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Conflict or Convergence? International Criminal Justice and the Interplay between International Human Rights Law and International Humanitarian Law

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Anti-plagiarism statement

I hereby declare that this dissertation represents my own work. All materials and sources used in its elaboration have been acknowledged and all citations have been properly identified.

Statement regarding length of dissertation

The body of this dissertation, including spaces and notes, occupies a total of 184.878 characters.

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ABSTRACT

Interpreting international law requires navigating multiple legal frameworks, including International Humanitarian Law, International Human Rights Law, and International Criminal Law. While these branches have distinct foundations and goals, they are integral components of international law, mutually reinforcing and complementing each other. An important area of overlap between International Human Rights Law and International Humanitarian Law is the protection of the rights to life and liberty – issues that often give rise to legal controversy. The challenge lies in solving conflicts between those branches without allowing one set of norms to supersede the other, as the *lex specialis* principle could suggest. The International Court of Justice has invoked the *lex specialis* principle to explain the interaction between International Human Rights Law and International Humanitarian Law. But this principle assumes a relation – speciality – that is difficult to apply consistently; and the functions the Court assigns to the principle are challenging to implement. This thesis proposes that, rather than prioritising one branch over the other, we adopt a complementarity approach, to be evaluated on a case-by-case basis. This complementarity is exemplified by International Criminal Law, which draws on sources from both Human Rights and Humanitarian Law, as well as on fundamental principles of criminal law. Moreover, courts handling International Criminal Law have jurisdiction over *jus in bello*, *jus ad bellum*, and periods of peace, which requires them to deal with different substantive areas; and here too sources can conflict, particularly in the adjudication of crimes against humanity and war crimes, which are the most frequently adjudicated international crimes. The complementarity approach offers an answer to the question of how these different legal frameworks converge in legal practice.

Keywords: human rights; international humanitarian law, international criminal law; *lex specialis*; complementarity; armed conflicts

RESUMO

Interpretar o direito internacional requer a navegação por múltiplos quadros jurídicos, incluindo o Direito Internacional Humanitário, o Direito Internacional dos Direitos Humanos e o Direito Penal Internacional. Embora estas áreas tenham fundamentos e objetivos distintos, são componentes essenciais do direito internacional, reforçando-se e complementando-se mutuamente. Uma importante área de sobreposição entre o Direito Internacional dos Direitos Humanos e o Direito Internacional Humanitário é a proteção dos direitos à vida e à liberdade – questões que frequentemente suscitam controvérsia jurídica. O desafio reside em resolver conflitos entre estas áreas sem permitir que um conjunto de normas prevaleça sobre o outro, como o princípio da *lex specialis* poderia sugerir. O Tribunal Internacional de Justiça tem invocado o princípio da *lex specialis* para explicar a interação entre o Direito Internacional dos Direitos Humanos e o Direito Internacional Humanitário. No entanto, este princípio assume uma relação – especialidade – que é difícil de aplicar de forma consistente; e as funções atribuídas ao princípio pelo Tribunal são desafiadoras de implementar. Esta tese propõe que, em vez de priorizar uma área sobre a outra, se adote uma abordagem de complementaridade, a ser avaliada caso a caso. Esta complementaridade é exemplificada pelo Direito Penal Internacional, que se baseia em fontes tanto dos Direitos Humanos como do Direito Humanitário, assim como em princípios fundamentais do direito penal. Além disso, os tribunais que lidam com o Direito Penal Internacional têm jurisdição sobre o *jus in bello*, o *jus ad bellum* e períodos de paz, o que os obriga a tratar de diferentes áreas substantivas; e aqui também as fontes podem entrar em conflito, particularmente na adjudicação de crimes contra humanidade e crimes de guerra, que são os crimes internacional mais frequentemente julgados. A abordagem da complementaridade oferece uma resposta à questão de como esses diferentes quadros jurídicos convergem na prática jurídica.

Palavras-chave: direitos humanos; direito internacional humanitário; direito penal internacional; *lex specialis*; complementaridade; conflitos armados.

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1. Introduction

The international legal order is notably fragmentary, a reflection of the proliferation of legal activity across diverse domains, each with its own objectives and methodologies. This fragmentation has led to the emergence of specialised legal regimes, each operating as a "self-contained" system with its own moral foundations and guiding principles. This creates the danger of conflicting rules, principles, and institutional practices; and the law must address the question of how different regimes interact, particularly when dealing with the same subject matter.

The intricate interplay between International Human Rights Law (IHRL), International Humanitarian Law (IHL), and International Criminal Law (ICL) is a salient example. IHRL is grounded in the need to safeguard the inherent rights of individuals against abusive authority most of the times. IHL was conceived to govern the conduct of the parties involved in armed conflicts to mitigate harm, and ICL addresses the criminal responsibility of individuals for grave violations of international law, including breaches of IHRL and IHL.

Despite their distinct origins and objectives, these legal frameworks display often overlap in substantive content. The prohibition of torture, for instance, finds resonance in all three branches of law, encompassing all individuals without reference to status. However, divergences exist, particularly regarding the lawful use of force and deprivation of liberty during armed conflicts. International law provides a framework to regulate state and individual conduct during such conflicts, but its specialised branches often conflict when applied to the realities of armed conflicts.

This research explores how international law should be applied in contemporary armed conflicts, considering the growing need to manage multiple substantive areas simultaneously. This necessity is evident in the adjudication of cases before regional and universal human rights bodies, the International Court of Justice (ICJ), the International Criminal Court (ICC), *ad hoc* tribunals, and domestic courts.

IHRL bodies increasingly address human rights violations during armed conflicts, requiring them to consider how IHL influences the interpretation of IHRL treaties and norms. Resolving these issues often involves deciding whether to apply IHL, IHRL, or both, without definitely prioritising one over the other. The European Court of Human

Rights, for example, has used IHL as an interpretative tool, as seen in cases like *Varnava and Others v. Turkey.*[1]

The Court interpreted also Article 2 of the European Convention on Human Rights, which protects the right to life, in light of general principles of international law, including IHL. In *Hassan v. UK* (2014), the Court directly applied IHL to assess the prohibition against arbitrary detention under Article 5, determining that the detention was consistent with IHL and, therefore, did not violate Article 5 and international law.[2]

Ad hoc tribunals and the ICC also play crucial roles in adjudicating cases that involve multiple substantive areas. However, *ad hoc* tribunals are temporary with limited jurisdiction, while the ICC, though permanent, only addresses international crimes under specific conditions. In the absence of a universal, compulsory judicial system, domestic courts are also essential for enforcing and interpreting international legal norms, applying IHL, IHRL, and ICL either directly or indirectly.

Given that most criminal cases should be handled at the domestic level, it is crucial to support the adjudication of international crimes nationally. This includes strengthening legal frameworks, building the capacity of judges, and enhancing the management of cases by courts. The adjudication of international crimes requires specialised knowledge, so this research will serve as a resource on the application of substantive international law within the context of armed conflicts, ultimately contributing to the delivery of well-reasoned judgments.

The necessity of strengthening the capacity of domestic judges in applying international law during armed conflicts is highlighted by contemporary armed conflicts. On 24 February 2022, the Russian Federation's presidency announced the decision to conduct a "special military operation" in Ukraine, aiming at its "demilitarization and de-Nazification." On that same day, Russian troops crossed various border locations into Ukraine, launching land, air, and sea operations. Since this extensive attack, Ukrainian territory become the scene of intense warfare.

[1] European Court of Human Rights in Judgment *Varnava and Others v. Turkey*, App. No. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16071/90, 16072/90, and 16073/90, 18 September 2009.
[2] European Court of Human Rights in Judgment *Hassan v. the United Kingdom*, App. No. 29750/09, 16 September 2014.

In response to Russia's armed aggression, Ukrainian judges, in collaboration with national and international experts in international law, recognised the urgent need for enhanced judicial expertise. In cooperation with the Supreme Court and the National School of Judges of Ukraine, they developed a bench book focused on the adjudication of international crimes. This initiative underscores the critical role that a well-informed and prepared domestic judiciary plays in upholding international law and ensuring justice in accordance with international legal standards.[3]

This research therefore transcends mere academic or theoretical discussions on international law. Its aim is to facilitate the understanding of how IHL, IHRL and ICL interact, especially in moments where the content overlap. While this challenge is longstanding, it remains controversial how tribunals should address some of the issues arising from these interactions. Three topics, in particular, are controversial and will be explored in detail: the protection of the right to life, the right to liberty, and the adjudication of war crimes and crimes against humanity.

Historical theoretical divergences continue to divide international legal scholarship regarding the legal framework governing the interaction between IHRL and IHL. The ICJ has provided ambiguous guidance regarding the application of the classical *lex specialis* principle to regulate the interaction.[4] Whether a logically coherent framework for the interaction between IHL and IHRL is established, its replication within ICL would present a different level of complexity, as ICL draws upon multiple sources beyond IHL and IHRL, including fundamental principles of criminal law derived from comparative law.

To determine the applicable international law among the options offered by the interaction between the branches, I will draw on examples from the international armed conflict between Russia and Ukraine. It is the responsibility of the courts to decide concrete cases based of evidence gathered through due process. However, it is possible to offer insights into the legal issues at hand, which may be useful for the further

[3] *Benchbook on the Adjudication of International Crimes*, available at: https://www.asser.nl/media/796504/benchbookplusonplusinternationalpluscrimesplusadjudication.pdf

[4] See International Court of Justice in Advisory Opinion *Legality of the Threat or Use of Nuclear Weapons*, 1996; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004.

evaluation of specific cases. A key preliminary consideration is the adherence of these countries to international law.

Both Russia and Ukraine recognise the existence of IHL. They are parties to the four Geneva Conventions of 1949, of its 1977 Additional Protocol I, and the 1907 Hague Conventions IV with its annexed Regulations concerning the Laws and Customs of War on Land. The conflict is also governed by several instruments relating to the use of weapons, including those that impose absolute prohibitions on certain weapons, such as the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects.

Customary IHL applicable to international armed conflicts also applies, and the International Committee of the Red Cross identified 157 rules of customary IHL relevant to these conflicts.[5] Both sides claim the non-violation of IHL and deny targeting civilians or civilian infrastructure, indicating that IHL exerts some form of constraint on them.

Regarding IHRL, both Ukraine and Russian Federation are parties to the core UN human rights treaties. Ukraine remains a party to the European Convention on Human Rights and the International Covenant on Civil and Political Rights, though it has derogated some obligations under Article 15 of the Convention and Article 4 of the Covenant.[6] Russia, on the other hand, has cease to be a party to this Convention and has not notified the United Nations of any derogations from the Covenant.

Concerning ICL, neither Russia nor Ukraine are parties to the Rome Statute of the International Criminal Court (Rome Statute). Nonetheless, Ukraine has twice exercised its prerogatives to accept the Court's jurisdiction over alleged crimes under the Rome Statute occurring on its territory, pursuant to Article 12(3) of the Rome Statute. This

[5] See ICRC Customary International Humanitarian Law Database available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/home.

[6] See, e.g., Council of Europe, 'Notification – JJ9398C Tr./005-298 – Ukraine – Communication Related to the Derogation to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5)' (Council of Europe, 12 September 2022), as well as 'Ukraine: Notification C.N.612.2019 under Article 4(3) ICCPR' (United Nations, 23 January 2017).

declaration allows the ICC to exercise jurisdiction over war crimes and crimes against humanity committed on Ukrainian territory.[7]

Additionally, the Geneva Conventions and Additional Protocol I require the prosecution of certain IHL violations listed in these instruments as grave breaches, including by third States based upon the principle of universal jurisdiction (Articles 49, and 50 of the First Geneva Convention; Articles 50, and 51 of the Third Geneva Convention; Articles 146, and 147 of the Fourth Geneva Conventions; and, finally, Articles 85, and 85(1) of Additional Protocol I).

Before focusing on the reality, however, to understand how the interaction between the branches occurs during armed conflicts, it is essential to understand the phenomenon of fragmentation of international law and its consequences, as well as how functions the coherence and synergy of the international legal order. In Chapter 2, I delve into the fragmentation of international law, a central issue in debates over the interaction between various international legal regimes.

The fragmentation of international law presents both challenges and opportunities. On the one hand, fragmentation offers the potential to enhance the efficiency of international law by fostering harmonised approaches through careful interpretation and application. This reflects the adaptability of international law in addressing global challenges, where specialised regimes have emerged in response to the growing complexity of global society.

However, fragmentation is often viewed negatively, as it can create conflicts and incompatibilities between legal obligations. This fragmentation can lead to a loss of legal certainty and potentially erode the unity and coherence of international law. The existence of distinct, self-contained regimes within international law, each with its own unified object and purpose, means that the interpretation and application of these regimes are influenced by their distinct origins and objectives.

Therefore, in Chapter 2.1 and 2.2 I analyse IHL, IHRL, and ICL in terms of the purpose they serve, as well as the causes from which they arise. This is also important because resorting to the *lex specialis* principle presupposes a genus-species relationship, a

[7] See Declaration by Ukraine lodged under Article 12(3) of the ICC Statute, 8 September 2015, available at: https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf

correlation among the semantic content of rules and hence their legal concepts, and these factors directly relate to asserting the existence of a speciality – a topic that is further explored in Chapter 5.

The existence of distinct legal regimes also makes it necessary to analyse the internal coherence and synergy of the international legal system, which can be approached from various perspectives. In Chapter 2.3, I address broader theories regarding the interaction between IHL and IHRL, particularly the complementarity, integrationist, and separatist approaches.

Although most international scholars now advocate for the complementarity approach, the reasoning behind this choice is not always compelling. I argue in favour of the complementarity approach based on considerations of maintaining coherence of international law based on Article 31(3)(c) of the Vienna Convention of the Law of Treaties, which directly relates to the complementarity theory.

The frameworks proposed will help understand the interaction between different branches of law, including how norms from one branch may converge or conflict with those from another. In Chapter 3 I will focus on conflicts and the concurrence of norms and offences. The objectives of one branch may be undermined if another norm prescribes a different deontic solution for the same situation. The aim of Chapter 3 is to provide a framework for classifying and resolving normative conflicts related to the protection of the right to life and liberty, as well as the adjudication of crimes against humanity and war crimes.

In Chapter 3.1, I explore the traditional classification of normative conflicts and examine methods of resolving them, according to Alf Ross in *On Law and Justice*, who offers valuable guidance into the topic. However, certain conflicts, particularly those involving norms with high levels of abstraction and indeterminacy, may not be adequately analysed and resolved using the traditional approach. In Chapter 3.2, I argue that the intersections between IHRL, IHL, and ICL are better resolved through a process of weighing the conflicting interests and values at stake, rather than relying on traditional criteria such as the *lex specialis* principle.

While Chapter 2 and Chapter 3 establish the context of the interaction between the different branches, from Chapter 4 on I delve into specific conflicts between the branches. First, I analyse the protection of the right to life and liberty within the

frameworks of IHRL and IHL, establishing guidelines on the protection of these rights during armed conflicts. The right to life and the right to liberty are considered “first rank” rights alongside the freedom from torture.

In a world marked by transition and turmoil, threats to human life are numerous, including excessive use of force by law enforcement agents, nuclear threats, armed conflicts, and deaths from hunger and disease. The right to liberty is also multifaceted, as it protects individuals from arbitrary arrest and detention, but extends to other areas of deprivations of liberty such as mental illness, vagrancy, drug addiction, immigrant control, etc.

IHL and IHRL may provide distinct deontic solutions regarding both rights for certain situations, raising the question of which norm to apply in a specific case. The solution provided in the present study will differ from the guidance offered by the ICJ concerning the use of the *lex specialis* principle to address the interaction between IHRL and IHL. This guidance has raised numerous questions and the *lex specialis* principle is not an adequate method for resolving the conflicts between norms of IHL and IHRL. In Chapter 5, I conduct a thorough analysis of this principle and argue against its use on this matter.

In Chapter 6, I analyse the interplay of the sources of ICL, specifically IHL, IHRL and the fundamental principles of criminal law. ICL stands as the ultimate example of complementarity within international law, as it establishes a court with jurisdiction that spans across *jus in bello*, *jus ad bellum*, and peacetime contexts, creating harmonisation of various legal regimes within a single judicial framework.

IHL, IHRL, and ICL each has a core set of principles that, in principle, should remain inviolable. However, there are situations of conflicts between the sources of ICL, including IHL and IHRL, where choices must be made, and it is necessary to consider whether and to what extent the fundamental principles of one branch should be adjusted to accommodate the imperatives of the others.

Chapter 6 focus on the overlapping characteristics of crimes against humanity and war crimes. Crimes against humanity are rooted in IHRL, while the prohibitions underlying war crimes are found in IHL treaties. The content of this crimes often overlap, and ICL case law accepts cumulative convictions in certain situations. The scenario in which as

individual is convicted of both offences for the same conduct offers valuable insights into the interaction between IHL, IHRL, and ICL.

Considering the theoretical and practical aspects explored in the previous chapters, the conclusion in Chapter 7 will revisit the framework for the interaction between the branches of international law and provide final comments on its consistency. International law serves as a means by which humanity strives to make armed conflicts less cruel, recognising that they cannot be entirely eradicated. However, it is not a finalised means; it is also up to jurists to demystify it and facilitate its clarity and coherence. This is the ultimate aim of this entire research.

2. Interpreting a fragmented legal order

In the last century, international law has expanded significantly, extending into diverse areas such as trade, environmental protection, and scientific cooperation. What was once governed by "general international law" has fragmented into specialised systems like trade law, environmental law, the law of the sea, and niche areas like investment law and international refugee law. Each of these branches claims relative autonomy and possesses distinct principles and institutions.

The fragmentation of international law reflects the development of specialised legal regimes that often operate as cohesive units with norms aligned to a unified object and purpose. The interpretation and application of these regimes must, as much as possible, reflect this overarching object and purpose. IHRL, IHL, and ICL function as self-contained regimes. Exploring their teleological and foundational aspects is crucial to understanding their applicability in various contexts.

2.1. International Human Rights and Humanitarian Law

IHRL is concerned with the rights inherent to individuals and imposes obligations on governments to act or refrain from certain acts. Although the internationalisation of human rights began after World War II with the United Nations and the Universal Declaration of Human Rights, the concept of human rights is rooted in natural law, the idea that humans possess intrinsic rights. This concept, known since antiquity, is famously illustrated in Sophocles' play "Antigone," when Antigone buried Polynices in violation of Creon's edict forbidding it. In this context, the following dialogue occurs:

> Creon: Tell me, tell me briefly: had you hear my proclamation touching this matter?
>
> Antigone: It was public. Could I help hearing it?
>
> Creon: And yet you dared defy the law.
>
> Antigone: I dared. It was not God's proclamation. That final Justice that rules the world below makes no such laws. Your edict, Kind, was strong, but all your strength is weakness itself against the immortal unrecorded laws of God. They are not merely now: they were, and shall be, operative forever, beyond man utterly.[8]

The dialogue illustrates Antigone's defiance of Creon's edict, in which the "immortal unrecorded laws of God" represents a higher law that transcends temporal commands, emphasizing that natural rights take precedence over political mandates. Historically, natural law was often tied to divine authority, as seen in the writings of Stoics like Cicero and Seneca, and theologians such as St. Augustine, who believed that natural law reflects a divine purpose or telos. Natural rights arise from human nature, and this was historically understood as deriving from the consequences of divine creation.[9]

However, the legitimacy of natural law can also be grounded in human rationality and social nature, which pre-exists positive law and is independent of any religious foundation. Natural rights, or what it is now referred to as human rights, are objective and universal in scope, and do not depend on the subjective feelings or desires of individuals nor originate in the decrees of governments or legislative powers. They are grounded in the moral qualities of human persons and the universal right to be treated as an end in itself, they arise, specifically, from the inherent dignity and great worth of the person, as emphasized in the Preamble of the Charter of the United Nations.

Natural and human rights are not dependent on legislative enactment; they pre-exist positive law, stemming from the nature of humanity. Every human, from existence to death, possesses inherent dignity and human rights by virtue of being a person. Because

[8] Sophocles, *Antigone*, verses 353-363, available at: https://mthoyibi.wordpress.com/wp-content/uploads/2011/05/antigone_2.pdf.
[9] See, e.g., Gregg, Samuel, *The Essential Natural Law*, Fraser Institute, 2021.

a person is a rational and morally responsible subject, the criterion for full moral worth – fundamental dignity – is being a person. While human rights originated from natural law and human dignity, IHRL has evolved significantly beyond these philosophical foundations, particularly after the atrocities of the Nazi Holocaust.

The inadequacies of the pre-existing international legal framework, which failed to clearly outlaw such actions, spurred the development of a robust body of positive IHRL. This body of law, codified in treaties and international legal instruments, transformed the international legal system, establishing human rights as positive demands against authority, thereby limiting state sovereignty.

IHRL, therefore, consists of legal principles and rules that give effect to the purposes of natural law. Moreover, the obligations of states within this framework arise from their consent to treaties and organisations dedicated to human rights, anchored in the principle of *pacta sunt servanda*, which is a principle also rooted in natural law that forms the basis for consensus.

Similarly, early just war doctrines, rooted in natural law, focused on the moral dimensions of human actions. Classical theorists believed that war was governed by unchanging moral laws inherent in the natural order. Theologians like St. Augustine emphasized, and St. Ambrose of Milan were deeply concerned with the rightness or wrongness of individual actions.

The Augustinian perspective posits that naturalistic morality is inscribed within the hearts of God's creatures, with humans not being evil by nature. Evil entered the world through an act of free will, burdening subsequent generations who, in turn, contribute their own share of sin. Humans are inherently social beings, inclined to come together and contribute to social order. Although basic human needs may facilitate social cohesion, nature alone is insufficient; human initiative is essential for action, driven by either *caritas* (right intentions) or *cupiditas* (wrong intentions).

Medieval just war doctrines emphasized several conditions for the permissibility of war, particularly the requirement of a just cause, forming the doctrine of *jus ad bellum*. The criteria for a justifiable war include acting under rightful authority, having a just cause, fighting with righteous intention, possessing a reasonable hope of success, and using war as a last resort to address or prevent serious injustice.

According to Augustine, just war is motivated by a call to justice rooted in our dual nature as created and fallen beings. The decision to use force may be seen as an expression of *caritas* or neighbourly love, where a war undertaken to preserve or achieve peace would leave the world in a better state. Just war, thus, arises from a sense of *caritas*, seeking to establish a fair and lasting peace.[10]

As secular leaders and states grew in number and power, the focus transitioned from individual combatants to state actions. By the 19th century, interstate wars were considered matters of national policy, often overlooking the concept of justice in war. Interstate wars between sovereigns with equal rights were considered just wars. International law, through instruments like the Lieber Code of 1863, the First Geneva Convention of 1864, and the Declaration of St. Petersburg of 1868, acknowledge the existence of war and established rules impacting the rights and duties of neutrals and belligerents during war time.

The Lieber Code, issued during the American Civil War, aimed to regulate military conduct. The Geneva Conventions marked an initial step towards protecting victims of armed conflict, declaring medical units neutral and inviolable, setting a precent for humanitarian treatment during times of war. The Declaration of St. Petersburg, invoking the "laws of humanity," prohibited certain weapons, emphasizing that "the progress of civilisation should have the effect of alleviating as much as possible the calamities of war." This sentiment was echoed in the Hague Conventions of 1899 and 1907, gradually diminishing the importance of *jus ad bellum*.

The doctrine that supplanted medieval just war theories was the law of nations, which primarily outlined the rights and duties of states without extending them to individuals. Early formulations of the IHL did not formally acknowledge individual rights or establish personal criminal liability for violations. Within this framework, less emphasis was placed on determining the moral rectitude of each party in conflict. In this sense, *jus in bello*, which governs the conduct of armed conflicts, became distinct and independent from *jus ad bellum*.

[10] Regarding Augustinian arguments on the just war theory and natural law, see, e.g., Elshtain, Jean Bethke, *The Just War Tradition and Natural Law*, Fordham International Law Journal, vol. 28, issue 3, article 6, 2004.

After the World Wars, the United Nations Charter aimed to regulate *jus ad bellum*, but this led to its oversimplification, recognising only two conditions for legally permissible military force: UN Security Council authorisation or self-defence. This meant a solidification of a division between *jus in bello* and *jus ad bellum*. Although *jus ad bellum* is still important in international law, it remained simplistic and isolated from questions of conduct in armed conflicts, and centred on questions of the conditions under which states can use force.

Jus ad bellum has been reduced to a single straightforward rule: absent United Nations authorisation, a state may engage in armed conflicts only in self-defence against aggression. This aligns with "common-sense morality," here defined grounded in practical reasoning and social consensus rather than formalised doctrines and understood as the intuitive ethical judgments and principles widely held by individuals, encompassing norms and values about right and wrong.

Specifically, the most prevalent rationale for harm, which is liability due to wrongful action, creates an asymmetry between the moral positions between the wrongdoer and the victim. This structure of justification for the infliction of harm is shared across *jus ad bellum* and common-sense morality, which differs from the one of IHL. In other words, *jus ad bellum*, IHRL, and common-sense morality all acknowledge that in most instances of justified self-defence, the initial defender is justified in acting while the wrongdoer is not.

IHL, on the other hand, serves to mitigate suffering during armed conflicts, independent of the justification of the armed conflict provided by *jus ad bellum*. The rules of *jus in bello* remain neutral between both sides of the conflict, regardless of the initial unlawful use of force, making IHL symmetrical in its application.[11] IHL could only be asymmetrical because it does not consider the unequal relation of power in a conflict. Therefore, unlike morality in that sense, which is singular, international law is grounded on a dichotomy between *jus ad bellum* and *jus in bello* which implies different rules depending on the situation.

[11] See, e.g., McMahan, Jeff, "Laws of War", *The Philosophy of International Law,* Oxford, Oxford University Press, 2010; Shue, Henry, "Laws of War", *The Philosophy of International Law*, Oxford, Oxford University Press. 2010.

Human beings, as rational creatures, are expected to behave in ways that align with their rational nature, and moral law derives from this inherent nature, thus constituting "natural law." In morality, there is no special code that supersedes ordinary moral principles in times of war. Hence, law diverges from morality because the morality of killing during armed conflicts is asymmetrical, whereas IHL is entirely symmetrical.

This study does not seek to resolve why legal rules governing hostilities are neutral or why they do not account for justice considerations recognised in *jus ad bellum*. However, two reasons explain this divergence. First, due to epistemic reasons, since the requirements of morality are challenging to discern during war, particularly when determining a lawful use of force. Second, because humanitarian objectives are best served by granting moral equivalence to all belligerents, ensuring consistent humanitarian aid and protection, regardless of the lawfulness of a combatant's cause.

For this study, it suffices to assert that – although they have historically influenced each other – morality and IHL diverge, and to explore the implications for IHL's interaction with IHRL. The evolution of the laws of armed conflict has far moved away from its roots in natural law, highlighting the difficulty of reconciling morality with armed conflicts and underscoring one essential difference between IHL and IHRL.

Human rights are universal norms and entitlements possessed by all human beings simply by virtue of their humanity. These rights, identifiable through ordinary moral reasoning, serve as critical standards for evaluating political institutions and positive law. IHRL, grounded in the inherent dignity of all human beings, recognises individuals as the basic units of moral concern, encompassing natural, inherent, and universal rights.

The Preamble of the United Nations Charter and the Preamble of the Universal Declaration of Human Rights refer to the "inherent dignity" of all human beings, who are "born free and equal in dignity and rights." The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights assert that human rights "derive from the inherent dignity of the human person." IHRL jurisprudence centres on human dignity, which can only be fully realised in peacetime, while armed conflicts undermine it.

Asserting that IHL and IHRL share the same purpose of protecting human dignity is unrealistic because there is a distinction between the inherent qualities of human beings

and their accidental characteristics, such as age, development, or combatant status. IHRL is based on respect for all rational beings as equal, regardless of other factors, whereas IHL focuses on the principle of distinction between civilians and combatants (among others, Article 48 of the Additional Protocol I).

IHL aims to protect individuals during armed conflicts by balancing military necessity with humanitarian considerations. This is demonstrated by the principle of distinction, which requires that belligerents distinguish at all times between persons who may be lawfully attacked and those who must be spared and protected from hostilities, reflecting practical considerations rather than an intrinsic respect for human dignity.

Military necessity pertains to achieving a specific military advantage, while the principle of humanity seeks to limit harm and prevent unnecessary suffering. For instance, determining whether a weapon causes "superfluous harm" requires assessing the military advantage gained from its use. From a humanitarian perspective, factors such as the type of injury inflicted, the number of deaths, and the extent of suffering caused must be considered.

The principle of humanity aims to limit harm, destruction, and death during armed conflicts, focusing on preventing excessive injury and unnecessary suffering rather than solely protecting human dignity as the name could suggest. The humanitarian dimension of IHL may be symbolised by the Martens Clause in the Preamble of the 1899 Hague Convention, which calls for IHL to be interpreted in line with the principle of humanity and the "dictates of public conscience." The core objective of the humanitarian principle is to reduce the dominance of military necessity, thus mitigating the destructiveness of conflicts.

Conversely, IHRL is generally robust, though not all rights are absolute; few, such as the prohibition of torture, are impervious to being overridden by any consequentialist consideration. Violations of IHRL are fundamentally inconsistent with our moral intuitions. While rights may conflict, necessitating a balance where one individual's rights might be limited by another's, the duties prescribed by IHRL are defined by rights that stand apart from and override any broader objectives, such as military necessity.

The principle of distinction under IHL, which grants civilian immunity, is driven more by practical considerations than by the principle of humanity. These considerations include belligerents' interest in preserving their societies from destruction, the general

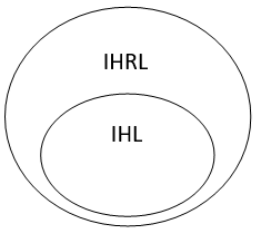
non-threat posed by civilians, the professional consent to risk by combatants, and the prevention of conflict escalation. The overarching goal of IHL is not the protection of human dignity per se but rather the minimisation of harm, and the mitigation of the destructiveness of armed conflicts.

The inherent differences in purposes between IHRL and IHL norms is in the base of their conflicts. Chapter 3 will examine the nature of these normative conflicts and the potential responses, setting the stage for Chapter 4, where specific instances of collisions, particularly regarding the right to life and liberty, will be classified and addressed. Before delving into these specific issues, a broader question must be addressed: despite their differences, how IHL and IHRL interact within international law?

2.2. Theoretical approaches to the interaction

International law is a coherence-seeking system, though achieving coherence can be approached through various theoretical perspectives. Regarding the relationship between IHRL and IHL, three predominant theories emerge: the integrationist theory, the separatist theory, and the complementarity theory. [12]

The integrationist theory posits that IHL is merely a component of IHRL, regulating the protection of human rights specifically during armed conflicts. IHRL, in this sense, is the genre and applies all times, while IHL only applies during armed conflicts to certain categories of people, such as the wounded and prisoners of war. Within this framework, one might view, for example, IHRL (in a broader sense) as encompassing IHRL (in the strict sense) and IHL, given that both branches aim to protect the human person.



However, this raises a question: if IHL were simply a part of IHRL, how could it pursue a distinct purpose? IHL aims to minimize harm during armed conflicts through

[12] These theories were identified by the International Committee of the Red Cross in collaboration with the Secretariat of the League of Red Cross Societies in *The Red Cross and Human Rights*, Geneva, 1983, available at: https://library.icrc.org/library/docs/CI/CD_1983_006_ENG_007.pdf.

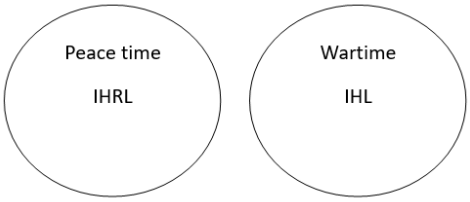
pragmatic measures, while IHRL focuses on defending human dignity for all individuals, regardless of other features, such as class, ethnicity, nationality, or stats in an armed conflict. Besides, IHL imposes specific limitations on IHRL, including on the non-derogable right to life under IHRL for combatants during conflicts.

Although IHRL recognises differences, such as special protections for refugees, women, and children, these distinctions are intended to rebalance inequalities in favour of equality, not to categorise individuals based on their roles in armed conflict. Refugees are often provided with protections to address their displacement and lack of national protection; women receive safeguards to counter gender-based violence and discrimination; and children are granted protection due to their developmental needs and dependence.

These distinctions are designed to ensure that all individuals can enjoy their fundamental human rights equally, acknowledging the specific circumstances that may hinder their ability to do so, thereby promoting substantive equality. The distinction between civilians and combatants is made to reduce the suffering caused by armed conflicts, by determining legitimate targets. IHL statuses does not align with the categorisations of IHRL, as they serve fundamentally different purposes.

The integrationist theory fails conceptually because it conflates the distinct objectives of IHL and IHRL. Even the positive discrimination under IHRL aims to safeguard human dignity universally, which is distinct from IHL's objective of minimising harm during armed conflicts. Merging these branches under the integrationist theory disregards their unique principles and purposes, rendering the theory conceptually untenable.

The separatist theory, on the other hand, asserts that IHL and IHRL are entirely distinct and that any attempt to merge them causes confusion. According to this theory, the onset of an armed conflict effectively suspends the applicability of IHRL, allowing IHL to take full control. In this scenario, IHL and IHRL norms do not overlap, making their co-application impossible. The branches are considered incompatible in nature and objective, but compatible terms of the application of their norms.



This theory, however, presents significant challenges. First and foremost, human rights, which are inherent to individuals by virtue of their humanity, should not be negated simply because a state or non-state actor engages in armed conflict. While IHRL rights may be limited, they cannot be entirely displaced, as they are rooted in the basic premise of universality – a concept enshrined in the relevant IHRL instruments.

Additionally, it is practically impossible to determine when IHRL ceases to apply and IHL takes over. The term "war" has historically evolved under various socio-economic, political, religious, and cultural influences, and it is used in various contexts. In addition to interstate armed conflicts, the term is also used to situations where violence reaches a significant level, such as war between criminal gangs, war on crime, and war on terror.

Legally speaking, however, the transition from peace to armed conflicts signifies a shift where actions that might be illegal during peacetime can become lawful, and certain norms that apply in peacetime may cease to have effect while others take precedence. Consequently, there has long been a concern to determine when peace transitions into armed conflict.

Article 2 of the Geneva Conventions state that their provisions apply to all situations of "declared war or any other armed conflict", indicating that wars are armed conflicts, but they diverge as war depends on a formal declaration by at least one party involved. In practice, war is rarely formally declared, so the crucial notion in international law is armed conflict, encompassing the various types of hostilities that may not meet the traditional criteria of interstate warfare.

Defining armed conflict is complex due to the evolving nature of conflicts, which often involve non-state actors, asymmetric tactics, and protracted low-intensity conflicts. The blurring of the lines between peace and armed conflicts complicates the efforts to delineate when one state ends, and the other begins. Examples include insurgencies and counterinsurgencies where non-state actors challenge government authority using guerrilla tactics, such as the Taliban in Afghanistan and the FARC in Colombia.

Conflicts can also involve terrorist and extremist campaigns aimed at destabilising governments and advancing political agendas, like Boko Haram in Nigeria and Al-Shabaab in Somalia, which utilise a combination of guerrilla tactic and terrorism. Proxy wars and regional conflicts are also prevalent, where states or non-state actors support rival factions contributing to prolonged instability and violence. The conflict in Syria serves as a notable example.

Post-conflict situations in fragile states that persists despite formal peace agreements are also examples. They are characterised by persistent violence, criminality, and political instability stemming from unresolved grievances and power struggles. These dynamics are observed in parts of the Democratic Republic of Congo and the Central African Republic, where armed groups continue to operate despite previous peace agreements.

These examples illustrate how contemporary conflicts blur the distinction between peacetime and armed conflict. These scenarios require nuanced approaches to protect civilians and uphold human rights amidst ongoing violence and instability. Chapter 4 will discuss the distinction between situations of law enforcement and conduct of hostilities, which may offer insights on that matter but could not be resorted to under a separatist approach.

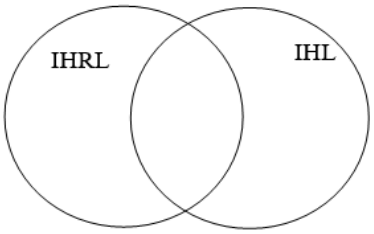
The separatist approach is also flawed because it overlooks potential gaps in legal protection and the possibility of mutual reinforcement between IHL and IHRL. IHL primarily regulates hostilities and protects specific categories, such as civilians and combatants, but does not cover the full spectrum of human rights protections under IHRL. In practice, IHL and IHRL often complement each other, for instance during calm military occupations in which law enforcement situations may be prevalent, sometimes calling for the application of IHRL.

Contrary to the separatist theory, the idea of interdependence between IHL and IHRL is widely accepted, including by the ICJ. Despite some ambiguity regarding the *lex specialis* principle, the ICJ does not support the separatist theory.[13] A significant body of

[13] See note 4, para. 25 in the Nuclear Weapons case, and para. 106 in the Wall case.

jurisprudence from universal and regional human rights courts also affirms the applicability of IHRL in armed conflicts.[14]

The complementarity theory, which I support and is the prevailing perspective, recognises that IHRL and IHL are distinct yet complementary branches of law. This theory argues that these branches are interconnected and driven by a common philosophical conviction: respect for human dignity, which must be protected against harm.



However, it is crucial to acknowledge that IHRL and IHL have different purposes: IHRL protects human dignity, while IHL focuses on reducing harm during armed conflicts. IHRL is associated with universal and regional human rights organisations, whereas IHL is linked to the International Committee of the Red Cross, which is unrelated to IHRL. IHL, a "law of exception," intervenes during disruptions of international order, while IHRL is applicable at all times.

Certain IHRL norms are difficult to enforce during armed conflicts, such as the freedoms of peaceful assembly and association, and specific economic, social, and cultural rights, while IHL provides more detailed rules for protecting individuals during armed conflicts, such as norms regulating maritime warfare. Despite their differences, IHL and IHRL are complementary. They serve as dual supports that mitigate the inevitable consequences of conflicts.

These branches are part of a broader international legal system, which, although fragmented, seeks to achieve coherence. The concept of a legal "system" implies completeness and consistency, and ultimately a loss of coherence could undermine the

[14] See, e.g., Inter-American Court of Human Rights in Judgment *Bámaca v. Guatemala*, Case No. 11/129, para. 209; Security Council Resolution 1019, UN Doc. S/RES/1010, 9 November 1995; Security Council Resolution 1034, UN Doc. S/RES/1034, 21 December 1995; European Court of Human Rights in Judgment *Isayeva, Yusupova and Basayea v. Russia*, 24 February 2005.

system's integrity, because an agglomeration of isolated and diverse norms does not amount to a legal order.

This does not mean that coherence is an inherent characteristic of a legal system; rather, it is a rational ideal that legal systems strive to achieve. Positive law, as a human creation, reflects our limited rationality and is a product of historical and political considerations. Legal systems are dynamic and evolving, not inherently coherent. Coherence must be continually pursued, and the fragmentation of international law presents an opportunity to enhance the system.

This approach ensures comprehensive protection of individuals' rights in the complex and fluid contexts of modern conflicts, as well as ensures that each branch operates in its full potential. This constructive approach is embodied by the interpretative method outlined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which refers to the principle of systemic integration. This principle suggests that the broader system of international legal obligations should be considered when interpreting specific rules, fostering synergy between different branches of law.

2.3. International Criminal Law

ICL encompasses all criminal rules under international law that impose specific legal consequences for certain actions defined as international crimes. It includes the substantive rules and principles that define these crimes and set criteria for individual criminal responsibility. From an institutional perspective, ICL is still in its early stages of development. Its evolution, however, has been neither linear nor cohesive, instead progressing through a fragmented historical process marked by varied and sometimes unconnected experiences.

The first international war crimes trial occurred in 1474 with the prosecution of Peter von Hagenbach in Breisach. Yet, it was not until the *ad hoc* tribunals for the former Yugoslavia and Rwanda in the early 1990s, and more notably with the creation of the ICC, that ICL began to consolidate into a significant legal practice.

ICL's development has led to the emergence of a distinct field within international law. While IHRL and IHL apply to collective entities such as states or conflict parties, aiming to enhance state practices for individual protection, ICL focuses on the criminal responsibility of individuals who commit international crimes. Without individual

criminal responsibility, the enforcement of IHL and IHRL could be fundamentally incomplete.

ICL represents a significant advancement within IHRL and IHL, providing essential enforcement mechanisms by penalising perpetrators. While many prohibitions within ICL derive from IHRL or IHL, ICL specifically targets only the most severe offences against the international community. To address these offences, ICL employs stringent measures, including arrest, stigmatisation, punishment, and imprisonment of the perpetrators. Consequently, ICL incorporates several unique principles not found in other legal fields, such as the principles of legality, culpability, and fair labelling.

ICL draws from multiple sources, primarily international law and comparative law. From comparative law, it adopts fundamental principles of criminal law, which, although not explicitly named in the Rome Statute, are embedded in its various provisions.

For instance, the principle of legality is reflected in Articles 22, 23 and 24, which enshrine the principles of *nullum crimen* and *nulla poena* (*sine lege scripta, praevia, certa* and *stricta*). According to these principles, a person can only be punished for an act codified the Statute at the time of its commission (*lex scripta*), committed after its entry into force (*lex praevia*), defined with sufficient clarity (*lex certa*), and not extended by analogy (*lex stricta*).

The principle of culpability is most notably reflected in Article 30 of the Rome Statute, which addresses the mental element, or *mens rea*. This principle restricts criminal responsibility before the ICC to those who have intentionally committed the material elements of a crime with knowledge of its likely consequences. It is based on a moral theory of responsibility and punishment, arguing that criminal responsibility should be linked to moral blameworthiness, thus justifying criminal sanctions. It requires that moral culpability be the foundation for individual liability and that any imposed sentence reflects the actor's moral culpability.

The principle of fair labelling, another core tenet of criminal law, requires that offences be described accurately, ensuring that they are precisely categorised and labelled. This principle mandates that legal definitions of crimes be clear, precise, and properly represent the nature of the criminal conduct, ensuring clarity and fairness in criminal law.

The fundamental principles of criminal law in ICL differ significantly from their counterparts in national legal systems in terms of their standards and application. They are *sui generis*, as they must balance ensuring justice and fairness for the accused with maintaining global order. This balance is influenced by the nature of international law, the lack of international legislative policies and standards, and the expectations that ICL norms will be integrated into the national criminal laws of various states. Consequently, these principles are not applied as strictly as in national legal systems due to the unique characteristics of ICL.

International law is also a fundamental source of ICL. Primarily, IHRL establishes international fair-trial standards, integrated into the Rome Statute, which shape the procedural elements of ICL. Consequently, ICL's procedural component derives from mixed sources.

Additionally, IHRL and IHL contribute significantly to the substantive elements of ICL, especially regarding crimes under Article 5 of the Rome Statute. Article 7 exemplify this interplay, defining war crimes in terms of violations of IHL treaties, such as the Geneva Conventions and the Hague Conventions. Article 8 define crimes against humanity, which prohibitions are included in the major IHRL treaties, such as the Conventions against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention to Suppress the Slave Trade and Slavery.

ICL, therefore, incorporates elements from diverse legal disciplines, resulting in intersections that may bring contradictory assumptions and reasoning methods, including inadvertent violations of its own principles.[15] This blend can create internal inconsistences, leading to a lack of clarity on how institutions should navigate the relationships between different legal sources, including general principles of law, international law, and criminal law.

Two examples illustrate potential conflicts arising from ICL's diverse sources. First, in the in *Ntaganda* Trial Chamber decision, the Court determined that the members of an armed group could be victims of violations of IHL committed by other members of that

[15] Regarding the tensions arising from the interaction between the sources of ICL, see, e.g., Robinson, Darryl, "*The Identity Crisis of International Criminal Law*", Cambridge University Press, 01 December 2008, available at: https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/abs/identity-crisis-of-international-criminal-law/47836B8BE0B803C6DE8B79306A3906F6

same group.[16] However, IHL traditionally excludes crimes committed by commanders and soldiers against their own members.

While an act must violate IHL to be classified as a war crime, this decision expands the Court's jurisdiction beyond IHL's traditional scope, raising concerns about adherence to the principle of legality. The Court's broader interpretation could be seen as retroactively applying legal definitions not established at the time of the conduct, undermining the predictability and fairness intended by the principle of legality.

Second, Article 28 of the Rome Statute addresses the command responsibility doctrine, which imposes liability where a superior-subordinate relationship exists, and the superior failed to prevent or punish crimes committed by subordinates. This doctrine allows for convictions based on omissions, a 'had reason to know' standard, and without causal contribution to the crime. However, this doctrine clashes with the principle of culpability, which requires that the accused's conduct contributes to or impacts the commission of the crime.

Even if the failure to punish is worthy of criminalisation, convicting someone without their direct contribution undermines the principle of fair labelling. It might be inaccurate to label such a failure as a crime against humanity, war crime, or genocide. This principle also requires proportionality between the severity of the label and the commander's moral blameworthiness or involvement. The tribunals' imposition of such labels for crimes bearing enormous stigma contravenes the principle of culpability, which requires a causal contribution for conviction.

This contradiction between the command responsibility doctrine and fundamental principles of criminal law partly arises from conflating IHL procedural duties of commanders with ICL. The command responsibility structure is rooted in IHL, which imposes duties on commanders to prevent, or report crimes during armed conflicts. As in the *Ntaganda* case, this doctrine unintentionally extends criminal liability by grafting it onto broader IHL duties without considering whether criminal law warrants a narrower scope, raising issues of culpability and fair labelling.

[16] See the International Criminal Court Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda,* ICC-01/04-02/06-2359, 8 July 2019.

Within IHL, the command responsibility doctrine concerns only war crimes and offers optional criminal responsibility alongside disciplinary measures. Conversely, ICL establishes the individual criminal responsibility of the commander. Additional Protocol I highlights the distinction between the commander's procedural duty under IHL and personal criminal liability. Article 87 imposes a general duty on commanders to prevent breaches and report them, supplemented by Article 86(2), which asserts that subordinates' breaches do not absolve superiors from penal or disciplinary responsibility.

The reference to "penal responsibility" does not specify whether the superior must be punished for the subordinate's crime or a difference offence. It should not be possible to convict the commander as a party to genocide, for example, based solely on a failure to punish subordinates' crimes if that failure did not contribute to genocide.

These examples demonstrate how ICL's diverse sources can lead to conflicting solutions, disregarding the differing structures and consequences of the involved legal areas, and neglecting principles essential for individual blame and punishment of individuals. Therefore, reconciling ICL's sources within a doctrinal framework is necessary, as the principles in the Rome Statute provide only a foundation for further developing relevant general principles of ICL.

Crafting a doctrinal framework that reflects the multifaceted nature of ICL is challenging due to the inherent differences in the disciplines from which its components originate. However, advancing the rule of law within ICL demands further rationalisation of crimes and the development of general principles of ICL.

In Chapter 6, I will focus on one example relating to the interaction between IHRL and IHL under ICL, particularly the adjudication of war crimes and crimes against humanity. As IHL and IHRL overlap in general, the content of these crimes also overlap. The analysis of this overlap will allow for further rationalisation of international crimes and the development of ICL's general principles, specifically legality, culpability, fair labelling, and those related to the concurrence of offences.

Given ICL's evolving nature, the ICC has the potential to become a stronger, more independent institution of international justice, less reliant on states and the United Nations Security Council than previous tribunals. Conversely, the ICC might struggle to remain a viable and credible institution. The ICC's future hinges on its ability to

navigate and integrate these complex legal frameworks and principles, thereby solidifying the development of ICL's general principles, rationalising international crimes, and ensuring systemic coherence of international law.

The interplay between ICL's components resembles a pattern of overlapping norms lacking a systematic framework, though such a framework exists in international law. I support the approach developed to establish the complementarity between norms of IHRL and IHL: the norms applicable to ICL are complementary, enriching one another and fostering harmonisation to uphold the coherence of ICL's substantive and procedural norms and international law in general.

In this chapter, I have explored the fragmentation of international law and its interpretative implications for the interaction between its branches. Each branch functions as a cohesive unit, with norms reflecting a unified object and purpose, guiding their interpretation and application. To understand the points of convergence and divergence, I examined the origins and purposes of IHRL and IHL.

IHRL is primarily concerned with protecting human dignity, while IHL, given the realities of armed conflict, cannot realistically preserve human dignity. Despite their distinct purposes, both branches belong to a coherence-seeking legal order and, therefore, complement each other. A similar approach applied to the interaction between the sources of ICL, including IHL, IHRL, and the fundamental principles of criminal law.

However, asserting systemic complementarity between these branches is insufficient. Complementarity suggests a systemic relationship among the various influences governing ICL, but it remains a broad concept that does not resolve specific issues and risks becoming a catchphrase. The interaction between these branches cannot be reduced to a theoretical framework alone.

As ICL, IHRL, and IHL frequently overlap in practical cases, concrete solutions are required. In the next chapter, I will analyse the conflict and concurrence of norms and offences. This analysis, together with the insights from the current chapter, will provide the theoretical foundation for the discussions in Chapter 4 onwards, where I will examine specific points of intersection between these branches.

3. Conflict and concurrence of norms

Normative systems generally aim to achieve specific objectives and develop higher functions. To achieve these goals, regulating the behaviour of those to whom norms are addressed is essential. These norms typically control behaviour by determining whether actions are forbidden or allowed, obligatory or not obligatory. For instance, to protect human dignity, IHRL norms prohibit arbitrary violations of the right to life, and to mitigate the impacts of armed conflicts, IHL norms establish civil immunity.

However, these functions are undermined when the normative system itself assigns distinct and incompatible deontic solutions to the same situations. When two norms contradict each other, their legal consequences are tied to the same factual conditions, it results in a logical problem of interpretation.

Many of these contradictions are not recognised or problematised as conflicts of norms because they are often irrelevant, peacefully coexisting, and routinely resolved. Nonetheless, other conflicts persist and must be resolved, guided by the values protected by the normative system. Within international law, the phenomenon of fragmentation has led to an increasing number of contradictions that can be problematised.

A conflict of norms arises when two or more norms within the same system, sharing the same scope of validity, prescribe different and incompatible legal effects to the same set of factual circumstances. For example, when one norm makes behaviour B mandatory under situation S, while another prohibits the same behaviour in the same situation.

In addition to the practical consequences of failing to provide clear behavioural guidelines, normative conflicts have significant theoretical implications. First, a normative conflict may indicate a logical inconsistency within the system, suggesting a formal defect. However, such conflicts also offer opportunities to enhance the system's effectiveness through resolution. Second, legal decisions require justification, demonstrating that the chosen decision is legally sound and appropriate for the case.

Normative conflicts can thus pose serious challenges to justification when different and incompatible solutions could be justified.[17]

Addressing this topic as contradictions, conflicts of norms, or antinomies, serves as a starting point. Law encompasses numerous types of normative conflicts, making exhaustive description difficult. This research will focus on three classifications: the traditional approach and criteria with almost universal vocation; the theory of concurrent incriminating norms in criminal law with intermediate degree of generality; and doctrinal elaborations, typically characterised by their topical specificity.[18] Certain conflicts are more aptly analysed and resolved using different approaches.

In this chapter I will address Alf Ross's traditional classification of norm conflicts, which is based on their scope of application, as well as a more recent approach of conflicts between principles, rights, and values, commonly discussed in constitutional law regarding fundamental rights. If properly adapted, this new approach can also apply to the cases under scrutiny in Chapter 4 onwards. The issue of concurrence of offences under criminal law will also be considered to form basis to the analysis of the interactions involving ICL.

3.1. Conflicts of norms

Alf Ross's classification of norm conflicts includes three types: total-total, total-partial, and partial-partial contradictions, each with distinct implications for legal interpretation. A total-total contradiction occurs when neither of the norms can be applied without conflicting with the other under any circumstances.[19]

Here, the scope of application of the conflicting norms (N1 and N2) is entirely coincident, meaning both apply to the same situations. For example, consider N1 stating, "It is permitted to kill during armed conflicts," while N2 asserts, "It is prohibited to kill during armed conflicts." Whenever the conditions for N1 are met, those for N2 are also met, leading to an inevitable conflict. If depicted graphically, the norms would be represented by coextensive circles.

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[17] Regarding the practical consequences arising from normative conflicts, see Zorrilla, David Martínez, "Conflictos Normativos" in *Enciclopedia de filosofía y teoría del derecho*, Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 2015.

[18] Regarding the concurrence and conflicts of norms, see Veloso, José António, *Direito e Justiça*, "Concurso e conflito de normas", 2003.

[19] See Ross, Alf, *On Law and Justice*, Oxford, Oxford University Press, 2019.

Total-partial contradictions arise when one norm's scope is broader than the other's, encompassing it entirely. One norm cannot be applied without conflicting with the other, while the broader norm has an additional field where it operates without conflict. This type of contradiction implies a relation of speciality between the norms, with one being a specific instance of the other. Graphically, this can be represented by concentric circles, where the more specific norm's circle is encompassed within the broader norm's circle. This reflects the figure representing the integrationist theory in the previous chapter.

Partial-partial contradictions exist when each norm has a field of application that conflicts with the other, but also independent fields where no conflict arises. This can be illustrated by intersecting circles, with an overlapping section indicating the conflicting area, and two non-overlapping sections representing the independent scopes. This typology aligns with the figure representing the complementarity interaction between IHRL and IHL, where conflicts occur in certain areas, but each branch also operates independently in others.

In assessing contradictions, the relationship between the statutes containing the conflicting norms is a crucial factor. I contend that contradictions between IHRL and IHL norms are generally partial-partial, as each body of law has specific fields where conflicts may arise but also broader, conflict-free areas. IHRL applies universally, while IHL is specific to armed conflicts, where certain IHRL norms may conflict with IHL.

However, for an antinomy to be genuine, both conflicting norms must be valid. If one norm is invalid – due to, for example, being issued by an unauthorised body or being hierarchically inferior in total-total or total-partial contradictions in which the inferior norm is also the special one – then the conflict is only apparent, and the valid norm prevails.

Similarly, when conflicting norms derive from provisions enacted at different times, the most recent rule may prevail, rendering the earlier rule invalid, at least in total-total contradictions, or in total-partial contradictions where the subsequent norm is also the general one. In such cases, the earlier rule cannot apply in any situation that does not conflict with the subsequent rule, so the more recent norm prevails.

In situations where both norms are valid and part of the legal system, authentic antinomies arise, requiring resolution based on applicability rather than validity. This

resolution often involves establishing a rule of preference, as seen in total-partial antinomies where the hierarchically inferior norm is also the general one, or where the subsequent norm is the special one, because the inferior or earlier norm does not always conflict with the superior or subsequent norm, remaining valid.

Potential contradictions between norms of IHRL and IHL are authentic due to their partial-partial nature, ensuring the continued validity of each branch within its exclusive field of application. Norms from both fields are issued by authorised bodies, are recognised as legitimate international law sources, and developed concurrently and complementarily, not in a simple chronological sequence where one body of law replaced the other.

Key conventions in both fields have been adopted and revised over time, with overlapping periods of development. For instance, the Universal Declaration of Human Rights (1948) and the Geneva Conventions (1949) evolved around the same time but with different scopes and focuses. Thus, criteria such as hierarchy, chronology, and competence are generally inadequate to resolve conflicts between IHRL and IHL.

In this case, the decision as to whether which norm to apply when contradictions are detected, will depend on evidence other than textual, or on discretion. The ICJ and many international scholars invoke the traditional *lex specialis* principle to resolve contradictions between IHRL and IHL norms.

This principle requires that when conflicting norms have a relationship of speciality, where one norm is encompassed within the application scope and conditions of the other, the most specific norm prevails. This criterion is particularly relevant to total-partial antinomies due to the inclusion relationship. I argue that applying the *lex specialis* principle to conflicts between IHRL and IHL is inappropriate, among other reasons, because there is no speciality relationship between these norms. This complex issue warrants further exploration, which will be undertaken in Chapter 5.

Traditional criteria for resolving antinomies – such as competence, hierarchy, chronology, and speciality – tend to oversimplify the complexities of legal contradictions. These criteria provide a static framework, insufficiently capturing the nuances of specific conflicts, especially in dynamic legal fields. This is particularly true in international law, where a coherent structure seeks to unify the international community while incorporating numerous provisions with strong substantive character,

often drafted in general terms with a high degree of abstraction, leading to greater indeterminacy.

Conflicts between principles, rights, and values may be approached fundamentally different in comparison to the traditional approach. Unlike rules, where logical contradictions arise from conflicting norms that cannot be simultaneously applied, principles can coexist without inherent contradiction. The tension between principles arises not from logical incompatibility but from specific empirical circumstances of the particular case.[20]

In other words, normative principles are logically compatible and, in most cases, can be applied without collision. However, specific circumstances sometimes create tension or incompatibility, meaning that the principles at stake cannot be simultaneously satisfied, as they favour incompatible responses. This is reminiscent of partial-partial contradictions, in that each norm retains its core of validity and that the solution generally relies on the discretion of judges.

Conflicts between principles may not be addressed using traditional criteria like competence, hierarchy, or chronology, which are designed to resolve conflicts between rules. This distinction is crucial because principles, values, and rights are structurally different from rules, affecting the structure of conflicts and the mechanisms for their resolution.

The traditional criteria for resolving antinomies offer definitive and invariable solutions to conflicts but here neither principle is invalid, nor are the norms in a partial-partial contradiction. A specific mechanism of "weighing and balancing" required, comparing the conflicting elements to establish which one takes precedence in a particular case, rather than attempting to establish a definitive hierarchy between them.

Depending on the circumstances, the same elements can be analysed differently, giving preference to the other principle involved. This process requires a rational justification from the decision-maker, often a judicial body, who must carefully consider the competing principles and determine which should take precedence in the given circumstances. This decision-making process is subject to rationalised control

[20] Regarding conflicts of fundamental legal rights, see, e.g., Zorrilla, David-Martinez, *The Structure of Conflicts of Fundamental Legal Rights*, Law and Philosophy, Vol. 30, No. 6, November 2011, available at: https://www.jstor.org/stable/41487009

parameters such as the principle of proportionality, which ensures that the sacrifice of one principle is justified by the benefit gained from upholding another.

Robert Alexy breaks down the proportionality principle into three sub-principles: suitability, necessity, and proportionality in the narrow sense.[21] Legal principles, values, and rights are optimisation requirements, necessitating their greatest possible realisation within legal and factual constraints.

The principles of suitability and necessity address optimisation relative to what is factually possible. The principle of suitability requires that the action taken must effectively contribute to the achievement of a legitimate end. An action that causes harm or sacrifices a legal principle or right must do so for a valuable purposes, and if it does not it results in unjustified harm.

Once a decision satisfies the principle of suitability, the next stage involves the principle of necessity, which ensures that the action taken is the least burdensome option available to achieve the legitimate end. If a less harmful alternative exists that could achieve the same result, the more harmful option is unjustified.

If the behaviour meets the requirements of suitability and necessity, the final step is to analyse its proportionality in the strict sense. This principle involves optimisation relative to legal possibilities, comparing the benefits of satisfying one principle against the harm caused to another. The decision must balance these competing interests to determine whether the importance of upholding one principle justifies the detriment to the other.

The control parameters of the mechanism of weighing and balancing, such as the proportionality principle, are crucial for resolving conflicts between principles in contexts like constitutional law. It must, of course, be adaptable to the unique conditions of armed conflicts under international law. The extreme circumstances of armed conflicts demand flexibility in the application of principle, ensuring that legal decisions are both context-sensitive and effective in guiding legal decision regarding the high-stakes environment of armed conflicts.

[21] Alexy, Robert, *A Theory of Constitutional Rights*, Oxford, Oxford University Press, 2010.

In sum, conflicts between IHRL and IHL are characteristically partial-partial. Traditional methods of resolving antinomies are not adequate to address the complex and abstract nature of these conflicts. The conflicting elements to be analysed in Chapter 4 and 5 are substantive and abstract in aspect, as they regard the protection of the right to life and liberty and the fundamental principles of criminal law. Resolving these conflicts requires a process of weighing and balancing grounded in the complementarity theory and guided by parameters such as the proportionality principle, while also considering factual evidence.

Chapter 6 will explore how the interaction between IHL and IHRL influences their application within ICL. The prohibitions under crimes against humanity and war crimes reflect values of IHRL and IHL, respectively. However, the overlap between these crimes presents challenges, particularly in cases of cumulative convictions, which may jeopardise the rights of the accused. The concurrence of offences in ICL necessitates distinct considerations in comparison to the general framework of normative conflicts.

3.2. Concurrence of offences

The issue of *concursus delictorum* in ICL typically arises when defendants are accused and convicted of the multiple crimes based on the same conduct. This phenomenon, involving cumulative charges and convictions, deals with all situations in which at least two offences are adjudicated at once, regardless of whether these offences refer to one and the same set of fact or to several distinct sets of facts.[22]

This phenomenon raises significant questions about whether all applicable provisions should result in convictions or whether the application of one offence precludes another. The core issue revolves around determining when facts are "the same" and when offences are "different."

Concursus delictorum arises in two scenarios: first, when different conduct fulfils distinct offences (real concurrence); and second, when the same conduct fulfils multiple offences simultaneously or repeatedly (apparent concurrence). In the latter, nominally distinct offences are, in essence, a single offence, leading to a rule of non-application based on the interpretation of the legislative intent.

[22] Regarding concurrence of offences, see, e.g., note 18; and Stuckenberg, Carl-Friedrich, "Cumulative Charges and Cumulative Convictions" in *The Law and Practice of the International Criminal Court*, Oxford, Oxford University Press, 2015.

Two cases of apparent concurrence are relevant here. The first involves logical inclusion, where the definition of one offence is fully subsumed within another, creating a genus-species relationship. This can be visualised as a smaller circle within a larger one, where the larger crime, or *lex specialis*, includes elements beyond the lesser crime, or *lex generalis* (resembling the figure on the integrationist approach in Chapter 2.2).

The larger crime requires further elements which are not part of the smaller crime, in the sense that the smaller crime is the "lesser included offence". This is the so-called unilateral speciality, that necessitates that a conviction for the lesser-included offence should not be entered.

The second case involves two offences in a logical relationship of interference, of reciprocal speciality, in the sense that the offences overlap either logically or factually, so not necessarily, but possibly the same conduct violates these two offences. The representation of the relation between these offences resembles the figure on the complementarity approach in Chapter 2.2.

The solution to this case is considerably less settled. On the one hand, if the offences are usually violated at once because they are closely related and protect similar or cognate interests, for the more comprehensive crime may suffice to characterise the criminal wrong. In these cases, the principle of consumption operates, and the larger crime "consume" the smaller one because it expresses all its wrongfulness. There is only one applicable crime, and, for this reason, the concurrence is apparent.

On the other hand, if the offences violated by the same conduct are not considered the "same offence," i.e. do not represent a case of apparent concurrence, convictions for all offences may be justified. Multiple convictions for the same conduct are not inherently unfair, provided the resulting punishment aligns with the goals of criminal law. If all statutory provisions are applicable, the defendant should be convicted for each violation, as this reflects the full scope of their wrongdoing.

When the offences are not logically separated, however, one must be aware of the risk of prejudice to the accused, such as increased public blame, societal stigma, losing eligibility for early release, etc. Double conviction for the greater and the lesser offence is tautological, and hence unnecessary to fully describe what the accused did.

This discussion on *concursus delictorum* in criminal law is vital for the analysis in Chapter 6. The prohibitions of crimes against humanity and war crimes overlap. A murder or rape, for instance, can simultaneously be a war crime and a crime against humanity if, during an armed conflict, the conduct includes a widespread or systematic attack directed against a civilian population and is committed against persons hors de combat.

ICL case law treats the relationship between crimes against humanity and war crimes as one of reciprocal speciality, allowing, however, cumulative convictions. Chapter 6 will explore in which cases the concurrence between these crimes is true or apparent. If apparent, the analysis will determine which provision should prevail, considering principles such as the *lex specialis* principle and the principle of consumption.

4. The protection of the right to life and the right to liberty

The protection of the right to life and liberty, as reflected in international law, manifests the interplay between IHL and IHRL. These rights, considered norms of customary international law or general principles transcending specific provisions, represent a paradigmatic example of conflicting rights between these branches, each embodying distinct rationales. Both IHL and IHRL apply to the protection of life and liberty during armed conflicts, although they sometimes offer differing solutions. The objective of this chapter is to understand how these branches operate complementarily to protect these rights under international law.

4.1. Considerations on the right to life

Under IHRL, the protection of the right to life emerges as a primordial provision within all major conventions, requiring that any killing by State authorities meet strict criteria of necessity, proportionality, and self-defence.[23] This implies an assessment of the situation to ensure that a clear and imminent danger to life cannot be averted by any other means, not exceeding what is necessary to address the immediate threat.

[23] See, e.g., Articles 3 of the Universal Declaration of Human Rights, 6(1) of the International Covenant on Civil and Political Rights, 4(1) of the American Convention on Human Rights, 4 of the African Charter on Human and Peoples' Rights, 2 of the European Convention on Human Rights, and 3.2 of the Asian Human Rights Charter.

Conversely, IHL permits the killing of combatants under the "privilege of belligerency", while simultaneously exempting the criminal liability. Belligerent parties does not need to prove necessity to kill combatants belonging to the other belligerent party to be able to do it lawfully, subject to a few constrains. The proscription of perfidy in Article 37 of Additional Protocol I forbids the treacherous killing of adversary combatants. War crimes also constitute exceptions to the general rule that actions aimed at impairing the military potential of the enemy are not subject to punishment. Persons hors de combat also cease to be legitimate targets, as stipulated in Article 41 of Additional Protocol I.

Beyond these constrains, the privilege of belligerency represents the ultimate expression of the principle of distinction requiring the differentiation between military personnel and the civilian population. Civilians who do not take part in hostilities, in this sense, are not considered legitimate targets for acts of violence (Article 51 of Additional Protocol I and Article 13 of Additional Protocol II).

Civilians are protected unless incidental casualties, justified as "collateral damage," are proportionate to the military advantage sought. IHL therefore accepts the use of lethal force and tolerates incidental killing of persons not directly participating in hostilities. Conversely, the justification of collateral damage finds no standing under IHRL, since the use of force is a last resort, and the deliberate planning of an operation with the intent of causing death is categorically unlawful within the framework of IHRL.[24]

The principle of proportionality diverges significantly between the branches. However, prior to consideration of proportionality and necessity, IHRL introduces an element absent from IHL: the requirement of a "legitimate aim" in determining whether the right to life has been violated. IHL is indifferent to the legitimate aim in a military attack, except in the narrowest sense of targeting a military objective. This reflects the impartiality of *jus in bello* to the cause of conflicts, showing no preference for one combatant over another, regardless of which party is the aggressor.

IHL's indifference to the conflict's cause contrasts with IHRL, which is primarily concerned with regulating the unequal relationship between the state and the individual. This inconsistency in the protection of the right to life under IHRL and IHL is

[24] The common case law thread is that the use of lethal force would be unnecessary if an arrest could be made with ease. See, e.g., European Court of Human Rights in Judgment *Ergi v. Turkey*, Application no. 66/1997/850/1057, para. 79, 28 July 1998; and *Ozkan v. Turkey*, Application no. 21689/93, para. 297, 6 April 2004.

exacerbated by its non-derogable nature under IHRL. Even in public emergencies, these rights cannot be limited, except under the European and American Conventions on Human Rights that permits derogation regarding lawful acts of war under Articles 15 and 27, respectively.

The non-derogation clauses were likely not intended to entirely prohibit killings during armed conflicts. IHRL conventions were probably drafted with a focus on peacetime, considering a separation between the laws governing armed conflicts and those governing peacetime. The non-derogation clauses thus reflect a pacifist dimension fundamental of the origins of IHRL.

4.2. Considerations on the right to liberty

Both IHL and IHRL delineate the circumstances under which detention is lawful and outline the protections afforded to detained individuals. While the two legal frameworks differ in certain respects, they share a common objective: to prevent arbitrary detention by establishing clear grounds for detention, particularly in relation to security needs, and by ensuring procedures that enable the ongoing assessment of the necessity for detention.

During armed conflicts, IHL grants warring parties the right to restrict individual liberty for various reasons, with specific protections provided depending on the nature of the conflict and the status of the detainee. For instance, the First Geneva Convention regulates the detention or retention of medical and religious personnel (Articles 28, 30 and 32), while the Second addresses the protection of medical and religious personnel aboard hospital ships (Articles 36 and 37). The Third and Fourth Geneva Conventions provide more comprehensive protections for individuals in detention or internment during international armed conflicts.

The Third Geneva Convention sets forth protections for captured combatants, adhering to the long-standing custom that prisoners of war may be interned for the duration of active hostilities (Articles 21 and 118). Internment is considered an administrative detention aimed at preventing further participation in the conflict, rather than as a punitive measure. Prisoners of war, however, must be released and repatriated without undue delay once active hostilities have ceased. They cannot be prosecuted or punished solely for their participation in hostilities, except in cases where they have committed war crimes or other violations of IHL.

The Fourth Geneva Convention stipulates the conditions under which civilians may be detained, specifying that internment or assigned residence is permissible only when absolutely necessary for the security of the detaining power (Article 42), or, in occupied territory, for imperative reasons of security (Article 78). This might include preventing individuals from participating in hostilities or gathering intelligence on an adversary. For civilians subject to preventive detention, Article 43(1) require periodic review "by an appropriate court or administrative board."

During non-international armed conflicts, IHL offers less detailed regulation of detention. The prohibition against arbitrary deprivation of liberty in such conflicts largely depends on state practices, including military manual, national legislation, and official statements. IHRL plays a significant role in this context, particularly given the advancements in procedural safeguards design to prevent arbitrary detention since the adoption of the Geneva Conventions.

IHRL, on the other hand, provides stronger protections for detained individuals, regardless of whether they are detained during armed conflict or in peacetime. It recognised the right to due process and fair trial guarantees, which are primarily upheld through three key obligations: informing the arrested person of the reasons for their arrest, promptly bringing the arrested individual before a judge, and offering an opportunity to challenge the lawfulness of the detention.[25]

4.3. Abstract overview

In summary, IHL and IHRL offer distinct forms of protection for the right to life and liberty. IHRL mandates that "everyone" or "anyone" must have the right to challenge their detention in court, so the protection of the right to liberty under IHRL may be here called "Due Process norm." Conversely, IHL's "Internment norm" permits the detention of prisoners of war without judicial review and allows for civilian detention to be reviewed merely by an administrative board.

IHRL also strictly regulates the use of force by state authorities, demanding that any killing be a last resort, necessary, and proportional, encapsulated in the "Strict Necessity

[25] See, e.g., Article 9 of the International Covenant on Civil and Political Rights, 5 of the European Convention on Human Rights, 7 of the American Convention on Human Rights, 6 of the African Charter on Human and Peoples' Rights in conjunction with the Resolution on the Right to Recourse and Fair Trial by the African Commission on Human and Peoples' Rights.

norm." Conversely, IHL operates under the "Distinction norm," which permits the killing of combatants during armed conflict and accepts collateral damage if proportionate to the military advantage gained.

The Due Process and Internment norms, on the one hand, and the Strict Necessity and Distinction norms, on the other hand, may both be applicable simultaneously, leading to normative conflicts. Each norm can offer a distinct deontic solution for the same factual conditions, posing the question of which is the appropriate norm to apply according to international law. Two hypotheses may be fruitful.

First, during an international armed conflict, a military force plans and execute an airstrike on a military headquarters located next to a densely populated urban area controlled by enemy combatants. This airstrike do not meet the requirements of the Strict Necessity norm, as the norm does not accept the justification of collateral damage and deems deliberate planning for death categorically unlawful. This norm is generally not derogable. Conversely, under the Distinction norm such an airstrike could be deemed permissible if the anticipated military advantage outweighs the civilian harm.

This could be the case, for instance, if the military headquarters is a high-value target crucial to the enemy's command and control structure, and destroying this headquarters would significantly degrade the enemy's operational capabilities and disrupt their communication, potentially shorten the conflict. Therefore, in principle, there is one norm permitting the airstrike, and another prohibiting, resulting in a normative conflict. Specifically, a partial-partial contradiction, because the norms have independent areas of application, and might only conflict during armed conflicts.

Second, in an international armed conflict, an occupying power conducts a sweep of a civilian neighbourhood, arresting several individuals suspected of aiding enemy combatants. These individuals were detained without due process guarantees, such as information on specific reasons for their detention, legal representation, or an opportunity for judicial review.

Such detention practices would be deemed unlawful under the Due Process norm. Yet, under the Internment norm, such detention might be justified if deemed necessary for security reasons, such as to prevent acts of espionage, sabotage, or to ensure the security of the occupying forces. States may derogate from the Due Process norm, allowing the Internment norm to apply. If derogation is not in place, a partial-partial normative

conflict arises, as the Due Process norm prohibits this deprivation of the right to liberty, while the Interment norm permits. Even so, each norm has its own specific field of application, maintaining their validity.

Traditional criteria are insufficient for resolving conflicts between IHL and IHRL norms. Both norms were legitimately issued, and they have no clear hierarchical relationship, hindering the use of the criteria of competence and hierarchy. Although IHRL norms could prevail over IHL norms under the *lex posterior* principle, which posits that newer laws take precedence, this principle does not straightforwardly apply here. IHL and IHRL conventions evolved concurrently and complementarily, rather than in a simple chronological sequence where one law supersedes the other. The *lex posterior* principle only applies if there is explicit intent to supersede, which is not true between IHL and IHRL.

The *lex specialis* principle is also not adequate to solve this contradiction, because of reasons to be exposed in the next chapter. In the absence of traditional criteria, the resolution of conflicts will depend on broader principles and discretion. This is supported by the "normative excess" of the rights to life and liberty, as well the textual elasticity of IHRL provisions. As optimisation requirements, principles, values, and rights do not exhaust their content on specific provisions. The right to life is broader than the Strict Necessity norm or the Distinction norm, as well as the right to liberty is broader than the Due Process norm and the Internment norm. These are normative specifications of broader standards which are the protection of the right to life and liberty.

Consequently, the protection of the right to life and liberty cannot be confined to the interpretation of one legal branch. The appropriate standard of protection depends on the specific circumstances and broader international law requirements. The discretion that the normative excess entail is reinforced by the elasticity offered by IHRL provisions, which generally prohibits the arbitrary violation of the right to life and liberty. The term "arbitrary" allows for a degree of interpretation and discretion, implying a not absolute standard, and providing a balance between the protection of fundamental human rights and allowing the recipients the necessary flexibility to address exceptional situations effectively.

Regarding the two hypotheses, the arbitrariness of the deprivation of the right to life and liberty could be assessed considering the standards of IHL. For instance, while IHRL prohibits arbitrary deprivation of the right to life and liberty, IHL standards such as proportionality (Article 51 of the Additional Protocol I) or security necessity (Article 78 of the Fourth Geneva Convention) will influence the assessment of lawfulness and arbitrariness.

Thus, the applicable norm is a composite of IHL and IHRL norms: while IHRL provisions protect the rights to life and liberty, the assessment of arbitrariness is guided by IHL standards. The specific norm to apply emerges from a broader general standard of protection tailored to the circumstances. However, this approach is not always definitive.

For instance, the European Convention on Human Rights does not provide this vague standard of arbitrariness to legal operators but specifies permissible grounds for detention. Legal practitioners must therefore consider specific facts and weigh the prevailing legal considerations.

A particularly compelling issue in the context of armed conflicts is the distinction between law enforcement and the conduct of hostilities, which is gaining increasing significance. These paradigms are governed by distinct legal standards, yet neither is explicitly defined in international law.

Generally, hostilities refer to the use to means and methods of warfare between parties engaged in an armed conflict. The “conduct” of hostilities encompasses all hostile acts executed by individuals directly participating in such activities. While this term is not explicitly defined in international law, it is inherently linked to armed confrontations between parties in both international and non-international armed conflicts.

In contrast, law enforcement pertains to the exercise of police powers by state agents, involving actions such as arrest and detention, aimed at serving the community and protecting individuals from unlawful acts. The primary objectives of law enforcement

include maintain public order, safeguarding individual rights, preventing and combating crime, and assisting the public.[26]

However, in the context of armed conflicts, the scope of law enforcement is broader than in domestic settings. It encompasses activities such as maintain order in peace operations or belligerent occupations, controlling access to persons or goods at checkpoints or during embargo enforcement, and guarding individuals deprived of their liberty, including prisoners of war and those detained in non-international armed for reasons related to the conflict or for criminal activities.[27]

Thus, even amidst armed conflict, not all forcible measures fall under the conduct of hostilities. The legal framework governing law enforcement continues to apply to actions taken by parties to the conflict outside the conduct of hostilities. Both paradigms often coexist during armed conflicts, applying simultaneously to different individuals and objects within the same location, as forces may be required to perform functions related to both law enforcement and the conduct of hostilities.

For instance, the sweeping of a civilian neighbourhood during a military occupation could be treated differently if the context were one of peaceful and settled occupation. In such scenario, where the state can apply IHRL and provide greater protection to individuals, the law enforcement paradigm might suffice, applying the Due Process norm without necessitating an analysis of arbitrariness under the paradigm of hostilities under IHL. Conversely, if hostilities were to resume or break out, the paradigm of hostilities is required.

This chapter has examined the interplay between IHRL and IHL in safeguarding the rights to life and liberty, highlighting their overlap and the distinct solutions they offer. It has shown that conflicts between these norms are not easily resolved through traditional criteria, requiring a flexible approach that considers the specific circumstances.

[26] This definition is drawn upon soft-law instruments, such as the United Nations Code of Conduct for Law Enforcement Officials and the United Nations Basic Principles on the Use of Force and Firearms, as well as the European Code of Police Ethics.

[27] Melzer, Nils & Gaggioli, Gloria, "Conceptual Distinction and Overlaps Between Law Enforcement and the Conduct of Hostilities" in *The Handbook of the International Law of Military Operations*, 2nd edition, Oxford, Oxford University Press, 2015.

This flexibility is embedded in some of the textual provisions of IHRL, which prohibit arbitrary violations, but also stems from the nature of human rights as optimisation requirements characterised by their "normative excess." This nuanced approach allows for the protection of these rights through the application of a dual norm, incorporating elements from both legal branches. However, the matter of fact cannot be disregard, and the distinction between law enforcement and the conduct of hostilities remains a crucial factor, as the appropriate legal treatment depends on accurately identifying the situation.

4.4. From abstraction to reality (I)

Having engaged in an abstract analysis using hypothetical scenarios to expose the tensions between different legal norms, I will now transition to applying this framework to real-world situations. Specifically, I will examine reported events from the ongoing international armed conflict between Ukraine and Russia to illustrate how the abstract principles previously discussed manifest in concrete cases.

According to the Office of the United Nations High Commissioner for Human Rights, on February 24, 2022, Russian troops launched an armed attack on Ukraine, entering ten regions, including Kyiv, Chernihiv, and Sumy. By early April, after several weeks of fighting with Ukrainian forces, Russian troops retreated from these three regions. Soon afterward, the bodies of civilians began to be recovered in large numbers across various towns and villages within these regions, many showing signs that suggest they may have been intentionally killed.[28]

As of October 31, 2022, summary executions and attacks on individual civilians were documented in 102 villages and towns within the three regions between February 24 and April 6, 2022. These acts, committed by Russian forces in control of these areas, resulted in the deaths of 441 civilians, although available information indicates that the total number of summary executions and lethal attacks directed against individual civilians by Russian forces during this period is likely much higher.

The events described occur within the context of an ongoing international armed conflict, regulated by IHRL, IHL, and ICL. IHL serves as the primary legal framework

[28] Office of the United Nations High Commissioner for Human Rights, *Killings of Civilians: Summary Executions and Attacks on Individual Civilians in Kyiv, Chernihiv, and Sumy Regions in the Context of the Russian Federation's Armed Attack Against Ukraine*, December 2022, available at: https://ukraine.un.org/en/210727-killings-civilians-summary-executions-and-attacks-individual-civilians-kyiv-chernihiv-and

governing the conduct of hostilities, with the attacks raising concerns under key IHL principles – distinction, precaution, and proportionality. IHL mandates a clear distinction between combatants and civilians, affording specific protections to civilians against the dangers of military operations. Civilians cannot be targeted unless they are directly participating in hostilities (Articles 51 of the Additional Protocol I).

Moreover, during military operations, all feasible precautions must be taken to avoid or minimise civilian casualties (Article 57 of Additional Protocol I). IHL also prohibits murder, with Article 75(2)(a)(i) of Additional Protocol I including the prohibition of murder as a fundamental guarantee. Additionally, wilful killing – defined as the killing of one or more protected persons – is classified as a grave breach of the Geneva Conventions and a war crime under the Rome Statute. For such crime to occur, it must take place within the context of an armed conflict, and the perpetrator must be aware of both the conflict and the protected status of the victim.[29]

Both Ukraine and Russia are also bound by their obligations under IHRL, particularly the International Covenant on Civil and Political Rights, to which they are both parties. While traditionally, IHRL obligations apply within a state's territory, there is a growing consensus and jurisprudence suggesting that states have IHRL obligations in areas where they exercise effective control, even beyond their borders.[30] This seems particularly relevant in cases where Russian forces had effective control over the situation, ensuring the right to life of the victims.

For example, on March 7, 2022, around noon, four Russian soldiers entered the home of a 27-year-old man who lived with his mother. They discovered a camouflage uniform, raising their suspicions. After finding messages on the man's phone regarding the movement of Russian forces, they decided to detain him. On March 30, 2022, Russian troops left the area, and the next day, the man's body was found in the basement of the

[29] Regarding murder as grave breach, see Article 50 of the First Geneva Convention, Article 51 of the Second Geneva Conventions, Article 130 of the Third Geneva Convention, and Article 147 of the Fourth Geneva Convention. Regarding war crimes, see Article 8(2)(a)(i) of the Rome Statute.

[30] Regarding the responsibility for acts in breach of IHRL occurring outside the territory of the state, see, e.g., European Court of Human Rights in Preliminary Objections *Louizidou v. Turkey*, App. No. 15318/89, paras. 62-64, 1995; Judgment *Cyprus* v. Turkey, Appl. No. 6780/74 & 6950/75, para. 77; Inter-American Commission of Human Rights *Coard v. The United States*, Case 10.951, para. 37.

house where he had last been seen detained. He was lying on a mattress with a gunshot wound and severe injuries to his hand.[31]

This scenario involves both the detention and subsequent killing of an individual, which can be examined through the complementary lenses of both IHL and IHRL. The initial detention might be considered legitimate under IHL if the soldiers believed the individual posed a security threat or was involved in hostilities. Such detention, occurring during the conduct of hostilities, is permitted under IHL, which allows for conditional detention during armed conflict.

However, the subsequent killing appear to fall under a law enforcement scenario, as the individual was already detained by Russian soldiers. Given that Russian forces likely had effective control over the situation, this action should be scrutinised under IHRL. Even under IHL, the killing would be unlawful due to violations of the principles of distinction, proportionality, and precaution. Under IHRL, however, the standards are even stricter, with less room for justification in judicial proceedings.

IHRL mandates that state actors use force only as a last resort and only when absolutely necessary to protect life. This standard requires that all non-lethal measures be exhausted before resorting to force, marking the summary executions a clear violation of fundamental IHRL protections. These strict requirement makes it difficult to defend or justify such actions, for example claiming military necessity.

Overall, the killings of civilians reported between February 24 and April 6, 2022, during the conduct of hostilities, should be addressed under IHL standards. However, if there was effective control over the alleged victims in a law enforcement situation, such as regarding detained individuals, the proper parameter is the standards of IHRL. If individual's rights are in fact directly under the control of state agents, then the state is obligated to defend the human rights that are under its power of control.

Moreover, if this effective control over the alleged victims extends to an "established and exercised" authority or jurisdiction over the territory, this indicates a military occupation, which is also governed by IHL. Both Hague Regulations and Geneva Conventions impose extensive obligations on an occupying power.

[31] See, note 28, paras 33-36.

According to Article 42 of the Hague Regulations, a territory is considered occupied when it is actually place under authority of the hostile army, and this occupation extends to the territory where such authority can be established and exercised. Similarly, under common Article 2 of the Fourth Geneva Convention, the Convention applies to all cases of partial or total occupation of a High Contracting Party's territory, even if the occupation meets with no armed resistance.

The extraterritorial application of IHRL in situations of effective control over the alleged victims and the regime of occupation under IHL are based on the idea that a state must wield the necessary amount of control to ensure law enforcement and the well-being of the persons in a territory. Nonetheless, the concepts of "established and exercised" authority under IHL and "effective control" over the alleged victims under IHRL differ.

IHRL's standard of control is broader and more flexible, recognising varying degrees of state control and corresponding obligations, ranging from respecting to protecting and fulfilling human rights. In contrast the law of occupation under IHL presupposes a degree of control that imposes specific and absolute obligations on the state, including responsibilities for protection and welfare, such as tax collection, education, food, and medical care.[32]

Therefore, a power may exercise varying levels of control over parts of a territory, sometimes amounting to effective control under IHRL but not reaching the threshold of occupation under IHL. This was probably the situation on March 7, 2022.

Conversely, since March 2014, the Autonomous Republic of Crimea and the city of Sevastopol have been considered occupied territories under IHL. For an occupation to exist, hostile foreign forces must exercise effective control meeting the following conditions: the physical presence of foreign armed forces without consent of the effective local government, preventing it from exercising its powers, and the ability of foreign forces to exercise their authority.[33]

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[32] In this sense, see Droege, Cordula, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, Israel Law Review, Vol. 40, Issue 2, 2007.

[33] See, e.g., note 30; and the European Court of Human Rights in Judgment *Ilaşcu v. Moldova and Russia*, App. No. 48787/99, 2004.

Russia has an increasingly expanded its military control over parts of Ukraine. As of May 26, 2022, after three months of hostilities, Russian-controlled territory stretched from Kherson in the west, through Mariupol and large parts of Donetsk and Luhansk in the east, to the vicinity of Kharkiv in the north. The Russian Federation has imposed its own political, legal, and administrative systems in these occupied areas. These regions qualify as military occupations once the cumulative criteria mentioned are met.

According to the Office of the United Nations High Commissioner for Human Rights, Russian armed forces committed multiple violations of the rights to life and liberty against individuals, particularly those perceived as opposing the occupation. Between February 24, 2022, and December 31, 2023, Russian forces detained hundreds of civilians in occupied regions and summarily executed at least 29 civilians in the temporarily occupied areas of Kherson, Zaporizhzhia, Donetsk and Luhansk.[34]

Most of these victims were suspected by Russian forces of opposing or acting against Russian control and occupation of these areas. In many instances, Russian forces targeted individuals based solely on their profile, such as veterans of the Ukrainian armed forces and family members of current or former Ukrainian military personnel. Russian forces also targeted individuals who refused to cooperate with the occupying authorities or were perceived to hold pro-Ukrainian views.

The applicable law during military occupations is the paradigm of law enforcement: the IHL law of occupation plus IHRL norms. According to the first, the detentions could be considered lawful under IHL for "imperative reasons of security" (Article 78 of the Fourth Geneva Convention). The right to liberty of IHRL is therefore limited if the civilians seem to offer security threats. The targeted killings, conversely, is probably unlawful under any legal framework, although the paradigm to apply to detained individuals should be the one of law enforcement.

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[34] See United Nations Human Rights Office of the High Commissioner, *Ten Years of Occupation by the Russian Federation: Human Rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine*, 28 February 2024, available at: https://www.ohchr.org/en/documents/country-reports/ten-years-occupation-russian-federation-human-rights-autonomous-republic; Human Rights Council, *Situation of human rights in the temporarily occupied territories of Ukraine, including the Autonomous Republic of Crimea and the city of Sevastopol*, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, available at: https://reliefweb.int/report/ukraine/situation-human-rights-temporarily-occupied-territories-ukraine-including-autonomous-republic-crimea-and-city-sevastopol-report-secretary-general-ahrc5669-advance-unedited-version.

Determining whether an action falls under law enforcement, or the conduct of hostilities requires careful, fact-based analysis. In a relatively calm occupation, law enforcement paradigm typically apply. If hostilities resume or new conflicts arise, the IHL paradigm may become more relevant. Analysing events within the context of armed conflicts requires a nuanced understanding of the complementary interpretation and application of international law.

Each legal framework offers distinct norms and standards that govern different aspects of conflict, and their relevance may vary depending on the specific circumstances. Ensuring justice in armed conflict situations demands a case-by-case analysis of the applicable legal frameworks. In this chapter, I have explored the interaction between IHRL and IHL without relying on the *lex specialis* principle, which is frequently discussed by the ICJ and various international scholars. In the next chapter, I will critically examine the limitations and implications of this principle, challenging its use in the interpretation of international law.

5. The lex specialis principle

In contrast to the approach outlined in the previous chapter, the ICJ and much of the international legal scholarship generally explain the interaction between IHRL and IHL through the application *lex specialis* principle. According to this principle, during armed conflicts IHL functions as the *lex specialis* that takes precedence over IHRL, *lex generalis*. The ICJ first referenced to the *lex specialis* principle in relation to the protection of the right to life, in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons of 1996.[35]

In that Advisory Opinion, the ICJ argued that the protections afforded by the International Covenant on Civil and Political Rights do not cease during armed conflicts, except under the operation of Article 4, which allows for certain provisions to be derogated during a national emergency, including armed conflict. However, Article 6, which regards the right to life, is non-derogable under Article 4. As a result, the test for determining what constitutes an arbitrary deprivation of life during armed conflicts is governed by the applicable *lex specialis*, IHL.

[35] See note 13.

The ICJ further refined its perspective on the relationship between IHRL and IHL in its 2004 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.[36] The ICJ emphasised that the protection offered by IHRL does not cease during armed conflict, except through the effect of specific derogation provisions. The ICJ then identified three categories concerning the relationship between IHRL and IHL: some rights fall solely under the purview of IHL, some solely under that of IHRL, and some rights fall under both IHRL and IHRL. The situation in the Wall fell into this third category, where both IHRL and IHL, with IHL as the *lex specialis*, were considered.

These Advisory Opinions has sparked significant debate and controversy regarding the exact meaning and implications of the *lex specialis* principle as it pertains to the interaction between IHRL and IHL. The controversies often centre around the theoretical approach adopted by the ICJ and the specific function attributed to the *lex specialis* principle in this context.

The objective of this chapter is twofold. First, I will clarify the ICJ's use of the *lex specialis* principle by explaining the functions it serves in the ICJ's jurisprudence. Second, I will argue against the application of the *lex specialis* principle to the interaction between IHL and IHRL, considering the functions it serves by the ICJ and contending that these bodies of law do not share a relationship of speciality.

5.1. Functional considerations

The *lex specialis* principle is most commonly applied when there is a total-partial contradiction between a special and a general norm. When it becomes impossible to comply with two norms simultaneously – because adherence to one would result in the violation of the other – the *lex specialis* principle provides a solution to this practical dilemma.

The practical dilemma arises, for example, when one must choose between adhering to the norm of Strict Necessity, which prohibits the airstrike, or the norm of Distinction, which permits it, to use the example of Chapter 4. This dilemma exists because there is a contradiction between the deontic qualifications of the norms, each applicable to the same situation.

[36] *Ibid.*

In this context, the *lex specialis* principle acts as a conflict resolution rule, setting aside the general rule in favour of the specialised one in specific situations. When applied to the interaction between IHRL and IHL, the former would typically be displaced by the latter. Specifically, in the relation to the protection of the right to life during armed conflict, the norm of Distinction under IHL would likely overrule the norm of Strict Necessity under IHRL.

However, this outcome is not guaranteed: applying the *lex specialis* principle as a conflict-solving rule does not equate to adopting a strictly separatist approach. It simply suggests that IHL norms are more likely to override IHRL norms in such contexts. The *lex specialis* principle as conflict solving rule offers a rationale for the exclusive application of IHL, but from a systemic perspective, it is just one of several meta-rules that operate within the legal system.

In specific cases, other meta-rules might carry greater weight and lead to different conclusions. If the *lex specialis* principle were framed as the major premise in a deductive syllogism, it would imply that this principle applies whenever its specific conditions are fulfilled. However, even when those conditions are met, it remains necessary to consider competing arguments and balance conflicting considerations to fully account for the complexities involved in legal reasoning.

The determination of which norm to apply should not rely solely on the *lex specialis* principle but also on other relevant evidence. For such a conclusion, it is enough to remember the case of military occupations and the extraterritorial application of IHRL. The Inter-American Commission of Human Rights, for instance, has long asserted jurisdiction over acts committed outside the territory of a state because of a teleological argument: since human rights are inherent to all individuals by virtue of their humanity, states must guarantee these rights to anyone under their jurisdiction.[37]

The applicability of IHL or IHRL may depend on the level of control exerted by the occupying power over the occupied territory, independent of the *lex specialis* principle. The applicable norm may also differ in situations where the occupation is calm compared to situations where hostilities have resumed or erupted. In such cases, the distinction between law enforcement and conduct of hostilities is also crucial. In a law

[37] See note 30.

enforcement context, a norm derived solely from IHRL may apply, irrespective of the *lex specialis* principle.

In summary, while the *lex specialis* principle as conflict-solving rule support the exclusive application of IHL, stronger counterarguments may still outweigh this principle. This is because the lex specialis principle is only one of the several meta-rules in the legal system that govern the relationship between different norms. Therefore, even when considering that the norms of IHRL and IHL interact based on the *lex specialis* principle as a conflict-solving rule, the decision of which norm to apply in a particular case also depend on other evidence.

The ICJ, however, does not view the *lex specialis* principle as a conflict-solving rule, as it considers IHL and IHRL norms to apply concurrently when a right may be matters of both branches. In the Nuclear Weapons Opinion, the ICJ held that the norm protecting the right to life during armed conflicts is derived from both IHL and IHRL provisions. IHL must be considered when interpreting Article 6 of Covenant, and the criteria for determining arbitrary deprivation of life should not be deduced solely form the Covenant. In the Wall Opinion, the ICJ extended the *lex specialis* principle to cover all rights that are governed by both IHRL and IHL, without specifying concrete norms in a speciality relationship.

Consequently, the ICJ does not adhere to a separatist approach, which would exclude IHRL during armed conflicts; instead, it acknowledges the concurrent application of IHRL and IHL. However, it remains controversial which theoretical approach the ICJ adopts, the complementarity or integrationist. While the ICJ supports areas where each branch operates independently, it also views them as mutually reinforcing rather than mutually exclusive. This suggests an inclination towards the complementarity theory, although the references to the *lex specialis* principle might align more closely with the integrationist theory.

In any case, the ICJ's approach implies that the *lex specialis* principle serves a dual function: as a principle of specific interpretation and as principle for identifying norms. On the one hand, as a principle of specific interpretation, it allows a more general norm to be interpreted in light of a more specific one. The *lex specialis* accumulates with the *lex generalis,* helping the interpreter to determine the scope of application of the *lex generalis*.

On the other hand, as a principle for identifying norms, the *lex specialis* principle helps identify special and general provisions that apply to specific cases. In the Wall Opinion, the ICJ extended the *lex specialis* principle to cover all rights governed by both IHRL and IHL, but it did not specify particular norms in a speciality relation. Thus, the *lex specialis* principle is conceived as a tool for identifying provisions suggesting a genus-species relationship.

Once identified, the *lex specialis* principle dictates the application of a specific norm derived from a general standard in a particular circumstance. The resulting norm, however, results from interpreting the general norm in light of the more specific one, composed of normative fragments from both IHL and IHRL. In this sense, the norms of both branches are applied concurrently. In sum, according to the ICJ, the *lex specialis* principle functions to identify special and general provisions suggesting a genus-species relationship, from which a single, complex norm, composed of normative fragments, is derived.

Three key consequences of this characterisation of the *lex specialis* principle are worth noting. First, it is unclear how the *lex specialis* principle should be used to identify norms or provisions. The application of the *lex specialis* principle presupposes the prior identification of distinct rules. While identifying rules may seem like a mechanical and logical operation, it involves interpretation and reinterpretation distinct from the derogation effected by the principle.

As the very formulation *lex specialis derogate legi generali* presupposes, the interpreter is already faced with two norms, and it may only operate once two distinct provisions have already been identified. Nothing in the *lex specialis* principle tell us under what conditions a norm is sufficiently complex to be considered distinct.[38]

For example, are norms under Article 55 of the Fourth Geneva Convention regarding the duty to ensure food and medical supplies for the civilian population in occupied territories *lex specialis* of Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights regarding the right to an adequate standard of living? Are the norms under Common Article 3 of the Geneva Conventions, which prohibit the taking of hostages, considered *lex specialis* in relation to Article 9 of the

[38] Regarding the pitfalls of applying the *lex specialis* principle with identification functions, see Zorzetto, Silvia, *La norma speciale: Una nozione ingannevole*, Edizioni ETS, 2011.

International Covenant on Civil and Political Rights, which addresses arbitrary detention?

Second, when an interpreter derives a single norm composed of fragments from different normative sources, this process inevitably involves making choices. For instance, in the Nuclear Weapons case, the ICJ argued that IHL should be used to determine whether a particular loss of life constitutes an arbitrary deprivation of life under Article 6 of the International Covenant on Civil and Political Rights. This reasoning could lead to various legal outcomes, such as:

> Conclusion 1 (C1): Article 6 of the ICCPR remains applicable during armed conflicts, but arbitrariness is decided by military necessity.
>
> Conclusion 2 (C2): Article 6 of the ICCPR remains applicable during armed conflicts, but arbitrariness is decided through IHL principles.

The flexibility and implications of these conclusions differ. C1 accepts limitations on the right to life during armed conflicts, justifiable only by military necessity, suggesting that such constraints are driven by the practical demands of armed conflicts and the need to defeat the enemy and shorten the conflict.

C2, on the other hand, adopts a more holistic approach that aligns IHRL with the broader humanitarian goals of minimising civilian harm. This perspective emphasizes that any violation of the right to life must be analysed within the wider context of the humanitarian principles embedded in IHL.

C1 and C2 can be viewed as representing opposite ends of a spectrum concerning the interpretative approach to the right to life during armed conflicts. However, these are merely two of several possible interpretations. Keeping the decision about which norm to apply open is not necessarily a disadvantage. Judicial discretion, which allows for flexibility and adaptability, ensures that justice can be tailored to the specifics of each case. This flexibility can be particularly important for the development of international law, especially considering the rapidly evolving international context.

Nevertheless, if the ICJ considers that arbitrariness under IHRL hinges on whether IHL was complied with, what happens in cases where the concept of arbitrariness is not

available to legal operators? Not all IHRL rules include an "arbitrary" standard that can be filled with IHL content via *lex specialis* principle as a tool of specific interpretation.

The European Convention on Human Rights does not employ this standard but instead provides a list of reasons that justify the deprivation of liberty. To resolve contradictions, legal practitioners would need to forcibly stretch the Convention's provisions to include IHL elements that are simply not written in its text.[39]

Take, for instance, the case *Hassan v. United Kingdom* before the European Court of Human Rights.[40] This case, which arose during the armed conflict in Iraq, involved applying IHRL to the detention of a direct participant in hostilities during the so-called "war on terror." The Court examined the detention of an individual by British forces during the occupation of Iraq.

The applicant, his brother, argued that in the absence of a formal derogation from its human rights obligations, the United Kingdom violated his brother's right not to be arbitrarily detained under the specific conditions outlined in Article 5 of the Convention. The United Kingdon invoked the *lex specialis* principle as a conflict solving rule, arguing that "where the provisions of the Convention fell to be applied in the context of an international armed conflict […], the application had to take account of international humanitarian law, which applied as the *lex specialis*, and might operate to modify or even displace a given provision of the Convention."

They further argued that the permitted grounds for deprivation of liberty, as outlines in subparagraphs (a) to (f) of Article 5, should be reconciled, as much as possible, with the taking of prisoners of war and the detention of civilians posing a security risk under the Third and Fourth Geneva Conventions.

The European Court, however, adopted the ICJ's approach to the *lex specialis* principle as a tool for specific interpretation. In doing so, the Court effectively rewrote the European Convention, removing the obligation of the United Kingdom to derogate from its IHRL obligations before detaining individuals. Moreover, the Court introduced a

[39] Something called "judicial vandalism" by some, e.g., M. Milanovic, "Norm Conflicts, International Humanitarian Law and Human Rights Law" in *International Humanitarian Law and Human Rights Law*, 2011, p. 107; Alonso Gurmendi, Dunkelberg, "There and Back Again: The Inter-American Human Rights System's Approach to International Humanitarian Law" in *The Military Law and the Law of War Review*, Review 2017-2018, Volume. 56, pg. 7.
[40] European Court of Human Rights, *Hassan v. the United Kingdom*, Appl. No 29750/09, Judgment, 2014.

previously non-existent ground for interment under IHRL, based solely on IHL provisions.

This approach explains the strong dissent in judgement, where four judges argued that "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."[41]

In summary, the European Convention on Human Rights does not have an "arbitrary" standard that can be readily infused with IHL elements through the *lex specialis* principle. It, instead, specifies particular justifications for depriving liberty, which complicates efforts to reconcile IHRL with IHL. This tension was evident in the *Hassan v. United Kingdom* case, in which the European Court invoked the *lex specialis* principle, effectively expanding the Convention's scope to incorporate IHL provisions.

This judicial manoeuvre led to a significant reinterpretation of the European Convention, sidestepping the United Kingdom's obligation to formally derogate from its human rights commitments during armed conflict and introducing a new legal basis for detention derived solely from IHL.

Finally, the third consequence of the *lex specialis* principle as characterised by the ICJ is that when applying a specific norm resulting from a general standard, it seems that that norm should at least share at least the same ratio as the general standard. For instance, regarding the protection of the right to life, Article 51 of Additional Protocol I does not seem an application of an IHRL standard for the protection of the right to life such as the one in Article 6(1) of the Covenant. Simply put, these provisions have different focus and do not share a genus-species relation. This relates to the relational aspect between the norms of IHRL and IHL that will be analysed from now on.

5.2. The premise of a genus-species relation

The concepts of "general" and "special" rules are correlative. A rule is considered special in relation to another rule when its conditional facts represent a specific instance of the broader conditional facts encompassed by the general rule. These terms are logically intertwined, with "special" and "general" functioning as relational descriptors.

[41] See note 40, Partly Dissenting Opinion of Judge Spano joined by judges Nicalaou, Bianku and Kalaydjieva, para. 19.

The *lex specialis* principles presupposes a relationship of speciality between norms. Specially as an interpretative principle, it requires that the scope of application of IHL norms is encompassed within the broader scope of IHRL norms. Consequently, when IHL norms apply, the general IHRL norm also applies, but not the reverse.

However, establishing a relationship of speciality can be challenging, particularly when analysing the interaction between two branches of law that were not originally designed to operate within a genus-species framework but were intended to function independently under different circumstances. These branches, as emphasised in Chapter 2, serve distinct and axiologically divergent purposes. Therefore, it is difficult to conceive a true genus-species relationship between IHRL and IHL norms.

But the critical question here is: when can provisions be said to have a speciality relationship? For this research, it suffices to state that when two norms do not share the same *raison d'être,* ratio, or serve the same purpose, they do not have a genus-species relationship that justifies the application of the *lex specialis* principle.

If applying the lex specialis principle as a tool of specific interpretation leads to the application of a particular rule from a general standard to a specific situation, IHL norms should be applications of IHRL protection standards. However, this is not the case. Article 51 of Additional Protocol I is not an application of an IHRL standard for the protection of the right to life.

Under IHRL, the protection of the right to life extends beyond merely avoiding death; it encompasses basic economic and social needs because it is grounded in the inherent dignity of the human person – a concept recognised as fundamental to the entire body of IHRL. The concept of human dignity has been specifically linked with the enforcement of a right to life, with national and international courts interpreting "life" as requiring the facilitation of dignity.

For instance, the Inter-American Court of Human Rights interprets the right to life as obliging states to create the conditions necessary to guarantee a dignified existence.[42] This does not imply that the right to life is absolute. Although there is growing

[42] Inter-American Court of Human Rights, *Villagran-Morales et. al. v Guatemala*, Merits, 1999, para. 144.

recognition of positive obligations under the right to life, these obligations are limited by what is reasonable under the circumstances.

Factors such as limited public resources, individual autonomy, and freedom from pain and suffering can negate a state's obligation to preserve life. Additionally, the use of lethal force by agents of the state is permissible when necessary and proportionate. In this context, the rhetoric surrounding the right to life under IHRL frames it as the most fundamental right grounded in the principle of human dignity. This perspective is reflected in the IHRL jurisprudence, which has developed the "strict necessity" requirement for the use of force in law enforcement operations.

This requirement, however, is replaced by the "military necessity" standard during hostilities, which is balanced by the principle of humanity. Instead of focusing on eliminating an imminent threat, the objective shifts to achieving a legitimate military purpose. Even the principle of humanity prohibits inflicting suffering, injury, or destruction beyond what is necessary for legitimate military objectives.

Under IHRL, the legitimate target is scrutinised even before considering proportionality, as the violation of the right to life is justifiable only when averting an imminent threat posed by one individual to another's right to life. IHRL thus offer an asymmetrical account of justification, where the defender's actions are justified, but the aggressor's are not.[43]

In contrast, IHL aims to reduce the destruction caused by armed conflicts, balancing this goal with military necessity. IHL maintains neutrality between those engaged in a lawful use of force and those participating in hostilities using unlawful use of force, thereby reflecting a symmetrical approach that does not incorporate considerations of justice. This analysis highlights a fundamental incompatibility between IHL, which is linked to armed conflicts and moral symmetry, and IHRL, which is based on human dignity, moral asymmetry, and the right to peace.

IHRL's pacifist or anti-war dimension is largely absent from IHL, which remains neutral towards the morality of war. The asymmetrical notion of justice and the pacifist dimension are deeply rooted in the foundational principles of IHRL, just as neutrality in *jus in bello* is central to IHL. These characteristics represent the core of each branch,

[43] For a more detailed analysis, see note 11.

and this is precisely where the efforts to reconcile IHRL and IHL through the *lex specialis* principle as an interpretative tool fail.

These conceptual differences make it impossible to fully reconcile IHL and IHRL through the *lex specialis* principle as a principle of specific interpretation. Ideally, these foundational characteristics should not be modified to accommodate *lex specialis* principle as a principle of specific interpretation. In other words, engaging IHRL into the *jus ad bellum* debate and encouraging it to align more closely with IHL, or vice versa, is unwarranted, as such efforts would compromise the intrinsic characteristics of each branch.

Attempting to merge IHL and IHRL through the *lex specialis* principle as a principle of specific interpretation is inadequate because the protections provided by IHRL do not have a clear counterpart in IHL. In areas like the protection of the right to life, the branches are incompatible and do not specify each other, as they have different *raison d'être*. However, this does not mean that the two branches cannot be reconcile through the *lex specialis* as a conflict-rule resolution.

If the ICJ referred to the *lex specialis* principle as a conflict solving rule – though this was not the case – it would mean that the specific rule (Article 51 of API) serves as an exception to the general rule (Article 6(1) of the ICCPR, for example), with the former derogating from the latter. In this context, the *lex specialis* principle functions not as an interpretative principle but as an exception to the general rule.

While conceptual differences could clarify the distinct underlying rationales of the two branches, they would not preclude reconciling the two systems through the *lex specialis* as a conflict-solving rule. Unlike its role as an interpretative principle, the *lex specialis* as a conflict-resolution rule does not require the inclusion of IHL norms within the scope of IHRL ones, in the sense that when the former applies, the latter also does. Instead, it operates when the former applies without necessitating the latter.

From a logical-structural standpoint, the contradictions between norms such as the Strict Necessity norm and the Distinction norm, or between the Due Process norm and the Internment norm (as explained in Chapter 4), are partial-partial and do not imply an inclusion relationship. One might argue that a "speciality" relationship exists based on other criteria, such as empirical factors, since armed conflicts represent a narrower

context compared to the broader scope of IHRL. This could give rise to a notion of an "improper" speciality relationship, which jurists might consider.

However, the ICJ did not assert a contradiction between IHRL and IHL nor did it used the *lex specialis* principle as a conflict solving rule. Instead, it used the *lex specialis* principle as a principle of specific interpretation with identification functions. This approach is problematic because IHRL and IHL norms do not share a clear genus-species relationship; their provisions do not have the same *raison d'être*, making it difficult to interpret IHL provisions in light of IHRL ones. Furthermore, as an identification tool, the *lex specialis* principle fails to clarify how it might be used to identify applicable provisions and extract applying norms.

The only scenario in which the reference to the *lex specialis* principle might make sense is as a conflict resolution rule that addresses partial-partial contradictions between norms in an "improper" speciality relationship. Even then, it is still not clear which are specific rules in relation of speciality. Besides, the reference to the *lex specialis* principle in general can be distracting, as suggesting one body of law is special in relation to the other can lead to arguments favouring separatist approaches (even when presented under the guise of complementarity).

The reference to the *lex specialis* principle appears to be an unnecessary add-on. The complementarity between IHL and IHRL, which the ICJ likely intended to emphasise, does not depend on the *lex specialis* principle and may actually be better articulated without it. Even the process of deriving a single norm from normative fragments and the resulting need for additional interpretative choices highlights the limited utility of the *lex specialis* principle in this context. The ICJ's reasoning aligns more closely with the concept of systemic integration found in Article 31(3)(c) of the Vienna Convention on the Law of Treaties.

In conclusion, when multiple norms apply to a particular case, the interpreter should aim to construct a coherent and meaningful interpretation that reflects international law as a system. This approach allows norms from different regimes to be seen as a single set of compatible obligations. It seems that the ICJ implicitly relied on the principle of systemic integration, albeit under the guide of the *lex specialis* principle as a principle of specific interpretation.

The complementarity between the branches, guided by Article 31(3)(c), along with judicial discretion limited by general principles of international law and the specific facts of the case, is sufficient to reach the conclusions that the ICJ arrives at through the *lex specialis* principle.

6. The Interplay within International Criminal Law

IHL and IHRL are also among the various sources of ICL, where they overlap and complement each other. Under ICL, the International Criminal Court has jurisdiction that spans across *jus in bello*, *jus ad bellum*, and peacetime contexts. Unlike other branches of international law that may focus on its specific object, ICL ensures that accountability is maintained across various branches of international law. ICL, in this sense, stands as the ultimate example of complementarity within international law in general and between IHL and IHRL in specific.

"Complementarity" is a broad term that does not offer definitive answers, and it is not the aim of this study. Just as with the protection of the right to life and liberty, it is possible to offer legally grounded guidelines for moments of intersection between these sources, especially where solutions are unclear. However, the interaction between IHRL and IHL within ICL must be analysed differently, because other sources of ICL, such as the fundamental principles of criminal law, come into play.

A crucial interaction between IHL and IHRL within ICL concerns the adjudication of international crimes, particularly crimes against humanity and war crimes. The issue of concurrence of offences is characteristic of international crimes, where a single act may constitute both crimes. War crimes are grave breaches of IHL, while crimes against humanity are rooted in the principles of IHRL. Crimes against humanity embody the values of IHRL by requiring that grave breaches and serious violations be part of a widespread or systematic attack against human dignity.

In this chapter, I will explore how the broader interaction between these branches impacts their specific interaction within ICL, particularly regarding the overlap between these crimes and the possibility of cumulative conviction under ICL. Analysing which crime applies in a particular situation relates to the broader complementary interaction and application of IHL and IHRL during armed conflicts. From an ICL perspective, this

analysis will contribute to the further rationalisation of international crimes and the fundamental principles of ICL.

In Subchapter 6.1, I will define crimes against humanity and war crimes, consider their relationship with IHL and IHRL, discuss their intricate historical connections, and examine how cumulative convictions might jeopardise fundamental principles of ICL. In Subchapters 6.2 and 6.3, I will explore alternative solutions to the plurality of crimes, including the application of the *lex specialis* principle (whether in a complementary or a separatist approach), and the principle of consumption. The framework established will then be applied to specific events of the international armed conflict between Russia and Ukraine in Subchapter 6.4.

6.1. War crimes and crimes against humanity

War crimes represent serious violations committed during armed conflict that are generally prohibited by treaty-based IHL, though sometimes also by customary IHL. It protects global peace and security, but also the fundamental rights of individuals caught in the conflict, particularly their life, liberty, and property. War crimes can be seen as armed conflicts gone wrong, in the sense that, from the perspective of IHL, armed conflict itself is not inherently unlawful, and there exists a lawful way to conduct it.

Conversely, crimes against humanity can be described as politics gone wrong. This concept, which emerged more recently than war crimes, does not require the existence of an armed conflict. A crime against humanity consists of certain prohibited acts, which are typically linked to IHRL conventions, committed as part of a widespread or systematic attack directed against any civilian population, in accordance with or in furtherance of a state or organisational policy, with knowledge of the attack. These acts include, but are not limited to, murder, extermination, enslavement, and rape.

Unlike war crimes, the Rome Statute does not directly reference IHRL conventions as the basis for the prohibitions underlying crimes against humanity, though they do encompass serious human rights violations. Crimes against humanity can be seen as severe attacks on fundamental human rights, such as the right to life, bodily integrity, freedom from slavery, and minimum guarantees of fair trial. Even so, serious human rights violations are a broader category than crimes against humanity, as they also include other international crimes such as genocide and war crimes. For serious human

rights violations to be classified as crimes against humanity, they must be committed in a systematic or widespread manner.

Once these violations reach a certain level of gravity, they constitute international crimes, specifically crimes against humanity. The distinction between serious human rights violations and crimes against humanity is therefore one of degree, rather than nature, because once that threshold of seriousness is crossed, the two categories converge.[44] However, the term "crimes against humanity" first appeared in positive international law before the advent of modern IHRL, and had already an intricate relationship with IHL, as reflected in Article 6(c) of the Charter of the International Military Tribunal at Nuremberg.

IHL did not cover atrocities committed by a State against its nationals within its own territory, which meant that many of the crimes committed by the Nazi regime and other Axis powers did not fall under the category of war crimes and needed to be addressed differently. The category of crimes against humanity was therefore seen as necessary to ensure that prosecutions could extend not only to crimes against foreign populations but also to crimes committed against a State's own citizens.

The creation of this category was, from the outset, linked to the idea of human rights as a component of international law, emphasizing that states have obligations not only toward other states but also toward their own citizens. To avoid leaving these crimes unpunished and to prevent accusations of retroactive law, the concept of crimes against humanity was derived from IHL, specifically the broad reference to the "laws of humanity" contained in the Martens Clause of the Hague Regulations.

However, Article 6(c) of the Nuremberg Charter imposed a requirement that crimes against humanity be committed "in execution of or in connection with any crimes within the jurisdiction of the Tribunal," namely war crimes or crimes against peace. This established a war nexus that restricted the scope of crimes against humanity to international armed conflicts. Following the post-war tribunals, the international community recognised the concept of crimes against humanity, and the newly established International Law Commission was takes with developing it further.

[44] Stating that crimes against humanity are serious violations of human rights, see, e.g., International Criminal Tribunal for the former Yugoslavia in Judgment *Prosecutor v. Kupreskic et al.*, 2000, para. 566 and 621.

By 1954, the International Law Commission proposed a new definition of crimes against humanity in Article 11 of the Draft Code of Offences Against the Peace and Security of Mankind, which removed the requirement of a war nexus. After the Cold War, a new definition was introduced in the 1991 Draft Code under the heading "Systematic or Mass Violations of Human Rights." This renaming highlights the clear recognition that crimes against humanity are a subset of systematic and mass human rights violations.

A subsequent definition revisited the requirement of a nexus to armed conflict, "whether internal or international in character," in Article 5 of the International Criminal Tribunal for the former Yugoslavia Statute in 1993. However, in the *Tadić* case, the Appeals Chamber clarified that this nexus should be understood as limited, in the sense that is not an essential element of the definition of crimes against humanity under customary international law.[45]

Initially, crimes against humanity were distinguished from war crimes by two aspects: they protected civilian populations regardless of nationality, and they included a requirement of scale or gravity. Nonetheless, traditional legal scholarship has long recognised that "the notions 'war crimes' and 'crimes against humanity' overlap, and that most war crimes are also crimes against humanity, while many crimes against humanity are simultaneously war crimes."[46]

Article 7 of the Rome Statute separated crimes against humanity from armed conflicts, establishing their autonomy as a concept rooted in IHRL. Without a link to armed conflict, crimes against humanity represent the categorical criminalisation of massive IHRL violations. This provision includes a contextual element – "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" – and lists the underlying acts that define these crimes. Article 8 establishes the jurisdiction of the ICC over war crimes, particularly when they are committed as part of a plan or policy, or as part of large-scale commission, and provides a closed and exhaustive list of individual crimes.

[45] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Appeal Judgment, 1999, para. 239.
[46] See, e.g., Schwelb, Egon, "Crimes Against Humanity" in *The British Yearbook of International* Law, New York, Oxford University Press, 1946, p. 179-180.

Despite the conceptual differences between the two categories, they share overlapping elements, and most cases brought before the ICC encompass both war crimes and crimes against humanity. For example, a murder or rape can simultaneously be a war crime and a crime against humanity if, during an armed conflict, the conduct involves a widespread or systematic attack directed against a civilian population or is committed against persons *hors de combat*.

Certainly, not all war crimes are also crimes against humanity, and not all crimes against humanity are war crimes. Certain actions, such as the misuse of a flag of truce or the deployment of prohibited weaponry, may constitute war crimes but not crimes against humanity. Conversely, acts of persecution based on political, racial, or religious grounds may amount to crimes against humanity but not war crimes. However, certain acts, such as the murder, torture, or rape of enemy civilians, may constitute both war crimes and crimes against humanity, depending on the specific circumstances.

When the same conduct qualifies as both crimes, simply noting the existence of an armed conflict is not enough to categorise the conduct as a war crime. In addition to the reasons discussed in Chapter 2 that make it difficult to clearly separate situations of armed conflict from peace, war crimes can only be committed during armed conflicts, whereas crimes against humanity can be committed during both armed conflict and peacetime. Since crime against humanity often occur during armed conflicts, they can become entangled with war crimes.

One might consider distinguishing these categories based on the populations they protect. Crimes against humanity can be committed against any civilian population, whereas war crimes traditionally protect nationals of the armed forces of belligerent countries or inhabitants of occupied territories as long as peace has not been declared.

However, this criterion is both obsolete and insufficient. It is obsolete because war crimes committed during internal armed conflicts may also be prosecuted, and because there is no requirement that war criminals and their victims be of different nationalities. It is insufficient because crimes against humanity can only be committed against civilians, while war crimes can be committed against both civilians and combatants.

As such, these criteria cannot be used to definitively distinguish between the two categories. Instead, during armed conflicts, what differentiates crimes against humanity from war crimes is the presence of a “widespread or systematic attack on a civilian

population." The two categories differ objectively because large-scale context or systematicity is not an intrinsic element of war crimes, but only a factor that might exist. When there is a concurrence between a crime against humanity and a "systematic or large-scale" war crime, both offences represent the same crime, albeit labelled differently, and may be penalised interchangeably.

The Rome Statute does not explicitly address the issue of *concursus delictorum*. Article 78(3) merely stipulates that when a person is convicted of multiple crimes, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total imprisonment period, within certain minimum and maximum limits. This provision leaves unresolved the questions of when conduct constitutes "more than one" crime and under what conditions multiple convictions may be validly entered.

In the absence of explicit statutory guidance, ICL case law consistently permits charging and convictions. An accused may be convicted of multiple offences arising from the same conduct if the conduct violates distinct statutory provisions, each with materially different elements. This situation of reciprocal speciality arises when each crime contains at least one distinct element found in the other, requiring proof of different facts.[47] For instance, the crime against humanity of murder requires a widespread or systematic attack on civilians, whereas the war crime of murder requires the victim to have been *hors de combat* or not actively participating in hostilities. Because each crime requires a unique contextual element, cumulative convictions are allowed.

Despite this established jurisprudence, concerns arise regarding the impact of cumulative convictions in situations of reciprocal speciality on fundamental principles of criminal law. The principles of legality and fair labelling demand that crimes be clearly defined, enabling individuals to understand what constitutes criminal behaviour. Fair labelling also requires proportionality, ensuring that the severity of legal labels corresponds to the accused's moral culpability and involvement. This principle demands that charges be framed in a manner that best matches the alleged criminal behaviour, which also aligns with the commitment to judicial economy.

[47] See, e.g., International Criminal Court (Trial Chamber II), *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07, para. 1695; International Criminal Tribunal for the former Yugoslavia (Appeals Chamber), *Prosecutor v. Popović et al.*, IT-05-88-A, para. 537.

The plurality of crimes may also result in double or multiple jeopardy for the same violation, infringing on the *ne bis in idem* principle. Although war crimes and crimes against humanity are related, Article 7 and 8 of the Rome Statute protect similar values through different means. When conduct seemingly falls under both categories, this is an apparent concurrence of offences; in reality, one norm sufficiently covers the conduct, protecting the violated value.

The totality principle, ensuring the final sentence reflects the overall culpable conduct, helps balance the consequences of multiple convictions, allowing for sentence reductions. However, cumulative convictions cannot be solely addressed through sentencing; they impose additional stigma on the accused, increased public blame, and may affect eligibility of early release, influenced by both the sentence and the nature and number of convictions.

Thus, the relationship between Articles 7.º and 8.º and the offences they cover may need reconsideration to identify a prevailing provision. From the standpoint of classifying the concurrence of offences, this suggests recognising an apparent concurrence of offences between crimes against humanity and war crimes when the same conduct appear to violate both, but in reality, such conduct is fully addressed by one norm.

6.2. The *lex specialis* solution

The solution established by ICL jurisprudence is grounded in United States case law, which relies on two principles to determine the permissibility of multiple convictions: unilateral speciality and reciprocal speciality.[48] An apparent concurrence of offences arises when they are in a relation of unilateral speciality, whereas a real concurrence of offences occurs when they exhibit reciprocal speciality.

As mentioned in Chapter 3.2, while unilateral speciality typically identifies an apparent concurrence of offences, reciprocal speciality is applied differently across legal systems. In ICL case law, a relationship of reciprocal speciality between crimes leads to multiple convictions. Conversely, civil law systems view this relationship as indicative of apparent concurrence, due to the imperative to uphold the *ne bis in idem* principle, which prevents multiple punishments for the same act.

[48] U.S. Supreme Court, *Blockburger v. US*, 284 US 299, 1932,

If reciprocal speciality is seen as indicative of apparent concurrence, one must determine the prevailing provision, or *lex specialis*, to apply. Failing to do so risks violating the *ne bis in idem* principle, rendering dual convictions unlawful. For instance, considering the war crime of unlawful deportation and transfer and the crime against humanity of deportation or forcible transfer of population (Articles 8(2)(vii) and 7(1)(d) of the Rome Statute, respectively).

The general provision should yield to the specific one, which more accurately addresses the particular conduct. This could be represented by concentric circles, in that one has a broader scope and completely encompasses the other. The *lex specialis* principle, however, does not have identification functions and presupposes the existence of two provisions already identified as having a speciality relationship.

The crime against humanity of deportation or forcible transfer might be seen as more specific due to its requirement of a systematic or widespread attack on civilian populations, indicating a larger, organised effort. The war crime of unlawful deportation and transfer, on the other hand, might be viewed as the *lex specialis* due to its direct connection to armed conflict and IHL. This nexus makes the provision more specific when conduct occurs during armed conflicts, offering a particular legal framework for addressing such issues.

The choice of which provision to apply as the more specific one could hinge on the context and specificities of the situation. If the focus is on the systematic nature of the conduct and its alignment with a widespread attack on civilians, the crime against humanity could prevail. Conversely, if the conduct is closely tied to armed conflict, the war crime could be deemed more specific. This decision, therefore, would depend on which aspects of the conduct are emphasized and how the legal frameworks of IHL and IHRL interact in the given scenario.

This approach reflects the application of the *lex specialis* principle within a complementarity context, which does not provide definitive solutions but rather permits judicial discretion. However, the *lex specialis* principle does not inherently identify which provision applies but presupposes the existence of two distinct provisions already in a genus-species or specialty relationship. In the case of crimes against humanity and war crimes, there is no straightforward speciality relation.

War crimes can also be committed in a systematic and orchestrated way, just as crimes against humanity can and generally do occur during armed conflicts. These circumstances are not decisive in separating the categories, which have distinct elements that do not necessarily place one in the subset of the other. They address different concerns and do not fit neatly into a single "hierarchy" in which one can be considered a special case of the other.

Potential contradictions between crimes against humanity and war crimes should not be represented as concentric circles, where one has a broader scope and completely encompasses the other. Instead, they should be depicted as intersecting in a partial-partial contradiction. Therefore, applying the *lex specialis* principle may be inappropriate, unless one considers an "improper speciality" as a valid interpretation. Even then, invoking the *lex specialis* principle can be misleading and lead to separatist interpretations.

For instance, one might argue for a strict application of the *lex specialis* principle, advocating for a clear separation of IHL and IHRL in international criminal trials.[49] This position presupposes that the provisions of war crimes and crimes against humanity are redundant during armed conflicts, and that *lex specialis* principle solves this redundancy privileging the more specific norm. However, this approach differs from complementarity as it does not prevent normative conflicts on a case-by-case basis but rather addresses redundancy between entire categories of norms during armed conflicts.

Beyond the rights of the accused, proponents of this view raise concerns about the relationship between IHL and ICL. In military operations, certain actions might be classified as crimes against humanity, even if lawful under IHL. Charging individuals with crimes against humanity allows for the prosecution of behaviour that might otherwise be protected under IHL.[50]

However, jurisprudence that disregards IHL's imperatives could undermine the principles of chivalry and professional conduct among military forces, which act in good faith. While ICL plays a crucial role in developing IHL, it may not always strike

[49] Supporting this approach, see Bartels, Rogier, "The Interplay between International Human Rights Law and International Humanitarian Law During International Criminal Trials", *Journal of Human Rights & International Legal Discourse*, Amsterdam Law School Research Paper No. 2018-19.
[50] See, e.g., International Criminal Tribunal for the former Yugoslavia (Appeals Chamber), *Prosecutor v. Vujadin Popović*, IT-05-88-A, judgment, para. 956-962.

the right balance between humanitarian considerations and military necessity. Humanising developments do not always lead to more humane outcomes in practice and may dimmish the role and legitimacy of IHL. The dilution of IHL through reclassifying conduct as a crime against humanity may not enhance civilian protection during armed conflict and could instead blur IHL rules.[51]

Given that ICL develops far from hostilities, international courts may sometimes overlook the realism inherent in IHL. ICL addresses atrocities committed when IHL fails to mitigate war's suffering while allowing military objectives. However, IHL can be effective because of the realism it embodies, ensuring that armed forces remain committed to protecting non-combatants and upholding humanity's values, even in conflict.

To preserve this realism and the military's commitment to IHL principles, a strict application of the *lex specialis* principle in international criminal trials might be proposed. This solution aligns with ICL's presumption of innocence and the principle of *in dubio pro reo*. ICL adheres to the legality principle, which includes *favor rei*, meaning criminal rules should be interpreted in favour of the accused. While armed conflicts heighten the desire for accountability, fundamental principles of criminal law might require a more cautious approach.

Notwithstanding, I argue against the strict application of the *lex specialis* principle, because it overlooks the complementary interaction between IHL and IHRL within ICL. These branches provide overlapping protections under different circumstances, and IHRL can offer additional safeguards that are not necessarily overridden by IHL. Strictly applying IHL during armed conflicts, excluding crimes against humanity, may hinder international law's development and accountability mechanisms.

Crimes against humanity involve widespread and systematic attacks on civilians which can occur in various contexts, including during armed conflicts. A rigid separation could prevent prosecuting actions that, while lawful under IHL, constitute gross IHRL

[51] For a more detailed analysis of the 'reclassification' issue see Akhavan, Payam, "Reconciling Crimes Against Humanity with the Laws of War: Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence", *Journal of International Criminal Justice*, 6, 2008; Bartels, Rogier, "A Fine Line between Protection and Humanisation: The Interplay between the Scope of Application of International Humanitarian Law and Jurisdiction over Alleged War Crimes under International Criminal Law", *The Yearbook of International Humanitarian Law,* 20, 2017.

violations deserving condemnation under ICL. Crimes against humanity often addresses severe abuses that IHL may not fully encompass. A strict *lex specialis* approach would exclude IHRL considerations, potentially undermining justice for victims of international crimes. Ensuring accountability for these crimes serves justice and victim protection, offering a more comprehensive response to grave human rights violations.

This approach could unnecessarily constrain judicial discretion, preventing courts from fully considering all relevant legal norms. Flexibility applying IHL and IHRL allows judges to craft decisions reflecting each case's complexities, providing a more tailored approach to justice. The strict application risks neglecting the complementary and protective functions of IHRL and ICL while emphasizing those of IHL. A more nuanced approach that considers the interplay between IHL, IHRL, and ICL, and ensures a more comprehensive and just legal framework that addresses the need for accountability and the complex reality of armed conflict is the adequate.

6.3. The *lex consumens* solution

The relationship between provisions of war crimes and crimes against humanity should be understood to identify which provisions prevail. If one crime is subsumed by the other, meaning all its legal requirements are met by the commission of a more serious offense, the principle of consumption applies, where the more severe crime absorbs the lesser one.[52] This principle not only avoid the inconvenience of cumulative convictions but also has significant implications for the application of penalties. If a crime against humanity is deemed more severe than a war crime, the same conduct should result in a harsher penalty when characterised as a crime against humanity.

For instance, the war crime of wilful killing in Article 8(2)(a)(i) consumes the provision of the war crime of wilfully causing great suffering or serious injury under Article 8(2)(a)(iii). To avoid violating the principle of *ne bis in idem*, *lex consumens derogate legi consumptae*. However, the question of relative seriousness between crimes against humanity and war crimes has been more contentious, dividing judges at the International Criminal Tribunal for the former Yugoslavia.

[52] Supporting this approach, see Palombino, Fulvio, "Cumulation of Offences and Purposes of Sentencing in International Criminal Law: A Troublesome Inheritance of the Second World War", *International Comparative Jurisprudence*, 2 (2): 89–92, 2016; Frulli, Micaela, "Are Crimes against Humanity More Serious than War Crimes?", *European Journal of International Law,* Vol. 12, Issue 2, 2001.

Judge Antonio Cassese argued that all international crimes are serious offences, and no hierarchy of gravity can be established a priori.[53] Similarly, the Appeals Chamber majority stated that, in law, there is no distinction between the seriousness of crimes against humanity and war crimes.[54] Judge Shahabuddeen, in his Separate Opinion, suggested that while an abstract ranking in terms of seriousness may exist, the facts of the underlying offence ultimately determine its gravity, thus a war crime can be as extensive and odious as a crime against humanity.[55]

Despite the challenges in definitively determining the most serious crime, a key consideration is the gravity of conduct, composed of the objective element (*actus reus*, or the harm) and the subjective element (*mens rea*, or the culpability of the offender). Both elements are present in the constituent elements of the underlying offence (e.g., murder) and the contextual elements of a crime against humanity or a war crime. While both offenses share the same *actus reus*, the contextual and mental elements differ, closely linked to the offense's seriousness.

Murder can be classified as a war crime if committed during an armed conflict, while it becomes a crime against humanity if part of a widespread or systematic attack against civilians. The seriousness of a murder as a crime against humanity is characterised by the perpetrator intending and being aware of the widespread or systematic attack. While crimes against humanity inherently involve large-scale or systematic violence, never isolated or random acts as war crimes might be, a war crime lacks a comparable contextual element, requiring only the jurisdictional threshold of an armed conflict.

Even though war crimes fall under ICC jurisdiction, especially "as part of a plan or policy or as part of a large-scale commission," this is merely an additional element. In contrast, the large-scale or systematic nature of crimes against humanity is a constitutive element, inherently aggravating their seriousness. Therefore, focusing on the contextual element, murder as a crime against humanity is more serious than murder as a war crime.

The mental element further influences the gravity of an act. For war crimes, the intent is simply to kill, while for crimes against humanity, it also includes knowledge of being

[53] See, note 45, specifically the Separate Opinion of Judge Cassese.
[54] *Ibid*, specifically the Sentencing Appeals in the Appeals Chamber.
[55] *Ibid*, specifically the Separate Opinion of Judge Shahabuddeen.

part of a widespread or systematic attack against civilians. This awareness of a broader plan or pattern of violence means the perpetrator understands the overall context of his act, that transcends that isolated situation and that particular victim. Thus, the intent for crimes against humanity is more specific and graver in nature.

Moreover, while war crimes involve excessive violence that is rightfully condemned, they are less morally shocking than crimes against humanity, which involve an unprovoked and systematic attack against civilians. Crimes against humanity are reprehensible not only in their means and magnitude but also in their very principle, as they represent illegal violence in its purest form. War crimes, on the other hand, are the perversion of otherwise lawful violence.

Therefore, the principle of consumption should resolve the apparent concurrence between provisions of war crimes and crimes against humanity, favouring the latter due to their greater gravity and the unique legal requirements they entail. In the next Subchapter, this analysis will be applied to the international armed conflict between Russia and Ukraine.

6.4. From abstraction to reality (II)

As mentioned in the introduction, neither Russia nor Ukraine are parties to the Rome Statute. Nonetheless, Ukraine has twice exercised its prerogatives to accept the ICC's jurisdiction over alleged crimes occurring on its territory, pursuant to Article 12(3) of the Rome Statute. This declaration allows the ICC to prosecute war crimes and crimes against humanity committed within Ukraine. Numerous violations of IHL and IHRL have been documented during this conflict, many of which may constitute war crimes and crimes against humanity.

The United Nations Human Rights Council established the Independent International Commission of Inquiry on Ukraine to investigate all alleged violations of IHL, IHRL, and related international crimes in the context of the Russian Federation's aggression against. Among violations investigated, the Commission has identified the waves of attacks on Ukraine's energy infrastructure since 10 October 2022 and the use of torture by Russian authorities as potentially amounting to crimes against humanity.[56]

[56] See the findings in Human Rights Council, *Report of the Independent International Commission of Inquiry on Ukraine*, 52nd Session, 18 March 2024; Human Rights Council, *Oral Update of the*

First, the Commission found that torture occurred predominantly in detention centres controlled by Russian authorities, where similar methods were used across different facilities during interrogations aimed at extracting information. This conduct constitutes the war crime of torture under Article 8(2)(a)(ii). Although the ICC has not yet issued arrest warrants for these acts, the Commission focussed its investigations on regions under prolonged Russian occupation, particularly Kherson and Zaporizhzhia, making it likely that a single commander may be responsible for multiple acts of torture.

The Commission conducted an in-depth investigation into whether these acts amount to torture as crimes against humanity under Article 7(1)(f) of the Rome Statute and Article 2 of the Conventions against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The systematic targeting of specific groups and consistent use of the same methods led the Commission to conclude that Russia authorities engaged in torture in a systematic and widespread manner. These circumstances, including elements of planning and resource allocation, indicate that these acts could constitute crimes against humanity.

The same conduct consubstantiate both the war crime and the crime against humanity of torture. These offenses differ not in nature, but in gravity. Convicting an individual for both would be tautological and unnecessary to fully capture the accused's actions or protect the values enshrined in these provisions. This represents an apparent concurrence of offences, best resolved by applying the principle of consumption, with the crime against humanity prevailing.

Second, the Commission documented the systematic attacks on Ukraine's energy infrastructure, beginning on 10 October 2022. These missile and drone attacks severely impacted the country's gas, heating, and electricity infrastructure, escalating in intensity and geographical scope. The attacks targeted power plants and critical infrastructure essential for the population's survival, resulting in significant civilian harm. Entire regions were left without electricity or heating for extended periods, particularly during winter, impairing access to water, sanitation, food, healthcare, and education. Despite public awareness of the civilian harm caused, Russian forces continued these attacks, leading the Commission to deem them disproportionate, widespread, and systematic.

Independent International Commission of Inquiry on Ukraine, 54th Session, 25 September 2023. Both available at: https://www.ohchr.org/en/hr-bodies/hrc/iicihr-ukraine/index

On 24 June 2024, the ICC's Pre-Trial Chamber II issued arrests warrants for two commanders allegedly responsible for the war crimes of directing attacks at civilian objects (Article 8 (2)(b)(ii) of the Rome Statute) and causing excessive incidental harm to civilian or damage to civilian objects (Article 8(2)(b)(iv) of the Rome Statute), as well as the crime against humanity of inhumane acts (Article 7(1)(k) of the Rome Statute).[57]

Although investigations are ongoing, the available information suggests a real concurrence of offences, despite the crimes stemming from a single course of action – the deliberate targeting of civilian infrastructure with foreseeable and widespread impacts the civilian population. Each crime addresses a different aspect of the conduct and protects distinct legal interest

Article 8(2)(b)(ii) criminalises the intentional targeting of civilian objects, thereby safeguarding civilian objects. Article 8(2)(b)(iv) criminalises the disproportionate harm to civilians, regardless of the legitimacy of the initial target, focusing on protecting civilian lives and well-being. Article 7(1)(k) criminalises the systematic, widespread impact on the civilian population, concentrating on the resulting suffering from the deprivation of essential services and protecting human dignity in general. This crime against humanity addresses the prolonged deprivation and suffering that follows the initial conduct.

Thus, this situation exemplifies a real concurrence of offences. While the crimes arise from the same factual situation, they differ in nature, each addressing a unique dimension of the conduct. This distinction justifies separate convictions, as the crimes do not merely overlap but instead capture different harms caused by the same conduct, warranting cumulative convictions without redundancy or tautology.

7. Conclusion

This research arises from a need to understand the legal interaction between distinct branches of international law: IHRL, IHL, and ICL. While these branches form part of a unified legal system, they originate from different foundations, pursue diverse

[57] See the investigations by the International Criminal Court in Ukraine (ICC-01/22) available at: https://www.icc-cpi.int/situations/ukraine

objectives, and are underpinned by distinct values. IHL primarily seeks to minimise harm during armed conflicts by balancing military necessity with the principles of humanity, distinction, and proportionality. In contrast, IHRL is rooted in the protection of the inherent dignity of all, applying in times of both peace and conflict. ICL, meanwhile, ensures the accountability for international crimes, addressing the most serious violations of both IHL and IHRL.

The interaction among these branches becomes particularly significant during armed conflicts, where the legal frameworks, though occasionally in tension, ultimately converge. This convergence underscores the coherence-seeking nature of international law, where norms from different branches mutually reinforce each other through a complementary approach. Despite the fragmentation of international law, complementarity fosters opportunities for increased efficiency and harmonious interpretation.

This is particularly crucial when IHRL bodies, the ICC, ICJ, or domestic courts must manage multiple international substantive areas simultaneously. The existence of self-contained regimes, each with its own objectives and purposes, is balanced by a coherent unit that effectively manages conflicts between regimes – such as those involving the right to life and liberty – through a constructive solution based on Article 31(3)(c) of the Vienna Convention on the Law of Treaties.

The protection of the right to life and liberty represents one of the areas where IHL and IHRL approach from distinct perspectives, reflecting their differing objectives and contexts of application. These rights, however, operate as optimisation requirements, transcending specific provisions that addressed them. When the factual conditions of norms from both IHL and IHRL are present, what emerges is a partial-partial contradiction that can be resolved through balancing the distinct considerations in relation to the particular circumstances of the case according to the complementarity between the branches.

One important matter of fact to consider is the distinction between law enforcement and conduct of hostilities situations. Generally, during the conduct of hostilities, IHL applies, while in law enforcement situations, IHRL applies. However, during armed conflicts these two situations often overlap. During hostilities, a military officer might

be responsible for law enforcement duties, such as supervising detained individuals. Military occupations further exemplify this overlap, as the occupying power must maintain public order and safety, which falls under the realm of the law enforcement, requiring the concurrent application of both IHL and IHRL.

Military commanders and state authorities must clearly understand the legal obligations that apply in any given situation to ensure compliance with international law. While this study has focused on the legal aspects of the interaction, a significant gap remains in understanding how the paradigms of law enforcement and conduct of hostilities operate on the ground. Future research could develop clear and actionable guidelines to distinguish between these situations, offering practical solutions. Also, exploring how military commanders and law enforcement officials can be trained to adhere to these distinctions in real time would be valuable, ensuring that their actions are legally compliant and effective in protecting human rights during armed conflicts.

A central finding of this research is the inadequacy of the *lex specialis* principle in analysing the interaction between IHL and IHRL. This principle typically applies to total-partial contradictions, which presuppose an inclusion relationship. The ICJ has referred to the *lex specialis* principle as a tool of specific interpretation with identification functions, relying heavily on a genus-species relationship between legal provisions. However, IHL provisions do not always find a clear meaning within IHRL, as they serve distinct purposes and have different rationales. This misalignment makes them ill-suited to specifying the interpretation of IHRL provisions.

Furthermore, it is also not clear how the *lex specialis* principle might be used to identify provisions in a genus-species relationship. It already presupposes norms within a speciality regime, yet it remains unclear which norms fall into this category under IHRL and IHL. This ambiguity can lead to the erroneous conclusion that IHL, as the *lex specialis*, should always override IHRL, which is misleading and risks undermining the complementarity nature of these legal regimes.

ICL stands as an expression of complementarity, with its jurisdiction encompassing *jus in bello*, *jus ad bellum*, and peacetime contexts. Drawing from multiple sources, including comparative and international law, ICL faces inherent tensions but also offers a platform for integrating various legal principles from IHL, IHRL, and comparative

criminal law. Here, complementarity ensures that justice is served in a manner that respects the diverse values and objectives of each legal branch from which it draws influences.

The interaction between ICL and these sources, particularly in the adjudication of international crimes, highlights the potential for coherence within a fragmented legal system. The content of war crimes and crimes against humanity often overlap creating a reciprocal speciality relationship between these crimes that raises questions about their application. The principle of consumption becomes particularly relevant when a single act could constitute both a war crime and a crime against humanity. Given the seriousness and gravity of crimes against humanity, characterised by their broader contextual and mental elements, these crimes should prevail when dealing with apparent concurrence of offences.

The ongoing development and rationalisation of international law are crucial for its continued relevance and effectiveness. The future of international law lies in embracing a complementarity approach that recognises the distinct yet interconnected nature of its self-contained legal regimes. By moving beyond rigid doctrines and towards a more holistic understanding, international law can better serve its ultimate purposes: minimising the harm of armed conflicts, promoting justice, maintaining peace, and protecting human dignity.

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