THE RELATIONSHIP BETWEEN INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW IN ARMED CONFLICT

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This report considers the relationship between international human rights law ("HRL") and international humanitarian law ("IHL") in the context of armed conflict and occupation. These two bodies of law regulate similar conduct and share common roots in their respective efforts to protect fundamental human dignity.[2] As Jakob Kellenberger, President of the International Committee of the Red Cross ("ICRC") has stated: "Like international human rights, international humanitarian law aims, among other things, to protect human life, prevent and punish torture and ensure fundamental judicial guarantees to persons subject to criminal process."[3] Yet there are important differences between the two bodies of law, and consequently, there is potential for conflict between them. This report draws on jurisprudence, state practice, and recent scholarship to describe three central approaches to applying the two bodies of law, to offer a recommendation as to which of the three approaches should be adopted by the United States, and to explain the stakes of the choice between the different approaches.

The report proceeds in five parts. Part I outlines the recent history of the U.S. Government's position on the relationship between HRL and IHL, concluding that September 11 marked a significant turning point in the U.S. position. Before September 11, HRL norms were implicitly considered applicable during armed conflict in at least some situations, but after the attacks the U.S. took a position that IHL applied as the exclusive applicable body of law during armed conflict.

Part II briefly discusses the conditions under which each body of law potentially applies. First, it outlines methods for determining when an armed conflict or occupation situation exists, since armed conflict and occupation activate IHL. (For the sake of simplicity, most of this report refers only to "armed conflict" though the legal analysis applies to both armed conflict and occupation.) Then it examines territorial sovereignty and the emerging effective control standard for the extraterritorial application of human rights as prerequisites for the application of HRL.

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[2] *See* Memorandum by Tom Dannenbaum, The Interaction of International Human Rights Law and International Humanitarian Law with Respect to Rights to Life and Liberty, as part of the Allard K. Lowenstein International Human Rights Clinic, at 1 (Dec. 17, 2009) (unpublished report, on file with authors) [hereinafter Dannenbaum Memo].

[3] Jakob Kellenberger, President, Int'l Comm. of the Red Cross [hereinafter ICRC], Address at the 27th Annual Round Table on Current Problems of International Humanitarian Law, (Sept. 6, 2003), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/5rfgaz.

Part III begins the core analysis of the report. It identifies three theoretical approaches to the relationship between HRL and IHL:

(1) *Displacement*. Once an armed conflict situation has been determined to be present, the displacement approach is simple in its application: IHL displaces HRL, such that IHL is the only body of law that applies in the context of the armed conflict. When no armed conflict exists, HRL applies, and IHL has no relevance.

(2) *Complementarity*. Complementarity is also relatively simple in theory, though substantially more complicated in practice. In the complementarity model, as in all the models, when there is no armed conflict, HRL applies and IHL has no role. When there is an armed conflict, however, HRL and IHL are both applied and are interpreted harmoniously. The two bodies of law thus are assumed to have what the report terms a "relationship of interpretation."

(3) *Conflict Resolution*. In the conflict resolution model, when an armed conflict is present, the decision maker must evaluate the relationship between the HRL and IHL norms. If they are, in fact, complementary, then both norms apply. If they conflict, however, the model offers three possible decision rules—event-specific displacement, reverse event-specific displacement, and specificity—for deciding the appropriate body of law to be applied.

Part III concludes with a detailed discussion of the specificity decision rule, which suggests that—in situations of conflict between relevant HRL and IHL norms—the norm more specific to the particular situation should govern. This section also describes a number of factors that aid in determining which body of law is more specific to a given situation. The specificity rule of conflict resolution that we detail derives from the broader *lex specialis* maxim, which states that "whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific."[4] However, the specificity rule applies at the level of the *operation*, *situation*, or *encounter*, so that whichever body of law is eclipsed still remains relevant in the broader armed conflict. The report ultimately concludes that this variation of the conflict resolution model is the most normatively defensible approach to the relationship between HRL and IHL.

Part IV applies the theoretical discussion of Part III to examples of conduct governed by both HRL and IHL. It examines situations in which conflicts actually exist

[4] Rep. of the Int'l Law Comm., Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 58th Sess., May 1, 2006—June 9, 2006 and July 3, 2006—Aug. 11, 2006, ¶ 5, U.N. Doc. A/61/10 (2006).

between the two bodies of law and considers how they might be approached. Finally, Part V offers a few brief conclusions.

I. THE U.S. POSITION

This Part offers a brief overview of the U.S. Government's evolving position on the relationship between HRL and IHL in the context of armed conflict. After considering the U.S. Government position before September 11, 2001, the report considers how the U.S. Government's position shifted in response to the events of September 11 and the United States' recent conflicts in Iraq and Afghanistan, and with al-Qaeda and related terrorist organizations.

A. The U.S. Position Before September 11, 2001

There was relatively little discussion of the relationship between HRL and IHL in the U.S. Government before the terrorist attacks on September 11, 2001, because the issue did not arise with much frequency. In the instances where the U.S. Government did express an opinion, it often appeared to implicitly favor an approach that allowed for the application of at least some human rights norms in times of armed conflict.

During the Nixon Administration, the UN General Assembly discussed respect for human rights in armed conflict. In 1970, the General Assembly adopted five resolutions on the subject, including one co-sponsored by the United States on the humane treatment of prisoners of war, urging "strict compliance with the provisions of existing international instruments concerning human rights in armed conflicts."[5] The U.S. backing of this resolution suggests early support for the application of at least some human rights norms in an armed conflict setting.[6]

The U.S. Government also faced related issues when considering the adoption of two major UN human rights instruments: the Convention Against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR). During the drafting of the CAT in 1984, the United States indicated that the Convention was inapplicable during armed conflict: "the convention . . . was never intended to apply to armed conflicts and thus supersede the 1949 Geneva Conventions on humanitarian law in armed conflicts and the 1977 Protocols additional thereto."[7] When it adopted the

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[5] G.A. Res. 2676 (XXV), U.N. GAOR, 25th Sess., U.N. Doc. A/RES/2676, at 77 (Dec. 9, 1970). Another unanimous resolution (not including eight abstentions) issued the same day stated: "Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict." G.A. Res. 2675 (XXV), U.N. GAOR, 25th Sess., U.N. Doc. A/RES/2675, at 76 (Dec. 9, 1970) (voting record available at http://www.un.org/en/ga/documents/voting.asp).

[6] *Airgram from the Department of State to Certain Posts* (Aug. 12, 1971), *in* 5 FOREIGN RELATIONS OF THE UNITED STATES, 1969-1976, UNITED NATIONS 177, 187 (2004); G.A. Res. 2676 (XXV), *supra* note 5, at 76-77.

[7] *Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*, ¶ 5, U.N. Doc. E/CN.4/1984/72 (Mar. 9, 1984); *see also* John B.

ICCPR in 1992, however, the United States did not make a similar disclaimer. It did enter several reservations and understandings,[8] but it did not enter a reservation regarding the Covenant's operation in times of armed conflict. This decision is particularly notable because the U.N. Human Rights Committee had by then made explicit its view that the human rights framework of the ICCPR was applicable at all times, including during armed conflict.[9]

B. The U.S. Position After September 11, 2001

After September 11 and the start of the "war on terror," the U.S. Government took the clearest and strongest position on the question of the relationship between HRL and IHL in times of armed conflict to date. The Administration endorsed a displacement approach to situations of conflict between HRL and IHL.[10] The Government announced that HRL had no role in situations of armed conflict; rather, in such situations, IHL entirely displaced HRL.

The central novelty of this approach was in the application of this reasoning beyond traditional armed conflict situations to what the Bush Administration termed the "war on terror." The U.S. Government used the displacement approach to justify, among other things, detentions at Guantánamo Bay and the use of so called "enhanced" interrogation techniques, including waterboarding and sleep deprivation. Legal Adviser John Bellinger explained in 2006 in testimony before the United Nations Committee Against Torture that, while the United States never sanctioned torture, the CAT did not apply to "war on terror" detainees. Bellinger indicated that "[i]t is the view of the United States that . . . detention operations [in Guantánamo, Afghanistan, and Iraq] are

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Bellinger, III, Legal Adviser, U.S. Department of State, Opening Remarks, U.S. Meeting with U.N. Committee Against Torture (May 5, 2006) (citing U.N. Doc. E/CN.4/1984 (Mar. 9, 1984)) ("At the conclusion of the negotiation of the Convention, the United States made clear 'that the convention . . . was never intended to apply to armed conflicts. . . .' The United States emphasized that having the Convention apply to armed conflicts 'would result in an overlap of the different treaties which would undermine the objective of eradicating torture.'"), *available at* http://www.state.gov/g/drl/rls/68557.htm. This is an early example of the application of the displacement approach that would be endorsed by the Government in the years immediately following the events of September 11, 2001.

[8] U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 CONG. REC. S4781-01 (daily ed. Apr. 12, 1992), *available at* http://www1.umn.edu/humanrts/usdocs/civilres.html; *see also* 138 CONG. REC. H8068-71 (daily ed. Apr. 12, 1992).

[9] Francoise J. Hampson, *The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, 90 INT'L REV. RED CROSS 549, 550 n.5 (2008). It is of course possible that the U.S. regarded a reservation as unnecessary because it did not believe the ICCPR would apply extraterritorially. But it is also possible to interpret the decision to suggest U.S. acceptance of the idea that some human rights norms applied during times of armed conflict.

[10] For a description of the displacement approach, see *infra* Section III.A.

governed by the law of armed conflict, which is the *lex specialis* applicable to those operations."[11]

The Bush Administration took an additional novel step in its analysis of the law of war: it argued that detainees accused of terrorist acts not only were not protected by HRL but also were not protected by IHL. These detainees, the Administration claimed, fell into the category of "unlawful combatants," for whom IHL offered few, if any, protections.[12] This view was rejected in 2006 by the Supreme Court's decision in *Hamdan v. Rumsfeld*,[13] which held that even "unlawful combatants" were entitled to protections under Common Article 3 of the Geneva Conventions.[14]

Under President Barak Obama, the U.S. Government has moderated its approach to the relationship between HRL and IHL, but has yet to clearly define its stance on the question. A recent speech by Legal Adviser Harold Koh to the American Society of International Law may be the closest the current administration has come to setting out its views on the application of HRL and IHL in times of armed conflict. That speech made clear that the U.S. Government continues to view itself as engaged in an armed conflict against al-Qaeda and related terrorist organizations.[15] While reaffirming that all relevant laws of war apply even to detainees earlier deemed "enemy combatants,"[16] Koh did not expressly disassociate the U.S. Government from the

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[11] John B. Bellinger, III, Legal Adviser, U.S. Department of State, Opening Remarks, U.S. Meeting with U.N. Committee Against Torture (May 5, 2006), *available at* http://www.state.gov/g/drl/rls/68557.htm. *See also* Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay (Mar. 10, 2006) *available at* http://www.asil.org/pdfs/ilib0603212.pdf; U.S. Dep't of State, United States Written Response to Questions Asked by the Committee Against Torture (May 8, 2006), *available at* http://www.state.gov/documents/organization/68662.pdf.

[12] *See* Marko Milanović, *A Norm Conflict Perspective on the Relationship Between International Humanitarian Law and Human Rights Law*, 14 J. CONFLICT & SECURITY L. 459, 464 (2010) (arguing that the administration's theory of *les specialis* "accorded [detainees] no rights whatsoever.")

[13] 548 U.S. 557 (2006).

[14] *Id.* at 562-63.

[15] Harold Hongju Koh, Legal Adviser, U.S. Department of State, The Obama Administration and International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm ("[W]e continue to fight a war of self-defense against an enemy that attacked us on September 11, 2001, and before, and that continues to undertake armed attacks against the United States.").

[16] *Id.* ("Let there be no doubt: the Obama Administration is firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts. . . . We in the Obama Administration have worked hard since we entered office to ensure that we conduct all aspects of these armed conflicts – in particular, detention operations, targeting, and prosecution of terrorist suspects – in a manner consistent not just with the applicable laws of war, but also with the Constitution and laws of the United States."); *see also* Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, at 1, In re Guantanamo Bay Detainee Litigation (D.D.C. 2009) (No. 08-442) ("The detention authority conferred by the AUMF is necessarily informed by principles of the laws of war.").

displacement position. He instead emphasized the applicable more generous IHL protections:

> [A]s a matter of international law, this Administration has expressly acknowledged that international law informs the scope of our detention authority. Both in our internal decisions about specific Guantanamo detainees, and before the courts in habeas cases, we have interpreted the scope of detention authority authorized by Congress in the AUMF as informed by the laws of war.[17]

Koh referred only to the laws of war, not to broader international human rights norms. In justifying targeted use of force and terrorist prosecution practices, Koh similarly referred explicitly only to the laws of war.[18]

At the same time, Koh did not refer to IHL as the *lex specialis* applicable to U.S. actions in Afghanistan and Pakistan, as did his predecessor, John Bellinger.[19] This—together with his statement that "the Obama Administration is firmly committed to complying with *all applicable law*, *including the laws of war*"[20]—may suggest the Administration's openness to a conflict resolution or complementarity approach, in which HRL norms are also deemed applicable during armed conflict.

II. PRELIMINARY QUESTIONS

The complex relationship between HRL and IHL is premised on a number of preliminary questions, which are largely beyond the scope of this report. The two most critical preliminary questions are: (1) When is IHL applicable? and (2) When is HRL applicable? Choosing between HRL and IHL assumes that either body of law could potentially apply, yet, completely independent of any conflict between HRL and IHL, each body of law has rules governing whether it is applicable to a given situation. This Part therefore briefly addresses these questions—flagging areas for possible future research—before presenting three approaches to resolving conflicts that arise between the two bodies of law.

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[17] Koh, *supra* note 15.
[18] *Id.* ("As in the area of detention operations, this Administration is committed to ensuring that the targeting practices that I have described are lawful. . . . The same goes, third and finally, for our policy of prosecutions.").
[19] *See supra* text accompanying note 11.
[20] Koh, *supra* note 15 (emphasis added).

A. When Does International Humanitarian Law Apply? Identifying the Presence of Armed Conflict

IHL applies only in situations of armed conflict; hence the applicability of IHL turns on whether an armed conflict or occupation exists. While a full examination of these questions is beyond the scope of the present report, this section provides a brief overview.

We begin briefly with how to identify the existence of an "occupation." Article 42 of the 1907 Hague Convention provides that a "territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."[21] Article 43 similarly speaks of the "authority of the legitimate power having in fact passed into the hands of the occupant . . . ."[22] In addition, Common Article 2 of the Geneva Conventions provides that the Conventions "shall apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."[23] It is clear that an occupation ends when the occupying power withdraws its forces from the territory in question. There is some controversy over whether an occupation ends when the government of the territory formally consents to the continued presence of foreign troops or whether some level of effective authority must be transferred as well.[24]

Turning to armed conflict, the complexity of identifying the existence of an armed conflict has increased dramatically in recent years with the decreasing frequency of traditional "battlefield" conflicts and the proliferation of non-state armed actors with a cross-national presence, like al-Qaeda. Among the most comprehensive recent efforts to define armed conflict is the International Law Association's Final Report on the Meaning of Armed Conflict in International Law.[25] After the initiation of the "war on terror," the Executive Committee of the International Law Association "was asked to . . . report on how international law defines and distinguishes situations of armed conflict and those situations in which peacetime law prevails."[26] The Committee found that, today:

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[21] Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art.42, Oct.18, 1907, 36 Stat. 2277, 1 Bevans 631.
[22] *Id.* art. 43.
[23] Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].
[24] *See* Siobhán Wills, *The Obligations Due to Former "Protected Persons" in Conflicts that Have Ceased To Be International*, 15 J. CONFLICT & SECURITY L. 117, 131-33 (2010) (describing contemporary debates over the meaning of occupation under international law).
[25] Int'l L. Assoc., *Final Report on the Meaning of Armed Conflict in International Law* (2010), *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/1022.
[26] *Id.* at 1.

> Declarations of war or armed conflict, national legislation, expressions of subjective intent by parties to a conflict, and the like, may have evidentiary value but such expressions do not alone create a *de jure* state of war or armed conflict . . . . The *de jure* state or situation of armed conflict depends on the presence of actual and observable facts, in other words, objective criteria.[27]

While "the Committee found no widely accepted definition of armed conflict in any treaty, . . . [i]t did . . . discover significant evidence in the sources of international law that the international community embraces a common understanding of armed conflict."[28] The two characteristics the Committee identified as common to all armed conflict were, first, "[t]he existence of organized armed groups" and, second, that the grounds are "[e]ngaged in fighting of some intensity."[29]

The Committee report drew on, among a diverse array of other sources, the frequently cited 1995 decision of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Tadić*, which also pointed to (1) organization of armed groups and (2) intensity of fighting as the defining characteristics of armed conflict.[30] Of course, who counts as a sufficiently organized armed group, what counts as sufficient intensity of fighting, and where and when the limits of the given fighting or armed group lie, are issues not fully settled by this case or any other single source.

Even when it is clear that an armed conflict exists, there is often a further question

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[27] *Id.* at 33. Common Article 2 of the Geneva Conventions similarly provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise . . . ." GC III, *supra* note 23, art. 2.

[28] Int'l L. Assoc., *supra* note 21, at 1.

[29] *Id.* at 2. It should be noted that the ICRC commentary on Common Article 2 can be read to adopt a lower threshold for the existence of an armed conflict:

> Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2 . . . . It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbrous machinery. It all depends on circumstances. If there is only at single wounded person as a result of the conflict, the Convention will have been applied as soon as he has been collected and tended . . . .

ICRC, COMMENTARY ON THE FOURTH GENEVA CONVENTION RELATIVE TO THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (Jean S. Pictet ed., 1952). The ICRC commentaries on the other Geneva Conventions contain similar language.

[30] Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

of whether the conflict is an international armed conflict ("IAC") or a non-international armed conflict ("NIAC"). Identifying the type of armed conflict is an important step in selecting the set of norms that apply. Different IHL instruments and customary rules apply depending on whether the situation is one of IAC or NIAC.[31] Recently, particularly in the "war on terror" context, the border between international and non-international armed conflict has blurred, and there have been calls for a new common definition of armed conflict so as to maintain consistent standards for applicable law.[32]

B. When Does Human Rights Law Apply? The Effective Control Standard

Unlike armed conflict in IHL, there are no inherent prerequisites for the application of HRL—which is designed to be universal.[33] Nevertheless, HRL must be applied by individual states, and most states do not consider HRL to apply everywhere. The baseline obligation is for a state's human rights obligations to be applied within its territorial boundaries. This obligation has long been widely accepted, in the United States and globally.[34]

Yet, as states have increasingly found themselves operating outside their own territorial boundaries—including in the context of armed conflict and the "war on terror"—the question arises whether human rights obligations apply extraterritorially, particularly with respect to non-citizens. In the past, representatives of the United States have taken the position that such obligations—including those under the ICCPR and the CAT—do not apply extraterritorially.[35] Nevertheless, there is growing consensus

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[31] *Compare* Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict arts. 51(3), 41, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; *with* Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 6(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]; *see generally* ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Dorwald-Beck eds. 2005) (explaining the different rules of customary IHL in international and non-international armed conflicts).

[32] *See* James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 INT'L REV. RED CROSS 313 (2003).

[33] *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] ("[I]n accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Now, therefore [t]he General Assembly [p]roclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations . . . .").

[34] *See* ICCPR, *supra* note 33, art. 2(1) (obligating members "to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant"); Universal Declaration of Human Rights, *supra* note 33 ("[E]very individual and every organ of society . . . shall strive . . . to promote respect for these rights and freedoms . . . both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.").

[35] *See, e.g.*, Letter from the Permanent Representative of the United States of America to the United

among international bodies and foreign states that HRL obligations apply abroad wherever a state exercises "effective control."[36] This standard has been articulated slightly differently by different bodies, including the Inter-American Commission on Human Rights, the UN Human Rights Committee and Committee Against Torture, the International Court of Justice ("ICJ"), and the European Court of Human Rights, as well as various national courts.[37] Yet the basic message is similar across them all: control, rather than territorial sovereignty, defines the outer limits of HRL obligations.[38]

III. THE RELATIONSHIP BETWEEN HRL AND IHL: THREE MODELS

This Part presents three distinct approaches to applying HRL and IHL in situations of armed conflict: the displacement model, the complementarity model, and the conflict resolution model. The models discussed herein are not formal rules of decision that different courts and governments have expressly adopted. Rather, they represent an attempt to classify the diverse approaches that tribunals, states, practitioners, and scholars have used or advocated into three analytically distinct categories. This effort to classify existing approaches must be tempered by a recognition that cases in the real world do not always fit neatly within a single model. For that reason, this discussion also notes cases that include language that might be read to support more than one model or that might be read differently in light of the different models.

Nations and Other International Organizations in Geneva, to the Office of the High Comm'r for Human Rights (Jan. 31, 2006), *reprinted as* Annex II to the United Nations High Commission on Human Rights, Report of the Chairman of the Working Group on Arbitrary Detention et al. on the Situation of Detainees at Guantanamo Bay, E/CN.4/2006/120 (Feb. 27, 2006) ("The United States has made clear its position that . . . the International Covenant on Civil and Political Rights, by its express terms, applies only to 'individuals within its territory and subject to its jurisdiction' [and not, e.g., to detainees outside the territorial U.S.]."); John B. Bellinger, III, Legal Adviser, U.S. Department of State, Opening Remarks, U.S. Meeting with U.N. Committee Against Torture (May 5, 2006), *available at* http://www.state.gov/g/drl/rls/68557.htm ("As a general matter, countries negotiating the Convention [Against Torture] were principally focused on dealing with rights to be afforded to people through the operation of ordinary domestic legal processes . . . . ").

[36] *See* Sarah Cleveland, *Embedded International Law and the Constitution Abroad*, 111 COLUM. L. REV. 225, 229 (1001) ("Regional human rights tribunals, the U.N. treaty bodies, and the International Court of Justice (ICJ) all have recognized that human rights obligations travel with a state when a state or its agents place persons or territories under the state's 'effective control.'"); Oona A. Hathaway, et al., Recent Developments in the Extraterritorial Application of Human Rights (2010) (on file with authors).

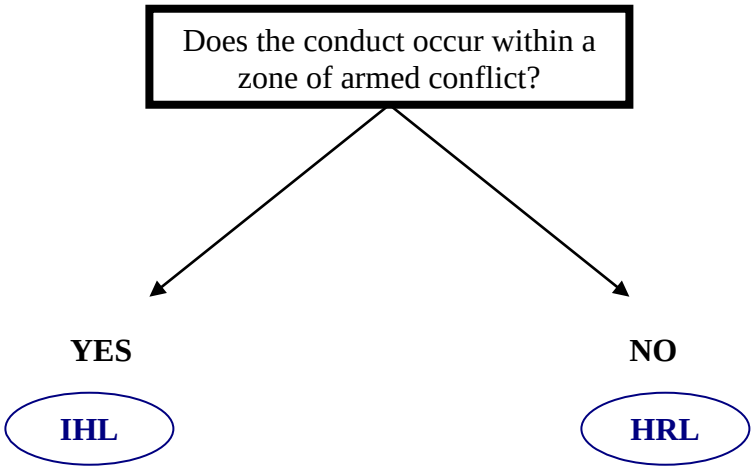
[37] *See* Cleveland, *supra* note 36, at 248-270; Hathaway et al., *supra* note 36.

[38] Cleveland, *supra* note 36, at 269 ("Whether one employs the 'authority and control' test of the Inter-American system, the 'power of effective control' standard of the Human Rights Committee and the International Court of Justice, the 'de facto and de jure effective control' of the Committee Against Torture—all of which apply to control over either persons or territories . . . or the more territorially-constrained conception of 'control' of the ECHR, control, rather than geography, is the touchstone for the recognition of rights protections abroad.").

A. Displacement

Defining the zone of armed conflict is the first and last step for determining the appropriate body of law in the displacement model. If the conduct occurs within the zone of armed conflict, IHL governs exclusively and displaces any HRL norms that might otherwise apply to the situation at hand. If the conduct is outside that zone, HRL remains operative. Displacement models may vary in their definition of armed conflict, making the field for application of IHL larger or smaller, but the basic tradeoff remains the same. Figure 1 illustrates the decision-making process under the displacement model.

Figure 1: DISPLACEMENT MODEL



This approach is labeled "displacement" because IHL is understood to *displace* HRL entirely during armed conflict.[39] The premise underlying this approach is that countries developed IHL to replace the norms controlling peacetime behavior, due to the demands of military necessity and the limitations of control in combat.[40] In this model, *lex specialis* is determined at the level of the armed conflict—if there is an armed conflict, IHL is the *lex specialis* for all conduct within the entire zone of armed conflict. In this respect it differs markedly from the "event-specific displacement" rule

[39] Dannenbaum Memo, *supra* note 2, at 7.

[40] *Id.* at 11; *see also* Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310, 347 (2007). *But see* David Kretzmer, *Rethinking Application of IHL in Non-International Armed Conflicts*, 42 ISR. L. REV. 1 (2009) (arguing that, with the advent of the modern human rights regime, humanitarian law is anachronistic and unnecessary except in situations of extreme violence).

of decision (discussed in Section III.C.1 below), which similarly operates to displace HRL, but on the much smaller scale of a single event, operation, or situation.

Proponents of the displacement approach rely on an aggressive reading of the ICJ's *Nuclear Weapons* advisory opinion.[41] The ICJ wrote:

> In principle, the right not arbitrarily to be deprived of one's life [codified in Article 6 of the ICCPR] applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the [ICCPR], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the [ICCPR] itself.[42]

The displacement model emphasizes the qualifying "in principle" of the first sentence and the definitive "only" of the final sentence.[43]

As noted above, the United States government has at times articulated arguments that could be read to reflect the displacement model, downplaying the role of HRL in armed conflict—particularly in the "global war on terror" context.[44] The Israeli Government has also advocated the displacement approach, specifically by denying the applicability of HRL to the Occupied Territories:

> Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace.[45]

It takes this position not only because it rejects the extraterritorial application of HRL,[46]

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[41] Dannenbaum Memo, *supra* note 2, at 5-6.
[42] Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, ¶ 25 (July 8) (Advisory Opinion).
[43] Dannenbaum Memo, *supra* note 2, at 12.
[44] *See supra* Part I; *see also* Prud'homme, *supra* note 47, at 358.
[45] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 102 (July 9)
[46] *Second Periodic Report of Israel to the Human Rights Committee*, ¶ 8, U.N. Doc. CCPR/C/ISR/2001/2 (Dec. 4, 2001) [hereinafter *Second Periodic Report*]; *see also* Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, 90 INT'L REV. RED CROSS 501, 519 (2008) (describing Israel as

but also because it characterizes the situation in the Occupied Territories as one of ongoing armed conflict.[47]

Aside from the U.S. and Israeli governments, there are few express adherents to the displacement model in the international community. The bluntness of the approach, which denies any role for HRL during the course of an armed conflict, has been regarded by most as inconsistent with a serious commitment to human rights norms. Much more common is the view that "IHL is not the only law relevant to armed conflict."[48] The question this raises, of course, is how to mediate between the two bodies of law if both can apply within the zone of armed conflict. The other two models—complementarity and conflict resolution—offer two different answers to this question.

B. Complementarity

The complementarity model holds that HRL and IHL are engaged in a common mission to protect human life and dignity.[49] Because they share a common foundational mission, these bodies of law are not in conflict but are instead complementary. Also called the "mutual elaboration" or "coordinated interpretation" approach, the complementarity model thus provides that IHL is interpreted in coordination with HRL.[50]

The simplicity of the approach is demonstrated by comparing Figure 2, which illustrates the complementarity model, with Figure 3,[51] which illustrates the conflict resolution model.

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having "consistently objected to the extraterritorial application of human rights instruments"). *But see* HCJ 3239/02 Marab v. IDF Commander in the West Bank (Sup. Ct. of Isr. Apr. 18, 2002),. For a discussion of the extraterritorial application of HRL, see *supra* Part II.B.

[47] *See* Nancie Prud'homme, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, 40 ISR. L. REV. 356, 376 (2007) (stating that Israel has "reject[ed] the application of human rights treaties in the Occupied Territories on the basis that this situation was one pertaining to armed conflict").

[48] Int'l Law Assoc., *surpa* note 25, at 3.

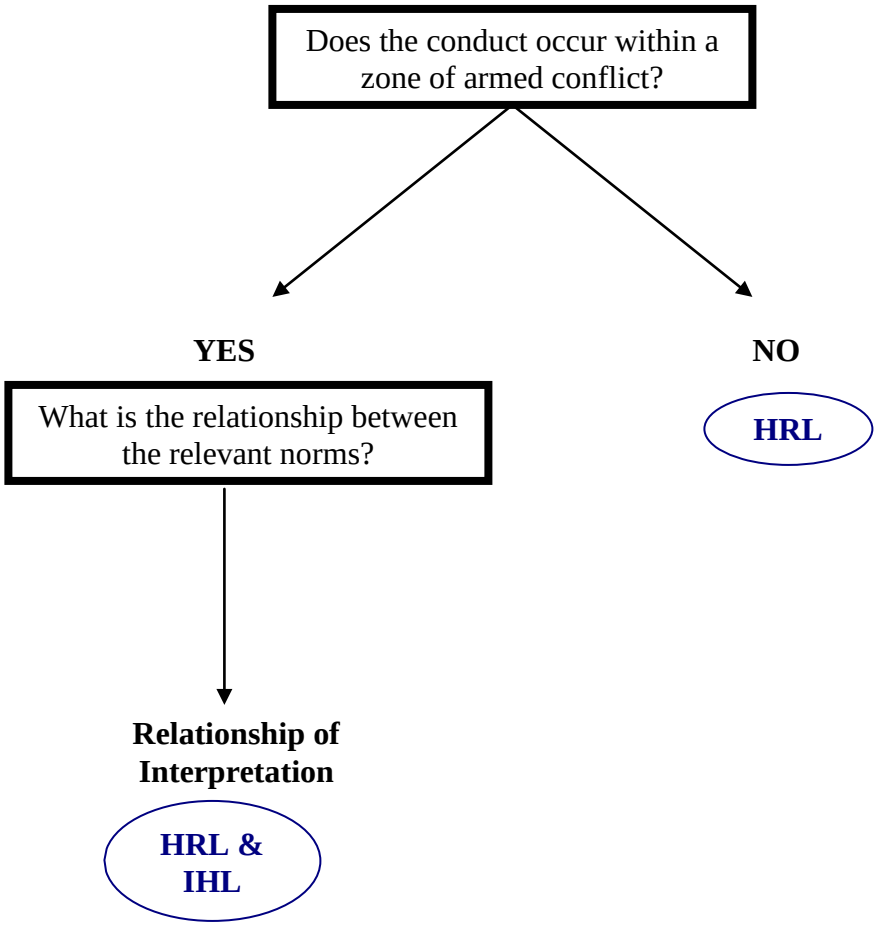
[49] *See* Kellenberger, *supra* note 3 ("The common underlying purpose of international humanitarian law and international human rights law is the protection of the life, health and dignity of human beings.").

[50] Dannenbaum Memo, *supra* note 2, at 8.

[51] *See infra* Section III.C.

The complementarity model provides that any instance where both IHL and HRL apply, the norms can be interpreted in such a way that they do not conflict—that is, the norms exhibit a "relationship of interpretation." Thus, the only operative question is whether there is an armed conflict (and thus whether IHL applies). If so, then that law is applied in conjunction with HRL. If not, then only HRL applies.

Figure 2: *COMPLEMENTARITY MODEL*



The complementarity approach relies on the authority of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), which requires treaty parties interpreting their obligations to take into account "any relevant rules of international law applicable in the relations between the parties."[52] As such, IHL provides rules

[52] Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331.

relevant to the interpretation of HRL in times of armed conflict, while HRL can do the same for IHL.[53]

The complementarity model suggests a different reading of the ICJ's *Nuclear Weapons* decision than that offered by advocates of the displacement model described in Section III.A.[54] The ICJ provides for complementary interpretation of the two bodies of law: The Court expressly states that Article 6 of the ICCPR applies in hostilities but that its meaning—specifically the meaning of an "arbitrary deprivation of life"—is determined in light of IHL.[55] This reading of the *Nuclear Weapons* decision finds support in the ICJ's *Wall* advisory opinion. The ICJ explained that in the *Nuclear Weapons* decision, it had "rejected" the argument that "'the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict'"[56]—in other words, the displacement model.

The complementarity approach is also reflected in General Comments by the UN Human Rights Committee.[57] The Committee stated the proposition directly in General Comment 31: "While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive."[58]

The ICRC has also been a leading advocate of the complementarity approach.[59] Speaking before the 27th Annual Round Table on Current Problems of International Humanitarian Law, Dr. Jakob Kellenberger, President of the ICRC, took the position that the bodies of law are "distinct but complementary."[60] Although acknowledging differences in the law—for example, that some human rights norms are derogable while

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[53] Dannenbaum Memo, *supra* note 2, at 8.
[54] *See supra* notes 41-43 and accompanying text.
[55] *See also* Vera Gowland-Debbas, *The Relevance of Paragraph 25 of the ICJ's Advisory Opinion on Nuclear Weapons*, 98 AM. SOC'Y INT'L L. PROC. 359 (2004) (arguing that paragraph 25 of the *Nuclear Weapons* opinion "serves to reinforce the consistent trend in human rights case law that the individual is entitled to both human rights and humanitarian law protection in complementary fashion in time of armed conflict").
[56] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. at ¶ 105. *See also id*. at ¶¶ 102-13; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶¶ 216-20 (Dec. 4).
[57] Dannenbaum Memo, *supra* note 2, at 8-9; *see, e.g.*, Human Rights Comm., *General Comment 29: States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001); Human Rights Comm., *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).
[58] *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, *supra* note 57, ¶ 11.
[59] *See* Kellenberger, *supra* note 3.
[60] *Id.*

IHL is always non-derogable—he maintained that these differences did not render the bodies of law "mutually exclusive."[61]

Moreover, the model loosely describes the more recent jurisprudence of the Inter-American Commission and the Inter-American Court of Human Rights. *Bámaca Velásquez* represents the high-water mark of the Inter-American Court's application of the complementarity theory.[62] The Inter-American Court explained in that case: "the relevant provisions of the Geneva Convention may be taken into consideration as elements for the interpretation of the American Convention."[63] Hence, the American Convention—a human rights agreement—remained fully operative and compatible with IHL during armed conflict.

In the *Coard* opinion, the Inter-American Commission was more restrained, holding that "while international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other."[64] The Commission then went on to note that IHL could help to define whether detention was "arbitrary" under the terms of Articles I and XXV of the American Declaration.[65]

The qualifying adverb "necessarily" illustrates one of the weaknesses of the complementarity model: it is difficult to assert that the two systems of law *never* conflict.[66] As described in greater detail in Part IV, there are some circumstances in which it may not be possible to reconcile conflicts between the two bodies of law through interpretation. One example is the treatment of persons captured during armed conflict: IHL specifies that "combatants" be held as POWs until the end of hostilities (and then returned), while HRL specifies that detainees be tried for their offenses. Clearly, IHL envisions uniform-wearing soldiers who enjoy POW status, while HRL envisions civilians improperly swept up in an armed conflict and who enjoy the right to trial and then to release. But what if the person captured was a civilian taking part in hostilities? The complementarity model provides limited interpretive tools for actors seeking to resolve this tension.

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[61] *Id.*

[62] Bámaca Velásquez v. Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 25, 2000); *see also* Las Palmeras v. Colombia, Preliminary Objections Judgment, Inter-Am. Ct. H.R. (ser. C) No. 67 (Feb. 4, 2000) (also following the complementarity model); *see also* Dannenbaum Memo, *supra* note 2, at 9-10 (explaining the Inter-American Courts' decisions).

[63] Bámaca Velásquez v. Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 209 (Nov. 25, 2000).

[64] Coard v. United States, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.6./V/II.106, doc. 6 rev. ¶ 39 (1999).

[65] *Id.* ¶ 42.

[66] For states willing to follow formal derogation procedures, these conflicts may, however, be avoided for most conflicts. *See infra* notes 128-129 and accompanying text.

A second weakness of the complementarity model is that the interpretive tools it does provide may undermine the very norms the model seeks to protect. In cases of tension between HRL and IHL, those applying a complementarity approach must engage in compromise to achieve harmony. This compromise might require the dilution of both norms to force them into a relationship of interpretation. Or it might consist of rhetorical acrobatics that pay lip service, rather than do justice, to a rule on one side of a normative conflict. Even if this leads to the "right" outcome as applied, it creates potentially damaging precedent by eviscerating a rule that might properly apply in full force in another context.

The model described next—the conflict resolution model—allows the two bodies of law to be interpreted together. Unlike the complementarity model, however, the conflict-resolution model also allows for the existence of true conflicts between HRL and IHL and provides an approach for resolving them, thereby avoiding the key weaknesses of the complementarity model.

C. Conflict Resolution

Under the conflict resolution model, as under the complementarity model, the existence of an armed conflict does not immediately invalidate HRL norms within the zone of armed conflict. Instead, the next inquiry is: Do the relevant HRL and IHL norms inform, or conflict with, one another? The premise underlying this approach is that HRL and IHL norms touching on the same conduct will have either "relationships of interpretation" or "relationships of conflict."[67] The International Law Commission defines these terms as follows:

> - *Relationships of interpretation*. This is the case where one norm assists in the interpretation of another. A norm may assist in the interpretation of another norm for example as an application, clarification, updating, or modification of the latter. In such situation, both norms are applied in conjunction.
>
> - *Relationships of conflict*. This is the case where two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them. The basic rules concerning the resolution of normative conflicts are to be found in the Vienna Convention on the Law of Treaties.[68]

Under the conflict resolution model, when the norms of the two bodies of law have "relationships of interpretation"—where they may be read harmoniously—one

[67] ILC, *supra* note 4, ¶ 2.
[68] *Id.*

norm assists in the interpretation of the other.[69] In cases where HRL and IHL norms have "relationships of conflict"—where "valid and applicable" norms create incommensurate obligations—rules for conflict resolution guide the choice between the two.[70]

Relationships of conflict may take two forms. The first is a conflict between an obligation and a permission. Many IHL norms that conflict with HRL may be characterized as permissive exceptions to baseline peacetime norms carved out to accommodate military necessity. For example, IHL grants states limited permission to take the lives of combatants in the course of armed conflict.[71] The second form of conflict is a conflict between two sets of obligations. This category includes situations in which an HRL obligation conflicts with an IHL obligation such that it is impossible to comply with one without violating another. For example, IHL obligates states to observe and protect local customs. When these local customs are contrary to HRL obligations under the Convention on the Elimination of Discrimination Against Women, the state actor might face a conflict between two sets of obligations.[72]

Figure 3 illustrates the decision-making process under the conflict resolution model. When norms are in a "relationship of interpretation," the norms are applied in conjunction with one another. The conflict resolution model always treats situations in which norms are in a relationship of interpretation as they would be treated under the complementarity model. Hence, the conflict resolution model is rooted in a narrower reading of the ICJ's *Nuclear Weapons* advisory opinion, in which the use of the word "arbitrary" in Article 6 of the ICCPR creates enough space for IHL to define the boundaries of permissible killing without creating a normative conflict. This approach illustrates the analytical process that goes into finding "relationships of interpretation" between the two families of norms.[73]

When norms are in a "relationship of conflict," however, the decision-maker must select a rule to resolve the conflict. We have observed three decision rules employed in practice. We term these three decision rules event-specific displacement, reverse event-specific displacement, and specificity.

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[69] *See* Droege, *supra* note 46, at 523-24. This suggests yet a third reading of the ICJ's *Nuclear Weapons* decision (or, perhaps more accurately, a different way of presenting the second reading): the *lex specialis* provides guidance about the application of the *lex generalis* to a specific circumstance, as IHL informed the application of Article 6 of the ICCPR to armed conflict in *Nuclear Weapons*.

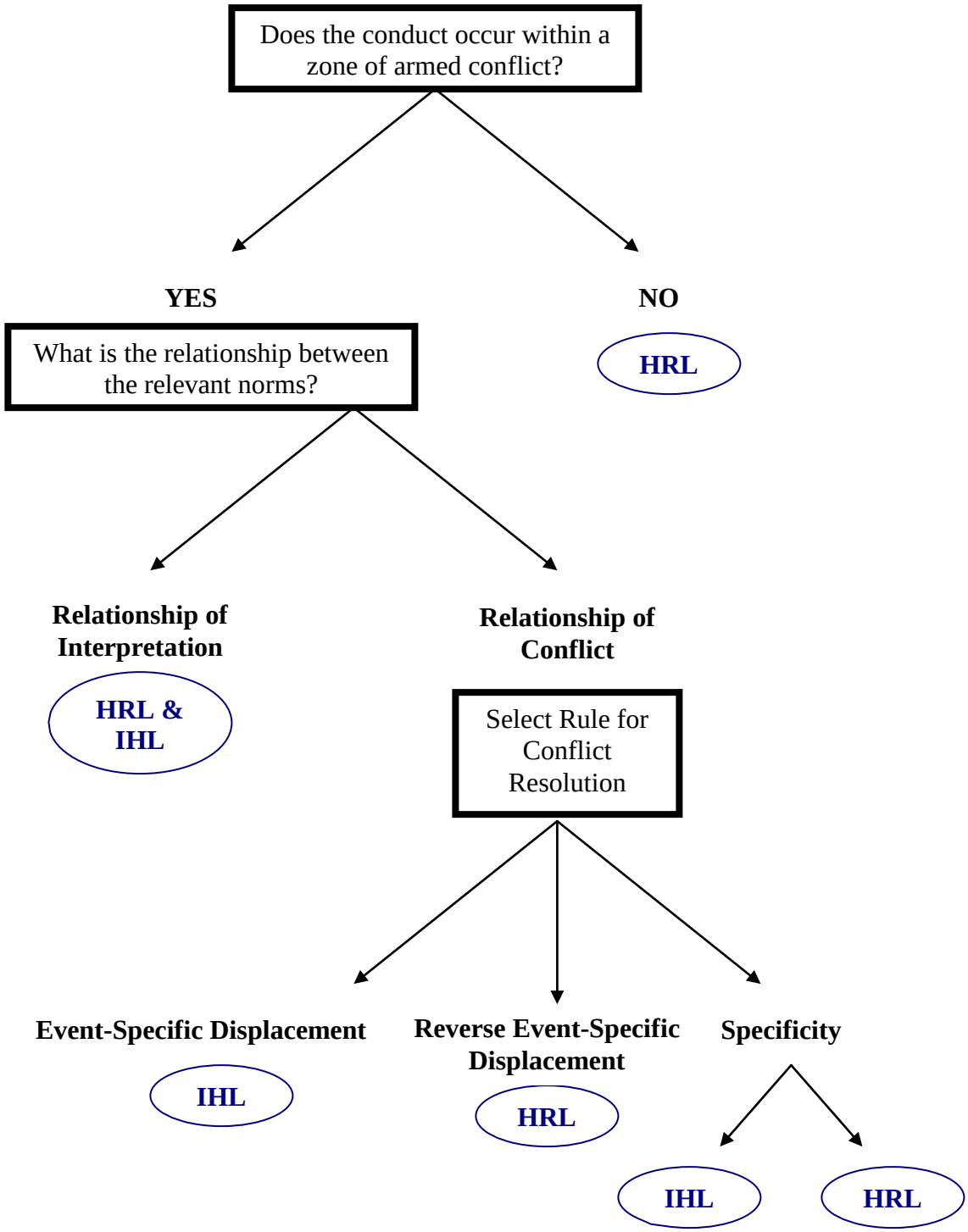
[70] ILC, *supra* note 4, ¶ 2.

[71] It is also possible, although less common, for IHL to impose an obligation where HRL is permissive. For example, HRL would permit a state to impose sanctions for certain crimes for which IHL obligates states to grant immunity. *See infra* Section IV.B.

[72] *See infra* Section IV.C.

[73] For more on this reading of the *Nuclear Weapons* advisory opinion, see *supra* text accompanying notes 55-56.

Figure 3: *CONFLICT RESOLUTION MODEL*



When dealing with relationships of conflict, actors following the conflict resolution model will arrive at different conclusions depending on which of the three decision rules for conflict resolution they select. The theory of *lex specialis* advanced by the conflict resolution model may be described as follows: "The maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific."[74] In other words, unlike the displacement model, the conflict resolution model uses *lex specialis* only to *resolve conflicts*, leaving harmonious norms intact. The different rules for conflict resolution advance different theories about which body of law—IHL or HRL—serves as the *lex specialis* in a given situation.

1. Rule 1: Event-Specific Displacement

The *Wall* advisory opinion applies the first decision rule discussed here, which we call event-specific displacement. An event-specific displacement approach holds that IHL displaces HRL during times of armed conflict, but only in instances in which the relevant norms of each body of law conflict. This conflict is determined not at the level of the armed conflict or military operation—as would be the case for the displacement model outlined in Part III.A.—but at the level of the specific event in question. Hence HRL may apply during times of armed conflict to events or situations where there is no conflicting IHL norm. Where there is a conflict, however, the event-specific displacement rule of conflict resolution provides that IHL is always the *lex specialis*.

The ICJ's *Wall* decision may be read to support this approach:

> [T]he Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[75]

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[74] ILC, *supra* note 4.

[75] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. at ¶ 106.

Although the ICJ *Wall* decision accepts the applicability of HRL during hostilities, it states that IHL is the "*lex specialis*." It is possible to read this to support the view that IHL prevails in relationships of conflict. That said, this is only one possible reading, as the ICJ does not, in its decision, elect to apply IHL over HRL. Such a choice was unnecessary in the case, since the norms in question—HRL and IHL norms concerning annexation—were in a relationship of interpretation.[76]

Unlike the Israeli executive branch,[77] the Israeli High Court arguably has adopted an event-specific displacement approach. The High Court expresses that position in *Public Committee Against Torture in Israel v. Government of Israel*, more commonly known as the *Targeted Killings* case.[78] In its opinion for that case, the High Court concludes that "humanitarian law is the *lex specialis* which applies in the case of an armed conflict." [79] However, "[w]hen there is a gap (*lacuna*) in that law, it can be supplemented by human rights law."[80] In other words, HRL norms do apply in armed conflict, but only when they are compatible with IHL. In this case, HRL informs IHL when the Court considers whether the state has an obligation to attempt to arrest civilians who directly participate in hostilities. Additional Protocol I of the Geneva Conventions provides that "civilians shall enjoy the protections afforded by this section, unless and for such time as they take a direct part in hostilities."[81] In interpreting this provision, the Court appeals to human rights standards articulated by the European Court of Human Rights when it requires the state to arrest civilians directly participating in hostilities when possible.[82] Throughout the rest of the opinion, the Court directly applies IHL to the exclusion of HRL. Thus, by considering HRL where it is not inconsistent with IHL, but treating IHL as the *lex specialis*, the Israeli High Court employs an event-specific displacement rule of conflict resolution.

Similarly, the Government of Australia has indicated that:

> If Australia were exercising authority as a consequence of an occupation or during a consensual deployment with the consent of a Host State, in

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[76] *See, e.g., id.* ¶¶ 123-30.
[77] *See supra* Section III.A.
[78] HCJ 769/02, Public Committee Against Torture in Israel v. Government of Israel (Sup. Ct. of Isr. Dec. 11, 2006), http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM [hereinafter *Targeted Killings Case*]; *see also* Dannenbaum Memo, *supra* note 2, at 42. Note that, like the Israeli executive branch, the High Court treats the situation in the Occupied Territories as an IAC, rather than an occupation.
[79] *Targeted Killings Case*, *supra* note 78, ¶ 18.
[80] *Id.*
[81] AP I, *supra* note 31, art. 51(3).
[82] *Id.* ¶ 40. The Court uses similar reasoning to conclude that the state must follow up any targeted killing with an independent investigation, an HRL duty for which the Court again cites European Court of Human Rights cases and other human rights authorities. *Id.*

> circumstances in which the principles of international humanitarian law applied, Australia accepts that there is some scope for the rights under the [ICCPR] to remain applicable, although in case of conflict between the applicable standards under the Covenant and the standards of international humanitarian law, the latter applies as *lex specialis*.[83]

Thus, HRL is not entirely displaced by IHL during times of armed conflict, but IHL prevails in event-specific cases of conflict.

2. Rule 2: Reverse Event-Specific Displacement

This rule is the mirror image of the event-specific displacement approach, inasmuch as it always resolves conflicts between HRL and IHL in favor of HRL. This rule of conflict is unlike the others inasmuch as its adoption by courts has resulted entirely from jurisdictional constraints on the courts themselves. We have identified two courts—the Inter-American Court for Human Rights and the European Court of Human Rights—that apply this rule because their primary jurisdictional mandate is to interpret human rights treaties. Thus, while they may look to IHL norms for guidance in interpretation, their constitution creates a decision rule that favors HRL.

For example, the Inter-American Court for Human Rights criticized the Inter-American Commission on Human Rights in its *Las Palmeras* decision for directly applying IHL norms that are not present in and conflict with the American Convention on Human Rights. The Inter-American Court conceded that it may evaluate "any norm of domestic or international law applied by a State, in times of peace or armed conflict," but clarified that it was competent only to determine if the norm "is compatible or not with the American Convention," which codifies applicable HRL. It continued:

> In order to carry out this examination, the Court interprets the norm in question and analyzes it in the light of the provisions of the Convention. The result of this operation will always be an opinion in which the Court will say whether or not that norm or that fact is compatible with the American Convention. The latter has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions.[84]

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[83] Human Rights Comm., *Replies to the List of Issues To Be Taken Up in Connection With the Consideration of the Fifth Periodic Report of the Government of Australia*, ¶ 19, U.N. Doc. CCPR/C/AUS/Q/5/Add.1 (Feb. 5, 2009).

[84] Las Palmeras v. Colombia, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 67, ¶ 33 (Feb. 4, 2000).

Thus, when an IHL norm is incompatible with the American Convention—where the norms share a relationship of conflict—the Court is jurisdictionally constrained to base its judgment on the American Convention norm only.[85]

The European Court of Human Rights has imposed similar jurisdictional restrictions by strictly limiting its adjudication to the European Convention on Human Rights, which codifies applicable HRL.[86] In *McCann v. United Kingdom*, for example, the European Court found that the United Kingdom had violated Article 2 of the European Convention in its anti-terrorist operations against IRA operatives in Gibraltar.[87] Although the European Court acknowledged that the soldiers reasonably perceived the use of lethal force to be necessary, it found for McCann because the operation was not designed to make killing a last resort, as required under HRL.[88]

3. Rule 3: Specificity

The rule of specificity dictates that in relationships of conflict between HRL and IHL, the norm more specifically tailored to the situation prevails.[89] As in the other conflict resolution models, the specificity rule applies at the level of an event or situation rather than at the level of the armed conflict. In contrast with the other two decision rules, however, the specificity rule does not presuppose that either IHL or HRL is always the *lex specialis*. Rather, it looks to which body of law is more specific to the situation at hand.

Three of the Inter-American Commission's decisions illustrate the three ways in which the relationship between HRL and IHL can be resolved using the specificity approach.[90]

First, in the *Abella* case, the Inter-American Commission resolved a conflict between HRL and IHL in favor of IHL. The case required the Commission to determine whether the killing of attackers in the La Tablada battle in Argentina violated Article 4 of the American Convention.[91] After noting that Article 4 creates a non-derogable right to life, the Commission determined that it provides little guidance in situations of armed

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[85] *See also* Dannenbaum Memo, *supra* note 2, at 9.
[86] For an extensive discussion of ECtHR treatment of conduct in armed conflict, see *id.* at 19-21.
[87] McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) (1995). For other examples of ECtHR cases employing this approach, see ECtHR, Isayeva, Yusupova and Bazayeva v. Russia, Judgment of 24 February 2005 ; Isayeva v.
Russia, Judgment of 24 February 2005.
[88] *Id.* paras. 20-90; *see also* Dannenbaum Memo, *supra* note 2, at 19.
[89] *See* Droege, *supra* note 46, at 522-23.
[90] This is the same tripartite structure that Tom Dannenbaum ultimately recommends in his memo to the Lowenstein Clinic. *See* Dannenbaum Memo, *supra* note 2, at 69.
[91] Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L./V/II.95, doc. 7 rev. (1997).

conflict, as it does not distinguish between civilians and combatants. Instead, the Inter-American Commission turned to Common Article 3 of the Geneva Conventions to conclude that there had been no rights violation.[92] Upon identifying the casualties as combatants, the Inter-American Commission did not consider any HRL-based "requirements to warn, attempt to arrest, or shoot to injure rather than kill."[93] There was a relationship of conflict between these potential HRL obligations, rooted in the American Convention, and the implicit IHL permission to abandon these precautions in battle. The Inter-American Commission resolved the conflict in favor of IHL because humanitarian norms were more specifically tailored to the situation.

Second, in its *Third Report on the Human Rights Situation in Colombia*,[94] the Inter-American Commission resolved a conflict between HRL and IHL in favor of HRL, despite the fact that it acknowledged the existence of an armed conflict in the country.[95] Although the Inter-American Commission applied IHL norms to certain conduct within the Colombia, when faced with the extrajudicial killings of "marginal groups" engaged in criminal activities, it applied a "pure" HRL law enforcement standard.[96] Even though IHL exists for situations of non-international armed conflict, the Commission found HRL norms to be more specifically tailored to the state's treatment of criminal activity.[97]

Third, in the *Avilán* case, the Inter-American Commission found a relationship of interpretation among HRL and IHL norms governing the extrajudicial execution of individuals *hors de combat*.[98] In that opinion, the Commission reasoned that "[i]t is precisely in situations of internal armed conflict that human rights and humanitarian law converge most precisely and reinforce one another."[99]

Thus, the jurisprudence of the Inter-American Commission demonstrates the full operation of the conflict resolution model. By applying a specificity rule of conflict resolution, the Inter-American Commission has applied different bodies of law depending on the relationship between the applicable norms and the particular circumstances to which the norms are to be applied. Put differently, the Court has found itself, at different times, at each possible terminal of the armed conflict branch of the conflict resolution model: IHL, HRL, and HRL & IHL.

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[92] *Id.* ¶¶ 156, 161, 188; *see also* Dannenbaum Memo, *supra* note 2, at 30-31.
[93] *Id.*
[94] Inter-Am. Comm'n H.R., Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102, Doc. 9 rev. 1 (Feb. 26, 1999).
[95] *See id.*, ch. 1, ¶ 20.
[96] *See id.*, ch. 4, ¶ 213.
[97] For a more detailed account of the case, see Dannenbaum Memo, *supra* note 2, at 34.
[98] Avilán v. Colombia, Case 11.142, Inter-Am. Comm'n H.R., Report No. 26/97, OEA/Ser.L./V/II.95, doc. 7 rev. (1997).
[99] *Id.* ¶ 174. Note that the same is arguably true of occupation. *See infra* text accompanying note 108. For a further explanation of the case, see Dannenbaum Memo, *supra* note 2, at 32.

A number of countries, including Canada and Germany, have indicated that they subscribe to versions of the specificity approach. In a brief in *Amnesty International Canada v. Chief of the Defence Staff for the Canadian Forces*, the Government of Canada stated:

> A state's international human rights obligations, to the extent that they have extraterritorial effect, are not displaced [in armed conflict]. However, the relevant human rights principles can only be decided by reference to the law applicable in armed conflict, the *lex specialis* of IHL: Critically, in the event of an apparent inconsistency in the content of the two strands of law, the more specific provisions will prevail: in relation to targeting in the conduct of hostilities, for example, human rights law will refer to more specific provisions (the *lex specialis*) of humanitarian law.[100]

Thus, because IHL is more specific to the conduct under review—"targeting in the conduct of hostilities"—it becomes the *lex specialis*. The Government is careful to note that only "specific provisions . . . of humanitarian law" become the *lex specialis*, not the entire body of law.

The Government of Germany has taken a similar stance, tailoring its instructions to the relevant body of law:

> Wherever its police or armed forces are deployed abroad, in particular when participating in peace missions, Germany ensures to all persons that they will be granted the rights recognized in the [ICCPR], insofar as they are subject to its jurisdiction. . . . The training it gives its security forces for international missions includes tailor-made instruction in the provisions of the Covenant.[101]

ICRC Legal Advisor Cordula Droege has advocated for the specificity approach, as well, pointing to "instances in which human rights law and humanitarian law do not contradict each other, but rather regulate different aspects of a situation or regulate a situation in more or less detail . . . ."[102] She acknowledges that "[t]here may be

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[100] Respondents' Factum Re: Determination of Two Questions, Pursuant to Rule 107 of the Federal Courts Rules, Regarding the Application of the Canadian Charter of Rights and Freedoms at 26, Amnesty International Canada v. Chief of the Defence Staff for the Canadian Forces (Fed. Ct. Jan. 18, 2008) (internal citations and quotations omitted).

[101] U.N. Human Rights Committee, Comments by the Government of Germany to the Concluding Observations of the Human Rights Committee, U.N. Doc. CCPR/CO/8-/DEU/Add.1, at 3 (Apr. 11, 2005).

[102] Droege, *supra* note 40, at 333-34; *see also* Dannenbaum Memo, *supra* note 2, at 11. Note that this position differs from the official position of the ICRC, which favors complementarity. *See* Kellenberger,

controversy as to which norm is more specialized in a concrete situation, and indeed 'an abstract determination of an entire area of law as being more specific towards another area of law is not, in effect, realistic.'"[103] Although "humanitarian law is generally the *lex specialis* in relation to human rights law," Droege argues that two situations might disrupt this hierarchy: non-international armed conflict and occupation.[104] In these situations, territorial control provides new relevance to HRL. This argument demonstrates how the rules for conflict resolution may be used in conjunction with each other. In this case, effective control becomes one factor for determining specificity.

Because the specificity approach lacks a consistent preemption rule, in contrast with the event-specific displacement and reverse event-specific displacement rules, it can be relatively difficult to identify the appropriate *lex specialis* for a given situation in advance. Inherent in the specificity approach is its dependence on facts—as circumstances change, so will the most specific law. The following paragraphs describe five factors that aid in determining whether HRL or IHL is more relevant to a given situation.

a. Wording and Content of Norms

As a starting point, it is important to look to the text of the rule of law that is being applied. When a norm uses terms that make it uniquely relevant to the conduct at hand, that rule may become the *lex specialis*. For this reason, much existing practice favors treating IHL as the *lex specialis* during instances of armed conflict. For example, in determining the proper treatment of combatants involved in an armed conflict, IHL frequently is treated as the *lex specialis* because, among other things, it distinguishes between combatants and civilians.[105] There is still room, however, for HRL to prevail in special circumstances, especially during occupation and non-international armed conflict. It is in these circumstances that the specificity approach is most likely to depart from the event-specific displacement approach outlined above.[106]

b. The Nature of the Norms in Question

In addition to the wording and content, it is important to consider the nature of the norms in question. For example, does the relationship of conflict exist between an HRL obligation and an IHL permission or does it exist between two obligations?[107] As noted above, in many cases IHL creates *permissions*—exceptions carved out to

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supra note 3.
[103] Droege, *supra* note 46, at 524.
[104] *Id.* at 527.
[105] *See, e.g.*, Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L./V/II.95, doc. 7 rev. (1997).
[106] Droege, *supra* note 46, at 523.
[107] *See supra* text accompanying notes 69-70.

accommodate military necessity (for example, permission to kill enemy combatants in the context of armed conflict). IHL also generates *obligations*, some of which may create protections that even go beyond those provided by HRL (for example, the obligation not to try POWs and to release them at the end of the armed conflict). Where IHL creates an *obligation* on a state, it is more likely to be the *lex specialis*. In contrast, whether an IHL permission is the *lex specialis* depends largely on facts on the other four factors.

c. Effective Control

In some cases, a state's level of effective control over the facts on the ground—beyond the threshold level necessary to trigger the applicability of HRL in the first place[108]—may lead to the conclusion that HRL is the more specifically tailored and relevant body of law. Conversely, when states exercise less control, IHL is more likely to be the appropriate body of law. One reason the scope of states' human rights obligations are limited during hostilities is their lack of authoritative control. In cases of armed conflict, a state operating outside its own sovereign territory frequently does not exercise sufficient control such that it is even possible for the state to respect human rights norms. The exigencies of war expand the scope of permissible action, while chaos, fear, and timing limit the capacity of states to meet obligations reasonably expected of them in other contexts, counseling in favor of applying IHL as the *lex specialis*.[109] On the other hand, when a state exercises effective control, this counsels in favor of a finding that HRL is the *lex specialis*.[110]

Bodies of the United Nations have been especially sensitive to the scenarios in which state actors exercise greater control, especially occupation.[111] The UN General Assembly cautioned the Soviet Union about its human rights obligations during its occupation of Hungary as early as 1956.[112] In 1967, during the Six Days War, the UN General Assembly reminded Israel that "essential and inalienable human rights should be respected even during the vicissitudes of war."[113] The unique nature of occupation may also explain why the ICJ changed the tenor of its jurisprudence on this question in *DRC v. Uganda*. [114] In that case, it did not identify IHL as the *lex specialis*—as it had in its *Nuclear Weapons* and *Wall* opinions—but instead emphasized its earlier statements

[108] *See supra* Section II.B.
[109] Droege, *supra* note 40, at 347; *see also* Dannenbaum Memo, *supra* note 2, at 11.
[110] Droege, *supra* note 46, at 527.
[111] *Id.* at 523.
[112] *Id.* at 504; *see* G.A. Res. 1312 (XIII), U.N. Doc. A/38/49 (Dec. 12, 1958).
[113] G.A. Res. 237, preambular para. 2, U.N. GAOR, 46th Sess., Supp. No. 49A, U.N. Doc. A/237/1967 (June 14, 1967).
[114] Droege, *supra* note 46, at 522.

on the applicability of human rights law to extraterritorial state activity during occupation.[115]

As the ICJ's opinion in *DRC v. Uganda* reveals, the effective control factor has gained traction as the rule for extraterritorial application of human rights.[116] It is important to note, however, that effective control factors into the equation differently when it is used to determine whether HRL preempts IHL than when it is used to determine whether HRL applies at all. The two applications dovetail in *DRC v. Uganda* because their underlying premise is the same: Territorial control increases the obligation of the state to fulfill its human rights obligations. Thus, according to some, HRL sometimes preempts IHL in zones of effective control. But the difference in the question—does HRL apply versus does HRL preempt—leads to a number of differences in the application of the rule.

First, in addition to being arguably dispositive outside the sovereign territory of a state in determining the applicability of HRL, when used as a component of the specificity approach, effective control is also a relevant consideration within the sovereign territory. While HRL presumptively *applies* within sovereign territory—thus requiring no effective control test—it does not necessarily *preempt* IHL in situations of a non-international armed conflict that occur entirely within the sovereign territory of a single state. A court applying the specificity rule of conflict resolution might consider—as the Inter-American Commission did in *Abella*[117]—the degree to which the government of that state exercises effective control over the hostile situation to determine whether HRL or IHL prevails within the territory.

Second, in determining the *lex specialis*, the presence of effective control is not decisive by itself. For example, prisoners of war may be within the effective control of a state, but extensive state practice indicates that they should not be charged with murder for lawful battlefield killings that states need not charge POWs in order to continue holding them.[118] In such cases, effective control should not cause states to strip POWs of their immunity by enforcing HRL trial norms.[119] Rather, IHL is clearly the *lex specialis* despite the presence of effective control. For this reason, as noted above, effective control may be more relevant to situations involving IHL norms granting states *permission* and less relevant when the IHL norms in question impose *obligations* on states, because the special obligations may be born of conditions other than military necessity.

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[115] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶ 216 (Dec. 4).
[116] *See supra* Section II.B; *see also* Hathaway et al., *supra* note 36.
[117] Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L./V/II.95, doc. 7 rev. (1997); *see also supra* nn. 90-93 and accompanying text (discussing *Abella*).
[118] *See infra* Section IV.B.
[119] *Id.*

This distinction has two important implications. First, it means that actors applying the specificity model must often consider additional factors beyond effective control to resolve the normative conflict between HRL and IHL. Second, it means that an actor need not accept the effective control rule for the extraterritorial application of human rights in order to accept the relevance of effective control for resolving conflicts between HRL and IHL. A decision-maker may use an entirely different rule to determine whether HRL applies but still look to effective control to determine whether applicable HRL prevails.

d. Expressions of Intent

The fourth consideration—expressions of intent—derives from Article 31 of the Vienna Convention on the Law of Treaties, which provides that treaties should be interpreted in light of their purpose, as expressed variously through agreements of the parties and instruments drawn up by individual parties in preparation for ratification.[120]

In the Inter-American Commission's decision in *Avilán v. Colombia*, for example, the Commission cited a previous expression of intent by the Government of Colombia to help justify a decision not to apply a law of war framework to extra-judicial killing, but rather to apply human rights law norms. The Commission explained:

> [T]here are additional elements that lead the Commission to consider that the victims were defenseless when assassinated by members of the police. For example, the judgment of the Administrative Tribunal of Cundinamarca, of June 3, 1993, held that the State was responsible for the death of four of the individuals and ordered that compensation be paid, rejecting the argument of legitimate action in combat . . . .[121]

Hence, the Colombian state had previously indicated its intent to consider the relevant conduct outside the law of war framework, and the Inter-American Commission used this expression of intent to come to its own decision.

e. State Practice

Finally, Article 31(3)(b) of the Vienna Convention of the Law of Treaties directs interpreters to "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." State practice under the various instruments of HRL and IHL help to reveal their intended scope and

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[120] Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

[121] Avilán v. Colombia, Case 11.142, Inter-Am. Comm'n H.R., Report No. 26/97, OEA/Ser.L./V/II.95, doc. 7 rev. ¶ 136 (1997).

relationship. In that way, state practice may serve to create a customary law of *lex specialis*.[122]

For example, HRL requires states (with narrow exceptions not relevant here) to bring any person deprived of their liberty to trial for a valid criminal offense within a reasonable period,[123] while IHL permits states to intern enemy combatants as prisoners of war for the duration of hostilities and prohibits states from subjecting them to trial except for war crimes or for crimes committed during internment. In resolving this conflict under the specificity rule, the "effective control" factor would suggest that, since prisoners of war are under the detaining state's control, HRL should govern. However, there is a wealth of state practice indicating that IHL, not HRL, properly governs the detention of enemy combatants without trial during international armed conflicts. Indeed, the provisions of the Third Geneva Convention on the detention of prisoners of war during international armed conflict are generally recognized as customary international law.[124] Thus state practice—together with the nature of the norms in conflict (an IHL obligation and an HRL obligation)—suggest that IHL is the *lex specialis*, even though the state exercises "effective control" over the enemy combatant.

D. Recommendation

The specificity rule of conflict resolution is the most nuanced approach to a complex problem. Given the uncertain boundaries of armed conflict in modern warfare, the wholesale abrogation of HRL required by the displacement model is too blunt an instrument. The complementarity model is better suited to protecting human dignity in all its forms—which is, after all, the shared purpose of both IHL and HRL. But it mistakenly assumes that the two bodies of law are never in deep conflict and are always reconcilable. IHL and HRL are sometimes in unavoidable conflict. Event-specific displacement denies the reality that HRL may simply be better designed to regulate certain hostile situations. Instead, the specificity rule provides, *a priori*, a list of criteria to inform the selection of a *lex specialis* on a case-by-case basis.

The specificity rule is not without its flaws. Its greatest strength is also its greatest weakness: the numerous considerations add nuance but also make the rule difficult to apply absent specific contextual facts. Although very useful for ex post review of conduct during armed conflict, the rule complicates ex ante decision-making, particularly on the ground. The flexibility of the model also might leave it open to manipulation and abuse. That said, there are two mitigating factors to counter these objections.

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[122] For more on the expressive influence of court jurisprudence, *see* Droege, *supra* note 46, at 542-46.
[123] *See infra* Subsection III.C.3.e.; *supra* Section IV.B.
[124] *See* ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 31, at 344-45.

First, most HRL norms are derogable in times of emergency.[125] Truly unavoidable relationships of conflict between HRL and IHL are discrete, predictable, and rare. Moreover, because relationships of conflict may be accounted for ex ante, some norms—such as the norms regulating treatment of POWs—are clearly identifiable as the *lex specialis* by their design. Only in a few, limited cases will it be difficult to predict which body of law will provide the *lex specialis*. In these cases, it is not clear that other models for resolving conflict between the two bodies of law serve ex ante decision-makers any better. For example, the displacement model is straightforward once one identifies the zone of armed conflict, but that preliminary inquiry is highly complicated and becomes extremely high-stakes.

Second, using the conflict resolution model as a guide, government policy-makers can identify foreseeable relationships of conflict.[126] These individuals are well-positioned to apply the specificity rule with all its complexities and convert their conclusions into manuals, like the Uniform Code of Military Justice. That way, on-the-ground decision-makers can apply rules that have already been run through the conflict resolution model. This underscores the importance of carefully examining these two bodies of law before making critical policy decisions. This kind of approach can achieve predictability, protection of human dignity, and decisiveness on the battlefield.

IV. IDENTIFYING THE STAKES: AREAS OF CONFLICT BETWEEN HRL AND IHL NORMS

Having described three basic models for the relationship between HRL and IHL when both bodies of law potentially apply, this Part explores the stakes of that choice by examining several areas of conflict between HRL and IHL, that is, areas of law in which the two bodies of law have different or conflicting norms. While the areas of law examined here—the right to life, detention and the right to trial, women's rights, and the rights of free expression, association, and movement—attempt to cover the most important and controversial areas of conflict between HRL and IHL, this Part is intended to be illustrative rather than exhaustive. For each area of law, we lay out the relevant HRL, the relevant IHL, and the ways in which each of the models outlined in Part III of this report would go about resolving any tensions and conflicts between those bodies of law. For purposes of this discussion, we focus on the HRL obligations imposed by customary international law, the ICCPR, and CEDAW.[127]

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[125] *See infra* Part IV.

[126] *See infra* Part IV.

[127] We recognize that the U.S. representatives have taken the position that the ICCPR does not apply extraterritorially. That view, however, is not accepted by the Human Rights Committee and is generally regarded as an outlier position. *See, e.g.*, Human Rights Comm., Comments on the United States of America, ¶ 284, U.N. Doc. CCPR/C/79/Add.50 (Oct. 3, 1995) ("The Committee does not share the view expressed by the Government that the Convention lacks extraterritorial reach under all circumstances."). Moreover, the ICCPR includes several norms that create potential conflicts with IHL norms. In addition,

As a preliminary matter, it is important to note that, with the exception of the obligations to protect the right to life under the ICCPR and women's rights under CEDAW, all of the HRL obligations discussed in this Part are derogable. Derogation enables states to temporarily abrogate an obligation under exceptional emergency circumstances.[128] Thus, where permitted and accepted by courts, derogation can resolve conflicts between HRL and IHL, since the HRL obligation ceases to apply. In order to derogate, however, a state must notify other parties to the relevant human rights instrument and must explain from what provisions it is derogating and its reasons for doing so.[129] This public procedure significantly raises the political costs of derogation, and also implicitly acknowledges that HRL would apply and that the actions taken might violate HRL if not for the derogation. States, however, generally either maintain that they are in compliance with HRL or avoid calling attention to the fact that they are not by avoiding publicly announced derogations. Accordingly, states very rarely formally derogate from their HRL obligations. The remainder of this Part will assume that the state has not derogated from its relevant HRL obligations. However, unless the discussion notes that an obligation is non-derogable, derogation remains an option for resolving any of the conflicts discussed here.

A. The Right to Life

One of the clearest areas of conflict between HRL and IHL involves the right to life. IHL permits state agents to intentionally kill combatants and incidentally kill civilians in circumstances that HRL does not countenance. Some of the conflicts between these legal frameworks can be resolved by reading ambiguous terms in human rights instruments to incorporate standards from IHL during armed conflict, but at bottom HRL and IHL give fundamentally different answers to the question as to when state agents can use lethal force.

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we address CEDAW despite the fact that the United States has not ratified the Convention. We do so because, (1) Afghanistan has ratified CEDAW, and it therefore arguably applies to U.S. activities in Afghanistan conducted with the Afghan government's consent; (2) some of the norms embodied in CEDAW are considered by some to be binding as customary international law; and (3) CEDAW remains before the Senate.

[128] *See, e.g.*, ICCPR, *supra* note 33, art. 4 ("In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.").

[129] *See, e.g.*, *id.* art. 4(3) ("Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.")

The right to life is enshrined in Article 6 of the ICCPR, which provides, "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[130] This obligation is non-derogable.[131] The use of the word "arbitrarily" in this provision clearly implies that lethal force is permitted under some circumstances, but the text of the ICCPR itself provides little guidance on what those circumstances are. An Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation[132] described the basic HRL framework for the use of lethal force as "the law enforcement model," which has "two main features":

> First, the use of potentially lethal force is restricted to a narrow range of circumstances. Likewise, the use of potentially lethal force must be proportionate; it must be limited to addressing the threat which is posed. The other main feature of the law enforcement model is that, where possible, State officials must arrest rather than kill persons who are posing a threat. Likewise, States must plan their operations so as to maximize the chances of being able to effect an arrest.[133]

In other words, under HRL, the use of lethal force is limited to situations in which it is necessary to address a specific threat that cannot be neutralized through arrest.

IHL, on the other hand, allows far wider use of lethal force. As codified in the Geneva Conventions and in customary international law, IHL permits state agents to target and kill enemy combatants who have not laid down their arms or been placed *hors de combat*. IHL also permits states to target civilians who are directly participating in hostilities as if they were combatants.[134] Unlike under HRL, enemy combatants do

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[130] *Id.* art. 6.
[131] *Id.* art. 4(2).
[132] The Expert Meeting was organized by the University Centre for International Humanitarian Law, Geneva, and included a dozen prominent legal practitioners and academics. The participants were William Abresch, Director, Extra-Judicial Executions Program, Center for Human Rights and Global Justice, New York University School of Law; Yuri Boychenko, Head of Division for Human Rights and Humanitarian Affairs, Permanent Mission of the Russian Federation, Geneva; Knut Dörmann, Deputy Head of the Legal Division, ICRC, Geneva; Professor Louise Doswald-Beck, Director, University Centre for International Humanitarian Law, Graduate Institute of International Studies, Geneva; Frederico Andreu Guzman, Senior Legal Advisor, International Commission of Jurists, Geneva; Professor Françoise J. Hampson, University of Essex, Member of the UN Sub-Commission on Human Rights, Governor of the British Institute of Human Rights; Professor Wolff Heintschel von Heinegg, Europa Universität Viandrina, Frankfurt (Oder); Professor David Kretzmer, The Hebrew University of Jerusalem; Colonel Philip McEvoy, Legal Advisor, Army Legal Services, United Kingdom; Jelena Pejic, Legal Advisor, ICRC Legal Division, Geneva; Steven Solomon, Principal Legal Officer, World Health Organization, Geneva, former Deputy Legal Advisor, U.S. Mission, Geneva; and Wilder Tayler, Legal Director, Human Rights Watch. Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation, University Centre for International Humanitarian Law, Geneva, Switz., Sept. 1-2, 2005 at 1, 43, http://www.adh-geneve.ch/pdfs/3rapport_droit_vie.pdf, at 1, 43.
[133] *Id.* at 8.
[134] *See* AP I, *supra* note 31, art. 51(3).

not have to pose a specific threat at the time they are targeted, nor do state agents have to attempt to arrest them before killing them. Moreover, IHL also permits state agents to kill non-combatant civilians in the course of attacking enemy combatants as long as the attack is aimed at a legitimate military objective and the resulting harm to civilians is necessary and proportionate to that objective.[135] In other words, IHL allows the use of lethal force subject to the principles of: (1) distinction, i.e., distinguishing between enemy combatants and civilians; (2) military necessity, i.e., directing attacks only against legitimate military objectives; and (3) proportionality, i.e., refraining from conducting attacks that would cause disproportionate harm to civilians.[136]

The core tensions between HRL and IHL around the right to life thus concern the type of threat that individuals must pose before they can be targeted, whether the state has a duty to attempt to arrest the person before resorting to lethal force, and the degree to which the attack can incidentally harm untargeted civilians. The three models described in Part IV of this report—displacement, complementarity, and conflict resolution—provide different approaches to resolving these tensions.

The displacement model asks simply whether the relevant conduct is part of an armed conflict or not. If it is armed conflict, then IHL applies, and if not, then the HRL "law enforcement model" applies. The ICJ's *Nuclear Weapons* Advisory Opinion can be read to follow this approach in the right to life context, since it explains that "whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life . . . can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the [ICCPR] itself."[137]

The complementarity model, on the other hand, would proceed by denying that there is any irresolvable conflict between HRL and IHL. The ICJ's *Nuclear Weapons* Advisory Opinion can also be read to adopt this approach, since it asserts that the ICCPR applies during armed conflict, but that during armed conflict "[t]he test of what is an arbitrary deprivation of life [under Article 6 of the ICCPR] . . . falls to be determined by the applicable *lex specialis*," namely, IHL.[138] Under this approach, "humanitarian law is to be used to interpret a human rights rule, and, conversely in the context of the conduct of hostilities, human rights law may not be interpreted differently

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[135] *See id.* art. 51(5)(b).

[136] *See, e.g.*, W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EUR. J. INT'L L. 86, 94-95 (1998).

[137] Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, ¶ 25 (July 8) (Advisory Opinion). As explained in Sections III.A & III.C, we believe that the ICJ's *Nuclear Weapons* Advisory Opinion is probably characterized as adopting a pure displacement or event-specific displacement approach. *See supra* notes 41-43, 69-73 and accompanying text.

[138] *Nuclear Weapons*, 1996 I.C.J. at ¶ 25.

from humanitarian law."[139] Thus, because the right to life is articulated in the ICCPR using an ambiguous term—"arbitrarily"—the displacement and complementarity models can reach the same practical answer as to what legal framework governs the use of lethal force: IHL.[140]

The conflict resolution model would approach the problem differently, giving effect to both legal frameworks whenever possible and choosing one to the exclusion of the other in cases of conflict. The Israeli Supreme Court, for example, in its opinion in the *Targeted Killings Case* employed an approach akin to the event-specific displacement version of the conflict resolution model, applying IHL in all cases of conflict. When considering whether a state must attempt to arrest a civilian who is directly participating in hostilities before using lethal force against him, the High Court found a gap in the applicable IHL and filled in that gap by requiring the state to abide by the HRL duty to attempt arrest.[141] However, in cases where arrest is impracticable, the High Court found that IHL applied, permitting the state to engage in targeted killing of civilians directly participating in hostilities as long as the attacks do not disproportionately harm other civilians.[142] The Inter-American Commission, on the other hand, has followed an approach that tracks the specificity version of the conflict resolution model. Thus, in *Abella* the Inter-American Commission applied IHL to Argentina's killing of participants in an armed attack on an army barracks,[143] but it applied HRL to Colombia's killing of members of "marginal groups" engaged in mere "criminal activities."[144]

B. Detention and the Right to Trial

A second important area of conflict between HRL and IHL concerns detention and the right to trial. There are several interlocking conflicts between these two bodies of law in this area. Most importantly, IHL permits states to intern POWs for the duration of hostilities and prohibits states from trying them for lawful combat activities, while HRL requires all individuals deprived of their liberty to be brought to trial, with only limited exceptions. IHL also permits states to intern certain civilians without trial for security reasons, which HRL would prohibit. In addition, IHL allows certain detention-related disputes to be adjudicated by administrative tribunals, while HRL

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[139] Ray Murphy, *United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers*, 14 CRIM. L. FORUM 153, 158 (2003).
[140] *See also* Dannenbaum Memo, *supra* note 2, at 7 (explaining that in the context of the right to life, the displacement and complementarity models can converge).
[141] *Targeted Killings Case*, *supra* note 78, ¶ 40.
[142] *Id.*
[143] Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L./V/II.95, doc. 7 rev. (1997).
[144] Inter-Am. Comm'n H.R., Third Report on the Human Rights Situation in Colombia, Chapter IV: Violence and Violations of International Human Rights Law and International Humanitarian Law, ¶ 213, OEA/Ser.L/V/II.102, Doc. 9 rev. 1 (Feb. 26, 1999).

requires a judicial hearing. Finally, HRL guarantees defendants the right to court-appointed counsel, while IHL does not.

Turning first to HRL, human rights instruments provide all individuals detained by the state with robust rights to judicial review. Article 9 of the ICCPR provides that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[145] In general, the "proceedings before a court" must take the form of a criminal trial, although detention without trial is permissible for narrow reasons pending trial, for reasons related to the detainee's physical or mental health, and for reasons related to controlling immigration.[146] Where the proceedings take the form of a criminal trial, accused individuals have the right to a public hearing before an impartial tribunal, the right to be informed of charges against them,[147] the right to defend themselves,[148] the right to an interpreter,[149] the right to cross examine witnesses,[150] the right to be presumed innocent until proven guilty,[151] and the right to appeal.[152] When hearings cannot be public for reasons of public order, morals, or national security, judgments must be made public (except in the case of juveniles).[153] Accused individuals also have the right "[to] have adequate time and facilities for the preparation of [their] defence and to communicate with counsel of [their] own choosing,"[154] and they must be appointed a defender if they cannot afford one.[155] They also must be "tried without undue delay."[156] Detention under HRL is thus focused on criminal law enforcement, with limited exceptions for public safety and immigration.

States' authority to detain under IHL is generally broader than under HRL, although the scope of that authority depends on whether the detainee is a POW or a civilian. Turning first to POWs, when enemy combatants are captured, IHL permits the state to intern[157] them as POWs without trial for the duration of hostilities. However,

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[145] ICCPR, *supra* note 33, art. 9.
[146] *See* Inter-Am. Comm'n H.R., Report on Terrorism and Human Rights, ¶ 118, 124, OEA/Ser.L./V/II.116, doc. 5 rev. 1 corr. (Oct. 22, 2002) (interpreting nearly identical provisions of the American Declaration on Human Rights and the American Convention on Human Rights and noting the similarity to the provisions of the ICCPR).
[147] ICCPR, *supra* note 33, art. 14(3)(a).
[148] *Id.* art. 14(3)(d).
[149] *Id.* art. 14(3)(f).
[150] *Id.* art. 14(3)(e).
[151] *Id.* art. 14(2).
[152] *Id.* art. 14(5).
[153] *Id.* art. 14(1).
[154] *Id.* art. 14(3)(b).
[155] *Id.* art. 14(3)(d).
[156] *Id.* art. 14(3)(c).
[157] Internment is a form of deprivation of liberty distinct from and less harsh than detention. The ICRC's commentary to the Third Geneva Convention explains that "[t]o intern a person is to put him in a certain area or place—in the case of prisoners of war, usually a camp—and to forbid him to leave its limits. The

POWs need only give their name, rank, serial number, and date of birth in response to any questioning,[158] and they must be released at the end of hostilities.[159] POWs also enjoy immunity for lawful combat activities, and therefore may not be tried for murder or similar civil crimes.[160] POWs may be punitively detained during or after hostilities only upon conviction for a war crime or for a crime committed during internment, and states must provide accused POWs with the basic guarantees of due process.[161] Where an individual's combatant status is unclear, a competent tribunal (not necessarily a court) must determine whether the individual qualifies as a POW.[162] Civilians, on the other hand, have rights against detention under IHL that are simultaneously narrower and broader than POWs. States may intern aliens within their territory and civilians residing in occupied territory only where "security . . . makes it absolutely necessary"[163] or for "imperative reasons of security."[164] However, unlike POWs, interned civilians are entitled to have the substantive basis for their internment reviewed by a competent tribunal (again, not necessarily a civilian court).[165] For civilians residing in occupied territory, the penal code of the occupied state presumptively remains in place, but the occupying state may supplement that code with its own penal laws on a prospective basis.[166] Unlike combatants, civilians enjoy no immunity from ordinary penal laws, and therefore may be tried and incarcerated for murder or other crimes to the extent that they participate in hostilities, subject to basic procedural guarantees. Those procedural guarantees, however, do not include the right to appointed counsel,[167] and the tribunal hearing the case may be a military rather than a civilian court.[168]

The central conflicts between HRL and IHL surrounding detention thus concern states' ability to intern POWs and civilians without trial, the extent to which detention or internment must be subject to review by a court, and, somewhat less importantly, whether civilians in occupied territory are entitled to appointed counsel if tried for a crime.

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concept of internment should not be confused with that of detention. Internment involves the obligation not to leave the town, village, or piece of land, whether or not fenced in, on which the camp installations are situated, but it does not necessarily mean that a prisoner of war may be confined to a cell or a room. Such confinement may only be imposed in execution of penal or disciplinary sanctions . . . ." ICRC, COMMENTARY ON THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF THE PRISONERS OF WAR 178 (Jean S. Pictet ed., 1960).

[158] GC III, *supra* note 23, art. 2.

[159] *Id.* art. 118.

[160] *Id.* art. 99.

[161] GC III, *supra* note 23, at arts. 95, 96, 99, 103-107; AP I, *supra* note 31, art. 75(4)(d); AP II, *supra* note 31, art. 6(2).

[162] GC III, *supra* note 23, art. 5.

[163] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 42, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

[164] *Id.* art. 78.

[165] *Id.* arts. 43, 78.

[166] *Id.* arts. 64-67.

[167] *See id.* arts. 71-74.

[168] *Id.* art. 66.

The displacement model would resolve these conflicts by asking simply whether or not there is an armed conflict. If an armed conflict is present, then POWs and civilians may be interned without trial, POWs may not be tried for their lawful combat activities, disputes around combatant status and the basis for civilian internment may be adjudicated by administrative or military tribunals, and civilians in occupied territory need not be provided with appointed counsel. If no armed conflict is present, then all detainees must be brought to trial before a court (subject to the exceptions for public safety and immigration), there is no immunity for combat activities, and criminal defendants must be afforded appointed counsel.

The complementarity model would proceed by attempting to reconcile the requirements of HRL and IHL. With regard to appointed counsel, since IHL does not expressly provide that occupying states have no obligation to provide appointed counsel, this model would be expected to resolve that conflict by requiring the appointment of counsel. Similarly, no provision of IHL would be violated by having combatant status disputes and civilian internee cases heard by a judicial instead of an administrative tribunal, as HRL would require.[169] The complementarity model, however, cannot effectively deal with the truly irreconcilable conflict over whether or not states must bring all detained individuals to trial. IHL provides that POWs cannot be brought to trial, but HRL provides that they must; IHL provides that civilians may be interned for security reasons, but HRL provides that they may not. These rules cannot be easily harmonized.

The conflict resolution model would take the same approach as the complementarity model in cases where the HRL and IHL norms are in a relationship of interpretation, and would then resolve cases of true conflict according to the chosen rule of conflict resolution. Accordingly, the conflict resolution model would, like the complementarity model, provide appointed counsel and would adjudicate all disputes over the basis for detention before judicial rather than administrative tribunals. As for internment of POWs and civilians without trial, the event-specific displacement version

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[169] The Inter-American Commission suggested its support for this approach in its Report on Terrorism and Human Rights:

> Notwithstanding the existence of these specific rules and mechanisms governing the detention of persons in situations of armed conflict, there may be circumstances in which the supervising mechanisms under international humanitarian law are not properly engaged or available, or where the detention or internment of civilians or combatants continue [sic] for a prolonged period of time. Where this occurs, the regulations and procedures under international humanitarian law may prove inadequate to properly safeguard the minimum standards of treatment of detainees and the supervisory mechanisms under international human rights law, including *habeas corpus* and *amparo* remedies, may necessarily supercede international humanitarian law in order to ensure at all times effective protection of the fundamental rights of detainees.

Inter-Am. Comm'n H.R., *Report on Terrorism and Human Rights*, *supra* note 146, ¶ 14.

of the conflict resolution model would apply IHL and allow internment without trial. The reverse displacement model—which some tribunals have followed for jurisdictional reasons—would instead apply HRL and demand that all detainees be brought to trial.

The specificity version of the conflict resolution model, would almost certainly regard IHL as the more specific law governing captured enemy combatants. After all, IHL has numerous detailed provisions on the internment of POWs that both expand and restrain state power relative to the peacetime baseline, and the history of state practice applying these rules is sufficiently robust to render them binding as customary international law.[170] The specificity approach would therefore likely grant POWs immunity from trial and allow their internment for the duration of hostilities. As for the internment of civilians (including those directly participating in hostilities), the specificity model would require a more nuanced, contextual inquiry into whether IHL governs (thereby allowing more prolonged detention for reasons of necessity, use of alternative tribunals, etc.) or whether HRL governs (thereby requiring a prompt hearing and access to the civilian justice system). This nuanced inquiry would turn on the degree of control exercised by the state and state practice with regard to civilian internment.

C. Women's Rights

A third potential area of conflict between HRL and IHL concerns women's rights. CEDAW, on the one hand, obligates state parties (which do not presently include the United States) to "take all appropriate measures" to eliminate discrimination and guarantee legal, social, and economic equality to women.[171] IHL, on the other hand, focuses more narrowly on protecting women from sexual assault and protecting them in their role as mothers. While the protections under HRL and IHL are largely compatible, conflicts may arise during armed conflict due to an occupying state's obligation under IHL to preserve local law and due to states' diminished capacity to guarantee the degree of social equality envisioned by HRL in the context of war.

HRL broadly provides for non-discrimination and equality for women in all fields of society. CEDAW requires states to "accord to women equality with men before the law,"[172] and to "take all appropriate measures" to eliminate discrimination and ensure equal rights to vote, to participate in government, to participate in public associations and organizations,[173] to education,[174] to healthcare,[175] to employment and

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[170] *See* ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 31, at 344-51.
[171] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].
[172] *Id.* art. 15.
[173] *Id.* arts. 7-8.
[174] *Id.* art. 10.
[175] *Id.* art. 12.

economic opportunity,[176] and to the benefits and burdens of marriage.[177] CEDAW does not explicitly prohibit violence against women, but states may have an obligation to prevent violence against women as a matter of customary HRL.[178] While CEDAW has no derogation provision, the rights therein are generally articulated at a relatively high level of abstraction—for example, Article 12 provides that "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services."[179] Moreover, the language of "tak[ing] all appropriate measures" suggests that states have some leeway in exactly how they implement their obligations.

Under IHL, women enjoy the same protections that apply to all persons during armed conflict, but there are also a number of provisions that protect women exclusively.[180] Under the Geneva Conventions, women must "be treated with all consideration due to their sex."[181] This entails a right against discrimination—under the Third Geneva Convention, for example, female prisoners of war must "in all cases benefit from treatment as favourable as that granted to men"[182] and may not be sentenced to a more severe punishment than men in similar circumstances.[183] Beyond non-discrimination, IHL also has provisions giving women special protection due to their reproductive roles and vulnerability to sexual assault.[184] Numerous articles in the Fourth Geneva Convention and Additional Protocol I expressly single out mothers and pregnant women for special consideration and protection.[185] The Fourth Geneva Convention and Additional Protocol I also provide that women must be protected from sexual violence, including rape, assault, and forced prostitution.[186] Female POWs also are given special consideration regarding privacy: they may not be housed with or searched by men.[187] In addition, even beyond the Geneva Conventions, the UN Security Council recently has adopted a series of resolutions aimed at protecting women from

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[176] *Id.* arts. 11, 13, 14.
[177] *Id.* art. 16.
[178] *See* BONITA MEYERSFELD, DOMESTIC VIOLENCE AND INTERNATIONAL LAW 6 (2010).
[179] CEDAW, *supra* note 171, art. 12.
[180] *See* ICRC, ADDRESSING THE NEEDS OF WOMEN AFFECTED BY ARMED CONFLICT: AN ICRC GUIDANCE DOCUMENT, ANNEX TO THE GUIDANCE DOCUMENT: GENERAL AND SPECIFIC PROTECTION OF WOMEN UNDER INTERNATIONAL HUMANITARIAN LAW (2004).
[181] Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field art. 12(4), *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature Aug. 12, 1949, art. 12(4), 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II].
[182] GC III, *supra* note 23, art. 14.
[183] *Id.* art. 88.
[184] Judith G. Gardam, *Women, Human Rights and International Humanitarian Law*, 324 INT'L REV. RED CROSS 421, 421-22 (1998).
[185] GC IV, *supra* note 163, arts.14, 16, 23, 50, 91; AP I, *supra* note 31, arts. 8(a), 70(1), 76.
[186] GC IV, *supra* note 163, art. 27; AP I, *supra* note 31, art. 76.
[187] GC III, *supra* note 23, arts. 25, 29, 97; GC IV, *supra* note 163, arts. 76, 85, 97, 124; AP I, *supra* note 134, art. 75(5); AP II, *supra* note 161, art. 5(2)(a).

gender-based violence during armed conflict and at providing women a role in conflict-resolution and peace-making.[188] At the same time, however, the Fourth Geneva Convention establishes that occupying states have an obligation to preserve the penal law of the occupied state and to allow local tribunals to continue to operate.[189]

The differences between HRL and IHL regarding women's rights thus center around (1) the broader scope of protection that HRL provides compared to IHL, (2) occupying states' obligation under IHL to preserve local law and local courts even if they discriminate against women in contravention of HRL, and (3) states' diminished capacity to guarantee the kind of social equality envisioned by HRL during armed conflict.

The displacement model would resolve each of these conflicts in favor of IHL in all cases during armed conflict. While in an armed conflict situation, the broader protections of HRL would not apply, even when they are not incompatible with the narrower protections afforded by IHL. Similarly, occupying states' obligation to preserve local law and local courts would supersede any HRL duty of non-discrimination, and any diminished state capacity to guarantee equality would be moot, since there would be no HRL obligation to take appropriate measures to ensure social equality.

The complementarity approach would attempt to harmonize a state's HRL and IHL obligations. Because the broader protections afforded by HRL are not incompatible with IHL's narrower and more specific protections, this approach would apply both sets of obligations. As for occupying states' duty to protect local law and local courts, the complementarity approach might proceed by noting that CEDAW only obligates states to "take all appropriate measures" to guarantee equality; accordingly, measures that would violate the Geneva Conventions could be considered not to be "appropriate," and therefore not mandatory under CEDAW. The complementarity approach might also exploit the leeway implicit in the word "appropriate" in addressing states' diminished capacity in wartime, concluding that CEDAW only requires states to eliminate discrimination against women to the extent that they have the effective capacity to do so. Such an approach, in which HRL and IHL are taken to be completely reconcilable, would align with developments in HRL and IHL over the past two decades. During this time, IHL has come to encompass more protections for women's rights, and HRL has begun to acknowledge the risk that women face from gender-based violence both in and out of conflict settings.[190] The Vienna Declaration adopted by the United Nations World

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[188] *See* S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000); S.C. Res. 1820, U.N. Doc. S/RES/1820 (June 19, 2008); S.C. Res. 1888, U.N. Doc. S/RES/1888 (Sept. 30, 2009).

[189] GC IV, *supra* note 163, art. 64.

[190] The UN General Assembly adopted the Declaration on the Elimination of Violence Against Women in 1993, "expressly recogniz[ing] that women in situations of armed conflict are especially vulnerable to violence." The UN has also appointed a Special Rapporteur on violence against women; her mandate

Conference on Human Rights recognized the fundamental convergence between these two bodies of law, declaring that "violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of human rights and humanitarian law."[191]

The conflict resolution model would reach the same ultimate conclusions as the complementarity model in this area of law. After all, the conflict resolution model only requires resort to a rule of conflict resolution when there is a true conflict between the relevant HRL and IHL norms. In this case, all of the relevant HRL and IHL norms can be seen to be in a relationship of interpretation, such that it is possible to apply each without excluding the validity and applicability of the other. The overlap between the complementarity and conflict resolution models in the area of women's rights illustrates that, to the extent that HRL and IHL norms do not conflict, the conflict resolution model incorporates the "relationship of interpretation" mode of analysis from the complementarity model within it.

D. The Rights to Freedom of Expression, Association, and Movement

The rights to free expression, association, and movement provide an additional potential area of conflict between HRL and IHL. While conflicts may arise, however, the HRL and IHL norms relating to these rights are largely reconcilable due to limitations on the scope of the rights under the ICCPR and due to the Fourth Geneva Convention's baseline concern for the fundamental rights of civilians residing in occupied territory.

The rights to free expression, association, and movement are all protected in the ICCPR. Article 19 guarantees "the right to hold opinions without interference" and "the right to freedom of expression"; Article 21 guarantees "the right of peaceful assembly"; and Article 12 guarantees "the right to liberty of movement and freedom to choose [one's] residence." These rights, however, are not absolute under the ICCPR. Each may be restricted in the interest of "national security, public order (ordre public), public health or morals or the rights and freedoms of others []."[192]

IHL has a number of provisions that touch on the rights to free expression, association, and movement. Turning first to free expression, IHL's definition of a "military objective"—"those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction,

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includes situations of armed conflict. At the 1995 Fourth UN World Conference on Women in Beijing, states "recognized the seriousness of armed conflict and its impact on the lives of women." *See* Gardam, *supra* note 184, at 421-22.

[191] *Id.* (quoting the 1993 Vienna Declaration and Programme of Action).

[192] ICCPR, *supra* note 33, art. 12(3). Articles 19 and 21 contain nearly identical limitations, with only slight variations in phrasing.

capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage"[193]—is clearly broad enough to encompass media and communications infrastructure, rendering important means of expression legitimate targets of military attack. In addition, the Fourth Geneva Convention permits an occupying state to supplement local law with its own penal laws to the extent that they are "essential to enable the Occupying Power . . . to maintain the orderly government of the territory[] and to ensure the security of the Occupying Power . . . ."[194] This authority does not extend so far as to allow an occupying state to punish "opinions expressed before the occupation,"[195] but that very limitation suggests that an occupying state may punish opinions expressed during the occupation. This same power to establish new laws also leaves room for an occupying state to restrict the right of free association and assembly. As for the right to freedom of movement, the commentary on Article 27 of the Fourth Geneva Convention explicitly recognizes that "the freedom of movement of civilians of enemy nationality may certainly be restricted, or even temporarily suppressed, if circumstances so require."[196] That same commentary notes, however, that "the regulations concerning occupation and those concerning civilian aliens in the territory of a Party to the conflict are based on the idea of the personal freedom of civilians remaining in general unimpaired."[197]

Thus, to varying degrees, IHL explicitly or implicitly permits states to restrict the rights of freedom of expression, association, and movement recognized by HRL during armed conflict.

The displacement model would resolve these conflicts by allowing states to restrict those rights to the full extent allowed by IHL, with HRL completely displaced within the zone of armed conflict.

The complementarity model would likely proceed by noting that each of these rights is limited in HRL itself by considerations of national security and public order, considerations that are unquestionably triggered during armed conflict. Similarly, the commentary to Article 27 of the Fourth Geneva Convention demonstrates that while IHL permits these rights to be restricted, it starts from the baseline proposition that they should be honored where possible. In this way, the two bodies of law can be interpreted so that their respective norms are compatible and mutually reinforcing.

The conflict resolution model would follow the same approach as the complementarity model in this instance. Because the relevant norms are in a

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[193] AP I, *supra* note 31, art. 52(2).
[194] GC IV, *supra* note 163, art. 64.
[195] *Id.* art. 70.
[196] ICRC, COMMENTARY ON THE FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIANS IN TIMES OF WAR 202 (Jean S. Pictet ed., 1960).
[197] *Id.*

relationship of interpretation rather than a relationship of conflict, the conflict resolution model need not employ a rule of conflict resolution here.

V. CONCLUSION

This report has presented an overview of approaches to the relationship between international human rights law and international humanitarian law in the context of armed conflict. It presented three possible models: displacement, in which IHL displaces HRL entirely in the zone of armed conflict; complementarity, in which HRL and IHL both apply in armed conflict, and are interpreted harmoniously; and conflict resolution, in which HRL and IHL may both apply in armed conflict, and may be interpreted harmoniously, but—in situations in which HRL and IHL norms governing an event or particular issue conflict—an additional analysis must be undertaken to determine the applicable body of law. There are, in turn, three conflict resolution rules that could be applied in the conflict resolution model: event-specific displacement, in which IHL always applies as *lex specialis* in cases of conflict between HRL and IHL; reverse event-specific displacement, in which HRL always applies in cases of conflict, as a jurisdictional matter; and specificity, in which either HRL or IHL may apply in cases of conflict, depending on which is deemed most specific to the given situation. The report also applied these various approaches to several areas of potential conflict between HRL and IHL, including the right to life, detention and the right to trial, women's rights, and the rights of free speech, expression, and movement.

The report ultimately concludes that the conflict resolution model with a specificity rule for conflict resolution is the most normatively defensible approach to the relationship between HRL and IHL. The approach allows for highly nuanced determinations as to whether particular conduct in the context of armed conflict may be governed best by HRL or IHL norms when the two conflict, while also recognizing—as the complementarity model does—that both sets of norms may productively inform each other in the many situations in which they do not conflict. The approach is also consistent with the jurisprudence of a range of international tribunals and the positions of U.S. allies.

This report began with a summary of the evolving U.S. Government position on the relationship between HRL and IHL, noting that—while the U.S. Government has generally applied a displacement approach since the events of September 11—it may recognize space to apply HRL norms in some situations in the context of armed conflict, as it implicitly did before September 11. In practice, the conflict resolution model with a specificity rule for conflict resolution need not depart dramatically from the recent U.S. Government approach. The specificity approach is rooted in the same *lex specialis* principles as the displacement approach, and it recognizes that IHL is most often the body of law most specifically tailored to armed conflict situations. Yet, the

conflict resolution model also recognizes that total abrogation of HRL in a zone of armed conflict is too blunt an instrument to accomplish the most basic goal of both HRL and IHL: to effectively protect fundamental human dignity.