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RETHINKING THE SCOPE OF APPLICATION OF INTERNATIONAL HUMANITARIAN LAW

AND ITS PLACE IN THE INTERNATIONAL LEGAL SYSTEM

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Rethinking the Scope of Application of International Humanitarian Law and its Place in the International Legal System

T.D. Gill[1]

Abstract: This essay explores some of the unsettled issues and certain issues which are arguably not settled satisfactorily relating to the material, personal, geographical and temporal scope of application of international humanitarian law and presents some arguments in favour of rethinking certain elements relating to that scope of application and the function and relationship of IHL to other regimes within international law and its place within the international legal system. These observations are meant as an attempt to stimulate discussion and where necessary some reassessment of the scope of application of international humanitarian law and not as a ready-made comprehensive approach or solution to all the controversies relating to its application.

Keywords: Scope of application of international humanitarian law *ratio materiae*, *ratio personae*, *ratio loci*, and *ratio temporis*, threshold armed conflict, legal methodology. international legal system

1. Introduction

This essay will set out some thoughts relating to one of the grey areas relating to the application of international humanitarian law (a.k.a. IHL/law of armed conflict/LOAC), namely in relation to its material, personal, temporal and geographic scope of application. While some aspects of the scope of application of IHL are relatively settled law, others are much less so, or are arguably not settled in a way that makes sense and provides for a coherent application of all relevant branches of international law to armed confrontations and conflict. I will first set out some observations relating to the main points of agreement and controversy. I will then go on to put forward some thoughts on how the main points of controversy could be addressed through a holistic approach to the application of international law in which international humanitarian law is but one relevant area of the law, albeit one of central importance, in regulating armed confrontation and conflict. These observations are meant as an attempt to stimulate discussion and where necessary some rethinking of the scope of application of international humanitarian law and not as a ready-made comprehensive approach or solution to all the controversies relating to its application. I should point out that this essay incorporates some views and builds on arguments I have made in several of my earlier writings, although it is by no means a copy of those earlier pieces.[2]

Before entering into the discussion, I wish to set out a few basic assumptions and premises. Firstly international law forms a system which has certain common characteristics, attributes and functions notwithstanding the (over)specialization which has emerged over the past half

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[2] See in particular, "Some Reflections on the Threshold for International Armed Conflict and on the Application of the Law of Armed Conflict in any Armed Conflict" which at the time of writing is pending publication in 2022 in *International Law Studies* in the context of a series of essays devoting attention to the "Twilight Zone of the Law of Armed Conflict". *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3941090*

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century within the various branches that comprise it. Secondly, while there are unquestioningly different theoretical approaches to the interpretation and application of (international) law, there is a relatively accepted approach to it which spans its different branches and national and other frames of reference and is most often used by States, international organizations, including courts and tribunals and has widespread acceptance and application in academic literature. This approach is usually referred to as a 'modern positivist approach', in which legal rules can be traced to one or more specific sources recognized within the system as authoritative and capable of generating legal obligations.[3] It is also premised on viewing law as a social construct and being subject to certain accepted modes of interpretation and methods of resolving conflicts between norms and applying different rules coherently and consistently. Finally, while I will set out reasons for applying different bodies of international law which may well impact on the (scope of) application of IHL, I am not advocating an abandonment of the well established principle that the law relating to the use of force (a.k.a. the *ius ad bellum*) is separate from humanitarian law and that the equal applicability of the obligations arising from humanitarian law to all parties to an armed conflict is not affected by the question whether a particular party is acting in accordance with the *ius ad bellum.*

2 . Settled and more controversial points relating to the scope of application of humanitarian law

The law relating to the scope of application of IHL appears relatively simple at first glance. IHL, except for a few provisions which are applicable in peacetime, applies once an armed conflict is triggered. According to the prevailing theory put forward in the ICRC commentaries to the Geneva Conventions, an international armed conflict involving two or more States (a.k.a IAC) is triggered whenever one State uses force against another, no matter how brief or inconsequential the encounter.[4] It applies throughout the territory of the States actively involved as parties, as well as anywhere outside the territory of non-belligerent States wherever there are military confrontations between the parties, for example in international waters or airspace, and lasts as long as military operations are underway, or there is otherwise a clear intention on the part of all parties to end the conflict (as opposed to a temporary cessation of hostilities). It allows for the targeting of anyone possessing combatant status, as well as civilians who directly participate in hostilities for the duration of such participation along with objects constituting a military objective. Certain provisions relating to the treatment of persons captured or detained in the course of the conflict and relating to the occupation of territory of an enemy State remain in force until the persons are released or the territory ceases to be occupied.[5] However, although

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[3] Key figures from this tradition include H.L.A Hart, Hans Kelsen and Sir Hersch Lauterpacht. For a succinct description of the approach and its relationship to moral considerations see e.g. L. Green and T. Adams "Legal Positivism" in E.N. Zalta (ed.) , *The Stanford Encyclopedia of Philosophy* (Winter 2019 edition) available at *<https://plato.stanford.edu/archives/win2019/entries/legal-positivism/>*

[4] This low threshold is often referred to as the "first shot" approach to the material application of IHL in IAC. This was first put forward by Jean Pictet in his commentary to Article 2 of the (First) Geneva Convention in 1952. See ICRC Commentary of 1952 to Article 2 of the First Geneva Convention 1949 pp.6-7 at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=02A56E8C272389A9C12563CD0041FAB4 The revised ICRC commentary to the First Geneva Convention of 2016 maintains and extends this threshold to violations of territorial sovereignty. See para. 237 thereof at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518

[5] The material, personal, geographical and temporal scope of IHL is treated *inter alia* by J. Kleffner "Scope of Application of International Humanitarian Law" in D. Fleck (ed.) *The Handbook of International Humanitarian Law,* 3rd ed. Oxford University Press (2013), 43ff. The reference to the "general close of military operations" is

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this may be the prevailing view, it is not the only one. Another approach put forward by the ILA Use of Force Committee in 2010, which has an appreciable degree of support in both the practice of States and in doctrine, takes the position that minor armed encounters between States do not automatically trigger an armed conflict to which, in principle, the entire corpus of IHL applies.[6] Likewise, there are various authors , including myself, who take the position that other regimes of international law can and do influence the temporal and geographical, and arguably also the personal scope of application of the humanitarian law of armed conflict. For example, in an armed conflict of relatively limited scope, there would not be an automatic presumption that IHL would apply anywhere on the globe, no matter how far removed from the seat of the conflict.[7]

The scope of application of IHL in non-international armed conflicts (a.k.a NIAC), whereby at least one of the parties to the conflict is a non-State armed group is even less straightforward and less settled, but a non-international armed conflict is said to exist when there are reasonably intensive and sustained armed encounters between a State's armed forces and one or more non-State armed groups possessing a certain degree of organization, or between such groups *inter se*.[8] Various factual indicators have been put forward in case law to provide a more or less objective indication when the requisite degree of intensity of armed clashes and organization of the parties has been met. These include such indicators as the number of casualties, the types of weapons used, the possible involvement of the UN Security Council among others in relation to the intensity of armed encounters. In relation to the organizational requirement for non-State actors (as States are presumed to possess the requisite degree of organization) the indicators include such factors as the degree to which such armed groups have some kind of command structure and disciplinary system, the degree to which they have the ability to recruit fighters and are capable of planning and executing attacks and other operations against the opposing party alongside some others.[9] It applies to the targeting of persons belonging to such an

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to be found *inter alia* in Art. 6 GC4 although some provisions of IHL are meant to apply beyond that temporal threshold in relation to protection of persons detained by the opposing party and occupied territory. See e.g. Article 5 of the Third Geneva Convention relating to the temporal scope of protection of POWS and Article 6 of the Fourth Geneva Convention in reference to the temporal scope of protection of civilian detainees and application of certain provisions to Occupied Territory even after the close of military operations in so fat as territory continues to be occupied.

[6] ILA Use of Force Committee Final Report, Hague Session 2010,p.2 at http://www.rulac.org/assets/downloads/ILA_report_armed_conflict_2010.pdf

[7] The general approach to whether a*d bellum* considerations can influence the application of IHL in geographical and temporal terms is that these only are relevant at the outset of any use of force and have no influence on the application of IHL once an armed conflict is underway. . One notable exception to this is Christopher Greenwood who sees a continued relevance for *ad bellum* considerations once an armed conflict has commenced without conflating the two bodies of law, and who in the wake of the Falklands/Malvinas conflict set out a different approach followed more or less here in this essay. "The relationship between the *ius ad bellum* and *ius in bello*" 9 *Journal of International Studies* (1983), 221ff. My own views on the impact of *ad bellum* law on targeting during an armed conflict are set out in T.D. Gill "Some Considerations on the Role of the *ius ad bellum* in Targeting" in P.A.L. Ducheine, M.N. Schmitt & F.P.B. Osinga, *Targeting: the Challenges of Modern Warfare,* Asser/Springer Press (2016), 101ff.

[8] *Prosecutor vs. Dusko Tadic*, Defence Motion for Interlocutory Appeal on Jurisdiction IT94-1 2/10/1995, para. 70

[9] These indicators were set out in a number of decisions of the ICTY subsequent to the *Tadic* decision referred to in the previous note. These were summarized in the *Boskoski* Trial Chamber decision (IT 04-82T) 2008, para. 177 and included, among others, the criteria named here..

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organized armed group, including members of State armed forces party to the conflict, as well as civilians who directly participate in hostilities, although there is no consensus on whether any member of an armed group is subject to attack or just those with a "continuous combat function" and how the notion of direct participation applies to the so-called 'revolving door of participation" among other areas of disagreement relating to the personal scope of application in non-international conflict. In geographical and temporal terms, IHL would apply within the entire territory of the State concerned and could also apply elsewhere if the parties engage in hostilities outside the territory of the State involved in the conflict, for example when hostilities 'spill-over' into a neighbouring State. A NIAC is said to apply until either the criteria for application of IHL cease to be met for a prolonged period or a peace agreement ending hostilities is reached. Additionally, the total defeat of one party by the other will also terminate an armed conflict.[10]

But when, where and how long IHL would continue to apply outside the territory of the State where the conflict originated and is occurring is less clear. For example does a spill-over of hostilities mean that IHL applies throughout the neighbouring State or just in the area where the hostilities take place? Does it cease to apply once the spill-over ceases or when the main conflict ceases? Likewise even the geographical and temporal scope of non-international armed conflict within the State where the conflict originated and is occurring is not always clear. While the prevailing theory is that it applies throughout the entire territory of the affected State, this does not conclusively answer questions such as whether the rules relating to the conduct of hostilities apply outside "hot battlefields" and whether areas still firmly under the control of the government and removed from armed encounters are not simply subject to normal "peacetime" national law and human rights law rather than IHL. The temporal scope of non-international armed conflict is also far from being always clear. Is one single act (or related set of acts) by a non-State actor enough to trigger the applicability of IHL, such as the series of attacks conducted by persons professing allegiance to ISIS in Paris in November 2015? Does a relatively prolonged period of inactivity mean that IHL ceases to apply when there has been no clear agreement to end the conflict and both parties are still in a hostile relationship and are in a position to carry out operations against the other? Can a non-international armed conflict continue indefinitely so long as there are adherents to the armed group or like-minded armed groups located somewhere who are conducting some kind of operations? Can anyone professing allegiance to such an armed group be targeted in the absence of a direct threat to life emanating from that person at the time of targeting? These and many other similar questions can be

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[10] For the personal, geographical and temporal scope of NIAC see in addition to the source referred to in n.5 *supra* among others S. Sivakumaran, *The Law of Non-International Armed Conflicts,* Oxford University Press (2012), 236ff. See also paras. 69-70 of the *Tadic* Appeals Decision referred to in n.7 *supra.* The question of who is subject to attack was discussed extensively in the ICRC/Asser Institute Expert group which dealt with the notion of direct participation in hostilities between 2003-2008 in a series of meetings held in The Hague and Geneva in which this author participated. Ultimately it proved impossible to reach consensus within the group and the ICRC published its Interpretive Guidance on the Notion of Direct Participation in Hostilities in 2009 without reference to the participants and solely on its own behalf. Despite agreement on many of the core issues, various topics were highly controversial, including whether a membership approach was applicable to members of armed groups and if so, what the scope of membership was, the question of whether repeated instances of direct participation led to permanent loss of protection from attack or one regained protection after each instance among others. For a discussion of some of the points of controversy, see e.g. M. Schmitt, "The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis" in 1 *Harvard Law School National Security Journal* (2010) available at http://www.harvardnsj.org/wp-content/uploads/sites/13/2010/01/Vol.-1_Schmitt_Final.pdf

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translated into a more general question. Does the meeting of the criteria for the existence of a non-international armed conflict entitle the parties to target each other for as long as they find this necessary or expedient anywhere the opponent is located? If not, where should the lines be drawn? But at least where there is a clear agreement between the parties to end a non-international armed conflict, which is matched by a complete cessation of hostilities, or one party inflicts a complete defeat upon its opponent, it is generally assumed the conflict will end and IHL will cease to apply, except in so far as persons are still being held as captives related to the conflict and therefore entitled to the minimum degree of humane treatment set out in IHL.

This survey of areas of agreement and contention, while far from complete, serves to illustrate that the question of the material, personal, geographical and temporal scope of the applicability of the humanitarian law of armed conflict is far from being nearly as settled as is often presumed. Moreover, it seems clear from the practice of the past twenty-odd years, that this ambiguity has not only increased, but also has incontrovertibly led to abuses and misapplications of the law.

It is also increasingly obvious that it is not acceptable to continue to leave these questions unanswered, even though reaching consensus on how to answer them is far from straightforward or easy. However, nothing ventured nothing gained, as the saying goes.

3 Applying the Humanitarian Law of Armed Conflict alongside other legal regimes as component parts of a system

In classic international law, the dividing line between applying the law of peace and the law of war and neutrality was relatively clear cut and virtually binary. Absent a declaration of war or a material state of war, the law of peace applied. Once a state of war existed , the law of war applied to the relations between the belligerent parties, while the law of neutrality applied to third States not party to the conflict in their relations with belligerents. Most other legal obligations were suspended for the duration of the war.[11]

But contemporary international law is not structured that way and there have been few declarations of war since the Second World War. In both the practice of States as well as of organs of international organizations and in the literature, there is a rebuttable presumption that the entire corpus of international law continues to apply alongside the humanitarian law of armed conflict once the material conditions for the existence of an armed conflict (referred to above) have been met except for specific treaty provisions that are open to suspension in the event of an armed conflict. Consequently, humanitarian law is but one legal regime within international law which applies during armed conflict, albeit one of obvious importance. But the existence of an armed conflict does not render the rest of international law superfluous, nor can the relationship between IHL and the other legal regimes be simply dismissed with a reference to the *lex specialis* principle which is one of the tools of legal methodology, but by no means the only one.[12]

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[11] Indeed up to and including the 8th edition of the most influential English language treatise on international law of the first half of the 20th century by Lassa Oppenheim, updated and edited by Hersch Lauterpacht, there was a sharp divide between the "Law of Peace" and the "Law of War and Neutrality" reflected in the division of the two bodies of law between two separate volumes, each dealing exclusively with either body to the virtual exclusion of the other. See *inter alia* Kleffner, n. 5 *supra* ,at p.44 on the demise of the "state of war" after WWII.
[12] The International Law Commission (ILC) published it Draft Articles on the Effects of Armed Conflict on Treaties in 2011, which in Article 3 sets out the basic rule that armed conflicts do not automatically result in the

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Yet, notwithstanding the general acknowledgement that other regimes of international law continue to apply alongside IHL during armed conflict, there is still very much of a tendency, especially among IHL specialists, to view IHL through a magnifying glass instead of treating it as part of a much broader legal system. For example, discussions around targeting, including in situations where it is arguably open to question whether IHL is applicable at all, tend to focus exclusively on questions such as whether the targeted individual or object constituted a military objective, whether the attack was proportionate in terms of collateral effects and injury to civilians and in terms of taking all feasible precautions to avoid or mitigate such effects during the planning and execution of the attack. While these questions are undoubtedly important and are relevant to answering the question whether the attack was conducted in conformity with the IHL rules relating to targeting, they are but part of the overall picture. Equally important questions include whether the attack was subject to IHL targeting to begin with, whether IHL applied at the time the target was engaged and whether it was lawful to engage the target in the location where the engagement took place. Other questions that need to be considered, assuming that the question of the applicability of IHL to the situation is answered in the affirmative, include which other legal regimes are applicable to the situation? Which legal obligations do they impose and how do the rules arising from different areas of the law relate to each other? Finally, in the event of an overlap or conflict between rules arising from different regimes, which rules determine how to reconcile potential problems arising from their parallel applicability and how does one go about doing this in a way that gives the rules binding on the party or parties their due and does not render the system as a whole inoperable or moot?

Another problem arising from the ambiguity relating to the scope of application of IHL is the well-intentioned, but not always constructive effect of applying IHL as widely as possible. The rationale behind this is to maximize the protective scope of IHL. But there are many more consequences to the existence of an armed conflict than simply the humanitarian treatment of persons affected by the conflict. The low threshold of the material scope of armed conflict, particularly international armed conflict between States resulting from the "first shot" approach, and the ambiguity relating to some aspects of the personal, temporal and geographic scope of applicability of IHL alluded to earlier, makes selective use of IHL possible by the party possessing the most military capability, for example, by engaging in "leadership targeting" with remotely piloted aircraft, bombardment of critical installations, such as the transportation infrastructure or power grid on the basis of their (subjective) qualification as military objectives by a party possessing aerial superiority, or the blockade of the opponent by air, sea and digital means by the party possessing such capabilities.[13] The latest version of the ICRC commentary to common Article 2 of the Geneva Conventions indicating the threshold of international armed conflict would make IHL applicable to a mere unauthorized violation of territorial sovereignty

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suspension or termination of treaties. This also applies to obligations under customary international law as is evident from *inter alia* Article 10 of the same instrument. For the full text see *Yearbook of the International Law Commission Volume 2, Part Two* (2011). The role of the *lex specialis* principle in the broader context of legal methodology was dealt with in another report by the ILC on the Fragmentation of International Law, UN . General Assembly doc. A/CN.4/L.682 (2006).

[13] Recent examples of such use of IHL as an instrument to achieve far-reaching "war aims" in the context of conflicts of relatively limited scope, including situations where it may be open to question whether IHL targeting rules even applied at all, include the strike on Iranian general Soleimani, the targeting of the Libyan leadership in the 2011 aerial campaign by NATO and the intensive bombardment of targets throughout Lebanon, including its transportation infrastructure, and the blockade of the Lebanese coast by Israel in response to the abduction of two Israeli soldiers on the border between Israel and Lebanon in 2006 to name but several.

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which can only have a tendency of magnifying the chance of escalation if the prerogatives flowing from the applicability of IHL were in fact applied.[14] The often heard counter argument to abandoning the "first shot approach" is that there would be no applicable law in the absence of applying IHL. This is not convincing. There is no reason why alternatives such as the application of the standards for using force under international human rights law or the 'on the spot' application of self-defence- or some combination of these could not serve as alternatives in situations of low-level armed confrontation of limited scope and duration.[15] This would address avoiding a legal gap without opening the door to applying IHL in low-level armed encounters with the possibility this works as a catalyst rather than as a restraint. Another way of avoiding gaps in protection is to sever the applicability of the protective provisions of IHL relating to treatment of persons from the rules relating to the conduct of hostilities. In other words, protection due to say the wounded, shipwrecked or persons evacuating an aircraft in distress and to medical installations would apply whenever necessary, irrespective of whether an armed conflict threshold was crossed or how intensive the conflict was, while rules relating to the conduct of hostilities would only start to apply once a conflict clearly existed. Moreover, the applicability of some rules IHL relating to the conduct of hostilities, such as leadership targeting and the imposition of blockades should arguably partially depend upon factors such as the intensity and duration of the conflict and the effect of parallel application of other relevant bodies of international law.[16]

Although there are somewhat more hurdles to the material scope of application of IHL in non-international armed conflict due to the criteria of intensity and organization for the existence of a non-international armed conflict referred to earlier, the lowering of the material threshold of application of IHL from what was intended when both Common Article 3 and Additional Protocol were negotiated to a rather indeterminate level of intensity and organization at present, notwithstanding the previously mentioned indicators relating to intensity and organization, leaves the borderline between what is somewhat euphemistically referred to as "internal unrest" or "sporadic mob violence" and a low-intensity non-international conflict unclear and open to abuse.[17] At the same time, the application of many- indeed most- of the rules applicable to conflicts between States has resulted in a situation which at the least raises legitimate questions about how realistic it is to expect that the plethora of rules said to apply to armed groups, regardless of their degree of training, organization and level of control over a portion of territory, are in fact capable of being meaningfully applied. Moreover, the application of IHL

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[14] See n.4 *supra* with reference to para. 237 of the 2016 ICRC commentary to Art. 2 of the First Geneva Convention.

[15] For a treatment of unit level self-defence also referred to as "on the spot reaction" see i*nter alia,* Y. Dinstein, *War, Aggression and Self-Defence* 6th ed. CUP (2017), 261-64; J.F.R. Boddens Hosang, *Rules of Engagement and the International Law of Military Operations* Oxford University Press (2020), 83ff. For a reference by the ICJ to this modality of self-defence see *Oil Platforms* case (Iran v United States, Merits phase) *ICJ Reports* 2003, para. 73, 195-96. For further argument relating to the limiting effect of *ad bellum* law on targeting see Gill, n.7 *supra*

[16] See n.20 and accompanying text *infra*

[17] The designation of "civil disturbance or unrest" is, it is submitted, vague and open ended and probably leaves too much doubt about where the threshold of armed conflict exactly lies. It leaves the door potentially open to apply the law of armed conflict to situations- which while sometimes violent- are nowhere near any reasonable threshold for moving from law enforcement methods of controlling violence up the scale of intensity to conducting hostilities. Examples include the militarization of counter narcotic operations in Latin America, the use of the armed forces to violently suppress civil unrest in various countries (Syria, Libya, Myanmar) in which tactics resembling open warfare have been used leading not only to serious human rights violations, but the deterioration of the situation into armed conflict.

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in relatively low-intensity non-international armed conflicts where the State has a presumption of control of varying degrees over its territory often has a tendency to intensify the violence rather than mitigating it. The corresponding tendency to assume the widest possible geographical and temporal scope of application, whereby IHL is considered applicable anywhere the opponent is located and for as long as any degree of threat is deemed to exist only tends to reinforce this tendency of aggravating the conflict. Even if the geographical scope of application of IHL in a non-international conflict is restricted to the territory of the State (barring exceptional circumstances), it should not automatically be the case that this signifies that IHL will automatically be the default applicable legal regime while other legal regimes are also applicable and in many cases more appropriate to address the situation.

Another argument for taking a "holistic approach" to the application of all the international law that is in fact applicable is that it undoubtedly serves to enhance protection, while at the same time avoiding the exclusion of a particular body of law on spurious grounds thereby undermining the integrity of the legal system. When common Article 3 was negotiated in the late nineteen- forties, international human rights law was in its infancy and even when Additional Protocol II was concluded over forty years ago it was still far from clear whether IHRL was applicable to armed conflict situations, especially in an extraterritorial setting. That is no longer the case and its protective scope often provides as much as or more protection to the victims of armed conflict as IHL does. Moreover, the protective provisions of IHL are largely complementary to those arising from IHRL in non-international armed conflict. In contrast, the IHL rules relating to the conduct of hostilities allow for a much more "robust" application of force than the rules relating to the use of force in the law enforcement context which are primarily subject to IHRL. But the dividing line between the hostilities paradigm and the "law enforcement" paradigm is unclear and subject to many different views, not to mention the fact that many States and most armed groups make little or no distinction between the two paradigms in the actual application of force and instead apply IHL targeting rules as the default regime in armed conflict, regardless of whether other legal regimes are applicable. In NIAC this often results in IHL being applied wherever members of an opposition armed group are located whenever this is expedient, irrespective of whether there is a greater or lesser degree of control over the territory and individuals in question. Proponents of a maximum scope of application of IHL in personal, temporal and geographic terms seem to often see IHL exclusively in humanitarian terms (maybe the label IHL is partly responsible for this), while in another context, IHL is often used as a basis for targeting individuals and conducting attacks on objects deemed to constitute military objectives, in situations where it is open to question whether IHL applies- and even if it does-whether IHL targeting rules are the only or most appropriate set of rules to apply. In particular, where the State has the option to exercise law enforcement authority in accordance with domestic law and international human rights law, there is no reason why IHL should exclusively determine how targeting be conducted. Certainly IHL rules relating to targeting are also supposed to protect civilians and persons *hors de combat*, and there is no doubt that there will be many situations where the rules relating to the conduct of hostilities are the only feasible and logical option and the rules if applied correctly do provide some safeguard against indiscriminate use of force. But in cases falling short of conducting hostilities in a full-blown internal conflict, there will often be situations where one of the parties has a substantial level of control and then it is not so logical to assume the applicability of IHL and its targeting rules in lieu of more restrained use of force under IHRL. At the least this calls for much more clarity on when one regime should apply and arguably for

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the restriction of IHL targeting to situations where the State either has no control over a portion of territory or members of an organized armed group, or where the control is contested and the only feasible option open is to apply IHL rules relating to the conduct of hostilities.[18]

In international armed conflicts this problem is less prevalent as there is generally more clarity when IHL rules relating to detention and conduct of hostilities would apply and in most cases would take precedence over the rules relating to detention and the use of force under IHRL. But there are other problems arising from the maximalist approach of IHL, both in low-level armed encounters between States which are arguably below a rational threshold for armed conflict and even in situations where there is unquestionably an armed conflict, whereby the applicability of IHL is presumed to exist anywhere for as long as the parties think it necessary or expedient- and when it does- to apply it to the virtual exclusion of the rest of international law. In situations where there is reasonable doubt as to the existence of an armed conflict, it makes perfect sense to assume that IHL does *not* apply unless it becomes crystal clear that the dividing line between an armed incident and an armed conflict has been crossed. Once that is the case, the duration and intensity of the conflict, along with considerations arising from the law governing the use of force (*ad bellum* necessity and proportionality) which in conflicts of relatively limited duration and scope would serve as a restraint on targeting persons and objects that were removed from or did not otherwise have a direct nexus to the area of operations. Such considerations could also arguably effect the personal scope of application and restrict targeting to persons directly involved in participating in the conflict or otherwise posing a significant threat or obstacle to successfully conducting operations, rather than assuming that anyone possessing combatant status or fulfilling a leadership function is automatically subject to attack regardless of their conduct, location or other relevant factors , in particular the intensity and duration of the conflict.[19]

Likewise, the rules arising from multilateral conventions and customary rules relating to the use of the international commons (international waters, airspace and outer space), if applied in a balanced way alongside IHL rules relating to naval and aerial warfare and military activities in outer space, will, or in any case should often pose significant restraints on targeting and interference with the use of those areas for purposes not connected to hostilities by both neutrals and belligerent States. For example, why should the fact that a conflict of relatively limited scope between two or more States is underway give any party to such a conflict a right to interfere with international civil aviation other than to warn away aircraft from areas where active hostilities are underway, or impose naval blockades which under the current rules of naval warfare can easily result in large-scale economic disruption and in some cases seriously affect the civilian population of both neutral and belligerent States? Blockade law and rules governing visit and search and capture of merchant vessels as part of the law of naval warfare should not give a belligerent a license to disrupt global commerce and blockade should be strictly confined to what is strictly necessary to prevent war materials reaching the opponent

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[18] The ICRC conducted a study on the application of the paradigms of law enforcement and hostilities which goes some way towards providing a degree of guidance. See G. Gaggioli (ed.) *The Use of Force in Armed Conflicts; Interplay between the Conduct of Hostilities and Law Enforcement Paradigms* (2013). Nevertheless, it leaves much unanswered, including the question I am raising here, whether the rules relating to conducting hostilities in the law of armed conflict should apply at all outside of full-blown, (relatively) high intensity armed conflict between State armed forces and one or more armed groups capable of conducting sustained military operations, except in specific situations where no other option is feasible under the circumstances.
[19] See sources cited in note, 7 *supra*

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with the least possible negative effect on the interests of third States or the population of the adversary State. In another context why should the fact that there was an international armed conflict underway give either party a right to target spacecraft and satellites in such a way as to seriously impair the peaceful use of outer space for an indefinite period of time as a result of uncontrollable effects of space debris? To give yet another example, although some States and lawyers question whether respect for sovereignty is relevant in the cyber context, there is no reason to assume that cyber operations with significant effects on non-belligerent States would not be subject to existing rules of international law relating to neutrality and respect for sovereignty. So, for example, a cyber operation targeting military command and control functions of the targeted State's armed forces which had or were likely to have significant and reasonably foreseeable negative knock-on effects in any non-belligerent State would be prohibited.[20]

In short, international law has evolved considerably over the past three quarters of a century since the end of World War II and there is no reason to apply IHL in the same way it was applied then whereby the law of armed conflict and the rest of international law are seen as largely mutually exclusive. If its scope of application is tailored to the intensity and duration of the conflict, it will be less likely to aggravate rather than mitigate conflict. In any case, there is no reason to apply it as if no other body of law is relevant, other than to dismiss it as *lex generalis* which can be set aside as soon as the "first shot" is fired.

That brings me to a final point before rounding up. If one accepts that different legal regimes continue to apply during armed conflict then the question of how to go about making their parallel application work in a meaningful way and reconciling any potential overlap or conflict of obligations becomes critically important. While arcane rules of legal methodology may seem irrelevant to the (military) lawyer tasked with giving effect to the legal rules governing a military operation, nothing could be further from the truth. They are in fact essential in making the parallel application of different regimes within international law possible and giving all due effect to all applicable law, including but not limited to the humanitarian law of armed conflict. While the maxim *lex specialis derogat lege generali* is a valid part of legal methodology and can serve a useful purpose in resolving conflicts between rules, including rules from different branches of international law when they in fact arise, it is but one part of a whole set or bundle of tools relating to the interpretation and application of legal rules and is neither a magic wand

[20] The law of naval warfare as it currently is presented still largely reflects the practice of WWII and earlier, although it has been slightly amended to take account of some aspects of the current law of the sea. See e.g. *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1994), which notwithstanding its title, devotes almost exclusive attention to international humanitarian law and in particular to rules of naval warfare, most of which have not been applied since WWII. The question whether such rules have any place in contemporary armed conflict and how they would apply in relation to the rest of current international law is left virtually unaddressed. The applicability of IHL to hostilities in outer space and its relationship to the legal regime in outer space is currently being examined in the context of a manual devoted to application of international law in outer space and has received some attention in the literature. One example is a recent article by D. Stephens "The International Legal Implications of Military Space Operations: Examining the Interplay between International Humanitarian Law and the Outer Space Legal Regime" in 94 *International Law Studies* (2018), 75. The question of the applicability of neutrality and respect for sovereignty received attention in M.N. Schmitt (ed.) the *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge Univ. Press (2017), Rules 4 and 150 with commentary. It should be noted that the position taken in the Tallinn Manual regarding respect for sovereignty has not been accepted by *inter alia* the UK or the US Department of Defense. For an essay on the contending issues which leave a grey area in this context, see M. Schmitt & L. Vihul, "Respect for Sovereignty in Cyberspace" in 95 *Texas Law Review,* Issue 7, online edition https://texaslawreview.org/respect-sovereignty-cyberspace/

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to wish away any obligation which might interfere with an untrammeled application of IHL, nor an invention of hidebound lawyers to circumvent legal obligations arising from one legal regime in favour of another. But applying the tools of legal methodology correctly is just a start to resolving the problems arising from competing legal and other interests and addressing the challenge of coherently applying the law of armed conflict as a part of a much wider legal system. The basic premise behind any legal obligation is that it is binding on any entity possessing some degree of legal subjectivity to which the obligation in question is opposable. It does not cease to apply if it happens to overlap with another legal obligation, and even when two obligations apply which are clearly in conflict with each other, there are any number of considerations which should be taken into account in determining which obligation will take precedence in a particular type of situation or set of circumstances, of which *lex specialis* is but one.[21] In some cases application of the *lex specialis* principle is a fairly clear and straightforward solution to a problem of conflicting obligation, such as in the case of applying the rules relating to the detention of prisoners of war and setting aside those IHRL obligations which directly conflict with that set of rules to the extent necessary to give them proper effect.

But in many other cases the question is not nearly as clear. For example, is the UN Law of the Sea Convention with its detailed set of obligations and careful balance of interests simply *lex generalis* to be set aside as soon as parties engage in hostilities at sea? Aside from the law of the sea, considerations of international economic and trade law are likewise comprehensive and detailed- at least as detailed as the law of naval warfare- and therefore with as much a claim to being *lex specialis* as the rules relating to interdicting trade between belligerents, and must be given all due consideration in determining what kind of measures can be taken in the context of armed conflict which would be likely to affect the interests of third states and the broader international community. What kind of balancing of interests is necessary to achieve a coherent and equitable application of international law when armed conflict at sea takes place and how should one go about ensuring that the interests of belligerents in conducting hostilities do not ride roughshod over the interests of all non-belligerents, both in relation to maritime areas adjacent to the coast of one or more non-belligerent States subject to the coastal State's functional jurisdiction, and of non-belligerent States with interests in maintaining the freedom of navigation and overflight in all areas not comprising territorial waters of a belligerent State and continuing the everyday business of engaging in maritime commerce? This requires a thorough consideration of the competing rights and interests of all concerned and is more about balancing these coherently than resolving conflicts of obligations. The same essentially applies to ensuring a reasonable application of the law of armed conflict in relation to any number of other international legal regimes, ranging from protection of the environment to international investment law and from respect for human rights to the primacy of the Security Council in matters effecting international peace and security. In other words, applying IHL as a component part of an overall system requires not only using the tools of traditional legal methodology, but applying it in context with the rest of international law in a way that gives all applicable law its due and gives the rights and interests of all concerned all possible consideration and not simply

[21] One valuable contribution to addressing the challenges to the coherent application of international law in spite of its overspecialization was made in the context of the ILC report by M. Koskenniemi on the fragmentation of the international legal system referred to in n. 12 *supra*

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setting aside the bulk of international law once armed conflict commences, as is now often the case.

4 Concluding Remarks

When attempting to answer what challenges and useful developments confront IHL in the coming years, I have attempted to demonstrate that one of the most important ones relates to how its scope of application and its place within the international legal system should be viewed and in some important respects reassessed. To be sure, IHL plays a crucially important role in regulating and mitigating hostilities and ensuring basic humanitarian protection of those affected by armed conflict and nothing I have said here is meant to gainsay its importance or impede its core functions. But those functions are just part of a broader legal mosaic and balancing of interests, and resolving ambiguities relating to the scope of applicability of IHL is an important part of attempting a coherent and balanced application of the law. In that context, it is important to keep track of what the core functions of IHL actually are and apply it in context with other bodies of law. One key step in that context is to keep in mind that a "maximalist approach" to the scope of application of IHL has many more consequences than simply safeguarding human dignity and ensuring protection of vulnerable individuals. Hence, where other bodies apply, the application of IHL should take that into account and, in particular, the application of IHL rules relating to the conduct of hostilities should be carefully assessed on the basis of the need to apply them, both in terms of to whom, what, where and how long these rules apply and in terms of making sure that the application of IHL does not serve to exclude other relevant, and in some cases, more appropriate bodies of law. I have also argued that a coherent application of the humanitarian law of armed conflict within the overall international legal system requires not only a balanced and considered application of the tools of legal methodology to harmonize obligations and resolve any conflicts of obligation which might arise, but also a much more comprehensive balancing of rights and interests of not only the interests and prerogatives of the protagonists, but those pertaining to the entire international legal system and the broader international community as a whole. This means in a nutshell that we should cease to primarily view IHL exclusively through a magnifying glass and start attempting to see it more or less through a prism in which each applicable legal regime has its own "colour" or place and function and specific relationship to the others. This may require some fairly fundamental rethinking on how IHL should be applied in relation to other legal rules and regimes way beyond simply determining whether one or more rule of human rights law should be set aside because of potential collision with IHL- or vice versa. The first and most important step in that reassessment is to abandon the outmoded "binary approach" to international law which belongs to a bygone age. That fundamental reassessment and rethink is without doubt one of the main challenges confronting us as international lawyers concerned with problems of how to regulate armed conflict. As far as I can see, we have much work to do in that respect in order to bring the law of armed conflict squarely into the twenty-first century.

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