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FOREGOING *LEX SPECIALIS*? EXCLUSIVIST V. SYMBIOTIC APPROACHES TO THE CONCURRENT APPLICATION OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW

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ABSTRACT

Developments in the international arena have led to the widespread acceptance of the relevance and continued applicability of international human rights law (IHRL) during armed conflict, raising questions as to its relationship with international humanitarian law (IHL). These questions have become increasingly pressing in light of the expanding extraterritorial application of human rights in recent case law. A closer look at State practice and jurisprudence nonetheless reveals that there is no common approach to managing the co-application of IHL and IHRL. Traditionally, the *lex specialis* principle has been used to resolve any issues relating to the concurrent application of both bodies of law. Yet, more recently, Courts and legal experts alike have begun looking for alternative methods to translate the interplay between IHL and IHRL into practice. This casts doubts over the continued relevance and adequacy of the *lex specialis* principle as a one-size-fits-all solution; at the same time, it remains unclear whether any of the alternative approaches can provide an adequate answer to the IHL/IHRL conundrum. This paper will therefore examine whether the practical challenges in implementing the principle, as identified in legal discourse, justify discarding it and whether the suggested alternative options succeed where *lex specialis* supposedly fails. Throughout and where necessary, the law and practice relating to internment during international military operations will serve as illustration.

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Introduction

In the early United Nations Charter era the relationship and interplay between international humanitarian law (IHL) and human rights law (IHRL) was not an issue, as the two sets of laws were considered to be distinct and mutually exclusive, conceived for different situations and with different theoretical considerations in mind. (1) Their disparate historical and doctrinal roots have traditionally been raised in support a strict separation between the "law of war" (i.e. IHL) and the "law of peace" (i.e. IHRL). (2) However, developments in international law, especially from the 1960s on, have rendered this compartmentalization of IHL and IHRL increasingly untenable and brought these bodies of law closer together. First, as Meron has correctly stated, "human rights have exercised vast influence on instruments of international humanitarian law, producing a large measure of parallelism between norms, and a growing measure of convergence in their personal and territorial applicability". (3) Human rights thinking reinforced the pre-existing emphasis on respect for human dignity within IHL, leading to a situation where humanitarian concerns became a key driver for elaborating new armed conflict related norms and standards. (4) Second, and perhaps more significantly, the notion that human rights law is relevant and remains applicable during armed conflict has gained support over time, first within the international community and academia, and subsequently amongst the judges of international judicial and quasi-judicial bodies. This is evidenced by a steady stream of resolutions of the UN Security Council, General Assem-

(1) For an account of the history of the relationship between and the converging development of IHL and IHRL, see o.a. M. Bothe, "The Historical Evolution of International Humanitarian Law, International Human Rights Law, Refugee Law and International Criminal Law", in H. Fischer, U. Froissart, W. Heintschel von Heineg & C. Raap (eds), *Crisis Management and Humanitarian Protection — Festschrift für Dieter Fleck*, Berlin, Berliner Wissenschafts-Verlag, 2004, 37-45; N. Quénivet, "The History of the Relationship Between International Humanitarian Law and Human Rights Law", in R. Arnold & N. Quénivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, Leiden, Martinus Nijhoff Publishers, 2008, 1-14; L. Doswald-Beck & S. Vité, "International Humanitarian Law and Human Rights Law", *International Review of the Red Cross* 1993, No. 293, 94-119; T. Meron, "The Humanization of Humanitarian Law", *The American Journal of International Law* 2000, 239-278.

(2) The strict separation theory has its adherents even today, see e.g. M.J. Dennis, "Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Around?", *ILSA Journal of International & Comparative Law* 2006, 459-476.

(3) T. Meron, "The Humanization of Humanitarian Law", *op. cit.* (note 1), 245.

(4) The effect was already apparent in the four Geneva Conventions, but it had its greatest impact on Additional Protocol I (API) and Additional Protocol II (APII) where IHRL was invoked "to bolster the rationale for protective provisions". See G. Corn, "Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict", *International Humanitarian Legal Studies* 2010, 58.

bly and decisions of judicial and quasi-judicial bodies — both within and outside the United Nations (UN) framework. (5)

These developments indicate a widespread acceptance of the idea that IHRL does not cease to apply during armed conflict, a view corroborated by the fact that various international/regional human rights instruments explicitly allow for certain derogations *in times of war* or other public emergency (see also *infra*). Military lawyers, government officials, scholars and judges have therefore had to consider the practical consequences of this evolution. This is where things get tricky. Although a consensus about the relevance of IHRL has grown, there is no agreement on how the concurrent application of IHL and IHRL should be translated into practice. When one examines how States have dealt with specific situations where rules of both bodies of law can be applied — for example, the capture and internment of individuals —, it becomes clear that there is no common approach. Some States, most notably the United States (US) during the Bush administration, have argued that whenever the norms and standards of these bodies of law are simultaneously applicable, predominance should categorically be given to the IHL rules and that human rights are relevant only insofar as they are reflected in the protective provisions of IHL. (6) Within the international community as a whole, the general stance has been more permissive and has advocated the use of IHRL as an interpretative tool and/or to fill gaps. Voices have even been raised in suggestion of blending both bodies of law together, thus creating a legal framework in which only the most protective standards of the two bodies of law are retained. (7)

The resulting uncertainty is problematic, particularly in light of the expanding extraterritorial application of IHRL when troops are deployed abroad (e.g. in the context of international military operations), which at present forms the bulk of military engagement for most (western) States. (8)

(5) See e.g. Security Council, *Resolution 1019* (9 November 1995), UN Doc. S/RES/1019; Security Council, *Resolution 1034* (21 December 1995), UN Doc. S/RES/1034; General Assembly, *Resolution 3525* (15 December 1975), UN Doc. A/RES/3525/XXX; General Assembly, *Resolution 2546* (11 December 1969), UN Doc. A/RES/2456/XXIV; Human Rights Committee, *General Comment 29* (31 August 2001), UN Doc. CCPR/C/21/Rev.1/Add.11; Human Rights Committee, *General Comment 31* (26 May 2004), UN Doc. CCPR/C/21/Rev.1/Add.13; Committee on Economic, Social and Cultural Rights, *General Comment 14* (20 January 2003), UN Doc. E/C.12/2002/11. For a more extensive overview see L. VAN DEN HERIK & H. DUFFY, "Human Rights Bodies and International Humanitarian Law: Common But Differentiated Approaches", in C. BUCKLEY, P. LEACH & A. DONALD (eds), *The Harmonisation of Human Rights Law*, Leiden, Martinus Nijhoff Publishers, forthcoming, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2448146 (last accessed 23 May 2015).

(6) See *infra*, p. 6-7.

(7) See e.g. International Committee of the Red Cross, *International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence*, Summary Report of the XXVIIth Round Table on Current Problems of International Humanitarian Law, November 2003, available at www.icrc.org/eng/resources/documents/misc/5ubcvx.htm, 8.

(8) It seems widely accepted that IHRL will apply extraterritorially whenever a State exercises effective "authority or control" over territory or persons abroad. However, a clear trend towards

The approach of judicial and quasi-judicial human rights bodies to extra-territoriality is becoming ever more generous, and therefore the prospect of armed forces having to comply with a panoply of human rights obligations when stationed abroad and having their conduct scrutinized by human rights bodies in human rights litigation — a disquieting thought for many States actively involved in multinational operations — has become very real. The number of instances in which the two spheres of law might interact has increased substantially, presenting practical day-to-day challenges for military personnel in the field — especially in the context of right to life and liberty cases. Any haziness as to the relationship between both bodies of law, and thus the applicable law, will persist in military manuals, standard operating procedures and rules of engagement ; clearly, this is unacceptable. In the words of Corn, "in an era of an already complex and often confused battle space, there can be little tolerance for adding complexity and confusion to the rules that war-fighters must apply in the execution of their missions". (9) Further clarification is therefore warranted and, in line with Prud'homme, it is argued here that "a well-coordinated application of IHL and IHRL is vital to ensuring adequate protection during armed conflict and the effective implementation of the legal framework". (10) Consequently, straightforward and workable rules need to be found to determine, on the one hand, how norm conflicts can be solved and, on the other, in the case of complementary protections, how both bodies of law can be applied together.

In its Advisory Opinion in the *Nuclear Weapons* case of 1996, the ICJ proposed using the *lex specialis* principle to sort out any issues relating to the concurrent application of both bodies of law. (11) This principle, which

more liberal interpretations of what constitutes "authority or control" can be discerned. In the European system of Human Protection, one can for example point to *Jaloud v. the Netherlands,* where the Grand Chamber accepted that persons passing through a checkpoint manned by the armed forces of a State party were under their authority or control and thus came within their jurisdiction for the purposes of Article 1, see ECtHR, *Jaloud v. The Netherlands*, Grand Chamber Judgment (20 November 2014), Appl. No. 47708/08. Moreover, with judges taking even more expansive approaches towards the extraterritorial application of the ECHR in several domestic cases, the last word on the subject has not been said and it will be interesting to see how far the Court is willing to go, e.g. *Al-Saadoon & others v Secretary of State for Defence* [2015] EWHC 715 (Admin). On the extraterritorial application of IHRL treaties, see generally F. Coomans & M. Kamminga, *Extraterritorial Application of Human Rights Treaties*, Antwerpen, Intersentia, 2004, 281 p. ; K. Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties*, Leiden, Martinus Nijhoff Publishers, 2012, 326 p. ; M. Gondek, *The Reach of Human Rights in a Globalising World : Extraterritorial Application of Human Rights Treaties*, Antwerpen, Intersentia, 2009, 442 p. ; M. Milanovic, *Extraterritorial Application of Human Rights Treaties : Law, Principles and Policy*, Oxford, Oxford University Press, 2011, 302 p.

(9) G. Corn, "Mixing Apples and Hand Grenades : The Logical Limit of Applying Human Rights Norms to Armed Conflict", *op. cit.* (note 4), 54.

(10) N. Prud'homme, "*Lex Specialis* : Oversimplifying a More Complex and Multifaceted Relationship?", *Israel Law Review* 2007, Vol. 40, No. 2, 356.

(11) *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, § 25.

has its roots in classical times, embodies the logical proposition that whenever specific rules were adopted to regulate a particular set of facts, they should prevail over more general norms. As applying the more specific rules acknowledges the will of states to regulate a particular situation differently, the validity of the *lex specialis* maxim was easily accepted in legal scholarship and the jurisprudence of international judicial bodies. (12) For a while, then, the principle constituted one of the main models to determine the interplay between norms of IHRL and of IHL, and the discussions were usually framed in terms of identifying and applying the more specific norms and standards. However, more recently, Courts and legal experts alike seem to have moved away from an exclusive focus on the principle, instead seeking other avenues to translate the interplay between IHL and IHRL into practice. (13) These judges and experts have dismissed the exclusivist idea that whenever the two bodies apply simultaneously and a norm conflict arises priority should be accorded to the norms of one regime over the other. Instead, they have favoured approaches that are premised on the parallel application of IHL and IHRL and resort to the interpretative techniques of Articles 31 and 32 Vienna Convention on the Law of Treaties (VCLT) to avoid or resolve possible norm conflicts (referred to here as symbiotic, VCLT-based approaches). Some have even argued that at times, "it is only the legislator who produced the antinomy who can provide the remedy for it" and pointed to alternative tools available to States to manage the co-applicability of the two bodies of law (e.g. derogations, UN Security Council Resolutions, subsequent agreements). (14)

This state of affairs casts doubts over the continued relevance and adequacy of the *lex specialis* principle in managing the concurrent application of IHL and IHRL. On the other hand, it remains to be seen whether any of the alternative approaches can provide an adequate answer to the IHL/IHRL conundrum. This paper will therefore examine in Part 1 whether the practical challenges in implementing this principle, as identified in legal discourse, justify discarding it. In Part 2, it will then be determined whether the suggested alternative approaches succeed where *lex specialis* supposedly fails

(12) In the same sense, A. Lindroos, "Addressing Norm Conflicts in a Fragmented Legal System : The Doctrine of Lex Specialis", *Nordic Journal of International Law* 2005, 36-37 ; C. McCarthy, "Legal Conclusion or Interpretative Process ? *Lex Specialis* and the Applicability of International Human Rights Standards", in R. Arnold & N. Quénivet (eds), *International Humanitarian Law and Human Rights Law : Towards a New Merger in International Law*, Leiden, Martinus Nijhoff Publishers, 2008, 104.

(13) The term "symbiotic" was used by Hill-Cawthorne to describe the way the ECtHR handled the simultaneous application of the norms of IHL and IHRL (relating to deprivation of liberty in armed conflict) in the recently decided case of *Hassan v. United Kingdom* (see also, *infra*), see L. Hill-Cawthorne, *The Grand Chamber Judgment in Hassan v. UK*, www.ejiltalk.org/the-grand-chamber-judgment-in-hassan-v-uk/, 2014.

(14) M. Milanovic, *Extraterritorial Application of Human Rights Treaties : Law, Principles and Policy*, *op. cit.* (note 8), 260.

and whether they provide clear and workable rules for a well-coordinated application of IHL and IHRL. The discussion will be capped off by looking into the steps States can undertake themselves to reconcile conflicting norms and pre-empt questions relating to their concrete interaction. Throughout and where relevant, we will use the law and practice relating to internment during international military operations as illustration. Inasmuch as the legal framework relating to this issue provides for a particular rich normative environment in which all possible configurations of interaction can be found with norms at times overlapping, complementing and contradicting each other, the kind of questions that are raised with regard to their interplay are exemplary for the broader challenges raised by IHL/IHRL-conundrum and as such, can help us understand how the relationship between the two bodies of law plays out in practice. Plus, as the extraterritorial application of IHRL treaties in the context of detention is well-accepted, focusing on these matters has the added benefit of allowing discussion on the interaction of IHL and IHRL without having to address the complex issues relating to extraterritoriality.

I. — The exclusivist approach : the *lex specialis* principle

A. — *The origins and scope of lex specialis*

The *lex specialis* maxim originated in Roman law and evolved into an established principle of legal reasoning in domestic law. (15) The principle has also been discussed in the context of international law, and it featured in the works of several early international lawyers, such as Hugo Grotius, Samuel Pufendorf and Emmerich de Vattel. (16) Over the years, as McCarthy has stated, "the place of *lex specialis* as a fundamental principle of international legal analysis has become entrenched. Although it finds no explicit place *eo nomime* in the Vienna Convention on the Law of Treaties (VCLT), it is nevertheless widely utilized as a means of treaty interpretation". (17) The principle has been used by judges and commentators to explain and resolve conflicts of norms within a single treaty, of standards enclosed in different treaties or between rules found in treaties and customs. Specifically with regard to the IHL/IHRL relationship, use of the principle can be traced back to two Advisory Opinions delivered by the International Court of Justice (ICJ).

(15) For an account of the origins and legislative history of the *lex specialis* principle, see A. Lindroos, "Addressing Norm Conflicts in a Fragmented Legal System : The Doctrine of Lex Specialis", *op. cit.* (note 12), 35-39.

(16) *Ibid.*, 35-36.

(17) C. McCarthy, "Legal Conclusion or Interpretative Process ? *Lex Specialis* and the Applicability of International Human Rights Standards", *op. cit.* (note 12), 104.

The ICJ first referred to *lex specialis* in its advisory opinion in the *Nuclear Weapons* case of 1996. (18) Here, the Court had to clarify the relationship between the right to life under Article 6 International Covenant on Civil and Political Rights (ICCPR) and the protection of life under IHL with regard to the use of nuclear weapons. The most important paragraph of the Advisory Opinion for our purposes is the following:

> "The Court observes that the protection of the [ICCPR] does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not to be arbitrarily deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities". (19)

Later, in the *Wall* case, the ICJ revisited the interplay of IHL and IHRL and the *lex specialis* principle. This time, it phrased its view as follows:

> "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 other may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law". (20)

Several key points can be made regarding these statements. First, the Court plainly affirmed the interconnectedness of IHRL and IHL by accepting that IHRL remains relevant and applies during armed conflict unless a formal derogation has been made. Thus, the Court endorsed and confirmed the approach taken by the international community, with the UN and International Committee of the Red Cross (ICRCI) leading the way, regarding the continued applicability of IHRL. Second, for the first time, a judicial body addressed the issue head-on and examined how it played out in a particular case and with regard to specific standards. Finally, by introducing the *lex specialis* principle it laid down the first theoretical framework for the parallel application of IHL and IHRL. Yet, in articulating the theory, the Court failed to provide the necessary clarification as to the exact scope and conse-

(18) Although the Latin might give a different expression, the principle has surfaced in discussions on the interaction of the two bodies of law only after the ICJ referred to it. This was evidenced by Milanovic, who traced the genesis of the use of the *lex specialis* principle in this context. See M. Milanovic, "The Lost Origins of *Lex Specialis*: Rethinking the Relationship between Human Rights and International Humanitarian Law", in J.D. Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights*, Cambridge, Cambridge University Press, forthcoming, available at http://papers.ssrn.com/sol3/papers.cfm ? abstract_id = 2463957, 5.

(19) *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, § 25.

(20) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, § 106.

quences of the use of the principle. The ICJ's statements on the relationship between IHL and IHRL in general and the maxim in particular are brief and uninformative. The Court did provide three different scenarios of interaction in the *Wall* case ; but, as Dennis (for example) has aptly demonstrated, the Court "did not offer specific guidance on how to subdivide the rights into these categories", making them useless in practice. (21)

Similarly, the explanation regarding the actual functioning of *lex specialis* leaves much to be desired and has resulted in confusion. First, questions were raised as to whether the norms of IHL should invariably be considered *lex specialis* in the context of armed conflict or whether, at times, IHRL could qualify as such. It is plausible that the latter scenario would apply under certain circumstances, and especially during non-international armed conflicts (NIACs), where the rules and standards of IHL are succinct and few in number. However, the Advisory Opinions do not provide a conclusive answer in this regard. Second, when comparing the two judgments, one cannot clearly deduce at which level the principle operates, as the way it was applied differed. In the *Nuclear Weapons* case the ICJ labelled the specific rules of IHL relating to the conduct of hostilities as *lex specialis*, while in the *Wall* case the ICJ seemed to consider IHL in its entirety as such. Third, while the ICJ used the *lex specialis* to reconcile IHRL with IHL through interpretation in the *Nuclear Weapons* case, doubts remain as to whether it could do more than that. Can the principle be used to disentangle genuine norm conflicts, i.e. when the language, scope and purposes of the conflicting norms do not allow the *lex specialis* to be applied or to influence the interpretation of the *lex generalis*? (22) Or is it nothing more than "a sub-species of harmonious interpretation"? (23) These (and other) questions were left unanswered. In sum, the ICJ, although it gave some pointers, largely failed to articulate a comprehensive theory relating to the IHL/IHRL conundrum and to remove doubts about the functioning of *lex specialis*. (24)

Despite the deficiencies in the approach of the ICJ, the validity of the *lex specialis* maxim was nevertheless readily accepted in legal scholarship

(21) M.J. Dennis, "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", *The American Journal of International Law* 2005, 133.

(22) At times, norms will be drafted exhaustively, precisely to prevent the possibility of overly expansive or unintended interpretations. In such cases, there is simply no maneuvering space to reconcile conflicting norms through interpretation. Oft cited and, for our purposes, relevant examples of such norms are Art. 2 and 5 ECHR, which include restrictive lists of deprivations of life, respectively liberty, that are not considered arbitrary. The latter article will be discussed in more detail below.

(23) M. Milanovic, *Extraterritorial Application of Human Rights Treaties : Law, Principles and Policy*, *op. cit.* (note 8), 251.

(24) In the same sense, "the treatment of the *lex specialis* principle by the [ICJ] casts a shadow on this principle and infuses doubts on the possibility to effectively use this tool in the context of the relationship between international humanitarian law and international human rights law" : N. Prud'homme, "*Lex Specialis* : Oversimplifying a More Complex and Multifaceted Relationship?", *op. cit.* (note 10), 378.

and the jurisprudence of international judicial bodies. Given the widespread recognition of its validity, one might expect to find an explanation of the scope and functioning of the principle there. Upon inspection of the body of work mentioning *lex specialis*, however, a different picture emerges : when confronted with the issue of the concurrent application of the two disciplines, most judges and commentators have limited themselves to citing the abovementioned dicta of the Advisory Opinions with regard to *lex specialis* and making general statements — e.g. "the two spheres of law are complementary, not mutually exclusive" — that do not offer any help in specific cases. (25) The principle has seldom been clearly defined.

On those rare occasions when an in-depth analysis of the principle has been conducted, the Advisory Opinions have been interpreted in manifestly different ways and the *lex specialis* principle has been construed as meaning fundamentally different things. Three different conceptions of *lex specialis* can be identified. The first favours the unqualified primacy of IHL. In this scenario, IHL as a whole would always be considered as the *lex specialis*, and once it is established that an armed conflict exists — be it an international armed conflict (IAC), a NIAC or a situation of occupation — it should take precedence over IHRL, at least in respect of any issue governed simultaneously and specifically by IHL. Here, one regime is considered to be more special in its entirety. The most prominent proponent of this approach was the US during the Bush administration, but other States have also, albeit infrequently and incoherently, advanced this type of argument, and traces of this approach can also be found in legal literature. (26) The number of

(25) Human Rights Committee, *General Comment No. 31* (26 May 2004), UN Doc. CCPR/C/21/Rev.1/Add.13, § 11. The Inter-American Institutions have tended to mirror the ICJ's approach, referring to IHL as the *lex specialis* and taking it into account when interpreting IHRL norms without elaborating on the principle itself. As to the Inter-American Commission on Human Rights, see IACoHR, *Arturo Ribón Avilán v. Colombia,* Report No. 26/97 — Case 11.142 (30 September 1997), OAS Doc. OEA/ Ser.L/V/II.98 Doc. 6 rev. ; IACoHR, *Hugo Bustios Saavedra v. Peru*, Report No. 38/97 — Case 10.548 (16 October 1997), OAS Doc. OEA/ Ser.L/V/II.98 Doc. 6 rev. ; IACoHR, *Juan Carlos Abella v. Argentina*, Report No. 55/97 — Case 11.137 (18 November 1997), OAS Doc. OEA/ Ser.L/V/II.98 Doc. 6 rev. ; IACoHR, *Detainees in Guantanamo Bay, Cuba — Request for Precautionary Measures* (2002), available at www.oas.org/en/iachr/pdl/decisions/Guantanamo.asp ; With regard to the Inter-American Court of Human Rights, see e.g. IACtHR, *Bámaca-Velásquez v. Guatemala,* Judgment (25 November 2000), Series C : Decisions and Judgments No. 70, §§ 203-208 ; IACtHR, *Serrano-Cruz Sisters v. El Salvador*, Judgment (1 March 2005), Series C : Decisions and Judgments No. 118. The European Court on Human Rights and the African Commission on Human and People's Rights, for their part, have not relied on *lex specialis* in examining the interplay between IHL and IHRL.

(26) In the context of the reporting procedures of the Human Rights Committee, the US, for example, stated the following: "As part of the armed conflict with al Qaida, the Taliban, and their supporters, the United States captures and detains enemy combatants, and is entitled under the law of war to hold them until the end of hostilities. The law of war, and not the Covenant [i.e. the ICCPR], is the applicable legal framework governing these detentions". See Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : concluding observations of the Human Rights Committee : United States of America : Addendum : Comments by the Government of the United States*

those advocating for the "total displacement" interpretation of *lex specialis* is relatively limited, however, as the vast majority of State representatives, judges and commentators have rejected this view because it is overly simplistic and would render any reference to the continued applicability of IHRL entirely moot, at least in respect of any issue governed simultaneously and specifically by IHL. Moreover, since the ICJ had in its statement already accepted the continued applicability of IHRL in times of armed conflict, it would be peculiar to explain its reference to *lex specialis* in such a manner.

The second conception provides an explanation of the *lex specialis* principle that is completely opposite to the one offered by the variant mentioned above, as it considers the *lex specialis* principle as a tool of conflict avoidance — that is to say, as an instrument to interpret human rights in light of humanitarian law and vice versa. Under this conception, when different interpretations of a norm of one body of law are possible and an apparent conflict between the norms exists, the principle guides the interpreter in the direction of the interpretation that will best accommodate the application of the norms of the other and more precise body of law, regardless of whether this is IHRL or IHL. In this sense, *lex specialis* can effectively be understood as a sub-species of harmonious interpretation. Given the complementary language, object and purpose of a part of the norms of IHL and IHRL, it is certainly conceivable that there will be cases where two potentially conflicting norms could be interpreted so as to make them compatible. Article 9 ICCPR and Article 7 of the American Convention on Human Rights (ACHR), for example, stipulate in similar wording that persons may not be deprived of their liberty arbitrarily. Given the "open" nature of these human rights norms, the reasoning of the ICJ in the *Nuclear Weapons* case with regard to the arbitrary deprivation of life can easily be transposed to this situation: What should be considered as arbitrary would be determined by reference to the norms regulating internment in IHL. Similarly, with regard to certain aspects relating to the treatment of detainees, such as right to freedom of medical experimentation, where the standards of one regime provide a more

of America on the concluding observations of the Human Rights Committee (12 February 2008), UN Doc. CCPR/C/USA/CO/3/Rev.1/Add.112, p. 3. Russia has argued in the context of the interstate case of *Georgia v. Russia (II)* that "the Convention did not apply to a situation of international armed conflict where a State Party's forces were engaged in national defence, including in respect of any required operations abroad. In such circumstances, the conduct of the State Party's forces was governed exclusively by international humanitarian law". See *Georgia v. Russia (II)*, ECtHR (13 December 2011), Appl. No. 38263/08, at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108097, 69. In a similar vein, Israel held in its Fourth Periodic Report to the Human Rights Committee that "For its part, Israel recognizes that there is a profound connection between human rights and the Law of Armed Conflict, and that there may well be a convergence between these bodies of two bodies-of-law in some respects. However, in the current state of international law and state-practice worldwide, it is Israel's view that these two systems-of-law, which are codified in separate instruments, remain distinct and apply in different circumstances". See Human Rights Committee, *Fourth Periodic Report of Israel* (12 December 2013), UN Doc. CCPR/C/ISR/4, at 47.

detailed regulation, the interpretation that explains the less elaborate norm in line with it is to be preferred above the one that results in conflict. (27)

One important caveat has to be made : while the notion of *lex specialis* as a tool for conflict avoidance and purposeful interpretation of potentially incompatible international norms is unproblematic and can be considered as a part of formal legal reasoning, it will not always be successful in reconciling the two disciplines of IHL and IHRL. After all, it will not provide an adequate solution when the underlying reasons and desired outcomes of the rules in question run counter to each other or when the language of the standards leaves no room for interpretation. A prime example is Article 5 ECHR. This article contains a limitative list of allowable forms of detention in its first paragraph. Internment for mere security reasons, as allowed and regulated by the Geneva Conventions during international armed conflicts (IAC) and occupation, is not on the list and cannot be read into any of the other available categories. (28) Along the same lines, the IHRL standards which require the review of detention by a court cannot easily be reconciled with the IHL's permitted use of "administrative boards". (29) In both situations, we are faced with a norm conflict that cannot be resolved through mere interpretation. After all, absent any derogation, the language of the provision precludes an interpretation that allows for internment or review by an "administrative board". While useful, *lex specialis* as a method of conflict avoidance can therefore only be applied in a limited number of cases.

In an attempt to circumvent these shortcomings, a third and final conception of *lex specialis* has been promoted, namely that the principle should be construed as a tool for norm conflict resolution. When two potentially conflicting norms of IHL and IHRL are not reconcilable through interpretation and the conflict thus cannot be avoided, one norm should prevail over the other. According to this third conception, *lex specialis* will designate which one, the decisive criteria being whether it is the "most closest, detailed,

(27) In the context of the right to freedom of medical experimentation, for example, the protection offered in IHL is more extensive than in IHRL. Compare in this regard, for example, Article 7 ICCPR with Article 13 GCIII, Article 32 GCIV and Article 11 API. In situations of IACs, it is therefore desirable to take account of the norms of IHL when interpreting the corresponding standards of IHRL.

(28) In the case of *Serdar Mohammed v. Ministry of Defence*, for example, Mr Justice Legatt discarded attempts by the United Kingdom Government to justify interment for security and intelligence purposes of a suspected Taliban commander under Art. 5 (1)(b) ECHR (arrest or detention "in order to secure the fulfilment of any obligation prescribed by law"), Art. 5 (1)(c) ECHR ("for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so"), Art. 5 (1)(f) ECHR ("with the view to deportation or extradition"). The findings of the judge were affirmed on appeal. See *Serdar Mohammed v. Ministry of Defence* [2014] EWHC 1369 (QB), §§ 295-356 and *Serdar Mohammed & Others v. Secretary of State for Defence* [2015] EWCA Civ 843 (QB).

(29) See Article 9(4) ICCPR, Article 5(4) ECHR, Article 7(6) ACHR for relevant human rights norms and compare with Article 43 and 78 GCIV.

precise or strongest expression of state consent, as it relates to a particular circumstance". (30) In the above-mentioned example, this might for instance lead the norms of IHL containing a legal basis for internment (at least in IACs) to prevail over Art. 5 ECHR. Importantly, contrary to what a rigid interpretation of the *Wall* Opinion would seem to dictate, this third variant is often construed as acknowledging that the more precise standards are not necessarily those of IHL, even in times of armed conflict. With regard to certain topics and especially in the context of NIACs, where the rules of IHL are relatively sparse, it has been argued that IHRL could very well contain the standards that have been elaborated the most. (31) It is also important to note here that under this conception of the principle the norm that has been labelled *lex specialis* will only prevail over the conflicting general rule to the extent strictly required to resolve the norm conflict. Unlike in the "total displacement" conception mentioned above, the general law will only be partially displaced, and aside from the conflicting norm it remains applicable.

Clearly, the scope and consequences of the use of the *lex specialis* principle will differ substantially, depending on the conception one withholds. While it can be derived from the above that while the limited support for the "total displacement" interpretation allows us to rule out this conception of *lex specialis*, the principle has regularly been used as a tool for both the avoidance and the resolution of norm conflicts in the past, and will most likely continue to be used as such in the immediate future. The remainder of this article therefore proceeds on the assumption that the *lex specialis* principle can be construed as having these two different meanings. (32)

B. — *Critical appraisal*

Having established the possible constructions of the principle, the follow-up question is whether *lex specialis*, as a mechanism of norm conflict avoidance and/or resolution, can effectively guide the concurrent application of norms of IHL and IHRL in specific cases. In this regard, the present authors subscribe to the view that, with regard to the IHL/IHRL conundrum, references to the *lex specialis* principle have generally been unhelpful and the "use of this term has served to obfuscate the debate rather than provide clarification". (33) The principle suffers from several intrinsic deficiencies,

(30) J. PAUWELYN, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, Cambridge, Cambridge University Press, 2003, 388.

(31) N. PRUD'HOMME, "*Lex Specialis*: Oversimplifying a More Complex and Multifaceted Relationship?", *op. cit.* (note 10), 375-376.

(32) International Law Commission, *Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (13 April 2006), UN Doc. A/CN.4/L.682, 88.

(33) F.J. HAMPSON & N. LUBELL, *Amicus Curiae Brief Submitted in the Case of Hassan v. United Kingdom*, 2013, www.essex.ac.uk/hrc/documents/practice/amicus-curae.pdf, § 18.

precluding it from offering an adequate answer to the whole array of complex and multifaceted questions that arise as a result of the simultaneous application of IHL and IHRL. The varying interpretations and disagreement about the scope and consequences of the principle are already a case in point. The fact that the scope and consequences of the use of the *lex specialis* principle will differ substantially depending on the conception one withholds cannot be downplayed or overlooked, as has often been the case. What we are left with is a broad and vague principle that has no clear and agreed content. However, even if one accepts the dual nature of the principle as a method of conflict avoidance and of conflict resolution, the principle remains difficult to apply.

After all, it cannot fully explain the complementary relationship between IHL and IHRL on its own. First, it has no normative content, as it provides no guidance as to which norm should be considered the more special one. The principle essentially functions on the second plane : only when it is clear how two norms interact and the specificity of one norm over the other is already established, will the principle provide a way out. When such knowledge is missing, the principle is as good as useless. Before the *lex specialis* can operate, the relations between norms therefore thus have to be addressed. In the present context, this puts us in a predicament. Admittedly, in some clear-cut cases, referring to *lex specialis* could lead to the desired results, for instance when the exact relationship between norms has already been established by a court or was fairly straightforward and could be explained by specificity. However, in other, more complicated scenarios the relationship between the rules and standards of IHL and IHRL will be far from clear, and given that "both branches of law seek to protect the person but do so with distinct aims and normative scopes", discerning the *lex specialis* from the *lex generalis* may prove difficult. (34) Identifying and isolating separate norms with a view to determining whether a norm conflict arises between them, and which norm is more specific, may indeed be a complex, and often artificial, enterprise. (35)

To begin with, it is complex because the IHL/IHRL relationship is bi-directional — i.e. both bodies of law may be *lex specialis* — and pinpointing which body of law should be considered specific, is in essence a case-specific determination, heavily contingent on the normative and factual context in which the interpretative process takes place. What rules will apply and how

(34) L.M. Olson, "Practical Challenges of Implementing the Complementarity Between International Humanitarian and Human Rights Law — Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict", *Case Western Reserve Journal of International Law* 2009, 449.

(35) This problem is not exclusive to the IHL/IHRL conundrum and is regularly encountered in international law, which is typified by fragmentation rather than harmony. Overall, as the different subsystems of international law have in general developed separately and within their own normative and institutional environments, it is especially difficult to establish systemic relations between norms, through specificity or otherwise. In the same sense, see A. Lindroos, "Addressing Norm Conflicts in a Fragmented Legal System : The Doctrine of Lex Specialis", *op. cit.* (note 12), 31.

much weight should be given to each norm depends on factors such as the locus where and the circumstances in which the incident takes place, the status of the individuals and the international legal obligations of the states involved. In other words, everything hinges on the actual circumstances of the case. Norms that can be considered the more specific ones in one case will not necessary qualify as such in other, at first glance perhaps similar, cases. Again, the norms relating to the treatment of those deprived of liberty can serve as an example here. On the one hand, in an IAC or a case of occupation, the treatment of internees is extensively regulated in the Third and Fourth Geneva Conventions (GCIII & IV) and with respect to certain aspects of the treatment, for instance, medical experimentation, these norms can be considered to be more specific than corresponding provisions of IHRL. (36) In an NIAC, on the other hand, even though for the individual deprived of liberty the factual situation is not necessarily very different, the latter provisions will most likely be more precise, given the scarcity of norms regulating this type of conflict. Consequently, the *lex specialis* principle cannot be applied mechanically ; an in-depth analysis will have to be conducted every time, and many variables must be factored in. For the representatives of State governments, judges and commentators who are looking at *lex specialis* as an instrument to justify the application of IHL over IHRL, as has often been the case, this must be a sobering thought. Against the background of the widespread acceptance of the continued applicability of IHRL in times of armed conflict, adopting a position that "[derives] the speciality of humanitarian law only from the context of war" will simply no longer do. (37)

Aside from being complex it is also artificial, because the suggestion that a more specific norm can always be found between IHL and IHRL is questionable. After all, how do you compare norms pertaining to two different branches of international law that, despite possessing similar features and goals, are inherently incompatible and may approach a single situation from entirely different angles, with entirely different outcomes in mind ? In a sense, when two conflicting norms of IHL and IHRL apply to the same situation but regulate it differently because the states adopted diverse perspectives when drafting them, one could argue that they both constitute *lex specialis*. In the end, each standard will have been conceived to achieve a specific result and when two norms are regarded as special, the logic of the principle breaks down. Moreover, *lex specialis* is premised on the idea that States could not possibly have intended to undertake contradictory commitments and thus, rests on the "on an unstated assumption — that for any given situation at any given point in time, there is one, and there can be *only* one, expression

(36) Compare in this regard, for example, Article 7 ICCPR with Article 13 GCIII, Article 32 GCIV and Article 11 API.

(37) G. Oberleitner, *Human Rights in Armed Conflicts : Law, Practice, Policy*, Cambridge, Cambridge University Press, 2015, 97.

of state consent or intent as to how that situation is regulated". (38) This assumption, however, does not hold up. On numerous occasions, it will "be implausible to claim that there is a common intention amongst the State parties as to how a particular human rights is to interact with a rule of IHL" and specificity will be of no use to manage the concurrent application of IHL and HRL. (39) Take for example the legal basis for internment in NIACs, where States disagree on whether IHL authorizes the deprivation of liberty for mere reasons of security and on how IHL interacts with the applicable norms of IHRL. In the *Serdar Mohammed* case, the United Kingdom argued in this regard that Common Article 3 and APII, as well as customary international law implicitly authorized internment in a NIAC and could thus be relied upon to detain individuals in Afghanistan. (40) Additionally, it believed that the system of IHL applying to NIACs displaced or modified the relevant norms of IHRL — *in casu* Article 5 ECHR — as *lex specialis* in respect of the actions of its armed forces. (41) These views have also been endorsed at one point or another by the United States and Canada — both coalition partners of the United Kingdom in Iraq and Afghanistan. (42) Yet, other coalition partners, such as Germany, disagree and have clarified that the protections of IHRL continue to apply to the detainees held in the course of NIACs. (43) Clearly,

(38) M. Milanovic, "Norm Conflicts, International Humanitarian Law, and Human Rights Law", in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux*, Oxford, Oxford University Press, 2011, 115.

(39) L. Hill-Cawthorne, "Just another case of treaty interpretation? Reconciling humanitarian law and human rights law in the ICJ", in M. Andenas and E. Bjorge (eds), *A Farewell to Fragmentation. Reassertion and Convergence in International Law*, Cambridge, Cambridge University Press, 2015, 289.

(40) See *Serdar Mohammed v. Ministry of Defence* [2014] EWHC 1369 (QB), §§ 239-268 and *Serdar Mohammed & Others v. Secretary of State for Defence* [2015] EWCA Civ 843 (QB), §§ 164-244.

(41) See *Serdar Mohammed v. Ministry of Defence* [2014] EWHC 1369 (QB), §§ 269-294 and *Serdar Mohammed & Others v. Secretary of State for Defence* [2015] EWCA Civ 843 (QB), §§ 107-124.

(42) This was amongst others acknowledged by the respective governments in their responses to the Human Rights Committee's (HRC), *Draft General Comment No. 35*. See Human Rights Committee, *Observations of the United States of America on the Human Rights Committee's Draft General Comment 35, Article 9* (10 June 2014) ["international humanitarian law, as the *lex specialis* of armed conflict, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims" and "international humanitarian law is the *lex specialis* in both international and non-international armed conflicts, including with respect to detention of enemy combatants in the context of the armed conflict"] and Human Rights Committee, *Draft General Comment No. 35, Article 9: Liberty and Security of Person, Comments by the Government of Canada* (6 October 2014) ["Consideration of obligations under Article 9 must take into account the fact that international humanitarian law is the *lex specialis* in factual situations of armed conflict and therefore the controlling body of law in armed conflict"], both available at www.ohchr.org/EN/HRBodies/CCPR/Pages/DGCArticle9.aspx.

(43) In response to the question "What rules of engagement apply to the arrest or detention of persons by members of German armed forces abroad, for example in the context of Operation ENDURING FREEDOM or the ISAF [International Security Assistance Force] mandate?", the Germany's Federal Government for example wrote that "the protection of human rights has always been and is a formative element especially also of the Federal Armed Forces' deployments abroad", see *Grundgesetz und Völkerrecht bei Auslandseinsätzen der Bundeswehr: Behandlung von Personen, die in Gewahrsam genommen werden*, Antwort der Bundesregierung, Bundestag Drucksache 16/6282

there is no way to pinpoint what the closest, detailed, precise or strongest expression of state consent is here in order to determine which norm should prevail over the other, and the principle provides no way out.

Second, apart from the fact that the *lex specialis* principle offers no guidance as to which norm should be considered the more special one, a closely related but perhaps more fundamental issue is the principle's inability to grasp the intricacies of the relationship between IHL and IHRL. These bodies of law are composed of customary norms, as well as a panoply of treaty standards with different natures (permissive, prohibitive and obligatory) that are enclosed in different (universal and regional) instruments, with varying geographical, temporal and substantive scopes of application and numbers of signatories. There is substantial overlap, with norms at times complementing and contradicting each other. The co-applicability of IHL and HRL can therefore take the form of a multitude of configurations, raising different questions and requiring different approaches and solutions. The *lex specialis* principle is ill-equipped to deal with all these questions, as it cannot consistently and predictably clarify the interplay and relationship of the two spheres of law. Essentially, the problem is that the binary reasoning that emanates from the maxim oversimplifies the multifaceted nature of their interaction. The difficulties involved in articulating the interplay of these spheres of law in terms of specific and more general norms already hint at the inaptitude of the principle, but it plays out on other, more profound levels as well.

Most importantly, by consistently according the specific law with superiority over general norms, it neglects the possibility that diverging norms of both bodies of law could be highly relevant to a particular case and should be accommodated so they could be applied in tandem, be it to fill gaps in the regulation of the one or the other legal framework, to apply norms of both regimes simultaneously in order to shore up the level of protection for those in need of it, or to assist and influence the interpretation and application of more broadly formulated norms in concrete circumstances. Admittedly, the principle will at times and to a certain extent be able to achieve comparable results — as has been mentioned above, when understood as a subspecies of

as cited by the ICRC, International Committee of the Red Cross, *Customary IHL Database*, *Practice relating Rule.99 Deprivation of Liberty* at www.icrc.org/customary-ihl/eng/docs/v2_rul_rule99. Moreover, when discussing the detention and legal status of the prisoners of Guantanamo Bay in 2005, the government of the Netherlands formulated their view as follows: "In addition to the rules of international humanitarian law, international human rights norms — insofar as they cannot be suspended in emergency situations — should also apply without restriction to armed conflicts" and that "the undeniable importance of keeping potential combatants away from the battlefield cannot entail that detainees are held for an unlimited period and without due process", see Letter of the Minister of Foreign Affairs to the House of Representatives, dated 10 May 2005 [*Kamerstukken II* 2004/2005, 27925, No. 172.], as translated by P.C. TANGE, "Netherlands State Practice during the Parliamentary Year 2004-2005", *Netherlands Yearbook of International Law* 2006, vol. 37, 336. For further State practice, see the ICRC Customary IHL Database.

harmonious interpretation, it will be able to assure the interpretation of the one body of law in the light of the other. There is, however, an important difference : *lex specialis* "ultimately seeks to identify the 'correct' (i.e., special) norm at the expense of the inappropriate general norm" and is thus more "about establishing prevalence than it is about securing consistency, filling gaps and achieving broader normative coverage". (44) In other words, the *lex specialis* principle, with its basic two-step approach of identifying and isolating two juxtaposed norms, and applying the more specific one, in principle does not allow for some sort of cumulative (i.e. parallel application without interaction) or complementary (simultaneous application with mutual influence) application, as might be desirable. Arguably, an approach that focuses on norm coordination rather than norm priority, achieves a better reconciliation of the two branches of international law and truly results in their concurrent application. This becomes evident in the context of the transfer of individuals deprived of liberal and the principle of *non-refoulement*, where it is generally accepted that the concurrent application of the relevant norms of IHL, IHRL and international refugee law brings about the most comprehensive protection for the individuals involved. (45)

It is for these reasons that the focus on the *lex specialis* principle seems to be misplaced in the context of the IHL/IHRL relationship. The idea that *lex specialis* has no clear value in the present context is not necessarily a new one. The authors cited throughout this article have, for many of the same reasons mentioned above, already retreated from considering *lex specialis* as the go-to principle to explain the interaction between the two bodies of law. Several judges have followed suit. Even the ICJ, which introduced the principle in discussions on the concurrent application of IHL and IHRL, seems to have stepped away from it. When confronted with the question of the interplay between the two branches of international law in the case of *Democratic Republic of the Congo v. Uganda*, for example, the ICJ reiterated its dictum in the *Wall* case but omitted the reference to *lex specialis* and did

(44) G. Oberleitner, *Human Rights in Armed Conflicts : Law, Practice, Policy*, *op. cit.* (note 37), 107-108.

(45) In the preamble of the Copenhagen Principles and Guidelines on the Handling of Detainees in International Military Operations, for example, the intention was "to ensure respect for applicable international humanitarian law and human rights law by the detaining, transferring and receiving States and organizations, as well as non-State actors and individuals". The commentary to the principle relating to transfers of detainees (No. 15) furthermore stipulates that "in transfer situations, it is important to ensure that the detainee who is to be transferred is not subject to a real risk of violations that breach international law obligations concerning humane treatment and due process", which has been interpreted as including IHRL ; Ministry of Foreign Affairs Denmark, *The Copenhagen Process on the Handling of Detainees in International Military Operations : Principles and Guidelines*, Copenhagen, 2012, at http://um.dk/en/~/media/UM/English-site/Documents/Politics-and-diplomacy/Copenhangen%20Process%20Principles%20and%20Guidelines.pdf, 24. See also C. Droege, "Transfers of Detainees : Legal Framework, Non-Refoulement and Contemporary Challenges", *International Review of the Red Cross* 2008, 670-676.

not even mention its Advisory Opinion in the *Nuclear Weapons* case. (46) If this omission was intentional, it can be construed as an attempt to drop the principle and reframe discussions on the subject. Similarly and more recently, the ECtHR did not mention the principle in the case of *Hassan v. United Kingdom*, opting instead for a more "symbiotic" approach to disentangle the IHL/IHRL conundrum (see *infra*).

These developments are promising, although they are still exceptions, with most judges and academics hesitant to completely forego the *lex specialis* principle. Even some of those who are cognizant of the questions surrounding its meaning and legal effect continue to frame the discussions exclusively in terms of identifying and applying the more specific norms and standards, leading one to wonder why. (47) A possible explanation has been offered by Milanovic. In his view, "the appeal of *lex specialis* lies in the veneer of antiquity of its Latin formula, in its apparent formality, simplicity and objectivity. But all it really does is disguise a series of policy judgments about what outcomes are the most sensible, realistic and practicable in any given situation". (48) Indeed, the broadness of the principle allows for different interpretations and accords wide discretion to decision-makers to tailor the solution to the circumstances at hand in a way they see fit. One can see the allure the principle has to some, especially those favouring the application of IHL over IHRL, as the principle "can be used to pay lip-service to the universality of human rights and their continued application in times of armed conflict, while at the same time effectively excluding human rights from such situations". (49) However, the fact that the broad scope of the principle allows "manipulation or manoeuvring" of the law to support diametrically opposed positions is problematic in and of itself. (50) Furthermore, another important downside outweighing possible benefits is that "the elusiveness of *lex specialis* creates ambiguity on the applicable law which in turn brings legal uncertainty". (51) As mentioned above, this is to be avoided.

Another (partial) explanation is the perceived lack of alternatives. As most cases are initially brought before domestic courts, and subsequently before specialized human rights courts, they are decided upon by judges with a limited knowledge of IHL, let alone of the interplay between this body of law and

(46) *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports* 2005, p. 168, § 216.

(47) See, for example, S. Aughey & A. Sari, "Targeting and Detention in Non-International Armed Conflict: *Serdar Mohammed* and the Limits of Human Rights Convergence", *International Law Studies* 2015, 111.

(48) M. Milanovic, "The Lost Origins of *Lex Specialis*: Rethinking the Relationship between Human Rights and International Humanitarian Law", *op. cit.* (note 18), 35.

(49) G. Oberleitner, *Human Rights in Armed Conflicts: Law, Practice, Policy*, *op. cit.* (note 37), 103.

(50) N. Prud'homme, "*Lex Specialis*: Oversimplifying a More Complex and Multifaceted Relationship?", *op. cit.* (note 10), 383.

(51) *Ibid.*

IHRL. While in some legal fora, such as the ECtHR, the judges have regularly been confronted with the concurrent application of the two branches of international law and have thereby acquired some familiarity with the subject as time goes by, outside these fora magistrates have little experience therewith. Most are uncertain about how to conceptualize this relationship, if not through the *lex specialis* principle. There are nevertheless alternatives, as legal doctrine has in recent years proposed different principled bases on which to rationalise the IHL/IHRL-conundrum. Most notably, a large group of detractors of the *lex specialis* approach have dismissed the exclusivist idea that whenever the two bodies apply simultaneously and a norm conflict arises priority should be accorded to the norms of one regimes over the other and instead opt for a more "symbiotic" approach to the relationship between IHL and HRL, emphasizing cumulative application and complementarity of norms over conflict. We turn to these approaches next.

II. — Symbiotic, VCLT-based approaches

The term "symbiotic" was first coined by Hill-Cawthorne to describe the way the ECtHR handled the simultaneous application of the norms of IHL and IHRL relating to deprivation of liberty in armed conflict in the aforementioned case of *Hassan v. United Kingdom,* but will be used here more generally to describe the ideas of those academics that consider the parallel and coterminous application of the two bodies of law as the default legal position. (52) Instead of continuously seeking to resolve the IHL/IHRL conundrum by considering which of two diverging norms should take precedence over, to the exclusion of, the other, the proponents of these symbiotic approaches thus opt, wherever and whenever possible, for a cumulative application of both spheres of law in order to fill possible gaps in regulation and achieve broader normative coverage. Now how does this play out in practice ? Whenever the norms and standards of these bodies of law are simultaneously applicable, their first reflex will be to propose applying the relevant provisions of IHL and IHRL in parallel, examining the conduct in question for conformity with both bodies of law. It has been argued that this approach will at times, and more specifically when the conduct under review constitutes a clear violation under both bodies of law, take away the need to determine precisely how the applicability of one body of law affects the

(52) See L. Hill-Cawthorne, *The Grand Chamber Judgment in Hassan v. UK*, *op. cit.* (note 13). These ideas have been suggested in legal literature for some time under a variety of denominators, such as "convergence", "pragmatic theory of harmonization", "cross-pollination" or "cross-fertilization". See, e.g., C. Droege, "Elective Affinities ? Human Rights and Humanitarian Law", *International Review of the Red Cross* 2008, 501-548.

interpretation of the other. (53) In this scenario, it will suffice to find that a state has failed to comply with both legal regimes, as for example the ICJ did in the *Democratic Republic of the Congo v. Uganda* case and the African Commission on Human and Peoples' Rights in *Democratic Republic of the Congo v. Burundi, Uganda and Rwanda.* (54)

Second, whenever an apparent norm conflict exists, those advocating a more symbiotic interaction "underscore the fact that the two disciplines are already involved together inasmuch as they are both inspired [one exclusively, the other partially] by a common objective — the protection of humanity –" and require the harmonious interpretation of the different norms. (55) The underlying rationale is that diverging norms do not operate in a legal vacuum but have to be interpreted, as much as possible, in line with each other because it is "both desirable and necessary to avoid States being faced with irreconcilable legal obligations and controversial results". (56) The opportunities for such mutual interpretation are manifold : the possibility for mutual influence of rules relating to the right not to be arbitrarily deprived of life or liberty has been explored above, but there is also ample room for harmonious interpretations with regard to economic, social and cultural rights, amongst others, with regard to the norms relating to cultural heritage, education, food and health care. (57) The legal basis for this harmonious interpretation has generally been found in Article 31 (3)(c) VCLT, which stipulates that in interpreting treaty norms account shall be taken of any relevant rules of international law applicable in the relations between the parties. The observant reader might notice at this point that the article functions in much the same way as the soft, second conception of *lex specialis*. This is true and it has rightly been argued that relying on the principle as a tool of norm conflict avoidance will generally lead to the exact same results as using Article 31 (3)(c) VCLT. (58) Yet, there are nevertheless some important differences that set reliance on the provision apart, namely that there is a clear legal basis — *lex specialis* is not mentioned in the VCLT or any other treaty — and there is no need to discern what norms should be considered specific, which as mentioned is a complex and artificial exercise.

(53) L. HILL-CAWTHORNE, "Just another case of treaty interpretation ? Reconciling humanitarian law and human rights law in the ICJ", *op. cit.* (note 39), 290.

(54) *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168, § 345 and African Commission on Human and Peoples' Rights, *Democratic Republic of Congov./Burundi, Rwanda, Uganda*, Decision (29 May 2003), Communication No. 227/99, §§ 66-98.

(55) N. PRUD'HOMME, "*Lex Specialis* : Oversimplifying a More Complex and Multifaceted Relationship?", *op. cit.* (note 10), 387.

(56) F.J. HAMPSON & N. LUBELL, *Amicus Curiae Brief Submitted in the Case of Hassan v. United Kingdom*, *op. cit.* (note 33), § 29.

(57) G. OBERLEITNER, *Human Rights in Armed Conflicts : Law, Practice, Policy*, *op. cit.* (note 37), 112-117.

(58) *Ibid.*, 108.

The final question then becomes how those in favour of a more symbiotic functioning of IHL and IHRL have dealt with genuine norm conflicts. Solely relying on Article 31 (3)(c) VCLT will not always do. As noted above, purposeful interpretation of potentially incompatible international norms has its limits and will be of no use when the underlying reasons and desired outcomes of the rules in question run counter to each other or when the language of the standards leaves no room for interpretation. Examining the decision in the case of *Hassan v. United Kingdom* before the ECtHR may provide useful insights in this regard. Central to this case was the norm conflict between the internment powers of the Third and Fourth Geneva Conventions, which authorize the internment of combatants and civilians posing a threat to security during international armed conflict and occupations, and the right to liberty, as laid down in Art. 5 ECHR, which does not allow for internment or preventive detention where there is no intention to bring criminal charges within a reasonable time. Because the British government had requested the Court to disapply its obligations under Article 5 ECHR or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law, the judges had no choice but to address the issue and offer their view on how to proceed when confronted with a genuine norm conflict. (59)

Ultimately, a majority of ten to four decided that the requirements of IHRL should be read down to permit IHL to apply to the situation. In this regard, the Court held that "the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision *should be accommodated, as far as possible*, with the taking of prisoners of war and the detention of civilians who pose a risk under the Third and Fourth Geneva Convention" (our emphasis). (60) At the same time, it attenuated the habeas corpus requirement of court review in order to permit review by a "competent body" (Articles 43 and 78 of GCIV), albeit on the condition that it provides "sufficient guarantees of impartiality and fair procedure to protect against arbitrariness". (61) In essence, instead of opting for an exclusivist perspective consisting of establishing the prevalence of one norm over another, the ECtHR attempted a middle-way solution and sought to let IHL and IHRL function in symbiosis by "merging" or "fusing" the two bodies of law to a certain extent and manoeuvring away any inconsistencies. In the current case, this resulted in the judges making allowances for the more permissive detention powers and habeas corpus requirements of IHL, while at the same time retaining the obligation to respect the procedural safeguards of IHRL, which are more stringent than the guarantees of IHL.

(59) *Hassan v. United Kingdom*, § 99.
(60) *Hassan v. United Kingdom*, § 104.
(61) *Hassan v. United Kingdom*, § 106.

To come to this conclusion, the judges relied on Article 31(3)(b) VCLT, which states that any subsequent practice in the application of the treaty can be taken into account, and, again, the principle of harmonious interpretation as laid down in Article 31 (3)(c) VCLT. First, the majority stated that a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, could be taken as establishing their agreement "not only as regards interpretation but even to modify the text of the Convention". (62) Upon finding that the practice of the State Parties is not to derogate from their obligations under Article 5 ECHR in order to detain persons on the basis of the Fourth Geneva Conventions during international armed conflicts, they subsequently argued that this practice pointed to an understanding on the part of states that Article 5 ECHR does not preclude internment pursuant to the powers accorded to them under IHL. (63) Building upon this argument, the Court then made clear that, even in situations of international armed conflict, the safeguards under the Convention continue to apply and, referring to Article 31 (3)(c) VCLT, that the Convention must be interpreted against the background of the provisions of international humanitarian law. This prompted it to read down Article 5 ECHR the way it did.

Can this symbiotic, VCLT-based approach taken by the ECtHR serve as a model for future attempts to manage the co-application of IHL and IHRL, meaning that apparent conflicts will be avoided through interpretation and that the common intentions of states, as derived i.a. from subsequent practice, will be the decisive consideration when looking to resolve genuine norm conflicts ? At this time, it should be noted that the judgment in the *Hassan v. United Kingdom* has been the subject of criticism in legal literature and that, as a result, the viability of the approach taken by the majority requires further contemplation. The critique has mainly focused on the way the judges have travelled beyond mere complementary application of IHL and IHRL and came to conclusions arguably not supported by the fundamental principles of treaty interpretation. In the view of the detractors, a court simply cannot reconcile diverging provisions when one of the norms is formulated exhaustively and has traditionally been interpreted narrowly, as with Article 5, §1 ECHR. Doing so, the argument goes, would amount to overstepping the boundaries of treaty interpretation and venturing into the domain of treaty amendment, a prerogative of States. A court simply cannot alter the exact formulation of treaties. This position was most notably put forward by the four dissenting judges during the Hassan case itself. In their words :

> "there is simply no available room to 'accommodate' the powers of internment under international humanitarian law within, inherently or alongside Article 5, §1. [...] On the facts of this case, the powers of internment under the Third and

(62) *Hassan v. United Kingdom*, § 101.
(63) *Ibid.*

> Fourth Geneva Convention, relied on by the Government as a permitted ground for the capture and detention of Tarek Hassan, are in direct conflict with Article 5, §1 of the Convention. [...] By attempting to reconcile the irreconcilable, the majority's finding today does not, with respect, reflect an accurate understanding of the scope and substance of the fundamental right to liberty under the convention". (64)

In legal literature the approach taken by the Court has been scrutinized in like manner. Borelli, for example, has stated that,

> "insofar as the Court's approach in Hassan is incompatible with the express terms of that provision, it involves resort to a *contra legem* interpretation which is, in itself, clearly inconsistent with the fundamental principles of textual and teleological interpretation set out in Article 31(1) of the Vienna Convention on the Law of Treaties, i.e. that a treaty is to 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". (65)

The present writers take note of this criticism and accept that the judgment in the case of *Hassan v. United Kingdom* is flawed. However, we believe that the problems lie not so much with the approach the ECtHR has taken, as has been argued above, but rather with the way the judges applied it in practice. In this regard, we side with Bjorge, who has stated that "whilst, in principle, subsequent practice could legitimately lead to the kind of extreme interpretative results which were the outcome in *Hassan* — interpretation *contra legem* — it is far from clear that the requisite practice was actually obtained in Hassan". (66)

Support for this point of view can be found in the reports on subsequent agreements and subsequent practice drafted by Georg Nolte, Special Rapporteur for the International Law Commission (ILC) in relation to the interpretation of treaties and in decisions of international (quasi-) judicial bodies. The Special Rapporteur recognized that subsequent practice, to the extent it establishes an agreement of the parties to the treaty regarding its interpretation, represents objective evidence of the understanding of the Parties and as such, can be considered as an authentic means of interpretation. (67) Consequently, it is a particularly important factor to be taken account of when interpreting treaties. In addition, Nolte pointed out that States and international courts are prepared to accord States parties a wide scope for the

(64) *Hassan v. United Kingdom, Dissenting Opinion*, § 19.

(65) S. Borelli, "The (Mis)-Use of General Principles of Law: *Lex Specialis* and the Relationship between International Human Rights Law and the Laws of Armed Conflict", in L. Pineschi (ed.), *General Principles of Law: The Role of the Judiciary*, Springer, 2015, 286.

(66) E. Bjorge, "What is Living and What is Dead in the European Convention on Human Rights? A Comment on *Hassan v United Kingdom*", *Questions of International Law* 2015, No. 15, 35-36.

(67) International Law Commission, *First Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation by Georg Nolte, Special Rapporteur* (19 March 2013), UN Doc. A/CN.4/660, § 30.

interpretation of a treaty by way of subsequent practice, even to the point that "there may be a blurring of the line between the interpretation and the amendment of a treaty by subsequent practice". (68) The ICJ, despite not openly acknowledging the possibility of modification through subsequent practice, has, for example, issued several advisory opinions in which it relied on particular subsequent practice of State Parties to come to conclusions arguably not supported by the text of the treaties involved. In the *Namibia* opinion, the ICJ assimilated abstentions with "concurring/affirmative" votes under Article 27 (3) UN Charter, which details the decision making procedure of the UN Security Council. (69) In the *Wall* opinion it stipulated that the "increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security is consistent with Article 12, paragraph 1, of the Charter", even though the article clearly states that "while the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation". (70) Although the States had packaged and sold their subsequent practice in those cases as justifiable interpretations not amounting to amendment, it is hard to deny that they are in truth de *facto* modifications. (71) The case law is not limited to the ICJ, as other international judicial bodies and arbitral tribunals have similarly upheld subsequent practice essentially changing the terms of a treaty. The ECtHR, for its part, has already explicitly accepted in its judgments in *Soering*, *Öcalan* and *Al-Saadoon and Mufdhi v. the United Kingdom* the possibility that subsequent practice might result in the modification of a treaty. (72) Although the idea is still contested in legal literature, these cases

(68) International Law Commission, *Second Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation by Georg Nolte, Special Rapporteur* (26 March 2014), UN Doc. A/CN.4/671, draft conclusion 11 (1) and § 165.

(69) *Legal Consequences for States of the Contitiued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Adrisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 22, §§ 21-22.

(70) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 149, § 27.

(71) The reasons for trying to pass their practice as permissible treaty interpretations, instead of acknowledging commonly agreed to contrary conduct, are policy-based, rather than strictly legal. In this regard, Hafner for example noted that "it seems that the distinction between modification and interpretation mainly depends on the will of the parties, stretching, occasionally, the meaning of a term or a norm so as to avoid the necessity of a formal amendment or a new treaty. Only international tribunals have retrospectively referred to the possibility of a modification by subsequent practice which States, however, would still call an interpretation", see G. HAFNER, "Subsequent Agreements and Practice: Between Interpretation, Informal Modification, and Formal Amendment", in G. NOLTE (ed.), *Treaties and Subsequent Practice*, Oxford, Oxford University Press, 2015, 117.

(72) *Soering v. the United Kingdom*, ECtHR, Judgment (7 July 1989), Appl. No. 14038/88, § 103; *Öcalan v. Turkey*, ECtHR, Grand Chamber Judgment (12 May 2005), Appl. No. 46221/99, § 163; *Al-Saadoon and Mufdhi v. the United Kingdom*, ECtHR, Judgment (2 March 2010), Appl. No. 61498/08, § 119.

therefore suggest that the amendment of a treaty through subsequent practice of the parties is, at least theoretically, possible and that the approach the ECtHR took in *Hassan* is not *a priori* illegitimate.

However, in order to have this effect, the subsequent practice should fulfill strict conditions. This is all the more the case when IHRL treaties are involved, as they may contain truly multilateral, *erga omnes* obligations. In the words of Alvarez, "where a treaty creates a third party beneficiary [...] as in the case of human rights treaties [...] the capacity for the states parties to modify their treaty through practice faces additional constraints". (73) Although a thorough discussion of these constraints falls outside the ambit of this article, for present purposes, the following statements can be made in this regard. For starters, as stipulated by Article 31 (3)(b) VCLT, the state conduct has to be subsequent and relational, meaning that the practice should have materialized after the conclusion of the treaty and that there must be a clear link between the conduct and the underlying treaty. (74) Additionally, it should be clear that the possible scope of a modification by subsequent practice is limited and should "not touch the main basis of the treaty" or for that matter, *jus cogens*. (75) As such, the subsequent practice should not be irreconcilable with the object and purpose of the treaty. Finally, it has been argued that in order to have authoritative value under Article 31 (3) (b) VCLT, the subsequent practice must be concordant, common and consistent. (76) These criteria have generally been explained as requiring a sequence of acts or pronouncements establishing the agreement of the state parties collectively. As the effect of subsequent practice on the interpretation of a treaty is particularly far-reaching in the present context, it should be evident that the burden of proof has to be high and the evidentiary standards

(73) J.E. Alvarez, "Limits of Change by Way of Subsequent Agreements and Practice", in G. Nolte (ed.), *Treaties and Subsequent Practice*, Oxford, Oxford University Press, 2015, 126.

(74) International Law Commission, *First Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation by Georg Nolte, Special Rapporteur* (19 March 2013), *op. cit.* (note 67), §§ 111-116.

(75) Quote by Sir Humphrey Waldock, expert consultant at the UN Conference of the Law of Treaties, see *Official Records of the United Nations Conference on the Law of Treatie, First session* (24 March-24 May 1968), UN Doc. A/CONF.39/11, p. 214-215, §§ 55-57.

(76) The wording "concordant, common and consistent" was used first by the WTO Appellate Body in the case of *Japan — Alcoholic Beverages II*, World Trade Organisation, *Japan — Alcoholic Beverages II*, Appellate Body Report (4 October 1996), WT/DS8/AB/R, WT/DS10/AB/R, T/DS11/AB/R, sect. E, 12-13. The formulation, however, stuck around and has been used to determine the authoritative value of the subsequent practice, See e.g. *Hassan v. United Kingdom, Dissenting Opinion*, § 13; G. Hafner, "Subsequent Agreements and Practice: Between Interpretation, Informal Modification, and Formal Amendment", *op. cit.* (note 71), 112 and International Law Commission, *Second Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation by Georg Nolte, Special Rapporteur* (26 March 2014), *op. cit.* (note 68), § 48 ["It is rather the extent to which subsequent practice is 'concordant, common and consistent' that a discernable pattern can be identified which implies an agreement of the parties which then must be read into the treaty"].

rigorous.(77) Consequently, in order to lead to a *de facto* modification, ***all*** State Parties should ***clearly*** accept the practice as the correct implementation of the relevant treaty provisions. The existence of such state practice cannot be presumed, for example by pointing to the silence or absence of protest of some States. Deciding otherwise would severely undermine the stability of treaties and treaty relations, as well as render the principle of *pacta sunt servanda* entirely obsolete.

If tested against these requirements, the flaws of the *Hassan* judgment surface, as the subsequent practice the ECtHR relied on does not seem to tick of all the boxes. This issue was also highlighted by Judge Spano in his dissenting opinion, arguing that it may be questioned "whether the State practice referred to by the majority in the present case can be considered to fulfil, in substance, the criteria underlying the subsequent practice rule of Article 31 §3 (b) of the Vienna Convention as developed in international law".(78) Most problematic in this regard is the assertion that the practice of the State Parties not to derogate from their obligations under Article 5 ECHR in order to detain persons on the basis of the Fourth Geneva Conventions pointed to a understanding on the part of states that Article 5 ECHR, despite its language, does not preclude internment pursuant to the powers accorded to them under IHL. The one does not necessarily follow from the other, as the lack of derogations with regard to states' activities abroad might be inspired "more by States' continued attempts to avoid conceding the extraterritoriality of the Convention than any view as to the relationship between IHL and IHRL".(79) In the end, one might argue that the Court's self-declared reliance on Article 31 VCLT served as nothing more than a pretext for a choice made on the basis of what the judges found to be the most sensible, realistic and practicable solution in the given situation. This would also explain why the ECtHR explicitly acknowledged that the decision was tailored to the case under review — namely, the internment during an IAC of an individual suspected of being a civilian posing a risk to security pursuant to GCIV — and could not necessarily be transposed to a different situation, as it is doubtful whether it would be willing to adopt a similar "liberal" stance to modification by subsequent practice if a similar incident were to take place in a NIAC or if different rights and norms were involved.(80)

(77) See J. Arato, "Accounting for Difference in Treaty Interpretation Over Time", in A. Bianchi, D. Peat and M. Windsor (eds), *Interpretation in International Law*, Oxford, Oxford University Press, 2015, 223, footnote 69.

(78) *Hassan v. United Kingdom, Dissenting Opinion*, § 13.

(79) L. Hill-Cawthorne, *The Grand Chamber Judgment in Hassan v. UK*, *op. cit.* (note 13).

(80) *Ibid.* See also E. Bjorge, "What is Living and What is Dead in the European Convention on Human Rights ? A Comment on *Hassan v United Kingdom*", *op. cit.* (note 66), 35 and *Hassan v. United Kingdom, Dissenting Opinion*, § 12.

Now, where does this leave us ? Clearly, as the *Hassan* judgment demonstrates, the reliance on the provisions of the VCLT will not take away all interpretative issues or for that matter, provide a concrete solution for the concurrent application of IHL and IHRL at all times. Judges will still need to examine what constitutes a "relevant" rule of international law under Article 31 (3)(c) VCLT and how much weight it will accord to it in its deliberation. Similarly, they will still have to determine whether subsequent practice fulfils the criteria under Article 31 (3)(b) VCLT and the States' actions can be considered as authentic, even decisive, rather than secondary sources of interpretation. On occasions, judges will come away empty-handed, not being able to reconcile a genuine norm conflict arising from the IHL/IHRL-relationship by resorting to the aforementioned provisions, for example because there was no subsequent practice establishing the agreement of State Parties to read down certain requirements of IHRL. As such, adopting a symbiotic, VCLT-based approach should not be considered as a magic potion that can instantly and completely cure all ailments caused by the IHL/HRL conundrum. Or, in the words of Pulkowski, "a panacea for all instances of regime conflict". (81)

Nevertheless, it is submitted here that such an approach is still preferable over the *lex specialis* mechanism for different reasons. First, it achieves comparable results as the latter principle, without having to embark on the artificial task of determining which of the competing norms is the special one. In case of an apparent norm conflict, reliance on Article 31 (3)(c) VCLT will help reconcile the two bodies of law through interpretation in much the same way as the weak, second version of *lex specialis* would. When a genuine norm conflict is involved, reliance on Article 31 (3)(b) might provide a way out when one can point to uniform subsequent practice indicating the existence of a common intention amongst State Parties as to how two conflicting norms should interact. Second, these approaches are founded on a clear conventional legal basis, whereas *lex specialis* is not. Third, by rejecting the exclusivist premise underlying the *lex specialis,* the symbiotic, VCLT-based approaches adopt, as mentioned, a more nuanced stance to the IHL/IHRL-conundrum in that they opt, wherever and whenever possible, for a cumulative and complementary application of both spheres of law instead of applying the "correct", special norm over the "inappropriate", general norm. In this sense, it arguably better articulates the ICJ's dictum that "some rights may be matters of both these branches of international law". Finally, the finding that judges will at times have to admit that in a particular instance a norm conflict between IHL and IHRL cannot be resolved through interpretation, should not necessarily be considered as affecting the viability of these approaches. On the contrary, while the *lex specialis* will at

(81) D. Pulkowski, *The Law and Politics of International Regime Conflict*, Oxford, Oxford University Press, 2015, 292.

times be used to impose a certain artificial solution that cannot be said to be a reasonable interpretation of the common intention of State Parties — in the end, still the decisive interpretative consideration —, these approaches recognize and accept that, in the words of Milanovic, "sometimes it is only the legislator who produced the antinomy who can provide the remedy for it". (82)

The final question that remains then is what happens if States, which "as masters of treaties co-determine the application and interpretation of international treaty law", do not take it upon themselves to reconcile international obligations ? Several scholars have in this regard argued that, absent for example a formal derogation or uniform subsequent practice indicating the existence of a common intention amongst State Parties as to how two genuinely conflicting norms should interact, reconciliation will not be possible and should not be forced. The norms will apply in parallel and States will have a political decision to make : they will have to choose which norm they will adhere to and if they opt for applying the less stringent norm, face the consequences under the law of state responsibility for breach of the more demanding one. (83) We support this point of view. This position will most likely be criticized for being "normatively [...] biased in favour of humanitarian concerns" and IHRL because the dilemma faced by the States when confronted with a genuine norm conflict will under this view generally come down to abiding by the stricter norms of IHRL or incurring responsibility. It is nonetheless submitted here that this way of proceeding will bring about more legal certainty and clarity in reasoning than a reliance on the *lex specialis* maxim as an overarching principle might. (84)

III. — States' toolbox

We have argued above that going forward, resorting to the interpretative mechanisms enclosed in de VCLT is preferable to relying on *lex specialis* when seeking to reconcile IHL and IHRL and manage their co-application. Yet, this will not always allow for complete harmony between IHL and IHRL. At times, the normal tools of treaty interpretation under the VCLT will come up short and we have argued that in such circumstances, the initiative to settle norm conflicts will be transferred from the judge to the States, who

(82) M. Milanovic, "Norm Conflicts, International Humanitarian Law, and Human Rights Law", *op. cit.* (note 38), 124.

(83) See e.g. M. Milanovic, "Norm Conflicts, International Humanitarian Law, and Human Rights Law", *op. cit.* (note 38), 115-116 ; L. Hill-Cawthorne, "Just another case of treaty interpretation ? Reconciling humanitarian law and human rights law in the ICJ", *op. cit.* (note 39), 290.

(84) A. Sari, *The Juridification of the British Armed Forces and the European Convention on Human Rights: "Because it's Judgment that Defeats Us"*, 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id = 2447183, 61-62.

can either take action or face the consequences and incur responsibility. To cap off the discussion on the relation and interplay between IHL and IHRL, we will therefore take a closer look at the steps States can undertake themselves to reconcile conflicting norms and pre-empt questions relating to their concrete interaction. In this regard, it can be noted that there are a multitude of avenues available to States to address the concurrent application of IHL and IHRL, some with temporary, others with more permanent effect. Three specific ones will be discussed in this subsection. The first tool that will be reviewed here is the legal technique of derogations and because it is *à la mode* to depict the mechanism as a powerful, yet underutilized tool in avoiding norm conflicts and managing the concurrent application of IHL and IHRL, its availability in the present context and possible pros and cons will be examined in detail. (85) Subsequently, the possible use of UN Security Council Resolution and subsequent agreements will briefly be considered.

A. — *Derogations*

A first tool that has been said to be available to States to manage the relationship between IHL and IHRL consists of utilizing the derogation clauses included in human rights treaties when seeking to reconcile the norms and standards of the two bodies of law. The legal technique of derogations, which is well established in international law and has been incorporated in different IHRL treaties (see Article 4 ICCPR, Article 15 ECHR and Article 27 ACHR), allows states to suspend the application of certain norms and standards of IHRL during periods of emergency. (86) Their appeal is clear — potential norm conflicts could be prevented by temporarily excluding the application of certain standards, thus allowing the other set of norms to be applied in

(85) M. Milanovic, "The Lost Origins of *Lex Specialis*: Rethinking the Relationship between Human Rights and International Humanitarian Law", *op. cit.* (note 18), 37. Originally, attempts to shift the focus from the *lex specialis* principle to derogation techniques were mainly undertaken by human rights advocates and were predicated on the premise that, in principle, States engaged in an armed conflict should be deemed subject to rules of IHRL that may be more stringent than those of IHL, and individuals should be subject to the higher degree of protection that may be granted by IHRL, unless and inasmuch as the State concerned has formally derogated from certain obligations under IHRL. However, against the background of the growing influence of human rights institutions and IHRL on military affairs, sceptics looking to halt what they call "legal mission creep" have also increasingly started looking at derogations as a viable tool to manage the IHL/IHRL conundrum and ensure that armed forces are not subject to overly burdensome IHRL obligations that might undermine their ability to do their job. See R. Ekins, J. Morgan & T. Tugendhat, *Clearing the Fog of Law: Saving Our Armed Forces from Defeat by Judicial Diktat*, London, 2015, www.policyexchange.org.uk/images/publications/clearing%20the%20fog%20of%20law.pdf, 28.

(86) Perhaps somewhat surprisingly, given the widespread instability and insecurity across the continent, the African Charter on Human and People's Rights does not regulate states of emergency, nor does it contain a derogation clause. Similarly, more recent IHRL treaties, such as for example the Convention on the Rights of the Child (CRC), do not provide States with the possibility of temporarily escaping from their IHRL obligations. These treaties continue to apply in full during armed conflict.

full — and several scholars have come out in support of using the mechanism. (87) However, because States have been rather reticent to resort to this instrument in order to pave the way for the application of IHL, especially with regard to their military activities abroad (*cf. Hassan*), one may wonder whether there are certain obstacles that complicate its use. The answer to this question has both a legal and political dimension.

First, a word on the legal aspect. Since "the drafters of the [Conventions] wanted to prevent arbitrary derogations [...] on the plea of the well-known, but dangerous, doctrine of necessity under constitutional and international law", it should not come as a surprise that strict conditions and procedure were prescribed against which any derogatory measure had to be tested. (88) Consequently, the specific enquiry here is whether States involved in armed conflict can live up to these conditions so that they can disapply their obligations under HRL and allow recourse to IHL or more permissive norms of domestic law, for example to intern individuals for mere reasons of security where there is no intention of bring criminal charges within a reasonable time ? The substantive and procedural requirements that have to be fulfilled for States to be able to lawfully "escape" from their IHRL obligations are, some significant (textual) differences notwithstanding, more or less the same under the different IHRL treaties mentioned earlier. (89) The first paragraphs of these provisions delineate the substantive requirements that have to be fulfilled. The first is the emergency requirement — i.e. that States will only be able to derogate from their human rights obligations "in time of

(87) Debuf has, for example, argued that derogations "afford States legitimate means to face an exceptional situation that cannot be appropriately addressed without resorting to extraordinary measures, and thus allow a swift restoration of order, peace and normal conditions, where human rights can be enjoyed fully by all", E. Debuf, *Captured in War: Lawful Internment in Armed Conflict*, Oxford, Hart Publishing, 2013, 93. Similarly, Larsen has contended that "it would create a coherent and transparent legal framework for the assessment of human rights obligations in [military operations], it would allow troop contributing states to avoid obligations that it would be unrealistic to comply with, and it would in fact lead to an increased level of human rights protection in the area of deployment, since the scope of application of the ECHR would shift from 'nothing' to 'some'", see K.M. Larsen, *The Human Rights Treaty Obligations of Peacekeepers*, Cambridge, Cambridge University Press, 2012, 313.

(88) F. Castberg, T. Opsahl, T. Ouchterlony, *The European Convention on Human Rights*, Leiden, Sijthof, 1974, 165. The statement was made with regard to the ECHR, but can be extrapolated to other treaties as the underlying reasons for adopting were to a certain extent similar. With regard to the ICCPR, O'Donell for example noted that "the inclusion of Article 4 in the Covenant on Civil and Political Rights constitutes an attempt to regulate departures from the usual standards during times of acute crisis, that is, to extend the Rule of Law to this domain rather than create an exception to it", see D. O'Donnell, "Commentary by the Rapporteur on Derogation", *Human Rights Quarterly* 1985, Vol. 7, No. 1, 30.

(89) The large degree of convergence between them is the result of temporal overlap in the drafting processes of the ICCPR and the ECHR and the fact that "the ACHR could draw inspiration from the older drafting materials and experiences of the two other treaties", see M. Milanovic, "Extraterritorial Derogations from Human Rights Treaties in Armed Conflict", in N. Bhuta (ed.), *The Frontiers of Human Rights: Extraterritoriality and its Challenges*, Oxford, Oxford University Press, *Forthcoming*, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2447183, 5.

[an officially proclaimed] public emergency which threatens the life of the nation" (ICCPR), "in time of war or other public emergency threatening the life of the nation" (ECHR) and "in time of war, public danger, or other emergency that threatens the independence or security of a State Party" (ACHR). Second, all three provisions lay down a strict proportionality test, meaning that States can only take measures derogating from their obligations "to the extent strictly required by the exigencies of the situation" and stipulate that the emergency measures may not be "inconsistent with [the derogating State's] other obligations under international law". Finally, the ICCPR and the ACHR both prescribe a third substantive condition, absent in the ECHR, namely that the emergency measures may "not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". The second paragraphs indicate that the power to derogate is not infinite and precludes the temporary suspension of certain rights even during the gravest of emergencies. (90) Finally, in their third paragraphs the provisions regulate the procedural side of the derogations and require states to notify the emergency measures taken, and the reasons thereof, to the institution designated by the respective treaties, to allow the other States and the relevant human rights institutions to take account of a resort to the escape clauses and enable international supervision. (91)

The starting point of this analysis, and perhaps the main issue is whether armed conflicts, which activate the application of IHL, fulfil the emergency requirement and are thus capable of triggering the power to derogate. The inclusion of the notion of "war" in Article 15 ECHR and Article 27 ACHR as a scenario where derogation may be permitted seems to be a clear indication that this would indeed be the case. However, one has to remain cautious, as this cannot automatically be presumed. First, because "war" is an antiquated legal concept, which has fallen into disuse in modern international law and cannot necessarily be equated with the notion of armed conflict as it is

(90) Following Art. 15, §2 ECHR, no derogation under ECHR can be made from the right to life — except in respect of deaths resulting from lawful acts of war — (Art. 2), the prohibition of torture (Art. 3), the prohibition of slavery and forced labour (Art. 4) and the "no punishment without law" principle (Art. 7) shall be made. Aside from the non-derogable rights included in the derogation clause of the ECHR, the ICCPR dismisses derogations from the prohibition to be subjected without free consent to medical or scientific experimentation (Art. 7, §2), the prohibition of imprisonment merely on the ground of inability to fulfil a contractual obligation (Art. 11), the right to recognition as a person before the law (Art. 16), the freedom of thought, conscience and religion (Art. 18). The ACHR, for its part, adds the rights of the family (Art. 17), the right to a name (Art. 18), the rights of children to protection (Art. 19), the right to nationality (Art. 20) and the right to participate in Government (Art. 23) to the list of non-derogable rights.

(91) The lists of derogations filed under the different treaties can be found at https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en (ICCPR), www.oas.org/es/sla/ddi/tratados_multilaterales_interamericanos_suspencion_garantias.asp (ACHR), http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CM=8&DF=02/07/2015&CL=ENG&VL=1 (ECHR).

understood today. (92) Second, because it remains uncertain whether war can be considered "an independent justification for a derogation in its own right" or whether one will still have to demonstrate that the war threatens the life of the nation/independence or security of a State Party to allow recourse to derogations. (93) For these reasons, one would still need to examine whether armed conflicts could be said to fulfil the emergency requirement, as would have been necessary under the ICCPR anyway, because its derogation clause does not contain a reference to "war". (94)

Whether or not a "war or a public emergency threatening the life of the nation" existed in an actual case, and thus whether the threshold for derogation was met, was discussed for the first time in the landmark case of *Lawless v. Ireland*. Here, the ECtHR explained the notion as referring to "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed". (95) This definition has been treated as authoritative and has been elaborated upon in subsequent decisions. Most notably, in the *Greek* case the European Commission on Human Rights specified that for the threshold for derogation to be met, the emergency "(1) must be actual or imminent; (2) its effects must involve the whole nation; (3) the continuance of the organized life of the community must be threatened; and (4) it must be exceptional in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate". (96) Ever since, the ECtHR has tested future cases

(92) "[T]he main reason for discarding war was that it was a concept that was considered to be too subjective, rigid, and technical — many wars in the material sense were historically fought but did not qualify in the technical, thus depriving those affected by them of legal protection"; see M. MILANOVIC, "Extraterritorial Derogations from Human Rights Treaties in Armed Conflict", *op. cit.* (note 89), 13. In this regard, it has for example been argued that the notion "war" in the derogation clauses encompasses only interstate wars — thus the traditional IACs — and does not cover NIACs, which nonetheless constitute the bulk of contemporary armed conflicts. See J. FITZPATRICK, *Human Rights in Crisis: The International System for Protecting Human Rights During States of Emergency*, Philadelphia, University of Pennsylvania Press, 1994, 57.

(93) M. MILANOVIC, "Extraterritorial Derogations from Human Rights Treaties in Armed Conflict", *op. cit.* (note 89), 13. After all, the latter is not automatically always the case. Consider, for instance, a scenario where a state of war has been proclaimed, but hostilities are sporadic, or where a formal declaration of war is not followed by hostilities. In similar sense, J. FITZPATRICK, *Human Rights in Crisis: The International System for Protecting Human Rights During States of Emergency*, *op. cit.* (note 92), 57.

(94) Those who drafted the ICCPR were of the opinion that the notion of public emergencies would cover wartime situations and that as the Covenant was discussed under the auspices of the UN, an organization specifically created to discourage the resort to the use of force in international relations, a reference to war would be undesirable. See United Nations General Assembly, *Annotations on the Text of the Draft International Covenants on Human Right*, UN Doc. A/2929, chapter IV, § 39.

(95) *Lawless v. Ireland*, ECtHR, Judgment (1 July 1961), Appl. No. 332/57, § 28.

(96) *Denmark, Norway, Sweden and the Netherlands v. Greece* [hereinafter *The Greek Case*], ECommHR, report of the Sub-Commission (1969), Appl. No. 3321/67, 3322/67, 3323/67, 3344/67, § 113.

against these requirements. (97) The other human rights treaty bodies have not provided an authoritative interpretation of their respective derogations clauses in like manner, yet, whenever the issue has been considered by UN commissions, (quasi-) judicial bodies or influential non-governmental organizations, cross-reference has regularly been made to the case law of the ECtHR ; and similar language — at times even word-for-word quotes — has been used in explaining their scope. (98) The general opinion in legal literature is therefore that the scope of application of these clauses does not differ from, and can be explained in line with, Article 15 ECHR. This is true even for Article 27 ECHR, which allows for derogations "in time of war, public danger, or other emergency that threatens the independence or security of a State Party" and thus *prima facie* seems to provide States with more leeway than the other escape clauses. (99)

As a result, the availability of derogations in times of armed conflict will have to be tested against the four criteria mentioned above. In this regard, and for obvious reasons, it is fairly safe to assume that ongoing hostilities in general do qualify as exceptional — actual or imminent — situations during which the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate. We are strengthened in this belief by the fact that the documents minuting the drafting process of the different treaties clearly demonstrate that during negotiations on the derogations clauses armed conflicts were considered by State representatives as prime examples of what could constitute "public emergencies/public dangers". (100) The question of whether armed conflicts, constituting emergencies, can be said to "threaten the life of the nation/

(97) Some of the more notable cases include : *Brannigan and McBride v. The United Kingdom,* ECtHR, Judgment (25 May 1993), Appl. No. 14553/89, 14554/89 ; *Aksoy v. Turkey*, ECtHR, Judgment (18 December1996), Appl. No. 21987/93, and *A. and Others v. The United Kingom*, ECtHR, Grand Chamber Judgment (19 February 2009), Appl. No. 3455/05.

(98) See e.g. United Nations Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (28 September 1984), UN Doc. E/CN.4/1985/4 (Annex) and R.B. Lillich, "Paris Minimum Standards on Human Rights Norms During States of Emergency", *The American Journal of International Law* 1985, afl. 4, 1072.

(99) Svensson-McCarthy has noted that the specific phrasing was chosen to mirror "the emergency terms used in the various constitutions of the American States" and does not necessarily reflect the will of the drafters of the ACHR to allow derogations in a greater number of cases. A.-L. Svensson-McCarthy, *The International Law of Human Rights and States of Exception*, The Hague, Martinus Nijhoff Publishers, 1998, 249. See also R. Norris & P.D. Reiton, "The Suspension of Guarantees : A Comparative Analysis of the American Convention on Human Rights and the Constitutions of the States Parties", *American University Law Review* (1981) 30, 189, 191-193 and J. Fitzpatrick, *Human Rights in Crisis : The International System for Protecting Human Rights During States of Emergency*, *op. cit.* (note 92), 56.

(100) See in this regard, e.g., United Nations General Assembly, *Annotations on the Text of the Draft International Covenants on Human Rights*, UN Doc. A/2929, Chapter V and European Commission on Human Rights, *Preparatory Work on Article 15 of the European Convention on Human Rights*, 22 May 1956, available at www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART15-DH(56)4-EN1675477.pdf.

the independence or security of a State Party" and thus whether its effects involve the whole nation and/or threaten the continuance of the organized life of the community is, however, a somewhat more complex one, and the ease with which it can be answered is largely dependent on whether one is dealing with emergencies stemming from armed conflicts taking place on the territory of the State seeking to derogate or those that take place abroad.

With regard to the former category, the answer is relatively straightforward. It can be noted that States have on several occasions made derogations (under the ICCPR and the ECHR) in relation to situations of emergency resulting from NIACs taking place within their own territory. (101) Although the answer to the question of whether a threat to the nation exists is ultimately a case-specific determination, this past practice of States suggests that emergencies resulting from NIACs taking place on the territory of the State seeking to derogate can be considered to be threatening the continuance of the organized life of the community. As human rights bodies have even accepted derogations in cases of emergencies falling well short of reaching the threshold of armed conflict or when the emergency was confined to certain parts of the State and the emergency could not be said to be so severe as to endanger the survival of the State as a sovereign and independent political entity, their case law reinforces, rather than contradicts, this finding. (102) Similar practice with regard to emergencies resulting from IACs is missing, yet, along the same lines, a resort to derogations does not seem overly troublesome when it is made with regard to the situation in the territory of the derogating State. Consequently, in such scenarios and provided States fulfil the other requirements mentioned above, derogating from IHRL obligations will be a legally valid option.

The situation is more difficult when the emergency takes place abroad — e.g. because the fighting occurs on the territory of the adversary state in the context of an IAC or because the derogating State is involved in an international military operation in a faraway land — and the derogation would take on an extraterritorial character. Here, the question of whether or not States are able to derogate from their IHRL obligations in an extraterritorial setting — thus with regard to emergencies taking place in another State — is not authoritatively settled. It is not that such derogations are *a priori* excluded.

(101) Russia has, for example, derogated from its obligations under the ECHR with regard to the non-international armed conflict in Chechnya. Similarly, with regard to the ICCPR, several States have filed derogations with regard to Article 9 ICCPR during non-international armed conflict taking place on their territory, see e.g. Algeria (1991, 1992), Nicaragua (1984), Peru (1984, 1992), Sri Lanka (1983, 1989, 2000), at https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en.

(102) The ECtHR has, for example, accepted derogations in cases of localized emergencies in South-East Anatolia and Northern Ireland. E.g. *Aksoy v. Turkey*, ECtHR, Judgment (18 December 1996), Appl. No. 21987/93 and *Ireland v. United Kingdom*, Judgment (18 January 1978), Appl. No. 5310/71.

The wording of the different derogation clauses contains no express indication that derogations are only possible in relation to the application of IHRL vis-à-vis the State's own territory, and it would be undesirable if they were to be interpreted as such. (103) However, States will often find it difficult to prove that hostilities in another State are threatening the "life of the nation" or "the independence or security". While a convincing case can arguably be made with regard to classic inter-State armed conflicts between neighbouring countries, with regard to certain multinational peace enforcement operations in faraway countries or, *a fortiori*, in the context of a peacekeeping operation abroad, this is far less obvious. It is not immediately clear how such situations can be said to affect the whole nation and threaten the continuance of the organized life of the community, unless the concept is interpreted so broadly as to encompass crises threatening the life of the nation in which the operation takes place, which is a controversial issue. Diverging views on the topic exist. On the one hand, there is the strand of thought that makes the traditional, strict and literal interpretation of the derogation clauses, namely that the wording of the escape clauses refers to the life of the nation seeking to derogate. The proponents of this view argue that States willing to avail themselves of the derogation mechanism in an extraterritorial setting will still have to demonstrate that a foreign crisis, for example, threatens the physical integrity of the population, the political independence or the territorial integrity of the state, or the existence or basic functioning of institutions indispensable to ensuring and protecting the rights recognized in the main IHRL instruments — a daunting, if not impossible task, indeed. This position was most famously adopted by the majority in the House of Lords' judgment in the case of *Al-Jedda v. United Kingdom*. (104) On the other hand, there are those who advocate for a more dynamic interpretation of the escape clauses. Having regard to the fact that the different human rights treaties constitute "living instruments" that must be understood in light of changed realities, they believe that the notion of a "public emergency threatening the life of the nation" should include an exceptional situation of crisis that affects the whole population and constitutes a threat to the organized life

(103) Inasmuch as it is expected that IHRL may apply on an extraterritorial basis, the same must be true for the derogation clauses. To borrow the words of Sassóli, "one cannot simultaneously hold a state accountable because it has a certain level of control abroad and deny it the possibility to derogate because there is no emergency on that state's own territory". See M. Sassóli, "The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts", in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux*, Oxford, Oxford University Press, 2011, 66.

(104) "Such power [of derogation] may only be exercised in time of war or other public emergency threatening the life of the nation seeking to derogate, and only then to the extent strictly required by the exigencies of the situation and provided that the measures taken are not inconsistent with the state's other obligations under international law. It is hard to think that these conditions could ever be met when a state had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw", see *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)*, [2007] UKHL 58, § 38.

of the community in which a military operation is conducted. (105) This is essentially the approach taken by Judge J. Legatt in his first instance judgment in the case of *Serdar Mohammed v. United Kingdom*. (106)

It is argued here that there are compelling reasons to construe the derogation clauses so as to include an outward-looking, extraterritorial component. First, the derogation clauses were introduced into the IHRL treaties specifically because the State representatives were of the opinion that it can be impracticable and counterproductive at times to require States to uphold the full range of human rights obligations, for example during phases of ongoing hostilities or other crises of substantial size and gravity. By allowing for confined, necessary and temporary emergency restrictions and prescribing the conditions and procedure that must be followed when such emergency steps are taken, the concerns of States would be allayed, while at the same time ensuring that the civilians of the host state do not lose human rights protections altogether. These concerns, and the rationale behind and purpose of the inclusion and practical implementation of the escape clauses in the human rights instruments, are equally in play in both a domestic and extraterritorial setting. Second, by allowing the emergencies taking place in unstable foreign territories where State signatories deploy international military operations to be read into the notion of a "public emergency threatening the life of the nation", the human rights institutions would merely adjust their jurisprudence to the changed reality resulting out of the increased acceptance of the extraterritorial application of IHRL and interpret the derogation clauses in a way that would make their application practical and effective. Yet, whether or not the human rights institutions will ultimately follow the example set in *Serdar Mohammed* in other cases remains to be seen and therefore, as Krieger has noted, "the legality of derogation from the ECHR in the context of a military operation abroad is not totally certain". (107) Clearly, this forms an obstacle and if a strict interpretation is chosen, this will, to a certain extent,

(105) See, e.g., *Loizidou v. Turkey (preliminary objections)*, ECtHR, Grand Chamber Judgment (23 March 1995), Appl. No. 15318/89, §§ 71-72; *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Inter-American Court of Human Rights, Advisory Opinion (14 July 1989), OC-10/89, § 37.

(106) In his words, "Article 15, like other provisions of the Convention, can and it seems to me must be 'tailored' to such extraterritorial jurisdiction. This can readily be achieved without any undue violence to the language of Article 15 by interpreting the phrase 'war or other public emergency threatening the life of the nation' as including, in the context of an international peacekeeping operation, a war or other emergency threatening the life of the nation on whose territory the relevant acts take place", *Serdar Mohammed v. Ministry of Defence* [2014] EWHC 1369 (QB), § 159. The issue was not revisited on appeal.

(107) H. Krieger, "After *Al-Jedda*: Detention, Derogation and an Enduring Dilemma", *Military Law and the Law of War Review* 2011, Vol. 50, 435. In the same sense, M.J. Dennis, "Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Around?", *op. cit.* (note 2), 476 [there is a "state of legal uncertainty concerning the ability of participating states in a multilateral force to derogate from international human rights instruments"].

diminish the value of derogations to manage the co-applicability of IHL and IHRL. After all, the bulk of activities of the armed forces, especially those of developed western States, nowadays consist of participating in the missions of international military operations deployed on the soil of a third, often fragile, State and the IHL/IHRL conundrum will for these States generally arise in an extraterritorial peacekeeping/peace enforcement setting.

Having established that the power to derogate will at times be triggered by the existence of an armed conflict, a second legal issue to be addressed here is whether States having recourse to derogations may automatically lower the bar to the minimum degree of protection granted by IHL, or whether the room for leverage granted by the various derogation clauses is more narrow. As the derogation clauses all lay down a strict proportionality requirement, this is indeed a legitimate question to ask. In this regard, Milanovic has argued that "even if during an armed conflict a state party derogated from Article 5 ECHR or Article 9 ICCPR to allow for preventive detention without judicial review, in a manner completely consistent with IHL, this would not necessarily suffice to make that derogation stand — the measures taken still need to be 'strictly required', as a matter of some sort of objective external assessment". (108) Illustrating his point by referring to a situation of occupation, where a State is supposed to exercise some level of authority or control within a foreign territory that enables it to discharge most, if not all, of the duties imposed by IHRL, Milanovic suggests, for example, that "in respect of the internment of civilians [...], a state which derogates from the ICCPR or the ECHR to allow for the review of their detention by mere administrative boards, but is in reality quite capable of creating independent courts who could do the reviewing, ultimately might not be able to rely on its derogation no matter what IHL might say". (109) This is a valid point and although the argument was made with regard to detention, the issue can be extrapolated to other overlapping areas of IHL and IHRL where States might want to use the escape clauses to resort to the former body of law. It is submitted here that while derogations allow the balance between (military) necessity and humanitarianism to be recalibrated in favour of the former, it has to be acknowledged that this will not necessarily be to the extent the States would want. Again, this can be seen as an obstacle for the use of derogations as a tool to manage the interplay between IHL/IHRL and reduce legal uncertainty. The specific circumstances of each case will determine whether or not less restrictive means are available to respond to the crises and the States can rely on IHL. Ultimately, it will be for domestic judges or human rights bodies such as the Strasbourg Court to control in any given

(108) M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*, *op. cit.* (note 8), 254.

(109) *Ibid.*

case the precise leeway States have to lower their human rights obligations in times of armed conflict.

Turning now to possible policy limits for using derogations, it is noteworthy that, as the ECtHR acknowledged in *Hassan v. UK*, States have so far not felt the need to derogate from their obligations under IHRL in relation to inter-State armed conflicts, or in relation to military deployments abroad (whether as part of an IAC or a NIAC) and it has already been suggested above that the reasons for not derogating in those contexts are more the result of political calculation, than legal reasoning. Two brief points can be made in this regard. First, as mentioned, the lack of derogations may (partly) be explained by States' belief that, in the context of international military operations, a recourse to these mechanisms would come down to the recognition of the extraterritorial application of the IHRL treaties. Since "the idea that armed forces acting abroad potentially carry with them the whole array of human rights obligations that a state has assumed under international law is an alarming prospect for many States", State may indeed have little incentive to issue a declaration of derogations, as by doing so they would reinforce the trending approach to extend the extraterritorial application of IHRL (and with it, the scope for judicial review by human rights bodies) to ever more circumstances and put their jurisdiction beyond dispute. (110) This is all the more the case since the ECtHR confirmed in *Hassan v. United Kingdom* the view, widespread among States, that at least in IACs there is no necessity to derogate from obligations under IHRL in order to rely on the (more lenient) regime under IHL (e.g. pertaining to the use of deadly force or to detention) and it is unlikely that the ECtHR will reverse its position in the near future. (111) Whether other human rights bodies will decide otherwise if given the chance remains to be seen, and it could be a while before the

(110) G. Oberleitner, *Human Rights in Armed Conflicts : Law, Practice, Policy*, *op. cit.* (note 37), 145.

(111) It did so when it examined the state practice relating to derogations from the right to liberty under Article 4 ICCPR, which contains a derogation clause similar to Article 15 ECHR, in the context of the case of *Hassan v. United Kingdom*. Here, the Court established that at the time eighteen States had lodged declarations derogating from their obligations under Article 9 ICCPR and noted that "of these, only three declarations could possibly be interpreted as including a reference, by the authorities of the derogating State, to a situation of international armed conflict or military aggression by another State. […] None of the States explicitly expressed the view that derogation was necessary in order to detain persons under the Third or Fourth Geneva Conventions" ; see *Hassan v. United Kingdom*, ECtHR, Grand Chamber Judgment (16 September 2014), Appl. No. 29750/09, at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146501#{%22itemid%22:[%22001-146501%22]}, § 41. According to Hampson and Lubell the ECtHR had two choices, namely "it could either take account of LOAC/IHL, on the basis that it is an independently applicable body of rules, or it could argue that the only way of modifying human rights law is by derogating". The Grand Chamber took the former approach, stating that "the lack of a formal derogation under Article 15 does not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case". See *Hassan v. United Kingdom,* § 103 and F.J. Hampson & N. Lubell, *Amicus Curiae Brief Submitted in the Case of Hassan v. United Kingdom*, *op. cit.* (note 33), § 20.

issue is raised again before a Court. Second, the derogation clauses require states to notify the emergency measures taken, and the reasons thereof, to the institution designated by the respective treaties and it has been argued that "the obligation to publicly announce derogations from human rights might pose an obstacle to Member States to use derogations for military activities". (112) This is especially true for Western democratic States, where the rule of law and respect for human rights are considered the foundation upon which the nation is built and adherence to the body of law is heavily scrutinized by state institutions, judicial bodies and the press. Attempts to depart from IHRL, even when the abovementioned conditions are abided by, will therefore be viewed critically by parliamentary opposition and wider society, to the point that such moves might even undermine the public and parliamentary support for staging the operation. Altogether, derogations will therefore not always be conceived as a viable political strategy from a State perspective.

In sum, it follows from the above that armed conflicts can satisfy the emergency requirement and that States, provided they fulfill the other requirements (proportionality, non-discrimination, formal notification) will at times be allowed to derogate from their IHRL obligations in favour of applying the more lenient norms of IHL in the context of hostilities taking place on their territory and possibly also when the States' armed forces are deployed on the soil of a third State. Those advocating the use of derogations may therefore have a point : under certain circumstances (such as during NIACs), derogations may prove a valuable tool in reconciling the two bodies of law, "providing not only flexibility for states when they need it the most but also important substantive and procedural safeguards". (113) Yet, it must be equally clear that is not an infallible one. Legal uncertainty will persist to some extent in that national courts/human rights bodies may eventually find a derogation to be disproportionate. Moreover, there are obstacles to the use of the instrument and there will always be situations where the interplay between IHRL and IHL norms will have to be directly addressed. By way of illustration, questions of the interplay between IHRL and IHL norms will persist in respect of specific IHRL norms that States have (for political or other reasons) chosen not to derogate from, or in respect of norms that are simply non-derogable. In those situations, one will still have to resort to the tools of norm conflict avoidance/resolution offered by the VLCT and if these do not bring a solution, revert back to the default application of dual application of IHL and IHRL with the possible consequence that the same conduct may be lawful under IHL, but not under IHRL.

(112) H. Krieger, "After *Al-Jedda* : Detention, Derogation and an Enduring Dilemma", *op. cit.* (note 107), 438.

(113) M. Milanovic, "Extraterritorial Derogations from Human Rights Treaties in Armed Conflict", *op. cit.* (note 89), 33.

B. — *Article 103 UN Charter*

An alternative route to create greater legal certainty and retake the initiative from the level of the judiciary would be that when States draft resolutions at the UN Security Council, e.g. in the context of drafting the mandates for international military operations, they resolve possible norm conflicts and settle any issues stemming from the IHL/HRL relationship — e.g. by prescribing a certain line of action that is compatible with IHL, but not with IHRL (such as the use of force as a first resort or internment/preventive detention for security reasons and where there is no intention to bring criminal charges within a reasonable time). (114) Such an approach could pre-empt further questions on this topic. After all, Article 103 UN Charter stipulates that in the event of a conflict between an obligation found in the Charter and an obligation under any other international agreement, the former prevails. This effect is extended to Security Council resolutions via Article 25 of the UN Charter. (115) A lot of ink has already been spilled with regard to the functioning of Article 103 UN Charter, as well as the ability or inability of UN Security Council decisions to displace human rights treaties by virtue of this article. For present purposes, we will focus on possible issues and obstacles that might complicate the use of this mechanism in the context of the IHL/HRL-conundrum. In this regard, we limit ourselves to two queries that deserve particular attention : first, does Article 103 UN Charter apply when UN Security Council resolutions do not directly *oblige* States, but rather *authorize* them to take a certain line of action, and, second, if so, do the authorizations common in the mandates of international military operations — i.e. to take "all necessary measures" to achieve the mission objectives and restore peace and security — prevail over norms under IHRL treaties ?

(114) See e.g. H. KRIEGER, "After *Al-Jedda* : Detention, Derogation and an Enduring Dilemma", *op. cit.* (note 107), 433. For an application of Article 103 UN Charter, see i.a. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libya v United Kingdom*) and (*Libyan Arab Jamahiriya v. United States of America*), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 9 and 115 ; *Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392 ; *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, European Court of Justice, Grand Chamber, Judgment (3 September 2008), Joined Cases C-402/05 P and C-415/05 P ; *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, ECtHR, Grand Chamber, Decision on Admissibility (2 May 2007), Appl. Nos. 71412/01 and 78166/01 ; *Nada v. Switzerland*, ECtHR, Grand Chamber, Judgment (12 September 2012), Appl. No. 10593/08 ; *Al-Jedda v. United Kingdom*, ECtHR, Grand Chamber Judgment (7 July 2011), Appl. No. 47708/08.

(115) Article 103 UN Charter states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". Article 25 UN Charter reads as follows: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

As to the first question, a strict textual interpretation of Article 103 UN Charter would seem to exclude according prevalence to authorizations over potentially conflicting treaty norms and several commentators have indeed explained the provision in this way, arguing that the word "obligations" has a "clear and unambiguous sense, which is limited to binding norms to the exclusion of [...] non-mandatory acts". (116) Additionally, it has been argued that Article 103 gives "precedence to the acts of a political organization over hard sources of law embodying binding legal obligations", is therefore "highly exceptional", and, for this reason alone, should be approached with caution and interpreted in a narrow sense. (117) The clear consequence of adopting this point of view would be that Article 103 would seldom be invoked and be of little use in the present context because with regard to issues of international peace and security, it is unusual for the UN Security Council to formulate mandates in a way that creates legal obligations to act in a particular manner. (118) UN Security Council resolutions are generally couched in exhortatory terms, i.a. because strong, mandatory language increases the risk of the resolution being vetoed. Moreover, as Lord Bingham correctly noted in the House of Lords' *Al-Jedda* judgment, "language of this kind cannot be used in relation to military or security operations overseas, since the UN and the Security Council have no standing forces at their own disposal and have concluded no agreements under article 43 of the Charter which entitle them to call on member states to provide them. [...] in practice the Security Council can do little more than give its authorisation to member states which are willing to conduct such tasks". (119) Finding this consequence undesirable as it would hamper the effectiveness of the UN Security Council, a large and persuasive number of legal experts have militated against this strict view and have advocated a broader interpretation of Article 103 of the Charter (120) — one that ensures that the provision would also cover UN Security Council authorisations. In so doing, they have placed emphasis

(116) R. KOLB, "Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council?", *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 2004, Vol. 64, 24. See in this regard, also R.H. LAUWAARS, "The Interrelationship between United Nations Law and the Law of Other International Organizations", *Michigan Law Review* 1984, Vol. 82, 1607 ["the definition of obligations under the Charter within the meaning of Article 103 must be confined to those obligations that have been laid down in provisions of the Charter and binding decisions of the Security Council"].

(117) *Ibid.*

(118) In the same sense, K.M. LARSEN, *The Human Rights Treaty Obligations of Peacekeepers*, *op. cit.* (note 87), 321.

(119) *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)*, [2007] UKHL 58, § 33.

(120) R. KOLB, "Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council?", *op. cit.* (note 116), 25. See also, D. SAROOSHI, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers*, Oxford, Oxford University Press, 1999, 151; K.M. LARSEN, *The Human Rights Treaty Obligations of Peacekeepers*, *op. cit.* (note 87), 320.

on the "overriding importance of the Charter and the measures taken by the Security Council for the maintenance of international peace". (121) The argument goes as follows: as the UN Security Council has been appointed as the guardian of international peace and security and should be able to take the action it considers necessary to counter any threats to it, it cannot be accepted that it would be obstructed in fulfilling this role because States cannot implement the envisaged action as a result of authorizations incompatible with their treaty obligations. (122) This functional interpretation of the provision can at present be said to constitute the majority view and finds support in state practice and the case law of international judicial bodies. (123) For these reasons, we proceed on the assumption that the application of Article 103 UN Charter is triggered not only when certain action is required, but also when it is authorized.

This brings us to the second question, which falls apart in two related sub-questions, namely (1) whether IHRL treaties should be considered as an excepted category by virtue of the values they enshrine, and (2) how precise Security Council authorizations ought to be in order to prevail over conflicting (esp. human rights) norms. With regard to the former issue, human rights advocates have argued that the special nature of IHRL requires special solutions and that IHRL instruments should be "impervious to dismissal by conflicting treaty norms drawn from other international spheres", such as Article 103 UN Charter. (124) Two lines of reasoning have been offered to support these statements. For starters, it has been argued that "because of the community interest and values that human rights norms enshrine, norm conflict situations involving human rights are [...] of constitutional importance", with constitutional understood as "law that recognizes no source of superior law, that does not draw validity and legitimacy from any other legal order". (125) Additionally, reference is made to Article 24 (2) of the UN Charter, which requires the UN Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles of the United Nations". As the UN is to promote and encourage respect for human rights and for fundamental freedoms for all (Article 1 (3) UN Charter), the argument goes, "it would be unacceptable if the UN Security Council were empowered to violate human rights when one of the most fundamental

(121) *Ibid.*

(122) *Ibid.* A. PETERS, "Article 25", in B. SIMMA, D. KHAN, G. NOLTE, A. PAULUS (eds), *The Charter of the United Nations: A Commentary*, Vol. I, 3rd ed., Oxford, Oxford University Press, 851.

(123) See *supra*, note 114.

(124) S.A. MIKO, "Norm Conflict, Fragmentation, and the European Court of Human Rights", *Boston College International & Comparative Law Review* 2013, Vol. 54, No. 3, 1367.

(125) M. MILANOVIC, "Norm Conflict in International Law: Whither Human Rights?", *Duke Journal of Comparative & International Law* 2009, Vol. 20, 70 and 130.

purposes is precisely to protect those rights". (126) The point advocated here, however, cannot be accepted in full as the effectiveness of the UN Security Council in fulfilling its primary role as guardian international peace would be severely hampered if it could not authorize or oblige States to undertake the action it deems necessary because it would be contrary to their IHRL obligations. Furthermore, the assertion that IHRL treaties should be exempt from Article 103 UN Charter is contradicted by State practice and the decisions of the international judicial bodies. (127) This was also acknowledged by Lord Bingham, who stated that the ICJ judgments "give no warrant for drawing any distinction save where an obligation is *jus cogens* and [...] it now seems to be generally recognised in practice that binding Security Council decisions taken under Chapter VII supersede all other treaty commitments", including IHRL. (128) Importantly, While IHRL cannot be considered as an excepted category with regard to Article 103 UN Charter, in light of the UN's role in promoting and encouraging respect for human rights, it has nevertheless been accepted that there are some limitations to the competence of the Security Council under the provision when human rights norms are involved. Larsen has in this regard for example noted that "even if one accepts that the UN Security Council is competent to authorise conduct that violates certain human rights norms, there is no reason to allow this to be done through general and ambiguous terms". (129) The ECtHR has expressed itself in a similar way in the *Al-Jedda* case, stating that:

> "In interpreting its resolutions, *there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights*. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the in light of the UN's important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law" (130) (our emphasis).

This is important in the present context because, as mentioned, with regard to international military operations mandates, UN Security Council resolutions generally use vague language and authorize States to take "all

(126) K.M. Larsen, *The Human Rights Treaty Obligations of Peacekeepers*, *op. cit.* (note 87), 326.

(127) A. Peters, "Article 25", *op. cit.* (note 122), 854 (see also footnote 353).

(128) *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)*, [2007] UKHL 58, § 35.

(129) K.M. Larsen, *The Human Rights Treaty Obligations of Peacekeepers*, *op. cit.* (note 87), 333. In the same sense, M. Milanovic, "Norm Conflict in International Law: Whither Human Rights?", *op. cit.* (note 125), 97 ["It is one thing to say that the phrase all necessary means has in practice developed as the appropriate diplomatic euphemism for the use of military force, but it cannot be plausibly read as an absolution from all human rights constraints that do not qualify as *jus cogens*"].

(130) *Al Jedda v. United Kingdom*, ECtHR, Grand Chamber Judgment (7 July 2011), Appl. No. 47708/08, § 102.

necessary measures" to achieve the mission objectives and restore peace and security, rather than clearly spelling out in advance the measures military forces are authorized or required to use to fulfil their mandate. It follows from the *Al-Jedda* case that such formulations are insufficient to set aside the norms of IHRL in favour of more permissive norms under IHL. However, when States would *a contrario* succeed in obtaining from the Security Council sufficiently precise and clear authorizations to resort to a certain line of action, compliant with IHL but contrary to IHRL, Article 103 UN Charter could arguably be used to provide a way out of the IHL/IHRL-conundrum as the authorization will result in setting aside the more stringent norm of IHRL to the extent necessary. However, this presupposes that the States concerned secure enough support to get such a resolution adopted by the UN Security Council and to obtain an international diplomatic consensus on an explicit deviation from IHRL. Moreover, even if such consensus could be found, it has been observed that it may be "unrealistic to expect the Security Council to spell out in advance, in detail, every measure which a military force might be required to use to contribute to peace and security under its mandate". (131) As Krieger points out, "explicit authorizations, which enumerate powers and provide for their limits, could be seen as an undue restriction on the discretion of the Security Council and the authorized States, and thus as a danger to the effectiveness of the UN efforts in the restoration of global peace". (132) In addition, such explicit authorizations to deviate from strict IHRL obligations, presuppose a more proactive quasi-legislative attitude on the part of the UN Security Council. This in turn may further test the (already frail) legitimacy of a body that many regard as fundamentally unrepresentative.

C. — *Subsequent agreement*

A final possible option for States would be to come to an agreement amongst themselves regarding the interpretation of specific treaty provisions and tackle the complex issues stemming from the IHL/HRL conundrum. Clearly, this would allow States to take back control of the process of reconciling the two bodies of law, because Article 39 VCLT states that "a treaty may be amended by agreement between the parties", while Article 31, §3, (a) VCLT stipulates that subsequent agreements have to be taken into account in interpreting treaties. The ECtHR conceded as much in *Hassan v. United Kingdom*, when it observed that "[t]here has been no subsequent agreement

(131) *Al Jedda v. United Kingdom*, ECtHR, Partly Dissenting Opinion of Judge Poalelungi (7 July 2011), Appl. No. 47708/08, p. 67.

(132) H. Krieger, "After *Al-Jedda*: Detention, Derogation and an Enduring Dilemma", *op. cit.* (note 107), 434.

between the High Contracting Parties as to the interpretation of Article 5 in situations of international armed conflict". (133)

While the principle is clear, questions can be raised as to the modalities (for example in terms of form, required number of parties and scope) the agreements will have to comply with to come within the ambit of these articles. Once again, the ILC reports on subsequent agreements and subsequent practice in relation to the interpretation of treaties, drafted by Special Rapporteur Georg Nolte, provide useful insights. For starters, the reports makes clear that only agreements between all the States having consented to be bound by the treaty will fall under Article 31 (3)(a) or 39 VCLT, meaning that "equivocal conduct by one or more parties will normally prevent the identification of an agreement". (134) This is not to say that bilateral or regional agreements regarding the interpretation of a treaty with broader membership have no interpretative value since they could be regarded as a supplementary means of interpretation within the meaning of Article 32. However, to be able to be considered as an authentic means of interpretation and possibly amend a treaty under the abovementioned provisions, a single common act of *all* parties to the treaty is required. On the other hand, as to the form of the agreement, the report's draft conclusion 9 (1) notes that "an agreement under Article 31 (a) [...] need not be arrived at in any particular form nor be [legally] binding as such". (135) Similarly, it has been stated that under Article 39 "an amending agreement may take whatever form the parties to the original treaty may choose". (136) Thus, the agreement may be a treaty and, for example, take the form of the inclusion in treaty law of "conflict clauses which establish clear priorities and coordinate the simultaneous application of [IHL and IHRL]" or of additional protocols to the universal and regional human rights treaties, spelling out how the different human rights obligations translate into the context of armed conflicts. (137) However, it need not be and a common understanding generated through a more informal process will suffice to trigger the application of the abovementioned provisions, provided the other conditions have been fulfilled. In this regard, an agreement regarding the interpretation of the treaty or the application of its provisions may very well be found in a memorandum of understanding or an exchange of letters. Finally, the report points to the fact that the agreement has to be both relational — "by such an agreement the parties must

(133) *Hassan v. United Kingdom*, § 101.

(134) International Law Commission, *Second Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation by Georg Nolte, Special Rapporteur* (26 March 2014), *op. cit.* (note 68), § 52.

(135) *Ibid.*, Draft Conclusion 9 (1).

(136) International Law Commission, *First Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation by Georg Nolte, Special Rapporteur* (19 March 2013), *op. cit.* (note 67), 67.

(137) G. Oberleitner, *Human Rights in Armed Conflicts: Law, Practice, Policy*, *op. cit.* (note 37), 121.

purport, possibly among other aims, to clarify the meaning of a treaty or to indicate how the treaty is to applied" (138) — and subsequent, in that the common understanding must be reached after the conclusion of the treaty.

Looking at international legal practice, the examples where formal subsequent agreements by states have served to amend a certain treaty provisions are manifold. The process of adopting formal protocols or amendments to adjust the framework or change the text of certain provisions of an existing treaty is well-known. The case is different for informal agreements and Nolte has noted that with regard to specialized regimes, such as for example IHRL treaties, "adjudicatory bodies have rarely relied on subsequent agreements in the sense of Article 31(3)(a) VCLT' in this regard". (139) States seldom issue such interpretative statements, instead preferring to go through the regular treaty-making processes when consensus exists. Nevertheless, there are some known instances where judicial bodies have accepted and relied on subsequent agreements by parties to change or interpret an ambiguous provision of a treaty. (140) While uncommon, the option is therefore not precluded. Accordingly, determining how the interaction of IHL and IHRL with regard to a specific right, provision or case should play out through subsequent agreements regarding the interpretation of the treaty or the application of its provisions between the parties to the different treaties of IHRL is theoretically possible.

Having established that the route of reaching a formal or informal agreement on the interplay of IHL and IHRL is available in theory, one may wonder, however, whether such an agreement can be achieved in practice. In this regard, it can be noted that despite the clear value in States determining how the interaction between IHL and HRL should play out in specific situations, they have, some lacklustre attempts aside, demonstrated little interest in furthering this agenda and reaching agreement on the topic. Early indications are that States are not even close to finding common ground on the issue. In the context of discussions on the *Copenhagen Process: Principles and Guidelines on the Handling of Detainees in International Military Operations*, for example, participating States explicitly engaged with the subject of the concurrent application of IHL and HRL, but could not find

(138) International Law Commission, *First Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation by Georg Nolte, Special Rapporteur* (19 March 2013), *op. cit.* (note 67), 76.

(139) G. NOLTE (ed.), *Treaties and Subsequent Practice*, Oxford, Oxford University Press, 2015, 303.

(140) See e.g. *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports* 2010, p. 14, § 131. [The Court concludes that the "understanding" of 2 March 2004 would have had the effect of relieving Uruguay of its obligations under Article 7 of the 1975 Statute, if that was the purpose of the "understanding", only if Uruguay had complied with the terms of the "understanding"]; *The Islamic Republic of Iran v. the United States of America*, Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), Iran USCTR Vol. 38 (2004-2009), p. 125-126, § 132.

a consensus, epitomised by the fourth point of the preamble stating that "Participants [...] [recognized] in particular the challenges of agreeing upon a precise description of the interaction between international human rights law and international humanitarian law" and the fact that the States made it expressively clear that "the text was not of a legally binding nature and thus, does not create new obligations or commitments". (141) Furthermore, for reasons that are as political as they are legal, most States tend to maintain their current strategy, which consists of defending cases on the basis that the HRL treaties do not apply in the specific circumstances of the case (for example because it is not covered by the established models of extraterritorial application) and arguing that IHL as *lex specialis* should take precedence, even if they suffer one courtroom defeat after another and judges reaffirm the continued applicability of IHRL in times of armed conflict and civil ? Strife for a more nuanced approach to the concurrent applicability of the two bodies of law. Thus, while in principle, relying on States to create greater legal certainty through subsequent agreements might thus seem to be a promising approach, the chances of this approach garnering any success in practice are, however, slim.

Conclusion

Recapitulating the above, three concluding statements can be made. First, it has been submitted here that the misgivings about the continued relevance and adequacy of the *lex specialis* principle in managing the co-application of IHL and HRL are justified because "it has not meaningfully, consistently and predictably clarified the relationship between [IHL] and [HRL] since it has been invoked by the ICJ". (142) As has been explained, *lex specialis* is a broad and vague principle that has no clear and agreed content, provides no guidance about which norm should be considered the more specific and "offers an artificial solution to the co-existence of international humanitarian law and international human rights law, a solution that cannot be disconnected from the purpose of each discipline, their specific features and the context they apply in". (143) Second, we have argued that the symbiotic, VCLT-based approaches adopt a more nuanced stance to the IHL/IHRL-conundrum in that they opt, wherever and whenever possible, for a cumulative and complementary application of both spheres of law instead

(141) See Ministry of Foreign Affairs Denmark, *The Copenhagen Process on the Handling of Detainees in International Military Operations : Principles and Guidelines*, *op. cit.* (note 45), preamble point IV and Principle 16 (+ commentary).

(142) G. Oberleitner, *Human Rights in Armed Conflicts : Law, Practice, Policy*, *op. cit.* (note 37), 104.

(143) N. Prud'homme, "*Lex Specialis* : Oversimplifying a More Complex and Multifaceted Relationship?", *op. cit.* (note 10), 386.

of applying the "correct", special norm over the "inappropriate", general norm. We therefore believe that going forward, resorting to the interpretative mechanisms enclosed in de VCLT (including reliance on subsequent practice) is preferable to relying on *lex specialis* when seeking to reconcile IHL and IHRL and manage their co-application, as it achieves comparable results as the principle, without having to embark on the artificial task of determining which of the competing norms is the special one and one can point to a clear conventional legal basis. Third and finally, relying on the VCLT will only get you so far. For starters, purposeful interpretation of potentially incompatible international norms under Article 31 (3)(c) VCLT has its limits and will be of no use when the underlying reasons and desired outcomes of the rules in question run counter to each other or when the language of the standards leaves no room for interpretation. Additionally, reconciliation between two contradictory norms of IHL and IHRL will not always be possible. Whenever there is no common intention to be derived from subsequent practice as to how two norms are to interact, for example, Article 31 (3)(b) will provide no way out and one will not be able to resolve the genuine norm conflict. In those circumstances, States may have several options to confront the legal, practical and political challenges involved and to undertake concrete steps to reconcile conflicting norms and address the questions relating to their concrete interaction. First, derogations may at times allow them to suspend the application of certain norms and standards of IHRL during periods of armed conflict. Second, issues stemming from the IHL/HRL relationship could be addressed in UN Security Council Resolutions, which, per Article 103 *juncto* Article 25 UN Charter, may, under certain conditions, prevail over conflicting (non-*jus cogens*) obligations under any other international agreement. Third, the interaction of IHL and IHRL with regard to a specific right, provision or case could be settled in subsequent agreements regarding the interpretation of the treaty or the application of its provisions between the parties to the different treaties of IHRL. However, there are legal and — perhaps, more important — political obstacles, and if the States chose not to or cannot avail themselves of these tools, the two conflicting norms of IHL and IHRL will remain applicable. In those circumstances States will be presented with the choice of either complying with the more stringent norms or facing the risk of incurring responsibility. This might sit uneasily with some States (and for that matter, legal experts) because this will generally come down to abiding by the stricter norms of IHRL. In the end, however, when States refuse to comply with the more stringent norm or to resort to the mechanisms available to them "out of political calculation (as they are free to do), then they must also suffer the consequences of their choice and the application of more stringent human rights scrutiny". (144)

(144) M. MILANOVIC, "Extraterritorial Derogations from Human Rights Treaties in Armed Conflict", *op. cit.* (note 89), 33.