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INTERNATIONAL MIGRATION AND THE LAW

LEGAL APPROACHES TO A GLOBAL CHALLENGE

Edited by

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ROUTLEDGE

This volume collects the final results of the Research Project of Relevant National Interest (PRIN) "International Migrations, State, Sovereignty and Human Rights: Open Legal Issues" (2019-2024). Four research units have been financed by the Italian Ministry of University and Research to carry on the PRIN, namely the units of the following Universities: Salerno, Campania "Luigi Vanvitelli", Bari "Aldo Moro", and Teramo. The researchers have worked under the guidance of Angela Di Stasi, as principal Investigator, and Ida Caracciolo, Gianni Cellamare and Pietro Gargiulo, as associate Investigators.
Adopting a multilevel and multidisciplinary approach, the book aims to explore existing and future trends in the development of migration policy from the local to the global level, highlighting the challenges and gaps in the protection of migrants, and providing concepts and empirical findings with implications also for practitioners and lawyers.

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THE PROTECTION OF INTERNATIONAL MIGRANTS BETWEEN INTERNATIONAL HUMANITARIAN LAW, INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL REFUGEE LAW

Egeria Nalin

ABSTRACT: *The chapter aims to analyse the interaction between international humanitarian law, international human rights law and international refugee law in the context of movements of persons, mainly caused by armed conflicts. As migrants may find themselves in a country involved in an armed conflict, and an armed conflict may determine exodus, international humanitarian law includes important rules for protecting migrants. Moreover, in times of armed conflicts and military occupation, refugee law and international human rights law continue to apply, as recognised by numerous domestic and international tribunals. Thus, all the mentioned provisions may provide specific protection, including against* refoulement*, to international migrants. On those grounds, the chapter will ascertain whether these normative systems relate to each other in terms of complementarity and cross-fertilisation so that their interplay may result in the maximum protection of migrants' rights.*

1. Migrants and armed conflicts

Although one of the primary aims of international humanitarian law (henceforth IHL) is to prevent the forced movement of persons either internally or externally, international migrations frequently find their

cause in armed conflicts if characterised by generalised violence against civilians and by the commission of war crimes, as in Afghanistan, the Central African Republic, the Democratic Republic of the Congo, Somalia, South Sudan, and Syria, among the others. It may also happen that the receiving country of migrants finds itself involved in a war, as recently happened in Ukraine. In these cases, IHL applies to migrants. To our purposes, drawing on the indications provided by the United Nations Office of the High Commissioner of Human Rights (OHCHR), a migrant is "any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence".[1] Since IHL is based on the principle of distinction between combatants and civilians, to the extent to which migrants can be considered as civilians, as they are not – or are no longer – taking an active part in hostilities, they are – regardless of their nationality – covered by the general rules for the protection of the civilian population, especially contained in the Geneva Convention IV of 12 August 1949, relative to the Protection of Civilian Persons in Time of War (GC IV), in Protocol I and II Additional to the Geneva Conventions of 12 August 1949, adopted on 8 June 1977 and relative to the Protection of Victims of International Armed Conflict (AP I) and to the Protection of Victims of Non-International Armed Conflict (AP II).[2]

In addition, as migrants "find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals" (GC IV, Art. 4), they are also "protected persons" under GC IV and are entitled to specific protection.

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[1] Recommended Principles and Guidelines on Human Rights at International Borders, Geneva, 2014, Ch. I, para. 10. For a distinction between migrants and refugee, see *The New York Declaration for Refugee and Migrants*, 16.9.2016, UN Doc. A/RES/71/1, and in the following *Global Compacts for Safe, Orderly and Regular Migration* (19.12.2018, UN Doc. A/RES/73/195) and *Global Compact for Refugees* (affirmed by the General Assembly on 17 December 2018).

[2] See Common Art. 3 GC, Art. 13 GC IV, Art. 2 AP II, Art. 4 AP II. According to the Commentary to AP (Y. SANDOZ, C. SWINARSKI, B. ZIMMERMANN (eds.) (1987), *Commentary on the Additional Protocols*, Geneva, hereinafter *ICRC Commentary APs*, para. 4489), the Protocol refers to "all residents of the country engaged in a conflict, irrespective of their nationality, including refugees and stateless persons". On IHL and the principle of non-discrimination based on nationality, see H. OBREGO GIESEKEN, *The Protection of Migrants Under International Humanitarian Law*, in *IRRC*, 2017, 99(1), 121 ff., especially 126-128.

Finally, they may be regarded as "refugees" under the following articles. According to Art. 44 GC IV, refugees are aliens "who do not […] enjoy the protection of any government". Moreover, Art. 70 GC IV concerns "nationals of the occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State". Furthermore, according to Art. 73 AP I, they are "persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons". The reference to the "relevant international instruments" contained in Art. 73 AP I must be understood as including the 1951 Geneva Convention relating to the *status* of refugees, as well as the relevant regional Conventions (such as the 1969 Organization of Africans Unity (OUA) Convention Governing the Specific Aspects of Refugees Problems in Africa) and, according to the preferable opinion, acts of soft law (such as the Latin American 1984 Cartagena Declaration on Refugee). Otherwise, the definition of refugee referred to in Arts. 70 and 44 GC IV disregards the mentioned international Conventions to include those "who have been forced by events or by persecution to leave their native land and seek asylum in another country" and that, therefore, do not enjoy the protection of any government.[3] It is also noteworthy that the attribution of the *status* of protected persons confers a level of protection higher than the one guaranteed by Art. 70. Indeed, Art. 70's rationale is to avoid refugees being punished because of their *status* or for leaving their country of origin, and to guarantee that they continue to enjoy the protection offered by the refugee *status*. It therefore prevents nationals of the Occupying Power and refugees in the occupied State from being "arrested, prosecuted, convicted or deported from the occupied territory, except for offenses committed after the outbreak of hostilities, or for offenses under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace". Finally, since Art. 44 GC IV does not require that refugees be recognised as such before the beginning of hostilities, a person who deserted into the adversary's territory during hostilities would be protected under that provision like the ones who had been

[3] See J. PICTET (1958), *Commentary Geneva Convention IV, Relative to the Protection of Civilian persons in Time of War* (hereinafter *Commentary GC IV*), Geneva, Art. 44, 263, and Art. 70, 350.

granted asylum before the beginning of the armed conflict. Indeed, while most migrants are considered civilians under IHL, they may be combatants, depending on their *status* under the Geneva Conventions and AP I,[4] and become migrants in need of international protection as deserters.[5]

As regards protected persons and refugees, IHL established, among others, specific non-*refoulement* obligations.[6] Art. 45 GC IV provides essential restrictions on the right of a Party to the conflict to transfer protected persons. Art. 45 defines transfer as "Any movement of protected persons to another State, carried out by the Detaining Power on an individual or collective basis", including internment in the territory of another Power, the returning of protected persons to their country of residence, or their extradition.[7] Nevertheless, the provision does not apply in case of repatriation to the country of origin of the people who are transferred as it "has the effect of placing the transferees in the position of nationals" and, therefore, entails the termination of the *status* of protected persons.[8] Deportation is also excluded in individual cases, "when State security demands such action".[9] In other cases, "Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention". This prohibition of indirect or

[4] In these circumstances, once in enemy hands, they shall also enjoy protection as prisoners of war (POW).

[5] On the conditions for claiming refugee *status* for deserting soldiers, see UNHCR, *Guidelines on International Protection no. 10, Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 12 November 2014, HCR/GIP/13/10/Corr. 1.

[6] Where applicable, migrants are also protected by the provisions relating to missing and dead persons (Part II, Section III of AP I), by those relating to relief in favour of the civilian population, and to the treatment of persons when in the power of a Party to the conflict (Part IV, Sections II and III of AP I). Moreover, GC IV and AP I contain rules on the reunion of dispersed families and the search for missing and dead ones.

[7] See J. PICTET (1958), *Commentary GC IV*, cit., Art. 45, 266.

[8] *Ibidem*.

[9] If expulsion occurs, it must be carried out under humane conditions, and persons concerned "must be able to present their defense without any difficulty" (J. PICTET (1958), *Commentary GC IV*, cit., Art. 45, 266).

secondary *refoulement*, when the receiving State fails to observe GC IV in an important respect, entails an obligation of the Transferring Power to ensure the fulfilment of these obligations by the receiving State. Hence, if "its efforts remain in vain, the transferring Power may request the return of the protected persons in order to directly resume its obligations under the Convention". After such a request, the receiving State is obliged to comply with it.[10] Notably, the transferring State's obligation to take steps to prevent the receiving State from committing violations also derives from the application of Common Art. 1 GC, implying for all the High Contracting Parties (HCP) the obligation to respect and ensure respect for those Conventions in all circumstances.[11]

Art. 45 IV CG also provides that "In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs".[12] It is worth noting that none of the limitations outlined in this Article apply to the extradition issued under treaties concluded before the outbreak of hostilities if protected persons are accused of offenses against ordinary criminal law. Moreover, the provision does not impede "the repatriation of protected persons, or their return to their country of residence after the cessation of hostilities" – although it does not require that the State of residence ensure the reception of migrants in an irregular position, who fled its territory because of the war.

At the same time, Art. 49 GC IV establishes that "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their

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[10] J. PICTET (1958), *Commentary GC IV*, cit., Art. 45, 268 ff.

[11] See, also for further references, L. CONDORELLI, L. BOISSON DE CHAZOURNES (2000), *Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests*, in *IRRC*, 837, 67 ff.; C. FOCARELLI (2010), *Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?*, in *EJIL*, 21, 125 ff.; GEISS R. (2015), *The Obligation to Respect and Ensure Respect for the Conventions*, in A. CLAPHAM, P. GAETA, M. SASSÒLI (eds.), *The 1949 Geneva Conventions. A Commentary*, Oxford, 111 ff.

[12] In the sense that the notion of persecution should not be understood based on refugees' law, but refers to serious violations of human rights (right to life, freedom, and security) on enumerated grounds, see R. ZIEGLER (2021), *International Humanitarian Law and Refugee Protection*, in C. COSTELLO M. FOSTER, J. MCADAM (eds.), *The Oxford Handbook of International Refugee Law*, Oxford, 221 ff.

motive". The principle is reaffirmed for internal conflicts by Art. 17 AP II, not allowing for the displacement of the civilian population for reasons related to the conflict, unless the security of the civilian population or imperative military reasons so require. In other words, the norm allows the displacement to prevent civilians from being exposed to grave danger, such as an imminent attack or the risk of becoming human shields. [13]

Of course, protected persons who wish to leave are not barred from doing so (unless the security of the population or imperative military reasons require their detention: Art. 49(5) GC IV), [14] but their right to flee does not necessarily imply a duty of reception for third Countries under IHL. Nonetheless, the very violation of IHL committed by the Parties of the armed conflict could entitle those fleeing the war to claim the *status* of refugee [15] or other forms of international protection, [16] as such, also providing an obligation of non-*refoulement*.

2. The interrelationships between international humanitarian law, international human rights law and international refugee law for the protection of migrants

For the 1951 Geneva Convention, the term refugee shall apply to any person who "owing to well-founded fear of being persecuted for rea-

[13] Y. SANDOZ, C. SWINARSKI, B. ZIMMERMANN (eds.) (1987), *ICRC Commentary APs*, cit., Art. 17, AP II, para. 4856 ff.

[14] In this regard, the J. PICTET (1958), *Commentary GC IV*, cit., (Art. 49, 283) affirms: "Thus, two considerations – the security of the population and 'imperative military reasons' – may, according to the circumstances, justify either the evacuation of protected persons (para. 2) or their retention (para. 5). In each case, real necessity must exist; the measures taken must not be merely an arbitrary infliction or intended to serve in some way the interests of the Occupying Power".

[15] For a detailed analysis of the conditions for claiming the *status* of refugee in times of armed conflicts, see UNHCR Guidelines on International Protection no. 12: Claims for refugee *status* related to situations of armed conflict and violence under Art. 1(A)(2) of the 1951 Convention and/or 1967 Protocol relating to the *Status* of Refugees and the regional refugee definitions, 2 December 2016, HCR/GIP/16/12.

[16] C. WOUTERS (2021), *Conflict Refugees*, in C. COSTELLO *et al.* (eds.), *The Oxford Handbook of International Refugee Law*, Oxford, 815 ff. On the relationship between IHL and IRL, see also S. JAQUEMET (2001), *The Cross-Fertilization of International Humanitarian Law and International Refugee Law*, in *IRRC*, 843, 651 ff.

sons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it" (Art. 1(A)(2)). The well-founded fear requires a prospective assessment based on the applicant's personal circumstances and the destination country's general situation. The existence of an armed conflict can impact this latter aspect. Furthermore, the individual nature of the fear does not exclude the collective character of the persecution.[17] Actually, the persecution on racial, religious, national, social, or political grounds often represents some of the causes of modern armed conflicts. Finally, applying the relevant IHL rules could be relevant to determine whether the aspiring refugee or person entitled to humanitarian protection has committed war crimes, suitable for excluding access to this *status* (Art. 1(F)(a)).

The impact of armed conflicts on the recognition of refugee *status* is even greater at a regional law level. Art. 1(2) of the 1969 OUA Convention Governing the Specific Aspects of Refugee Problems in Africa provides that "The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside of his country of origin or nationality".[18] In the same sense, under the Latin American 1984 Cartagena Declaration on Refugee, "in view of the experience gained from the massive flows of refugees in the Central American area […] bearing in mind the OAU Convention (Article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human

[17] On the relationship between IHL and the definition of persecution in Art. 1(A)(2) of the Convention on the *Status* of Refugee, see E. FRIPP (2014), *International Humanitarian Law and the Interpretation of 'Persecution' in Article 1A(2) CSRS1*, in *Int. J. Refug. Law*, 26, 382 ff.

[18] IHL significantly influences the definition of military occupation under the OAU Convention: see the UNHCR, *Guidelines on International Protection no. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, 2 December 2016, HCR/GIP/16/12, cit., para. 55.

Rights […] the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order".

Under European Union law, Art. 15 of the so-called qualification directive guarantees subsidiary protection to civilians fleeing indiscriminate violence in an internal or international armed conflict seriously and individually threatening a person's life. [19]

Finally, according to the jurisprudence of the treaty bodies of the main IHRL Conventions, a general and mandatory prohibition of *non-refoulement* [20] exists when persons are at risk of torture or inhuman and degrading treatment, [21] or if they fear for their own life. Such fear or risk may well derive from situations of generalised violence existing in the country of origin or some areas thereof. [22] The same Conventions pro-

[19] In defining who a civilian is, what indiscriminate violence or an international or non-international armed conflict are, the Court of Justice of the European Union has disregarded IHL and, taking into account the object and purposes of EU Law and the Charter of Fundamental Rights, has provided a broader interpretation (see ECJ, Grand Chamber, judgment 17.2.2009, *Elgafaji and Others*, case C-465/07, for a definition of indiscriminate violence and civilian, judgment 30.1.2014, *Diakité*, case C-285/12, for a definition of armed conflict).

[20] On the prohibition of *refoulement* under the IHRL rules, see, even for other references, G. CELLAMARE (2021), *La disciplina dell'immigrazione irregolare nell'Unione europea*, II ed., Torino, 146-185.

[21] CCPR, General Comment no. 20, 10 March 1992, *Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or degrading Treatment or Punishment)*, A/44/40, para. 9; General Comment no. 31, 26 May 2004, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13, para. 12; ECHR, Grand Chamber, judgment 7.7.1989, application no. 14038/88, *Soering v. United Kingdom*, paras. 88-91. See, also, UN Sub-Commission on the Promotion and Protection of Human Rights, Res. 2005/12, *Transfer of Persons*, 12 August 2005, E/CN.4/2006/2, 25, para. 3.

[22] CCPR, views 23.11.2009 *Kwok Yin Fong v. Australia*, 23 November 2009, CCPR/C/97/D/1442/2005, paras. 9.4, 9.7. See also ECHR, judgment 2.3.2010, application no. 61498/08, *Al-Saadoon v. United Kingdom*, para. 137. See, also, ECHR, judgment 14.2.2017, application no. 52722/15, *S. K. v. Russia*, paras. 55-63, where the Court recognises the existence of general violence in Syria, since "various parties to the hostilities have been employing methods and tac-

vide a prohibition of collective expulsions,[23] which can also apply to people fleeing war.

On such premises, on the one hand, migrants may enjoy protection under IHL; on the other, anyone fleeing an armed conflict or a situation of generalised violence and massive violation of fundamental rights deriving from it may be entitled to seek international protection under the mentioned provisions, or refugee *status* under the 1951 Geneva Convention, thus acquiring the right not to be refouled. Therefore, the question arises of the interrelationship between international human rights law (IHRL), international refugee law (IRL) and IHL for the protection of migrants.[24]

3. Problematic profiles of the concurrent application of international humanitarian law and international human rights law in times of armed conflicts and military occupation: the principle of speciality

In this regard, IHRL and IRL apply both in times of peace and in times of armed conflict.[25] Notably, the Convention on refugee *status* applies to persons fleeing peace or wartime persecution. Furthermore, the state

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tics of warfare which have increased the risk of civilian casualties or directly targeting civilians. The available material discloses reports of indiscriminate use of force, recent indiscriminate attacks, and attacks against civilians and civilian objects" (para. 61). Another extreme case of general violence was found to exist in Mogadishu in 2010: see ECHR, judgment 28.11.2011, applications nos. 8319/07 and 11449/07, *Sufi and Elmi v. The United Kingdom*, para. 248.

[23] Arts. 4, Protocol no. 4 ECHRs; 22(9) American Convention on Human Rights (ACHR) of 22 November 1969; 12(5) African Charter on Human and Peoples' Rights (ACHPR), 27 June 1981; 19, Charter of Fundamental Rights of the EU. For the ICCPR, see CCPR, General Comment no. 15, 11 April 1985, *The Position of Aliens Under the Covenant*.

[24] V. CHETAIL (2014), *Armed Conflict and Forced Migration: A Systematic Approach to International Humanitarian Law, Refugee Law, and International Human Rights Law*, in A. CLAPHAM, P. GAETA (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford, 700 ff.

[25] See, even for further other references, E. GREPPI (2013), *To What Extent Do the International Rules on Human Rights Matter?,* in F. POCAR, M. PEDRAZZI, M. FRULLI (eds.), *War Crimes and the Conduct of Hostilities. Challenges to Adjudication and Investigation*, Cheltenham-Northampton, 38 ff.; R. KOLB, G. GAGGIOLI, P. KILIBARDA (eds.) (2022), *Research Handbook on Human Rights and Humanitarian Law*, Chelteham-Northampton.

of war neither extinguishes nor suspends the application of human rights treaties: the Institut de droit international, in the resolution on The Effects of Armed Conflicts on Treaties, approved at the Helsinki session in 1985, affirmed that principle, unless otherwise provided by the treaty (Art. 4), and the International Law Commission in the Draft articles on the effects of armed conflicts on treaties, approved in 2011, included human rights treaties among those not affected by the conflict (Art. 7 and Annex lett. f)). In addition, the main international conventions on human rights, including the UN Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), allow State to derogate, through a specific procedure, from certain rights contemplated by these treaties in the event of armed conflict, thus confirming that, where no derogation occurs, the treaty provisions continue to apply.[26] Finally, in more general terms, the Security Council constantly recalls parties to an armed conflict to comply strictly with their obligations under IHL, IHRL and IRL.

Therefore, as the migrant may be simultaneously entitled to protection under IHL, IHRL and IRL, we propose to ascertain the interaction between these norms: whether these provisions apply concurrently or some should prevail over the others, and, in this latter hypothesis, based on what principles they should have pre-eminence. Finally, we propose to define which interpretative criteria to apply to resolve any conflicts between these bodies of law in case they apply concurrently but seem to offer conflicting solutions (*i.e.*, they seem to contradict each other).

In this regard, it is noteworthy to recall the International Court of Justice (ICJ) jurisprudence. In its advisory opinion of 8 July 1996 on "Legality of the Threat or Use of Nuclear Weapons", the Court confirmed the applicability of the ICCPR in times of war unless States take measures derogating from their treaty obligations. After recalling that no derogation is permitted for certain rights, such as the right not to be deprived of life arbitrarily,[27] the Court declared that what constitutes an arbitrary deprivation of life in times of war shall be defined by applying the rules of IHL, as they constitute *lex specialis* in times of armed con-

[26] Art. 4, ICCPR; Art. 15, ECHR; Art. 27, American Convention on Human Rights (ACHR). See also Art. 72 AP I, which refers to "other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict", and the second preambular paragraph of AP II, which states that "international instruments relating to human rights offer a basic protection to the human person".

[27] ICJ Advisory Opinion 8.7.1996, para. 25.

flict.[28] In the following advisory opinion of 9 July 2004 on "Legal Consequences of the Construction of a Wall in the Occupied Palestinians Territory", the ICJ confirmed the concurrent application of both IHL and IHRL and that the guiding interpretative principle is that of speciality.[29] Finally, in its judgment of 19 December 2005 on "Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)", the ICJ reaffirmed the dual applicability of the two normative systems and the extraterritorial applicability of IHRL (based on the well-known notion of 'jurisdiction' enshrined in the international conventions on human rights) in the event of military occupation of a foreign territory.[30] In other words, the Court argues that IHL and IHRL apply concurrently in times of armed conflict as they complement each other. However, when they collide, as they seem to regulate the same situations differently, IHRL shall be interpreted, as far as possible, in accordance with IHL, that is, the *lex specialis* designated to rule armed conflicts. In addition, when the normative conflict fails to be remedied by interpretation in conformity, applying the principle of speciality, the Court seems to sanction the prevalence of the IHL norm, namely the law applicable specifically in times of armed conflicts.

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[28] "The test of what is an arbitrary deprivation of life, however, 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 Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself": *ibidem*.

[29] ICJ Advisory Opinion 9.7.2004, para. 106: "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 consider both branches of international law, namely human rights law and, as lex specialis, international humanitarian law".

[30] Recalling the mentioned Advisory Opinion *on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (paras. 107-113), the ICJ "concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory', particularly in occupied territories" (ICJ, *Democratic Republic of Congo v. Uganda*, judgment 19.12.2005, para. 215).

Indeed, the concurrent application of the mentioned law systems may foster greater protection of the human person, given that their field of application *ratione personae* may vary and that they may provide different instruments of protection for those fleeing war, in case of violation of their rights or of the States' duties of protection.[31]

At the same time, the interpretation of IHRL norms in accordance with IHL is consistent with the 1969 Vienna Convention on the Law of Treaties since it establishes that in interpreting a treaty "There shall be taken into account, together with the context: […] (c) Any relevant rules of international law applicable in the relations between the parties" (Art. 31(3)) among which, in the event of armed conflict, IHL assumes peculiar relevance.

Finally, the International Law Commission (ILC),[32] as well as the jurisprudence of the treaty bodies of the main human rights Conventions (*i.e.*, Human Rights Committee,[33] the Inter-American Commission on Human Rights,[34] the European Court of Human Rights[35]) also apply the principle of speciality to resolve conflicts of norms when other means to interpret norms in conformity fail.

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[31] On these aspects, see S. JAQUEMET (2001), *The Cross-Fertilization of International Humanitarian Law and International Refugee Law*, in *IRRC*, 843, 651 ff.

[32] In the sense that the principle of speciality shall be applied when other means to interpret IHRL in a manner consistent with IHL fail, see INTERNATIONAL LAW COMMISSION, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 18 July 2006, A/CN.4/L.702.

[33] CCPR, General Comment no. 31, 26 May 2004, *The nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13, para. 11: "As implied in General Comment 29, the Covenant also applies in situations of armed conflict to which the rules of international humanitarian law are applicable. 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".

[34] IACHR, report no. 109/99, 29 September 1999, *Coard et al. v. United States*, para. 39 ff.

[35] See, among the others, ECHR, Grand Chamber, judgment 18.9.2009, applications nos. 16064/90 and 8 others, *Varnava and Others v Turkey*, para. 185; judgment 16.9.2014, Application no. 29750/09, *Hassan v the United Kingdom*, para. 102; judgment 21.1.2021, Application no. 38263/08, *Georgia v Russia (II)*, para. 92 ff.; Decision 25.1.2023, Application no. 8019/16, 43800/14 and 28525/20, *Ukraine and The Netherlands v. Russia*, para. 718 ff.

Nevertheless, the identification of which norms is more specific should be assessed following a case-by-case analysis and does not necessarily imply a prevalence of the IHL rule, since – as the ILC highlighted – "it is often hard to distinguish what is 'general' and what is 'particular'".[36]

4. The identification of the "special" norm based on the criterion of greater human dignity protection

AUN OHCHR 2011 study on the International Legal Protection of Human Rights in Armed Conflicts recognises the decisive criterion for identifying the special norm between IHRL and IHL with reference to the State's "effective control on the territory or persons". This is the same criterion that justifies the existence of jurisdiction under IHR conventions, allowing for their extraterritorial applicability. According to this theory, the existence of effective control would imply the prevalence of the IHRL norms and, conversely, the absence of effective control would imply the prevalence of IHL norms. This reconstruction does not seem acceptable to us: if the absence of effective control prevents the application of IHRL conventions, its existence does not necessarily exclude the concurrent application of IHL![37]

Similarly, we cannot support the theory according to which, in case of conflict between IHRL and IHL norms, the latter prevails over the other only if States have derogated from IHRL obligations. Of course, such a derogation suspends the obligation to ensure certain rights. Notwithstanding this, it is not clear why, if no derogation exists, the application of IHL should be sacrificed in any event.[38]

In our opinion, a useful element in identifying which the special (and, thus, prevailing) norm is can be identified by considering the ob-

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[36] Report of the Study Group of the International Law Commission, finalized by Mr. M. KOSKENNIEMI, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 13 April 2006, A/CN.4/L.682 and Add.1, para. 58.

[37] UN Office of the High Commissioner of Human Rights (2011), *International Legal Protection of Human Rights in Armed Conflicts*, Section D.

[38] M. MILANOVIC (2011), *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford, 229-261. See, also, the Joint Partly Dissenting Opinion of Judges Yudkivska, Pinto De Albuquerque and Chanturia, related to ECHR case *Georgia v. Russia II*, cit.

ject and common purpose of IHL and IHRL, rightly recognised by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the "general principle of respect for human dignity", which "in modern times […] has become of such paramount importance as to permeate the whole body of international law".[39] Indeed, references to human dignity are present in the Universal Declaration on Human Rights (UDHR) and in numerous human rights treaties. Moreover, as regard the ECHR, the European Court stated that "the very essence of the Convention is respect for human dignity and human freedom".[40] Finally, the rules on the definition of refugee referred to above appear to be inspired by the purpose of protecting human dignity as well.

In light of this, considering that the main pertinent Conventions contain norms that resolve possible conflicts with other treaties by admitting the application of the more favourable norm granting greater protection,[41] it seems to us that the identification of the special norm

[39] ICTY, judgment 10.12.1998, Case no. IT-95-17/1, *Prosecutor v. Furundžija*, para. 183.

[40] UDHR, Preamble and Art. 1; ACHR, Preamble, Arts. 6 and 11. See, also, ECHR, Grand Chamber, judgment 27.3.1996, application no. 28957/95, *Goodwin v. The United Kingdom*, para. 9: IACtHR, Advisory Opinion OC-4/84 19.1.1986, *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica requested by the Government of Costa Rica*, paras. 55-56. On human dignity see P. DE SENA (2017), *Dignità umana in senso oggettivo e diritto internazionale*, in *Dir. um. e dir. internaz.*, 3, 573 ff.; G. CELLAMARE (2020), *Osservazioni sulla politica dell'UE in materia di rimpatri*, in A. DI STASI, L.S. ROSSI (eds.), *Lo spazio di libertà sicurezza e giustizia a vent'anni dal Consiglio europeo di Tampere*, Napoli, 426 ff.; G. LE MOLI (2021), *Human Dignity in International Law*, Cambridge, 216 ff.; and A. DI STASI in this volume.

[41] See, for instance, Art. 5 of the Geneva Convention relating to the *Status* of Refugees ("Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention") and Art. 5(2) ICCPR ("There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent"). See, also, Art. 75(8) AP I ("No provision of this Article may be constructed as limiting or infringing any other more favorable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1"), and Art. 72 AP I ("The provisions of this Section are additional to […] other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict").

among the various normative systems can be carried out by considering their common objective and purpose, *i.e.* by applying the criterion of greater protection of the dignity of the human person. The same criterion is useful for guiding the interpretation of the rules of one body of law with respect to those of the other.

An example is the obligation to repatriate POWs at the end of hostilities, established by art. 118 GC III. It is now commonly interpreted in accordance with the principle of non-*refoulement* understood broadly. Therefore, States shall not implement the obligation to repatriate "where the prisoners face a real risk of a violation of fundamental rights by their own country" or "when they have a reasonable fear of being punished for the mere fact of having been captured and interned, or when they have deserted or defected".[42] In such cases, POWs shall be entitled to apply for refugee *status* or other forms of international protection when the conditions provided for by the relevant international norms are set out.

Another example of an interpretation "oriented" in favour of greater protection of the migrant person is provided by a reading of the combined provisions of common Arts. 1 and 3 GC, aimed at recognising the existence of a general non-*refoulement* obligation under IHL. As mentioned, an obligation to ensure respect for the Geneva Conventions derives from common Art. 1 GC for all HCPs, whether or not directly involved in the conflict;[43] this also entails an obligation to take positive action to prevent or end IHL violations.[44] As regards common Art. 3

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[42] ICRC, *Commentary GC III 2020*, paras. 4469-4470, available online. In the same sense, J. PICTET (1960), *Commentary. The Geneva Convention III Relative to the Treatment of Prisoners of War* (*Commentary CG III*), 546-547.

[43] According to the ICJ "it follows from [CA1] that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with" and that "all the States parties to the [GC IV] are under an obligation while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention" (Advisory Opinion *on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, cit., paras. 158-159).

[44] J. PICTET (1958), *Commentary GC IV*, cit., para. 38, and J. PICTET, *Commentary CG III*, cit., para. 18: "[t]he proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying

GC, it represents the "minimum yardstick" to be respected in both international and non-international armed conflicts,[45] and establishes that "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria". It follows that under common Art. 1, the HCPs to the GCs are obliged not to return anyone fleeing a country at war, if the return would expose them to the risk of treatments contrary to common Art. 3 provisions.[46] According to this interpretation, the prohibition complements and incorporates the ones enshrined in Art. 45(4) GC IV which, though excluding in any circumstance the transfer of protected persons "to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs", do not constitute "an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities" and for "offenses against ordinary criminal law". The proposed interpretation thus allows a full implementation of the non-*refoulement* principle in compliance with the IHRL absolute prohibition of *refoulement*, if there is a risk of violating the right to life or of the prohibition of torture and inhuman and degrading treatment.

Likewise, the right to leave the territory of a State during hostilities may be limited for the protection of national interest under IHL (Art. 35 CG IV). On the opposite, under IHRL all individuals are entitled to leave any country, but restrictions are permissible when they have a legal basis; they are necessary to protect national security, public order,

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the Conventions are applied universally". On negative and positive obligations deriving from the duty to respect and ensure respect for IHL, see Art. 1, in ICRC, *Updated Commentary to the First Geneva Convention* 2016, par. 158 ff., available online. On the obligation to ensure respect for States not parties to an armed conflict, see, even for further references, E. NALIN (2018), *L'applicabilità del diritto internazionale umanitario alle operazioni di* peace-keeping *delle Nazioni Unite*, Napoli, 71 ff.

[45] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)*, judgment 27.6.1986, para. 218.

[46] R. ZIEGLER (2014), *Non-Refoulement between 'Common Article 1' and 'Common Article 3'*, in D.J. CANTOR, J.F. DURIEUX (eds.), *Refuge from Inhumanity? War Refugees and International Humanitarian Law*, Leiden-Boston, 386 ff.; ID. (2021), *International Humanitarian Law*, cit., 238 ff.

public health, morals, or the rights and freedoms of others; finally, they are consistent with the other rights recognised in the relevant instruments (Arts. 12 ICCPR; 2, Protocol no. 4 ECHR; 22 ACHR; 12 ACHPR). Hence, as the formulation of the conditions allowing limitations on the right to leave is stricter and more restrictive under the IHRL, taking into account the common objective of the two normative bodies, the interpretation of the (more generic) requirements under IHL should be carried out in the light of the conditions established under IHRL and, in particular, taking into account the need to protect the fundamental rights of the human person which never admit derogation.

Furthermore, the prohibition of mass transfers and deportations of protected persons, which can be found in IHL within Art. 49(1) GC IV, may also be interpreted in accordance with the prohibition of collective expulsions, enshrined in the relevant IHRL Conventions and which also applies in cases of mass exodus caused by situations of armed conflict. On these bases, displaced persons are allowed to apply for international protection, and States are prohibited from returning them generally on the grounds of public order protection (disturbed by the mass exodus), as they shall examine the specific individual situation of each applicant.

Moreover, the general Common Art. 3 requirement for trials satisfying "judicial guarantees which are recognized as indispensable by civilized peoples" may be interpreted according to the more detailed IHRL norms on fair trial as developed by IHR treaty bodies jurisprudence.

Preventive detention still represents the most problematic case. Arts. 41-43 and 78 GC IV allow the detention of protected persons and, therefore, also of migrants, for imperative reasons of security. As regards IHRL, Art. 9(1) ICCPR provides that "No one shall be subjected to arbitrary arrest or detention", and, under Art. 5(1), ECHR "No one shall be deprived of his liberty" save in six situations.[47] Therefore, ap-

[47] "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offense or when it is reasonably considered necessary to prevent his committing an offense or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of

plying the suggested criteria, in times of war, detention could be considered not arbitrary under Art. 9 ICCPR if it is in accordance with imperative reasons of security of the State. At the same time, Art. 5 ECHR could suggest more restrictive interpreting criteria of the mentioned imperative reasons of security, to limit the application of an "exceptional character" measure.[48] Nevertheless, when on a case-by-case basis, the IHL norm on detention could not be interpreted in a manner consistent with the IHRL ones, taking into account the common object and purpose of those provisions, the principle of speciality should ensure priority to IHL during the active hostilities phase of the conflict and to IHRL during a prolonged military occupation (as the one of the Occupied Palestinians Territory could be).[49] A different interpretative solution, prioritising the more restrictive IHRL norms in any case, risks sacrificing the fundamental aim of IHL to humanise armed conflicts.

bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition".

[48] J. PICTET (1958), *Commentary CG IV*, cit., Art. 42, 258.

[49] Similarly, regarding the different protection of the right to life under IHL and IHRL, IHL shall have priority in the active phase of hostilities, and, as a consequence, the principles of distinction, precaution, proportionality, and the prohibition of specific means and methods of combat apply. Moreover, during military occupation, IHRL applies too, so the protection of the right to life may be further strengthened. See, in this sense, the European Court of Human Rights judgment in the *Varnava* case, cit., para. 185, and the decision in *Ukraine and The Netherlands v Russia*, cit., paras. 719-721 ("In so far as the incidental killing of civilians may not be incompatible with international humanitarian law subject to the principle of proportionality, this may not be entirely consistent with the guarantees afforded by Article 2 of the Convention. It will therefore be for the Court, at the merits stage of the present case, to determine how Article 2 ought to be interpreted as regards allegations of the unintentional killing of civilians in the context of an armed conflict, having regard to the content of international humanitarian law").