an example thereof will follow below, when explaining the model of convergence. But in other situations, a silence in IHL may rather

152 *Legality of the Threat or Use of Nuclear Weapons* (n 50) [25]. The Inter-American Court has similarly interpreted 'arbitrary' to fall to be determined by reference to IHL: IHL can be used 'to give content and scope to the provisions of the American Convention', *Case of the Serrano Cruz Sisters v El Salvador* (Preliminary Objections) Inter-American Court of Human Rights Series C No 118 (23 November 2004) [119]. Applying this to the right to life, see *Cruz Sánchez et al. v Peru* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 292 (17 April 2015) [272]. Further, see Chapter 6, §6.3.3.

153 Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' (n 27).

154 d'Aspremont and Tranchez (n 15); Todeschini (n 145).

155 Sivakumaran (n 63) 88–9.

156 CAT, art 1, see further Nowak (n 96). The CtAT has, however, opened up this definition somewhat through due diligence obligations, see *General Comment No. 2*, CtAT 24 January 2008, CAT/C/GC/2 [18].

157 Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' (n 149); Nowak (n 96).

be viewed as a *qualified* silence.[158] What is meant by this, is that IHL *means* to leave it open for States to decide how they wish to act, and therefore *purposefully* leaves discretion for the State. In essence, this viewpoint relies on the classic position that sovereign States enjoy freedom of action unless and insofar as restricted by international law.[159] If IHL intentionally does not regulate a situation, or does not flesh out the exact way *how* an obligation must be fulfilled, this may be intended to leave States free (subject of course to the Martens clause which at least obliges States to observe minimum levels of humanity).[160] In certain situations, IHL's silence on a matter may therefore reflect the fact that military necessity dictates States be left wide discretion to handle a situation, or to flesh out a more general obligation. Simply supplanting this discretion by detailed rules of IHRL may then in practice conflict with IHL, as IHL in such situations means to provide for an *implicit permission*. An example of this might be found in the context of the right to life and investigations, with regard to the IHRL requirement of *transparency*. In the words of the Human Rights Committee, this requires States to establish the truth regarding deprivations of life by *inter alia* making public the 'reasons and legal basis for targeting certain individuals and the procedures employed by State forces before, during and after the time in which the deprivation occurred', as well as the criteria for the use of lethal force, both generally and for specific cases, and details of the decision-making process leading to the application of force.[161] IHL, meanwhile, provides nothing as regards transparency,[162] but as State practice shows, States are very reluctant when it comes to giving clarity on their military strategies, citing national security interests.[163] It is certainly arguable that in leaving this open, IHL meant to leave States free to decide what level of transparency they wish to achieve, though there is some speculation in estimating the extent to which IHL *purposefully* leaves certain issues open.

158 Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' (n 149) 77. Similarly, see Sivakumaran (n 63) 92; Sandesh Sivakumaran, 'Re-Envisaging the International Law of Internal Armed Conflict' (2011) 22 European Journal of International Law 219, 240.

159 *The Case of the S.S. 'Lotus'*, Judgment (7 September 1927) *P.C.I.J. Series A. No. 10* [44].

160 See further Chapter 2, §3.

161 *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life*, HRC 30 October 2018, CCPR/C/GC/36 [28] and [64]. Further, see Chapter 5, §5.3.6 and 6.4.3.

162 Beyond obligations to collect dead combatants, see GC I, art 15-17; GC II, art 18-21; GC III, art 120-121. Further, see Susan Breau and Rachel Joyce, 'The Responsibility to Record Civilian Casualties' (2013) 5 Global Responsibility to Protect 28, 34ff.

163 Liesbeth Zegveld, 'Body Counts and Masking Wartime Violence' (2015) 6 Journal of International Humanitarian Legal Studies 443.

Convergence

Convergence between IHL and IHRL can be observed where norms of these bodies ultimately drive in the same direction. In such situations, both norms strive to achieve largely the same aim – though sometimes in different ways – with no conflict between them. They are, in other words, in harmony. Situations of convergence can again, roughly, be subdivided into three categories.

First, IHL and IHRL can converge where both contain detailed regulations. A prime example are the standards of treatment of detainees set by both legal regimes. Whereas as was explained before the legal basis for deprivation of liberty may give rise to normative conflict, conditions of treatment of detainees largely converge. Both legal regimes here aim to safeguard humane detention conditions, and both do so in a matter of detail.[164] Thus, IHL requires POWs are treated humanely, that their conditions of detention meet standards of human dignity, that they are provided medical care, and are ensured protection against threats to life or ill-treatment.[165] IHRL sets similar standards through the right to physical integrity and humane treatment, as fleshed out by the various courts and treaty bodies.[166] The detailed rules in both regimes in this context are complementary and they reinforce each other. Insofar as they diverge, both norms can easily be applied concurrently without any conflict arising. Take for example the very specific IHL safeguard requiring that soap and tobacco may not be sold to prisoners of war above local market price.[167] IHRL does not have any equivalent to this, but simply applying it in no way goes against what IHRL aims to achieve. The relationship is thus harmonious.

Second, when IHL contains only rudimentary rules as compared to IHRL's detailed jurisprudentially fleshed-out standards, the two may also converge. Typically, these are situations where IHL contains an open norm which aims to achieve the same result as the more detailed IHRL norm, and where the open norm is thus interpreted in light of detailed IHRL standards. A textbook example of this is the interpretation of Common Article 3's requirement of a 'judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples' for sentences or executions. IHL provides no further details for this obligation, but the aim of safeguarding judicial guarantees fully converges with IHRL's refined body of fair trial standards.[168] This applies similarly to the IHL

164 Further, see Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict* (Oxford University Press 2016).

165 Murray and others (n 81) 180–89.

166 Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, Oxford University Press 2013).

167 GC III, art 28.

168 Duffy, 'International Human Rights Law and Terrorism: An Overview' (n 143); Heintze (n 60); Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 40).

requirement of a 'fair and regular trial' during IACs.[169] Thus, because the aim of safeguarding fair criminal trials is shared between both fields, IHL's rudimentary guidelines converge with the more elaborate standards set by IHRL, which allows for application of both in harmony.

This can also be the case the other way around, where IHL provides more specific guidance than IHRL's open norms, such as those regarding humane treatment. IHRL does not specifically regulate the use of weapons beyond its general protections of life and physical integrity, whereas IHL very specifically outlaws or restricts the use of certain types of weaponry, such as landmines and incendiary weapons.[170] Because IHRL does not normally specifically address the use of such weapons, IHL here fleshes out and specifies the more general IHRL norms covering the use of force. IHL outlaws such weaponry because of its 'excessively injurious' or indiscriminate nature, and thus serves a humanising purpose. IHL and IHRL thus converge on this point, and are in harmony.[171]

Third, IHL and IHRL can converge where one of the two regulates, and the other does not. This is the case where IHL is silent, but where this does not, as was touched upon earlier, constitute a qualified silence. Such situations, viewed from the ICJ's conceptualisation in its *Wall* Opinion, fall in the category where even during armed conflict a situation is exclusively a matter of human rights law.[172] A case in point is the freedom of expression, which is not generally covered by IHL.[173] Because IHL does not regulate this issue, and because no tension arises by simply applying IHRL, this issue is an oft-cited example where no real tension exists between IHL and IHRL: IHL does not regulate expressions, and there is no reason to diverge from regular human

169 Murray and others (n 81) 182–3.

170 See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211, art 1; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (adopted 10 October 1980, entered into force 2 December 1983), Protocol III to Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 137.

171 It ought to be noted that although the presumption may be that any weaponry outlawed under IHL must therefore *ipso facto* also be unlawful under (the more protective) IHRL, this is not so. Law-enforcement and riot-control weaponry such as tear gas is outlawed under IHL, but is legal under IHRL, and its use may in fact be required by IHRL – concerned as it is with restricting lethal force. See Hampson, 'The Relationship between International Humanitarian Law and International Human Rights Law' (n 78) fn 18.

172 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 51) [106].

173 For an arguable exception where IHL does have something to say on this topic, see GC III, art 76, which allows censorship of POW correspondence. Daniel Bethlehem, 'The Relationship between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2013) 2 Cambridge Journal of International and Comparative Law 180, 191.

rights practice.[174] The right to marry is equally governed by IHRL only, with IHL being silent and in no way militating against simple application of IHRL.[175] This works the same the other way around, where IHL regulates a situation which is not governed by IHRL. IHL contains many such rules, as it regulates in detail many technical aspects of warfare and the organisation of States' armed forces. An example of a rule with no counterpart under IHRL would be the rules concerning the ICRC's distinctive emblem. The respect for and protection of those emblems under IHL in no way raise tension with IHRL, which means they can be applied under a paradigm of convergence. In other words, the law is in harmony in these situations.

Competition

Competition of norms takes up a middle ground between conflict and convergence. It concerns situations where although norms do not conflict, not even in the broader definition articulated above, they nevertheless pull in different directions and thus result in normative *tension*.

By way of example, first of situations where IHL provides rudimentary rules, one may think of investigations. Whereas both IHL and IHRL provide for a duty to investigate and these legal regimes in this broader sense converge, when it comes to investigative *standards*, IHL provides very rudimentary guidance only, and IHRL prescribes detailed rules of conduct. Simple application of human rights standards of investigation may, nevertheless, raise tensions with the IHL system. As is exemplified by the European Court case of *Jaloud v the Netherlands*, the application of detailed investigative standards as to the independence and effectiveness of the investigation may lead to results which are at odds with operational realities and military necessity. The Court stressed the importance of separating the subject of investigations from witnesses to prevent collusion and interviewing him promptly to prevent any risk or appearance of collusion,[176] but the suspect in this case was the highest ranking officer present. Separating him from the other troops would have significantly impacted the military's operational capabilities on the ground in a tense security situation where the Iraqi checkpoint had in fact been attacked earlier that very evening. Whereas IHL does not provide rules *explicitly* opposing this approach, it is submitted that military necessities nevertheless quite clearly pull in a different direction. Section 6.5 proposes a way to address such issues of competition.

174 E.g. Milanović, 'The Lost Origins of Lex Specialis' (n 47); Droege (n 4); Françoise J Hampson, 'The Relationship Between International Humanitarian Law and Human Rights Law From the Perspective of a Human Rights Treaty Body' (2008) 90 International Review of the Red Cross 849.

175 Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' (n 27).

176 *Jaloud v the Netherlands* (n 44) [206]-[208].

Finally, an example of a situation where IHL does not provide rules but where application of IHRL may nevertheless result in normative competition, can be found in the context of internment in non-international armed conflict. IHL treaty rules in this field are rudimentary, and whether IHL provides any authority for States or non-State armed groups to intern is subject to heated debate, which raises issues under the IHRL requirement of a *legal basis* for any deprivation of liberty.[177] Even if such a legal basis *is* provided for by IHL, or by domestic law for that matter, IHL only provides for certain standards of treatment for internees, but no procedural guarantees.[178] IHRL on the other hand, does provide for procedural protections, such as importantly the right to *habeas corpus*.[179] A firm argument can be made why IHRL ought to fill the gap left by IHL here, but this may still cause tension with IHL even if it does not as such regulate this issue. After all, detention is part and parcel of armed conflict, which is why under the framework of international armed conflicts, combatants may be detained simply for their taking part in the conflict, until the end of hostilities.[180] The same interest, the same military necessity, exists in NIACs for the internment of civilians taking a direct part in hostilities (or for internment by non-State armed groups). The sheer number of individuals detained in such conflicts can be argued to militate against providing full procedural guarantees, especially if the legal basis for the detention is simply their taking part in hostilities. Thus, there is at least an arguable case why despite IHL's silence, the application of the procedural guarantees provided by IHRL gives rise to competition with IHL. It must be stressed here that this potential normative competition in no way justifies the indefinite detention without review of individuals as takes place in Guantánamo Bay. This practice is legally untenable for a plethora of reasons,[181] and it ought to be recalled that the United States' justifications for this practice rely on a combination of denial of extraterritorial application of human and constitutional rights, and a denial of IHL status because they would classify as 'unlawful combatants'.[182] Section 6.5 explains how such competition *should* be resolved, in a way which does justice to both IHL and IHRL.

177 Daragh Murray, 'Non-State Armed Groups, Detention Authority in Non-International Armed Conflict, and the Coherence of International Law: Searching for a Way Forward' (2017) 30 Leiden Journal of International Law 435; Hill-Cawthorne, *Detention in Non-International Armed Conflict* (n 164).

178 See CA 3 and AP II, art 5.

179 ICCPR, art 9; ACHR, art 7; ECHR, art 5.

180 Hill-Cawthorne, *Detention in Non-International Armed Conflict* (n 164).

181 Helen Duffy, *The 'War on Terror'' and the Framework of International Law'* (Cambridge University Press 2015) 665–746.

182 Cf. Sassòli, *International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare* (n 65) 441.

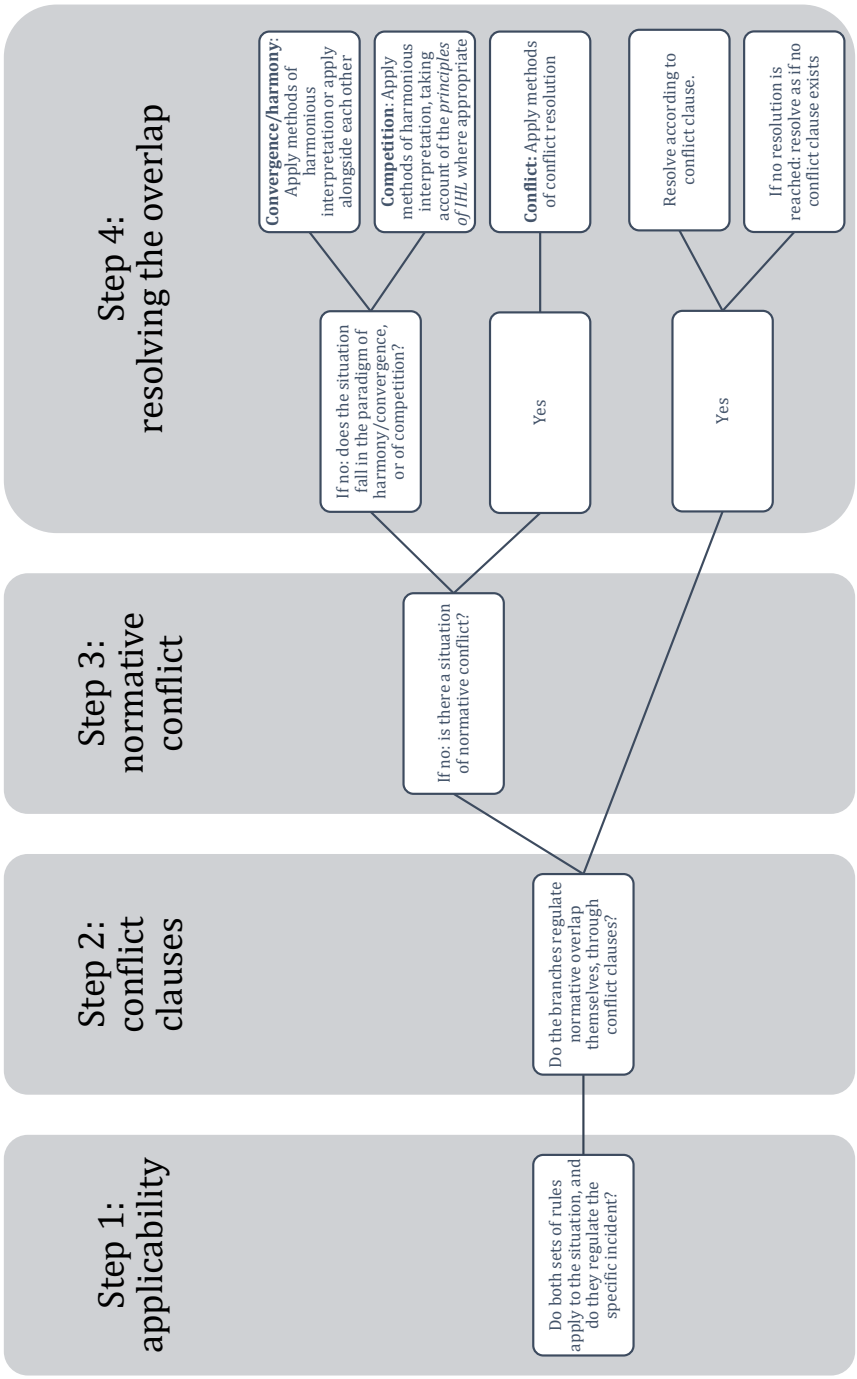
5.3 Résumé: refining the methodology for interplay

The aim of this section has been to come up with a typology which usefully distinguishes between various situations of normative overlap between IHL and IHRL. Because it was determined that the regulation or resolution of overlap of norms in the international legal system hinges on the existence or not of *normative conflict*, a typology of situations was devised which puts the relation between norms centre stage. It was shown how a narrow conception of what constitutes conflict, is ultimately underinclusive and therefore unhelpful. Drawing on legal theory, a broader conception of conflict was therefore proposed.

When taking stock of the various practical situations in which issues of interplay arise, it turned out that even under the broader conception of conflict, certain situations falling outside its scope nevertheless give rise to real tensions between IHL and IHRL. A binary distinction between situations of conflict and harmony were therefore thought to be inconsistent with the more multi-layered and nuanced reality of interplay. This ultimately led to embracing a third category of overlap, that of normative competition, in addition to the situations of conflict and harmony or convergence.

It was further shown how the various theoretical situations of overlap fit within the normative typology of conflict, convergence and competition. Whether a specific situation concerns conflict, convergence, or competition, ultimately determines how the overlap of norms is resolved. Before turning to this issue in the next section, the step-by-step flowchart for interplay can now be further refined to account for situations of normative competition. This involves one additional step to be taken if it is determined there is no normative conflict. A situation can then still fall under the paradigm of convergence or that of competition. This will determine the precise way to resolve the instance of interplay, as is explained in the next section.

Figure 5: a refined methodology for interplay



6 SOLVING SITUATIONS OF INTERPLAY

6.1 Introduction

The methodology developed thus far, shows that it is key to decide whether a specific instance of normative overlap between IHL and IHRL, concerns a situation of conflict, convergence, or competition. What is left to determine now, once it has been determined how the overlap must be categorised, is how the overlap can actually be *resolved*. That is the aim of this section.

To do so, this section examines in turn how conflict, harmony and competition shape the end result when it comes to the law as it must be applied by States. Before doing so, it also looks at the situation when a relevant derogation has been made by the State, modifying its human rights obligations (signified as a preliminary step in the methodology for interplay).

6.2 The limited role of conflict clauses and derogations

6.2.1 Introduction

The interplay decision tree sets out how, after having determined IHL and IHRL apply both to a situation and to a specific incident, it must be assessed whether a conflict clause regulates the relevant interplay between IHL and IHRL. A conflict clause is a secondary norm, which directly regulates how a conflict of norms with another body of law must be resolved. IHL does not contain such conflict clauses; certain IHRL treaties do to a certain extent. Such clauses generally provide for the continued applicability of the treaty in light of armed conflict, though they may give precedence to (certain provisions of) the Geneva Conventions should any conflict arise. Andrew Clapham has listed these treaties, as discussed below.[183]

A case in point is the International Convention against the Taking of Hostages (1979), which remains applicable during armed conflicts, but stipulates it is not applicable to acts of hostage-taking covered by the *aut dedere aut iudicare* obligation under the grave breaches provisions of the Geneva Conventions.[184] It thus gives precedence to the pre-existing obligation to extradite or prosecute under the Geneva Conventions over its own system of similar obligations. The Convention against Enforced Disappearance (2006) similarly provides it applies 'without prejudice to' provisions of IHL, the

183 Andrew Clapham, 'The Complex Relationship Between the Geneva Conventions and International Human Rights Law' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (Oxford University Press 2015).

184 International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205, art 12; Clapham (n 183).

Geneva Conventions and the Additional Protocols.[185] This wording indicates that although the CED applies concurrently with IHL, it must not be interpreted in ways which conflict with IHL, meaning any potential conflict ought to be resolved by reference to the applicable IHL.[186] Of a different nature is the Inter-American Convention on Forced Disappearance of Persons (1994), which explicitly excludes applicability to international armed conflicts covered by the Geneva Conventions and AP I.[187] It thus avoids normative conflict by simply precluding application to situations of IAC – though it does apply concurrently with the IHL governing NIACs, and does not provide for a conflict clause for such situations.[188]

Beyond these treaties, IHRL does not provide for explicit conflict clauses regulating the relationship with IHL.[189] IHL and IHRL thus do not regulate in any sort of comprehensive manner how they interrelate. There is, however, another mechanism which can alleviate tensions between the two regimes: the derogations regime under human rights law.

6.2.2 *Derogations and conflict clauses*

As was set out in Chapter 4, the ICCPR, ACHR and ECHR contain derogation clauses, providing States with the right to derogate from certain human rights obligations in case of armed conflict or national emergency.[190] If States were to make use of such clauses whenever an armed conflict arose, this would allow for a calibration between both bodies of law, as the stringencies of what is required under IHRL during peace time, would then be loosened and recourse could more readily be had to the oftentimes more lenient standards for individual protection under IHL. It is submitted, however, that derogations clauses ultimately cannot classify as conflict clauses, for a number of reasons.

Firstly, the existence of an armed conflict is a *factual* circumstance, divorced from whether parties to the conflict acknowledge its existence and from formal declarations of war.[191] As soon as an armed conflict exists, IHL becomes applicable. IHRL applies full stop, whenever a State has jurisdiction. As soon as as a matter of fact an armed conflict arises, both therefore apply as a matter of law. The derogations regime, in contradistinction with IHL, is contingent on a State's formal derogation from certain human rights obligations through

185 CED, art 43; Clapham (n 183).
186 Further on the meaning of the phrase 'without prejudice to', see Mus (n 76) 214–5.
187 Inter-American Convention on Forced Disappearance of Persons (adopted 9 June 1994, entered into force 28 March 1996), E/CN.4/2003/WG.22/Misc.1, art XV.
188 Clapham (n 183).
189 As Clapham explains, there are further human rights treaties which refer explicitly or implicitly to situations of armed conflict, but without any rules alluding to the regulation of interplay – meaning they are not conflict clauses. See Clapham (n 183).
190 ICCPR, art 4(1); ACHR, art 27(1); ECHR, art 15(1). See the discussion in Chapter 4, §4.6.
191 See Chapter 2, §4.2.

notification. If the derogations regime is meant to regulate the interplay between IHL and IHRL, this is therefore a logical gap: whereas the existence of an armed conflict and the applicability of IHL are automatic once the conflict erupts, if derogations are to regulate interplay, a formal recognition and notification by States is necessary, in fact perhaps both of the existence of the conflict, *and* of a wish to derogate.[192] The applicability of a conflict clause, and a properly calibrated interplay regime, is then conditioned on a State's formal response, which is precisely what IHL aims to avoid: it is conditioned on a *factual situation* only, not on formalities.[193] If a system is used where derogations clauses are meant to operate as conflict clauses, there will necessarily be a period of time where IHL and IHRL apply without the derogations regime being applicable.

Secondly, in cases where States are not willing to derogate – which is often the case[194] – this effectively prevents the derogation clause from operating as a conflict clause.[195] An often used counterargument is that if States *choose* not to derogate, they therefore *choose* to apply the more demanding system that is IHRL, which is certainly open to them (operating under the presumption that IHRL is indeed more protective and more demanding, which is not always the case).[196] Whether it makes sense to perceive of such an optional clause as a proper conflict clause, must, however, be questioned. After all, this would mean that unless States derogate, IHRL automatically takes primacy over IHL, which as was pointed out above is not in line with general international law. In fact, it would mean that derogations clauses are conflict clauses *claiming*

192 The ECtHR in *Hassan* partly remedied the imperfection in the derogations regime as a conflict clause, by accepting the existence of 'implied derogations'. This remedies the gap between the (sudden) eruption of an armed conflict and the possibility to formally derogate, but this applies to *international* armed conflicts only; *Hassan v UK* (n 41) [101]-[104] and [107]; further see Chapter 7, §6.3. Moreover, the Court accepts this only if States invoke IHL. As such invocation of IHL will take place during proceedings before the Court only, this clearly does not solve any issue of applicable law during the conflict. As a final limitation on the ECtHR's acceptance of implied derogations, it has done so thus far under the right to liberty and security enshrined in Article 5 of the ECHR only.

193 Hampson, 'The Relationship Between International Humanitarian Law and Human Rights Law From the Perspective of a Human Rights Treaty Body' (n 174) 565.

194 Hampson, 'Article 2 of the Convention and Military Operations during Armed Conflict' (n 33) 191; Daniel Bethlehem, 'When Is an Act of War Lawful?', *The Right to Life under Article 2 of the European Convention on Human Rights. Twenty Years of Legal Developments since McCann v. the United Kingdom. In Honour of Michael O'Boyle* (Wolf Legal Publishers 2016) 234.

195 States may opt not to derogate for political reasons, as particularly during NIACs, the recognition of the existence of a NIAC may be perceived as providing some sort of legitimacy and at the very least legal standing to a non-State armed group engaging the State. Moreover, derogations signify a loss of control, an image States may also wish to avoid.

196 Ziv Bohrer, 'Human Rights vs Humanitarian Law or Rights vs Obligations: Reflections Following the Rulings in Hassan and Jaloud' (2015) 16 Questions of International Law 5. An example might be IHL's prohibition of law-enforcement and riot-control weaponry such as tear gas, which is legal under IHRL; see Hampson, 'The Relationship between International Humanitarian Law and International Human Rights Law' (n 78) fn 18.

primacy over conflicting rules, *unless* States notify they wish to derogate. If IHRL were indeed to claim priority through derogations clauses, thereby deviating from international law, one would expect this to be formulated explicitly and unequivocally. However, it is the complete opposite: *if* we want to perceive derogations clauses as such, this must be based on inferences and remains entirely implicit. Moreover, as a matter of practice, derogations are hardly ever used for armed conflict situations, illustrating States do *not* view them as conflict clauses.[197]

Thirdly and relatedly, conditioning the interplay regime on derogations will readily lead to belligerent inequality, because in inter-State conflicts both parties will have the *possibility* to derogate, and the possibility to do so from *certain rights* only. They are likely not to do so identically, meaning they will have diverging legal obligations, in contravention with the principle of belligerent equality.

Fourthly, relying on the derogations regime is liable to import through the backdoor issues under the *ius ad bellum*. As Peter Kempees argues, the initiator of an aggressive war cannot presume to invoke a derogations provision. He explains how, by way of example, the national socialist regime during World War II would not have been in the position to derogate from their human rights obligations because they had started a war of aggression.[198] If this is indeed so, then the strict separation of *ius ad bellum* and *ius in bello* could be jeopardised by making the interplay between IHL and IHRL reliant on derogations which only one party to the conflict can use. This would, again, also put at risk the belligerent equality between the parties to the conflict.

Finally, a number of rights has been recognised as non-derogable, meaning these rights are not subject to derogations clauses and when such rights are at issue, no recourse to a conflict clause is foreseen. Some of the human rights which are non-derogable, are precisely the ones which are most contentious under interplay, namely the rights not to be deprived arbitrarily of life and liberty. Whereas derogations clauses can therefore affect interplay, this is best viewed as affecting a State's substantive human rights obligations, which may very well affect the question whether a normative conflict with IHL exists, but it cannot be viewed as a conflict clause which solves the relationship with IHL. If States do derogate this can certainly alleviate normative tensions,[199] but derogations clauses must not be perceived as conflict clauses as such.

197 See e.g. Hampson, 'Article 2 of the Convention and Military Operations during Armed Conflict' (n 33) 191.

198 Peter Kempees, *Thoughts on Article 15 of the European Convention on Human Rights* (Wolf Legal Publishers 2017); Kempees (n 42) 85–6.

199 Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 40).

6.2.3 *The effects and relevance of derogations*

If derogation clauses cannot be perceived of as conflict clauses, what is then to be the legal effect of a derogation is one is entered? Derogations from human rights potentially influence the interplay between IHL and human rights law by allowing States to deviate from the stringencies of human rights law when a public emergency or armed conflict 'threatening the life of the nation' erupts.[200] In such situations, they may deviate from human rights obligations (1) insofar as strictly required by the emergency, and (2) insofar as such deviations are in line with other international obligations of the State, only (3) if they notify the relevant institution of such derogation. States moreover have to make clear from which rights they derogate.[201]

The *effects* of derogations are to lower relevant human rights standards *to the extent strictly required* to cope with an emergency or conflict – they do not invalidate the human right (let alone the human rights treaty) as such. Further, they remain subject to proportionality review by supervisory bodies, whose supervisory jurisdiction is not affected by derogations.[202] This means that as far as interplay is concerned, human rights, even when lawfully derogated, still apply and regulate a situation. Derogations *lower* the applicable standard, which may very well alleviate normative tensions between IHL and IHRL, because the human rights standard under such circumstances likely no longer requires more than IHL does. This is liable to alter the nature of normative overlap – where two norms in principle conflict, derogations can bring IHRL in harmony with IHL. By way of example, where IHL allows for the internment of combatants for no other reason than their participation in hostilities, this in principle results in normative conflict with the European Convention's exhaustive list of grounds for deprivation of liberty. If a State derogates from the right to liberty, it can avoid such conflict as this lowers the applicable standards under the right to liberty, bringing them in line with

200 ICCPR, art 4(1); ACHR, art 27(1); ECHR, art 15(1).

201 Ibid. See further Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis. Emergency Powers in Theory and Practice* (Cambridge University Press 2006); Jan-Peter Loof, 'Crisis Situations, Counter Terrorism and Derogation from the European Convention of Human Rights. A Threat Analysis' in Antoine C Buyse (ed), *Margins of Conflict. The ECHR and Transitions to and from Armed Conflict* (Intersentia 2009); Jan-Peter Loof, 'On Emergency-Proof Human Rights and Emergency-Proof Human Rights Procedures' in Afshin Ellian and Gelijn Molier (eds), *The State of Exception and Militant Democracy in a Time of Terror* (Republic of Letters Publishing 2012).

202 *General Comment No. 29: Article 4: Derogations during a State of Emergency*, HRC 31 August 2001, CCPR/C/21/Rev.1/Add.11 [4]-[6]; *Lawless v Ireland*, ECtHR 1 July 1961, Appl No 332/57 [31]-[38]; *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights)* (Advisory Opinion) Inter-American Court of Human Rights Series A No 8 (30 January 1987) [22] and [38]. Further, see Chapter 4, §4.6.

IHL.[203] The essence of the derogation is thus to alter the substance of the human rights obligation, or to bring it down to its core, to provide the necessary level of realism to human rights protection in situations of emergency and armed conflict. This can also lead to *avoidance* of conflicts with IHL – without however directly addressing the relationship between IHL and human rights law.

In terms of the decision tree on interplay as articulated in this chapter, however, this does not fundamentally change anything: the interaction of the IHL norm and the now less demanding human rights norm still needs to be articulated in terms of conflict, harmony or competition. Whereas conflicts can thus be more readily avoided when derogations are used, they do not as such regulate the interaction between IHL and IHRL, and they do not for instance provide for deferral to IHL as the relevant legal standard.

In conclusion, whereas the reliance of States on derogations during armed conflicts can go a long way to alleviate conflicts between IHL and IHRL, they do not as such address the relationship between the two legal regimes. They are not, therefore, conflict clauses. This means that even if a derogation has been made, the additional steps in the decision tree have to be followed to assess whether a situation concerns conflict, competition or convergence.

6.3 Conflicting norms

6.3.1 Introduction

In situations of conflict, which should be understood as rules which are each other's contradictory or contrary opposites, a choice has to be made. Where a contrary obligation to act and a prohibition apply simultaneously, or where a positive permission and a prohibition apply simultaneously, the law is in conflict, and tools for conflict resolution have to be applied. As explained above,[204] the international legal system acknowledges three tools for the resolution of normative conflict: *lex superior*, *lex posterior*, and *lex specialis*.[205] *Lex superior* is a method which resolves normative conflict by reference to the hierarchy of norms: the higher norm prevails. As was explained above, the international legal system is not principally hierarchical in nature, and the

203 See *Hassan v UK* (n 41), where the Grand Chamber notably held to this effect based on *implicit* derogations.

204 See section 4.2, *supra*.

205 ILC Report 2006, p. 208 and 249, where the ILC stipulates that 'The techniques of *lex specialis* and *lex posterior*, of *inter se* agreements and of the superior position given to peremptory norms and the (so far under-elaborated) notion of "obligations owed to the international community as a whole" provide a basic professional tool-box that is able to respond in a flexible way to most substantive fragmentation problems'.

only norms with superior status to others are those of *ius cogens*.[206] The effect of *ius cogens* norms, according to the Vienna Convention on the Law of Treaties, is to invalidate not just a treaty rule conflicting with such a hierarchically superior norm,[207] but to invalidate the conflicting treaty as a whole.[208] Moreover, according to the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, all States must cooperate to put any violations of *ius cogens* norms to an end.[209] In practice, however, *ius cogens* takes up a modest place in the international legal system and it does not feature prominently in discussions on the interplay of IHL and IHRL. Insofar as *ius cogens* obligations exist in this field, they likely overlap, such as is the case for the prohibition of torture.[210] Because of this, conflicts between IHL or IHRL on one side, and a *ius cogens* obligation of the other regime on the other, are therefore likely non-existent. And this may be for the better, because even though *lex superior* potentially provides a clear-cut way of resolving normative conflict, the VCLT's rather radical solution of voiding an entire treaty which conflicts with *ius cogens*, could lead to the complete invalidation of an IHL or IHRL treaty – which hardly seems to be a solution.[211]

Lex posterior is a rule of precedence, favouring the more recent rule over the older one. As Article 30 of the VCLT stipulates, when all parties to a treaty subsequently become party to a later treaty relating to the same subject-matter, and these treaties do not regulate their interrelationship amongst themselves, the older treaty 'applies only to the extent that its provisions are compatible with those of the later treaty'.[212] In other words, the younger treaty takes precedence in case the way they regulate a certain subject, diverges. This rule does not, however, readily regulate the relationship between IHL and IHRL.[213] It cannot reasonably be argued that because the ECHR was concluded after the Geneva Conventions, it therefore takes precedence, nor can it reasonably be argued that because the Additional Protocols were concluded after that, that they take precedence over the ECHR. The prior/subsequent relation between various IHL and IHRL treaties simply does not logically regulate how IHL and IHRL interrelate. Similarly, even within the branch of human rights law such arguments do not hold sway, as the entry into force of the ICCPR

206 See Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 European Journal of International Law 491, 494–6.

207 If a norm of *ius cogens* emerges *after* a treaty norm already existed, it might however be separable pursuant to VCLT, art 44, under further conditions. See Ulf Linderfalk, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2007) 18 European Journal of International Law 853, 861, fn 37.

208 VCLT, art 53 and 64.

209 ARSIWA, art 41.

210 On the relationship between the IHL and IHRL prohibitions of torture, see Nowak (n 96).

211 See further Linderfalk (n 207).

212 VCLT, art 30(3).

213 Milanović, 'The Lost Origins of Lex Specialis' (n 47) 112.

in 1976 in no way takes precedence over the 1954 ECHR.[214] For IHL and IHRL such conclusion moreover follows from the applicability requirement of *lex posterior* that *all parties to a treaty* become party to the subsequent treaty; levels of ratification between IHL and IHRL diverge strongly, and no human rights convention can boast the same level of universality as the Geneva Conventions can.[215]

This leaves us with the principle of *lex specialis derogat legi generali*, the principle the ICJ relied on in its *Nuclear Weapons* Opinion as the method to solve issues of interplay. Since then, this principle has garnered the large majority of scholarly attention when discussing interplay.[216] The basic functioning of *lex specialis* as a method for conflict resolution is that when a conflict of norms arises, the law which most specifically governs the situation giving rise to the conflict, takes precedence.[217] However, care must be taken to distinguish this operation of *lex specialis* from its function as a method for *interpretation* and conflict *avoidance*, in which case it operates within the paradigm of systemic integration and guides how non-conflictual co-application is shaped.[218] As Marko Milanović explains, 'Unlike avoidance, which interprets away any incompatibility, norm conflict resolution requires one conflicting norm to prevail, or have priority over, the other.'[219] In its conflict resolution capacity, the *lex specialis* principle thus prioritises the more specific rule over the general. What this means precisely, however, remains subject to debate.[220]

6.3.2 Lex specialis derogat legi generali

6.3.2.1 Legal consequences of the application of lex specialis derogat legi generali

The operation of *lex specialis*, in its conflict resolution capacity, has been proposed in two distinct ways: one is that it gives precedence to one norm over the other when on a norm-by-norm basis it was established normative conflict exists, the other that it works on the level of *regimes*, that in case of conflict *lex specialis* displaces the other legal regime completely.[221] It was explained already why the latter interpretation cannot hold true, and why we must assess

214 ILC Report 2006, p. 24.
215 Further, see Jeutner (n 132) 31.
216 Marko Milanović has shown how before the Court's Advisory Opinion, legal practice and scholarship did not normally conceive of the relation through the *lex specialis* lens; rather it focused on continued application of IHRL and the derogations regime. Milanović, 'The Lost Origins of Lex Specialis' (n 47).
217 ILC Report 2006, p. 34-5.
218 ILC Report 2006, p. 34-5.
219 Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 40).
220 Lindroos (n 5).
221 For a discussion, see Milanović, 'The Lost Origins of Lex Specialis' (n 47); Prud'homme (n 79).

the interplay between IHL and IHRL on a norm-by-norm basis, and based on an assessment of whether there is a conflict between two or more norms applicable in a specific situation and to a specific incident. We must thus turn to *lex specialis* as a conflict resolution mechanism which operates on the level of norms, and which gives precedence to one norm over the other in case of conflict.

Whereas *lex specialis* gives precedence to one norm over the other, the effect of application of the principle is not to derogate the *generalis*, in the sense of invalidating the general norm.[222] Whereas the more specific norm takes precedence in that specific situation, the general norm remains applicable in the background, and may influence further application of the special rule – and in any case can become relevant again in other situations.[223] For instance in the example of the right to life and the use of lethal force, whereas the IHL permission to use lethal force based on status-based targeting can have precedence over the IHRL prohibition to deprive individuals of their lives, this does not mean this therefore *invalidates* the right to life, not even when looked at in the context of a specific incident. There is more to the normative tension between these norms than the black and white distinction between a permission and a prohibition, and the right to life may further govern the precise use of force, the precautions taken, and could arguably oblige States to use less harmful means to neutralise a threat even during armed conflicts.[224] In the *Targeted Killings* case, for instance, the Israel Supreme Court found that whereas IHL allows the targeting of civilians taking direct part in hostilities, if in a position to capture them without excessive risks to the armed forces, they may not simply be targeted and killed.[225] Another important consequence of the continued application of the *generalis* in the background, is that even if IHL were to qualify as the *lex specialis* in such situations, *IHL provides the primary frame of reference for the use of force*, but insofar as procedural protections are concerned, IHRL still applies. This means for instance that individuals may still rely on their right to an effective remedy before a court, and

222 Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' (n 125).

223 ILC Report 2006, p. 47-53. See also Sivakumaran (n 63) 89.

224 For a discussion, see Charles Garraway, ''To Kill or Not to Kill?'-Dilemmas on the Use of Force' (2010) 14 Journal of Conflict and Security Law 499; Amichai Cohen and Yuval Shany, 'A Development of Modest Proportions. The Application of the Principle of Proportionality in the Targeted Killings Case' (2007) 5 Journal of International Criminal Justice 310.

225 Supreme Court of Israel sitting as the High Court of Justice 11 December 2006 (Judgment), HCJ 769/02, 46 ILM 375 (2007) (*Targeted Killings (The Public Committee against Torture in Israel et al v The Government of Israel et al)*) [40]. See further e.g. Helen Keller and Magdalena Forowicz, 'A Tightrope Walk between Legality and Legitimacy: An Analysis of the Israeli Supreme Court's Judgment on Targeted Killing' (2019) 21 Leiden Journal of International Law 185; Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 40) 479.

complain before international human rights courts and treaty bodies of violations. Theoretically, it might also mean that the *procedural* duty to investigate deaths still applies,[226] because insofar as there is a conflict, this principally relates to the material side of the right to life, not to the investigations side. This issue will be returned to in Chapter 10, which also discusses the relationship between substantive rules, and their procedural corollaries.[227]

The legal consequence of application of the *lex specialis derogat legi generali* principle, is therefore to resolve a conflict by letting the more specific rule prevail over the more general rule. This leaves us with the question how then to determine which rule is general and which is specific, a question to which we shall turn now.

6.3.2.2 Contents of the lex specialis principle

The principle of *lex specialis* is a subsidiary rule, a third rule, which determines how a conflict between two primary rules can be resolved,[228] by virtue of their speciality. It does not, however, in all its generality, specify how to determine which rule is the *specialis* and which is the *generalis*. According to some, because *lex specialis* is devoid of clear normative content, it can be filled in according to the normative preference of whoever applies the rule, and thus provides a guise of legality and objectivity which in fact is absent.[229] Depending on one's normative preferences, one can then use *lex specialis* to argue towards a certain outcome, namely that IHL or IHRL is more specific to a given situation, and must therefore take precedence. There is a certain truth to the lack of direction provided by *lex specialis*, because the very core to the solution of normative conflict is left up to an undefined classification of rules into 'general' and 'specific'. Nonetheless, several suggestions have been made to fill in this normative void, by taking account of a number of factors in deciding which norm is to be qualified as *specialis*, and which as *generalis*.

An ostensibly simple way of deciding which norm is specific and which is general, is simply that because IHL was meant to govern armed conflict and occupation, it is *ipso facto* the *lex specialis* in such situations.[230] This reasoning somewhat goes back to the idea that *lex specialis* can regulate the relationship between the two legal regimes as a whole, which was rejected above, but merits attention here because there is an intuitive attraction in appointing IHL

226 Extensively on the procedural obligations, see Droege (n 48); Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' (n 125).

227 Chapter 10, §3.2.

228 Cf. Kelsen (n 109).

229 Lindroos (n 5). See also ILC Report 2006, p. 36.

230 For an example, see Michael J Dennis, 'Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict' (2007) 40 Israel Law Review 453. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 51) [106].

as *lex specialis*. After all, it is the law meant to govern situations of armed conflict.

Normally, the starting point is to perceive IHRL as the *generalis*, applicable at all times, and IHL as the *specialis*, applicable to, and designed to govern, armed conflict.[231] This also aligns with the ICJ's findings, putting IHL forward as *lex specialis*: 'the law applicable in armed conflict which is designed to regulate the conduct of hostilities.'[232] It ought to be born in mind though, that this finding in *Nuclear Weapons* pertained specifically to the right to life and the conduct of hostilities, an issue, in other words, which may be thought naturally to fall within the 'more specific' law of armed conflict as regulating deprivations of life during armed conflict. Moreover, the Opinion meant to answer questions concerning the legality of the use of nuclear weapons, and therefore the use of particular types of weaponry, which again intuitively falls in the sphere of the law governing armed conflict and the conduct of hostilities. We ought to therefore be careful in attaching overly broad conclusions to this finding; it may very well be limited to the conduct of hostilities and deprivation of life, where IHL will more readily constitute the *specialis* to IHRL's *generalis*.[233] In *The Wall* Opinion, even insofar as the Court's finding would intimate that IHL operates as *specialis* more generally in relation to IHRL, its subsequent application of the law appears to tell a different story. After finding that it must take into account '[IHRL] and, as *lex specialis*, [IHL]',[234] the Court goes on to find numerous violations of human rights – rights which were therefore clearly not displaced by IHL, nor was their application altered in any way.[235]

As the International Law Commission explains in its 2006 Report on Fragmentation, the rule regarded as 'special' in the *lex specialis* context, is 'the rule with a more precisely delimited scope of application (…), [t]hat is, when the description of the scope of application in one provision contains at least one quality that is not singled out in the other'.[236] The regulation of armed conflict is certainly one such 'quality', but it is not the only relevant factor in determining which rule is the more specific, which *can* be human rights law. Marco Sassòli echoes this approach when he argues in favour of the rule with the 'largest common contact surface area' to be considered *specialis*: 'Speciality, in the logical sense, implies that the norm that applies to a certain set of facts must give way to the norm that applies to that same set of fact

231 Michael J Dennis, 'Application of Human Rights Treaties Extraterritorially During Times of Armed Conflict and Military Occupation' (2006) 100 Proceedings of the Annual Meeting (American Society of International Law) 86, 132ff.

232 *Legality of the Threat or Use of Nuclear Weapons* (n 50) [25].

233 Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' (n 27).

234 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 51) [106].

235 Ibid [137].

236 ILC Report 2006, p. 35, and fn 60.

as well as to an additional fact that is present in a given situation.'[237] By way of example, think of a demonstration held in a situation of occupation.[238] Demonstrations are primarily covered by rules of IHRL, providing a right to demonstrate peacefully, and allowing for State restrictions of that right only when necessary in light of for instance public security. IHL remains applicable of course, as it concerns a situation of occupation. Now if the demonstration turns violent, and the State needs to use force to maintain security, this does not suddenly make IHL the more specific regime, with the use of force governed by the principle of distinction. Human rights law is very specific in its regulation of demonstrations as well as the use of proportionate force in the maintenance of security, also when demonstrations turn violent. So long as the violence therefore does not reach the level of an actual resumption of hostilities, IHRL then provides the rules *more specifically geared* to regulating the incident – the incident has the larger 'common contact surface area' with IHRL's rules governing demonstrations, than with IHL's rules governing the use of force.[239] This goes to underline the importance of a context-specific assessment, which is not simply based on the abstract relationship between IHL and IHRL, nor simply on interaction on the norm-specific level, but taking account of the specific context.

As this brief incursion may illustrate, there is no predetermined relation between IHL and IHRL, with one always functioning as *specialis*, the other as *generalis*. Moreover, even on the level of a specific norm there is no solution which applies in all circumstances. Both regimes can provide the more specific rule, depending on context. This has to do with the nature of these legal regimes: they are both specialised regimes, branches, of the more general field of international law. They are in a horizontal relationship.[240]

6.3.2.3 Determining the specialis

The task at hand when resolving a normative conflict between IHL and IHRL, is therefore to determine which norm is the more specific. The ILC has suggested this can be the case wherever a rule's scope of application contains at least one quality which the other does not. What qualities these are, however, is debatable and outcomes may vary depending on the perspective with which one approaches interplay. For instance, the inherent 'quality' of IHL is that its

237 Sassòli, *International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare* (n 65) 439.

238 Also using this example, see Hampson, 'The Relationship between International Humanitarian Law and International Human Rights Law' (n 78) 209ff.

239 It may be noted the application of IHRL in this situation is not by definition more protective, as IHL prohibits the use of tear gas and the like. See Hampson, 'The Relationship between International Humanitarian Law and International Human Rights Law' (n 78) 191, fn 18.

240 Hampson, 'The Relationship between International Humanitarian Law and International Human Rights Law' (n 78).

application is limited to situations of armed conflict and occupation, and is therefore meant specifically to govern such situations. Nevertheless, if one approaches the issue from a different angle, namely that IHRL is meant specifically to protect individuals and human dignity, and if a situation concerns the protection of civilians from State authorities, then IHRL may very well be thought of as more specifically regulating such situations.

Ultimately, what is therefore clear under general international law and the ICJ's case-law, is that the principle of *lex specialis derogat legi generali* must be used to resolve normative conflict between IHL and IHRL. How to determine which rule is the more specific, however, does not flow from that case-law, and as Anja Lindroos explains, the principle is in this sense 'descriptive', and 'has little independent normative force'.[241] Moreover, no codification of the principle exists in international law, which means little guidance exists to establish how the distinction between the 'special' and the 'general' is best made. The lack of fleshed out criteria could in turn, according to Lindroos, open application of the principle up to subjective choices.[242] In order to render such choices more objective, criteria can be developed. A number of legal scholars have made contributions in this respect.

Oona Hathaway et al. have come up with five factors to take into account when deciding which norm is to be viewed as the most specific in the context of the interplay between IHL and IHRL: '(1) the wording and content of the norms themselves; (2) the nature of the norms in question, (3) whether a State exercises effective control, (4) expressions of intent by parties to relevant treaties, and (5) state practice.'[243] Interestingly, they have therefore formulated four factors which primarily depend on a *legal assessment*, and one of a more *contextual* nature. Only the question to what extent a State exercises effective control fully depends on context, and with regard to the first factor they also submit that the wording and content of a norm can determine the *lex specialis* where those are 'uniquely relevant' to the situation – which therefore requires an examination of both the norms themselves, as well as the situation to which they are applied.[244] All other factors, however, depend on a solely legal assessment. Helen Duffy has also found that the factors for deciding the *specialis*, must depend on a contextual element, the relevance or appropriateness of a rule to regulate the specific situation, and a purely legal element, looking at the wording of the norm itself, particularly how explicit, direct and precise the provision is.[245]

241 Lindroos (n 5) 66.
242 Ibid.
243 Hathaway and others (n 40) 1917.
244 Hathaway and others (n 40) 1913–23.
245 Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' (n 125).

Similarly, the *Practitioners' Guide to Human Rights Law in Armed Conflict* also provides a number of factors to help determine whether IHL or IHRL in a specific context constitutes the primary frame of reference. The Guide does so without explicit reliance on the *lex specialis* principle, as it proposes two frameworks regulating the co-application of IHL and IHRL: 'active hostilities' and 'security operations', with the former primarily regulated by IHL with a background function for IHRL, and the latter regulated the other way around, with IHRL as the primary frame of reference, and IHL functioning in the background.[246] The Guide proposes this distinction in order to move beyond the abstractions of the interaction between legal regimes as such, by looking at how the law must be applied in several practical situations, such as for instance the conduct of hostilities, use of weaponry, situations of detention, and investigations. It moreover does not apply *lex specialis* as such, as it proposes the two frameworks of active hostilities and security operations as applicable throughout interplay, not dependent on whether a normative conflict exists. Nevertheless, for situations where there *is* normative conflict, the model proposed by the Guide comes to the same result, that is an application of the law more specifically geared to regulate the situation, with a background role for the other – with such background role likely smaller where the law is in direct conflict and where the primary framework thus overrides the secondary framework.[247]

To determine whether a situation is governed by the framework of active hostilities or security operations, the Guide suggests this is to be

> 'determined in light of the existence of [1] explicit rules [2] which are designed for the situation under consideration. (…) In situations where a body of law establishes explicit rules *and* these rules are designed for the situation at hand, this body of law must constitute the primary framework. In other situations, where the applicability of certain rules is unclear, or where conflicting rules are brought into play, the situation will play an increased role, and the rules most closely designed for the situation will provide the primary framework.'[248]

To answer whether the rules are designed to govern a situation, regard must be had to (1) whether the situation concerns one of IAC, NIAC, or occupation, (2) whether there is active fighting going on, (3) the status of individuals concerned and their activities, and (4) the level of control the State has over the situation.[249] 'Active hostilities' then connote situations where IHL is the primary framework, due to the explicit rules of IHL applicable to a situation, such as is the case for status-based targeting in IACs, or the detention of

246 Murray and others (n 81) 88–92.
247 Murray and others (n 81) 103.
248 Murray and others (n 81) 88–9.
249 Murray and others (n 81) 89.

prisoners of war.[250] Because of the active fighting going on, for instance, IHL is then better fit to be the primary frame of reference. This is the other way around in the 'security operations' framework, which connotes situations which are more akin to regular law enforcement, although they take place against the background of an armed conflict.[251]

These two paradigms provide a useful tool for the determination of whether IHL or IHRL is *lex specialis* in a given situation. Nonetheless, they provide no absolute answers, and situations in which classification is difficult, may remain. It must further be stressed that the *Guide's* reliance on an 'active hostilities' framework must not be confused with the European Court of Human Rights' finding that no extraterritorial jurisdiction can be exercised during the 'active phase of hostilities' because in a 'context of chaos', the required control over territory or over persons cannot be exercised. The *Guide* in no way proposes that under an 'active hostilities' framework, IHRL does not apply – it merely looks to IHL as the primary frame of reference. Further, the *Guide* looks to the frameworks of active hostilities and security operations in order to contextually decide which norm must provide the primary frame of reference, which depends on a norm-by-norm and situation-by-situation assessment. The European Court, on the contrary, considered that it could distinguish the Georgian-Russian conflict in two phases which were neatly separated temporally: a phase of active hostilities, and a phase of occupation. Russia, the Court found, exercised extraterritorial jurisdiction during the latter phase, but not the former. This is very different from what the *Guide* proposes, and even if the Court did define what it means by a phase of active hostilities – which so far it does not – this must not be confused with the active hostilities framework which helps determine which norm is the *lex specialis*.

6.3.2.4 Conclusion

Whereas the application of *lex specialis* itself is by no means a solve-all solution, it also does not allow for arbitrary choices as to the prevailing norm based purely on normative preferences – as is sometimes suggested.[252] We have a number of factors to rely on when determining which norm represents *lex specialis* in a specific situation, which as Marco Sassòli summarises, depends on which norm has the larger 'common contact surface area' with a situation.[253] The analysis must be made on a norm-by-norm basis, with account being taken of both a purely legal element, as well as a contextual element.[254]

250 Murray and others (n 81) 90.
251 Murray and others (n 81) 91.
252 Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (n 40).
253 Sassòli, *International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare* (n 65).
254 Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism' (n 125).

Generally, the norm which is both explicit and meant to regulate a specific incident, must be considered the *specialis*. Other factors listed largely serve to further clarify these two main categories, and illustrate through State practice or expressions of intent which norm States find to be the most specific and therefore applicable. Importantly, the level of control exercised by the State can shift the balance towards IHRL. By way of example, this means that if a State exercises sufficient control during a NIAC on its own territory, it will potentially need to carry out 'law enforcement' operations to capture insurgents, with stricter rules for the use of force, even though the law of NIAC would allow for the lethal targeting of such individuals. In case hostilities are increasingly active in such situations, IHL then takes over again as the primary framework which does allow for the direct targeting of such individuals. Thus, even though the norms regulating the use of force under IHRL and IHL remain the same, context decides which serves as the *specialis* in a specific situation.

Although the factors listed assist in fleshing out the application of *lex specialis*, normative choices remain to be made in deciding which norm is the more specific in a particular situation. Whereas part of the *specialis – generalis* equation can be solved in the abstract by looking at two applicable treaty provisions only, to see how explicitly and comprehensively they regulate a certain situation, the other part of the assessment is context-dependent. If it is determined what rule constitutes the *specialis*, this rule has precedence over the conflicting more general norm, though that general norm continues to apply and may guide interpretation of the special rule. Any meaningful assessment of interplay in case of normative conflict ultimately therefore depends on a contextual assessment of the applicable norms. The next chapter will do so for the duty to investigate.

6.4 Converging norms

In most cases where IHL and IHRL overlap there is no conflict between them – they are in harmony, and they converge.[255] In principle, the paradigm of convergence does not raise difficult issues of interplay, as States (and other actors) may simply apply both, without any tension arising between the two fields. For instance, insofar as human rights law guarantees the right to marry, simply complying with such right during armed conflict in no way raises any tension with IHL.[256] Application alongside one another is therefore the norm within the category of converging norms. An example of such application of norms of both regimes alongside one another, can be found in the ICJ's *The*

255 Milanović, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law' (n 73).

256 Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' (n 27).

Wall Opinion, and its judgment in *Armed Activities*. In both cases, which were discussed previously, the Court found that both IHL and IHRL were applicable, to go on and find violations of both. In *The Wall*, it found that the Israeli settlements in the Occupied Palestinian Territory breached international law, and then went on to list which norms of IHL and IHRL were violated – without engaging in a comparison of the two.[257] In *Armed Activities*, the Court similarly found that the killings, torture, destruction of villages and massacres perpetrated by Uganda clearly violated norms of both IHL and IHRL, and therefore applied both alongside each other.[258]

Nevertheless, even where norms of IHL and IHRL are in harmony, their concurrent interpretation sometimes more than simple application as one normally would, independently from the other legal regime. After all, that no tension arises, does not mean both fields require the exact same thing, and a fully harmonious application may require further harmonious interpretation. Such interpretation is based on the principle of systemic integration, as enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties. This provision provides, when it comes to the interpretation of treaty rules, that 'There shall be taken into account, together with the context: (…) (c) any relevant rules of international law applicable in the relations between the parties.' Systemic integration relies on the idea that there is a coherent inter-*national legal system and according to the International Law Commission, it requires treaty norms to be interpreted in light of other applicable rules of international law, as well as against the background of general rules making up the international legal system.[259] This means for instance that treaty rules must also be interpreted against the background of applicable custom, and that where two specialised treaty rules apply such as is the case in the context of IHL and IHRL, their interaction must moreover be examined in light of applicable custom as well as general principles of law.[260]

Examples drawn from the converging norms of interplay between IHL and IHRL can serve to make this a little bit more concrete. Where for instance IHL prescribes a fair and regular trial for criminal proceedings against civilians, such requirements must be interpreted and read in light of the IHRL fair trial standards.[261] Thus, whereas IHL and IHRL align and converge, systemic integration here requires IHL is read in light of the more specific rules of human

257 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 51) [120]-[137].

258 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (n 55) [206]-[221].

259 ILC Report 2006, p. 206-43, especially at 243.

260 ILC Report 2006, p. 232-9.

261 See also Droege (n 4); Greenwood (n 49); Milanović, 'The Lost Origins of Lex Specialis' (n 47).

rights law.[262] Similarly, where IHL explicitly prohibits the use of landmines, and where IHRL only generally protects the rights to life and physical integrity, such IHRL standards must be interpreted in light of the specific IHL requirements to include a prohibition on the use of landmines. Thus, systemic integration serves to mould converging rules of IHL and IHRL into a truly harmonious set of rules of conduct.

As these examples illustrate, also in this context of systemic integration, there is an aspect of reasoning based on the relationship between the general and the specific. More general, more vague, rules of IHL and IHRL are interpreted in light of more concrete provisions of the other field. As the ILC finds, systemic integration

> 'call[s] upon a dispute-settlement body – or a lawyer seeking to find out "what the law is" – to situate the rules that are being invoked by those concerned in the context of other rules and principles that might have bearing upon a case. In this process the more concrete or immediately available sources are read against each other and against the general law "in the background".'[263]

Insofar as the examples here are concerned, determining the 'specialis' depends only on the level of detail provided in the legal norm, not on the context as was stipulated above in the context of conflict resolution. Nevertheless, this relation between general and specific rules is often also typified as one of *lex specialis*,[264] which as was alluded to above, is one of the reasons why the ICJ's finding that *lex specialis* governs interplay has not resulted in an unambiguous understanding of interplay.

Lex specialis, in tandem with its function as a tool for conflict resolution, also functions as an interpretive tool.[265] In this context, it has been described as a principle of legal logic,[266] because it is an interpretive principle which is applied intuitively. When confronted with a case, lawyers always and necessarily determine the law which is most pertinent for the assessment of the case, which has become a natural part of the study and application of law. In my teaching experience, first year law students can find this confusing because from an ostensibly limitless number of rules which in some way or another are applicable, a *choice* is then made to decide which must be applied to the facts of the case. No clearly articulated rules exist to decide which rules apply *most pertinently*, yet experienced lawyers will seamlessly pick them out.

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262 Sassòli, 'Le Droit International Humanitaire, Une Lex Specialis Par Rapport Aux Droits Humains?' (n 70) 385–95; Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' (n 149) 72–8.

263 ILC Report 2006, p. 243.

264 See Marko Milanović' call for a clear articulation of *which* form of *lex specialis* one is invoking; Milanović, 'The Lost Origins of Lex Specialis' (n 47) 117.

265 ILC Report 2006, p. 54-9.

266 ILC Report 2006, p. 243.

In essence a selection takes place here which is based on the *lex specialis* principle, favouring the rules *most specifically meant* for a situation over more general rules which operate in the background, but which only come into play if the more specific rules for whatever reason do not provide a solution. *Lex specialis* is thus part and parcel of a lawyer's toolbox, already in any interpretation of the law or in the selection the relevant legal rules. In its role as a principle of interpretation, *lex specialis* signifies the relationship between general rules, and specific rules *which are a more specific iteration of the general rule for a certain context*.[267] In other words, in contradistinction with the role of *lex specialis* as described above as a tool for conflict resolution, as an interpretive tool, *lex specialis* governs relations between non-conflictual norms. Because application of *lex specialis* in this context in no way involves setting aside the general rule through a form of precedence or derogation, it must be strictly distinguished from *lex specialis* as a tool for conflict resolution. When it operates as a conflict resolution mechanism, *lex specialis* signifies an *exception* to general law, whereas as an interpretive tool, the *specialis* is a specific iteration of the *generalis*.[268]

In conclusion, where two norms of IHL and IHRL converge and are in harmony, they are in a mutually supporting relation and their relationship is governed by the principle of systemic integration. The two rules can thus be applied alongside one another, or interpreted in light of one another, to come to a fully harmonious interpretation and application of the rules. This does not give rise to particularly problematic issues, though it may require practitioners to deepen their knowledge and familiarity with the other field of law to ensure a truly harmonious interpretation – and to facilitate a coherent assessment of whether two rules are *genuinely* in harmony, or whether, perhaps, their application leads to some sort of tension.[269] In such cases, they are better examined from the perspective of normative *competition*.

6.5 Competing norms

In instances of normative competition, rules of IHL and IHRL do not conflict in the sense that they lead to contrary or contradictory opposing results, but their application nevertheless results in normative tension. This can be the case in several situations, primarily where IHRL regulates a situation and where IHL remains silent, but where the rationale of IHL, the object and purpose of IHL, would seem to pull in a different direction. As was explained above, the

267 See e.g. *A. and Others v United Kingdom* (n 112) [202].
268 ILC Report 2006, p. 21.
269 Cf. Hampson, 'Article 2 of the Convention and Military Operations during Armed Conflict' (n 33) 197.

applicability of tools for conflict resolution depends strictly on the existence of a conflict, meaning the normative tension exposed here cannot be solved by simply giving precedence to the one over the other, based on conflict resolution mechanisms. The simplest solution would of course be to simply apply IHRL, as this would not lead to a violation of IHL. By way of example, all internees in NIACs could simply be granted *habeas corpus* pursuant to IHRL, and any investigation can be conducted in full transparency as called for by human rights standards, without *violating* IHL in any way, shape, or form. Nevertheless, as was explained above, this may still cause *tension* with IHL, as military interests and necessity pull in a different direction, and because IHL at all times seeks to strike a *balance* between military necessity and other considerations, primarily humanitarian ones. This raises the question: does international law provide any way of alleviating the tensions in such situations, and to reconcile competing norms?

In the absence of tools for conflict resolution, the rules in situations of competition must fall in what the ILC calls the paradigm of 'relations of interpretation'.[270] This means that as principal means for reconciling the rules under IHL and IHRL, we must again look towards the principle of systemic integration and harmonious interpretation. Applying this principle, however, has its natural limits. In the interpretation of a treaty rule, it allows taking into account other applicable *rules of international law*. In other words, where IHL provides for a rule which competes with a rule of IHRL, systemic integration may then be used to harmonise such situations. For instance, where investigations are concerned – which is explored in-depth in the following chapter – IHL provides for a duty to investigate, but where investigative standards are concerned this does not fully coincide with IHRL, and arguably the application of human rights standards can cause tension with IHL and the balance it aims to strike with military necessity. Recall the *Jaloud* case, where human rights law required separating the highest in command from his troops to facilitate an investigation, whereas military necessity certainly pulled in a different direction.

Potentially, because IHL does provide a rule in this context, but one which does not specifically flesh out how States are supposed to investigate, systemic integration could be employed in this context to relieve normative tension. If, for instance, IHL's more general and unspecified duty to investigate is understood as granting a certain discretion to States in how they investigate, and thus as *permissive* of looser investigative standards, then such discretion must be accounted for in any exercise of harmonious interpretation. This, in turn, could prevent the discretion granted to States from being supplanted by IHRL investigative standards. In fact, if viewed as (implicitly) permissive, in its broad conception this could be viewed as constituting a normative

270 ILC Report 2006, p. 20ff.

conflict between an obligation and a negative permission (not to carry out an investigation conforming to all human rights standards). Thus, in situations where IHL provides for general rules, the balance of IHL can be preserved through systemic integration and potentially conflict resolution, if a conflict is brought to light.

Where this is different, are situations where IHL is completely silent. Here, there is no 'other applicable rule of international law' with which IHRL can be harmonised. Systemic integration therefore seemingly does not provide a way out of simply applying the human rights norm as is. In the example of *habeas corpus*, this would mean allowing all internees in NIACs *habeas corpus*, also if they are civilians taking a direct part in hostilities and may be interned for reasons of the conflict.[271] This exposes the limits of systemic integration:[272] no integration or harmonious interpretation is possible with a lack of regulation. I would submit there might nonetheless be a way to come to a balanced outcome in such cases, which leaves IHL's equilibrium intact: the principles of IHL.

The principles of IHL operate in the background and represent the framework of IHL.[273] Because, as the ILC puts it, international law relies on an 'informal hierarchy', the more specific treaty rules are always applied first, before the more general rules of custom, and finally principles of law.[274] Yet, the function of principles remains to guide the law, and in the words of Erik Koppe,

> 'Together [the] principles form a general and systematic legal framework and a frame of reference for the law of armed conflict. Most rules of the law of armed conflict, both conventional and customary, are reflections of these principles, give expression to these principles, or are the result of a compromise between these principles, in particular the principles of necessity and humanity.'[275] (references omitted)

Where there are no specific rules of IHL, or where the rules remain very vague, the principles can guide the interpretation of the law. Because the principles of IHL provide the framework for IHL, this could in fact be viewed as a form

271 It is assumed here that no customary rule of IHL regulates this particular issue.

272 At least insofar as situations are concerned where the argument that IHL provides a 'qualified silence' and intentionally leaves discretion for the State, is strained. Otherwise, if the IHL silence can be read as constituting a negative permission, mechanisms for conflict resolution may be applied.

273 See Chapter 2, §3.

274 ILC Report 2006, p. 233.

275 Erik Vincent Koppe, 'The Principle of Ambituity and the Prohibition against Excessive Collateral Damage to the Environment during Armed Conflict' (2013) 82 Nordic Journal of International Law 53, 57. Further, see Craig Eggett, 'The Role of Principles and General Principles in the "Constitutional Processes" of International Law' (2019) 66 Netherlands International Law Review 197.

of systematic interpretation – of interpretation of rules in light of the broader system of the legal regime.[276] This function of the principles of IHL is well-accepted.[277] The principles are commonly interpreted as guiding interpretation, though they can never as such set aside rules of IHL, which conforms with the ILC's conception of an informal hierarchy of norms: principles do not set aside rules.[278] Moreover, the Martens clause makes explicit that in case IHL is silent, the principles of IHL have a role to play: 'civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'.[279]

If applied to the specific situations at issue here, where IHL is vague or silent, and IHRL provides more detailed rules, the following line of reasoning may apply. Vague, indeterminate rules of IHL must normally be interpreted in light of the principles of IHL.[280] Thus, when engaging in systemic integration with human rights norms, it makes sense to take account of the principles of IHL as providing guidance to interpretation and as safeguarding the object and purpose of IHL. Because the principles function in the background of the IHL system, there is no reason why they could not come to the fore when the specific rules do not regulate a situation, or do not do so in a detailed manner. The Martens clause makes this explicit. Such an approach could moreover mitigate tensions arising between IHRL and IHL, because by viewing the principles of IHL as direct sources of law which can provide interpretive guidance to the interpretation of norms of IHRL, a nuanced and well-rounded solution can be reached for situations of normative tension.

An important pillar of support for the suggested approach is the case-law of the ICJ, especially in the *Corfu Channel* case. There, the Court clearly envisioned principles of law applicable throughout international law, the contents of which can vary depending on the specific context. In having to decide on the responsibility of Albania for mines found in the Channel, the Court made reference to 'elementary considerations of humanity, even more exacting in peace than in war',[281] which illustrates the Court's view of the principle of humanity (as it is contemporarily referred to) as a permanently applicable

276 In line with VCLT, art 31.

277 E.g. Kolb (n 148) 75.

278 Mary Ellen O'Connell, 'Historical Development and Legal Basis' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press 2013) 36–7.

279 As quoted from the modern version of the Martens clause, enshrined in AP I, art 1(2). See also the Preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land. See Chapter 2, §3.

280 Koppe (n 275) 64; Kolb (n 148) 75. See also ILC Report 2006, p. 234: 'parties are taken "to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way"', referring to *Georges Pinson* case (France/United Mexican States) Award of 13 April 1928, UNRIAA, vol. V, p. 422. Further, see Chapter 2, §3.

281 *Corfu Channel case*, Judgment (9 April 1949), *I.C.J. Reports* 1949, p. 4, p. 22.

principle of law. If the principle of humanity is permanently applicable, in a more or less exacting manner depending on context and because of the countervailing interest of military necessity during armed conflicts, then it makes sense that the 'considerations of humanity' underlying human rights law can during armed conflicts also be balanced with other applicable principles of law. None of this is to say that rules of IHRL may simply be set aside by principles of IHL – as is universally accepted amongst IHL lawyers, principles cannot set aside rules.[282] Where IHRL, however, allows flexibility, and where IHL ostensibly provides little by way of explicit rules but where principles of IHL would compete with the normal application of IHRL, then the inherent flexibility of IHRL can be used to make sure that its 'even more exacting' considerations of humanity sufficiently account for countervailing principles of IHL. Others have also advocated relying on the flexibility of IHRL to come to a contextual approach which takes account of the factual circumstance of armed conflict,[283] to which my approach adds a further *legal tool* to come to balanced solutions.

A potential stumbling-block in this approach, is whether the principle of systemic integration strictly speaking allows for the interpretation of treaty rules of one body of law, in light of principles of the other. After all, Article 31(3)(c) VCLT refers to 'any relevant *rules* of international law applicable between the parties' (emphasis added), which may guide interpretation. Rules can be principally distinguished from principles,[284] which could be taken to mean that systemic integration is meant to remain limited to harmonisation with *rules* of international law. According to the ILC, this ought not to pose a problem. General principles of international law, as well as general principles of law recognised by civilized nations, according to the ILC, apply generally and *ipso facto* provide the framework and background against which rules are interpreted.[285] Article 31(3)(c) VCLT is not needed to provide a legal basis for this. Especially if the principles of IHL are considered to be principles of international law and therefore an autonomous source of international law,[286] their application is automatic and not conditioned on a treaty rule. Even under the Article 31(3)(c) VCLT itself, moreover, it has been submitted that the reference to 'rules' notwithstanding, it allows for the interpretation of treaty rules in light of principles and general principles of law.[287]

282 See Chapter 2, §3.
283 E.g. Helen Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' in Helen Duffy, Janina Dill and Ziv Bohrer (eds), *Law Applicable to Armed Conflict* (Cambridge University Press 2020) 77ff.
284 See Eggett (n 275) 202–4.
285 ILC Report 2006, p. 243.
286 Under ICJ Statute, art 38; see Koppe (n 275) 62.
287 McLachlan (n 14) 313.

The practical solution arising from the use of principles of IHL in systematic integration, is that where IHL is indeterminate or silent, but nevertheless pulls in a different direction than IHRL, IHRL is then 'balanced with', interpreted in light of, the principles of IHL. Where IHL does not provide clear rules, the reason tension can nevertheless arise, is to be found in the underlying rationale and the objects and purposes of IHL. These are, in fact, precisely represented by the principles of IHL. Thus, when balanced with these principles, a nuanced and balanced approach to interplay in case of normative competition can be reached. This way, the application of human rights law, which in large part conforms to the principle of humanity, can be balanced with the countervailing principle of military necessity. The inherent flexibility which is often part of human rights law, can then be utilised to accommodate to a certain extent the tension with the principles of IHL. This should take the edge off situations of competition and reconcile IHL and IHRL in such situations. If this exercise should bring to light a genuine normative conflict, recourse can then be had to the tools for conflict resolution as discussed in section 6.3.

7 Conclusion

This chapter has explored the interplay of IHL and IHRL from a public international law perspective, because as both IHL and IHRL are branches of international law, their interaction must also be regulated by that legal regime. It was found that the international legal system regulates the interaction between various legal regimes based on whether they conflict, converge, or potentially compete. A careful contextual analysis, on a case-by-case basis, can thus solve complex issues of interplay when it comes to the primary addressees of international norms, States. State action where both IHL and IHRL apply must be guided by a thorough understanding of interplay deriving from the interaction of norms under international law. This way, States can conduct military operations in compliance with all their obligations under international law, under both IHL and IHRL.

Interplay gives rise to complex issues, which has also spawned a wide-ranging debate in legal scholarship. This Chapter makes four proposals for a way forward.

First, a methodology was developed to decide how IHL and IHRL interrelate in a specific situation, and relating to a specific incident. This involves (1) a determination of whether both regimes indeed apply in a specific situation and to a specific incident. If they do, (2) the existence and operation of a conflict clause must be explored. If a conflict clause does not resolve the issue or if no conflict clause is in operation, the third – crucial – step (3) is to assess whether the various applicable norms of IHL and IHRL conflict. (4) If they do, resort must be had to methods of conflict resolution, in particular *lex specialis*.

If they do not, the overlap may be solved through harmonious interpretation and systemic integration, pursuant to Article 31(3)(c) VCLT. How to do so precisely, however, depends on whether the relevant norms of IHL and IHRL are 'genuinely' in harmony, or whether they are rather in a relationship of competition.

Second, it is submitted that contemporary practice defines normative conflict in such a narrow way that it is of no use for the resolution of actual normative tensions. Based on legal theory, it was therefore argued to widen this definition, so that it encompasses conflicts which lie at the heart of the tensions between IHL and IHRL: those between obligations or prohibitions on the one hand, and permissions on the other. It was shown that as a matter of deontic logic, conflicts between a positive permission and a prohibition, such as exists between the IHL permission to use lethal force based on status alone and the IHRL prohibition to use lethal force unless strictly justified, must be considered as normative conflicts. If such conflict indeed exists, the *lex specialis derogat legi generali* principle regulates which norm must be given precedence. Importantly, whether IHL or IHRL constitutes the *lex specialis*, depends on both a legal analysis of the norms at issue, as well as on a contextual analysis of which norm was meant to regulate the specific situation and incident at issue.

Third, a category of *normative competition* was proposed, to add to the paradigms of conflict and convergence. It was shown that even if no normative conflict exists, this does not mean that IHL and IHRL genuinely drive in the same direction. Especially where IHL is silent on an issue, it may nonetheless militate against the simple application of IHRL. In such situations, the principle of systemic integration can guide an interpretation which strikes a balance between a norm under IHRL, and the interests of IHL. To do so, it was proposed that the principles of IHL can play an important role in the interpretation of the inherent flexibility which is part of most human rights norms. This allows for a legal tool for the harmonious interpretation of both regimes, in addition to the contextual interpretation of IHRL which already takes account of the factual circumstance of armed conflict.

Finally, it is proposed that in situations of normative convergence and harmony, both regimes are simply applied alongside each other – and where necessary interpreted in light of one another based on the principle of systemic integration. This conforms to contemporary practice by for instance the ICJ.

The step-by-step methodology for resolving issues of interplay has necessarily remained abstract – meant as it is to provide a guide for all instances of interplay. A more concrete determination of what is required of States under the interplay of IHL and IHRL, requires an analysis of specific norms. Chapter 10 aims to do so in the context of the duty to investigate.