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Reflections and Perspectives

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In memoriam
Professor Christof Heyns
(1959–2021)

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Contributors

Eirik Bjorge is a Professor of Law at Bristol University Law School and a Senior Global Research Fellow at New York University School of Law (2022–2023). He is the author of *The Evolutionary Interpretation of Treaties* (OUP 2014) and *Domestic Application of the ECHR: Courts as Faithful Trustees* (OUP 2015). His articles have been published in journals such as the British Yearbook of International Law, the American Journal of International Law, the Law Quarterly Review, and the Cambridge Law Journal. He has been a visiting scholar at Sciences Po, Paris; a *pensionnaire étranger* at the École normale supérieure, Paris; and a visiting professor at La Sapienza University, Rome. He has acted as counsel before the International Court of Justice, the European Court of Human Rights, the UN Human Rights Committee, and arbitral tribunals.

Stuart Casey-Maslen is an Honorary Professor at the Centre for Human Rights, University of Pretoria.

Camilla Guldahl Cooper is an Associate Professor of Operational Law at the Norwegian Defence University College/Command and Staff College.

Dr Knut Dörmann is Head of Delegation to the EU, NATO and the Kingdom of Belgium, International Committee of the Red Cross (ICRC) since June 2020. Previously he had been ICRC's Head of the Legal Division and Chief Legal Officer since December 2007, Deputy Head of the Legal Division between June 2004 and November 2007 and Legal Adviser at the Legal Division between December 1998 and May 2004. He holds a Doctor of Laws (Dr. jur.) from the University of Bochum in Germany (2001). He has been a member of several groups of experts working on the current challenges of international humanitarian law. He has extensively presented and published on international humanitarian law, international law of peace and international criminal law.

Helen Durham has been Director of International Law and Policy at the ICRC since 2014. She has over 20 years' experience in the Red Cross and Red Crescent Movement. Dr Durham holds a PhD in international humanitarian law and international criminal law, is a Senior Fellow at Melbourne Law School, and has worked as the Director of Research at the Asia Pacific Centre for Military Law. She has done missions in the field with the ICRC, including Myanmar, Aceh, and the Philippines, and has been involved in international legal negotiations in New York, Rome and Geneva.

Dr George Dvaladze is a teaching assistant at the Geneva Academy of International Humanitarian Law and Human Rights. He wrote his PhD thesis on *Equality and non-discrimination in armed conflict*.

Gloria Gaggioli is the Director of the Geneva Academy and an Associate/Swiss National Science Foundation (SNF) Professor at the Law Faculty of the University of Geneva. She is also member of the board of Geneva Call since August 2019. She is currently leading a four-year research project funded by the SNF on 'Preventing and Combating Terrorism and

Violent Extremism: Towards a Legal-Empirical Approach’. Prior to joining the University of Geneva, she served as Legal Adviser in the legal division of the International Committee of the Red Cross (ICRC). Professor Gaggioli also taught at the University of Neuchâtel and worked as Visiting Professor at Lille Catholic University and at the University of Aix-Marseille, as External Lecturer at the University of Copenhagen. She conducted research as a ‘Distinguished-Scholar-in-Residence’ at the US Naval War College, Stockton Center for the Studies of International Law. She wrote her PhD thesis (*summa cum laude*, Pedone 2013) on *The Reciprocal Influence between Human Rights Law and Humanitarian Law in the Light of the Right to Life*.

Ezequiel Heffes is a Senior and Policy Legal Adviser at Geneva Call. Prior to joining Geneva Call, he held different positions at the ICRC in Colombia, Afghanistan and the Democratic Republic of Congo. Ezequiel holds an LLM from the Geneva Academy of International Humanitarian Law and Human Rights and a Law Degree from the University of Buenos Aires School of Law. He is the author of *Detention by Non-State Armed Groups under International Law* (Cambridge University Press 2022) and the co-editor of *International Humanitarian Law and Non-State Actors: Debates, Law and Practice* (TMC Asser/Springer 2020).

Wolff Heintschel von Heinegg is Prof. Dr. iur. Chair of Public Law, in particular Public International Law, European Law and Foreign Constitutional Law at the Europa-Universität Viadrina, Germany. Since May 2018 he has been the President of the International Society for Military Law and the Law of War.

Christof Heyns (1959–2021) was a Professor of Human Rights Law and Director of the Institute for International and Comparative Law in Africa (ICLA), University of Pretoria. He was also a member of the United Nations Human Rights Committee, a former Director of the Centre for Human Rights of the University of Pretoria and the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions (2010–16).

Walter Kälin is Professor Emeritus of International and Swiss Constitutional Law, University of Bern. He is the former Special Rapporteur on the situation of human rights in Iraqi-occupied Kuwait and a former member of the UN Human Rights Committee. He also served as Representative of the UN Secretary-General on the human rights of internally displaced persons.

Dr Pavle Kilibarda is a Research and Teaching Assistant at the Faculty of Law of the University of Geneva and at the Geneva Academy of International Humanitarian Law and Human Rights. He obtained an LLM from the Geneva Academy in 2014 and a BA from the University of Belgrade in 2013. He defended his PhD on recognition of States in international law at the Faculty of Law of the University of Geneva in 2022 with the distinction *summa cum laude*. Prior to joining the University of Geneva, he worked as a Legal Training Associate at the ICRC and as a researcher at the Belgrade Centre for Human Rights. His research focuses primarily on matters of general public international law and human rights.

Robert Kolb is a Professor of Public International Law at the Law Faculty of the University of Geneva. He is a leading expert in international law and international humanitarian law and has published several books and articles on these topics in English, French, German and Italian. Prior to 2007, Professor Kolb worked as a Legal Adviser to the ICRC and the Swiss Federal Department of Foreign Affairs. He was also Secretary of the Institute of International Law and

a member of the Board of Directors of the University Centre for International Humanitarian Law, which in 2007 became the Geneva Academy of International Humanitarian Law and Human Rights. In addition, he has taught at the Graduate Institute of International and Development Studies in Geneva, the Universities of Bern and Neuchâtel, and the Catholic University of the Sacred Heart in Milan. In 2011, he acted as a counsel for the German government in the *Jurisdictional Immunities (Germany v Italy)* case at the International Court of Justice.

Vaios Koutroulis is a Professor of public international law at the Law Faculty of the Université libre de Bruxelles (ULB). In November 2021, he was elected as member of the International Humanitarian Fact-Finding Commission for a mandate of five years (2022–2027).

Jörg Künzli is Professor of Public International and Swiss Constitutional Law, University of Bern. He also serves as Director of the Swiss Centre of Expertise in Human Rights (SCHR).

Asaf Lubin is an Associate Professor at Indiana University Maurer School of Law, an Affiliate at the Berkman Klein Center at Harvard University, a Visiting Fellow at the Information Society of Yale Law School, and a Visiting Scholar at the Hebrew University of Jerusalem. Prior to joining the Maurer School of Law in 2020, Dr Lubin held numerous academic, governmental, and civil society positions, including as cybersecurity policy postdoctoral fellow at the Fletcher School of Law and Diplomacy at Tufts University, as a Robert L Bernstein Human Rights Fellow with Privacy International, and as an articulated clerk for the International Law Division of the Israeli Ministry of Foreign Affairs Office of the Legal Advisor. Dr Lubin holds a dual degree in law and international relations (LLB/BA, magna cum laude, '14) from Hebrew University of Jerusalem, and a Master of Laws (LLM, '15) and a Doctor of the Science of Law (JSD, '20) degrees from Yale Law School.

Vanessa Murphy is a Legal Adviser at the ICRC in Geneva, where she is responsible for legal issues related to the protection of children, gender in armed conflict, sexual violence, and the protection of the environment. Prior to joining the ICRC in 2016, Ms Murphy worked at AO Advocates, a UK-based law firm specialising in litigation for survivors of childhood sexual abuse, and at Hestia, a UK NGO delivering support services for victims of sexual violence and human-trafficking. She holds an LLM in international humanitarian law from the Geneva Academy, a Graduate Diploma in Law in the UK, and a BA in Political Science from Yale University.

Yasmin Naqvi is Special Adviser to the Deputy Director-General of the Organisation for the Prohibition of Chemical Weapons (OPCW). Previously, she held positions in the International Residual Mechanism for Criminal Tribunals, the OPCW, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Court, the UN Office of the High Commissioner for Human Rights and the International Committee of the Red Cross. Dr Naqvi holds a PhD and a Master's degree in Public International Law from the Graduate Institute of International Studies, Geneva, and LLB (Honours) and BA degrees from the University of Tasmania, Australia.

Marco Pedrazzi is a Professor at the Department of International, Legal, Historical and Political Studies, Università degli Studi di Milano, where he teaches International Law and International Law of Armed Conflict. His recent research interests focus on international

human rights law and international humanitarian law (and their interactions), disarmament law and space law.

Thomas Probert is an Extraordinary Lecturer at the Centre for Human Rights, University of Pretoria, and a Research Associate at the Centre of Governance and Human Rights, University of Cambridge.

Andrea Raab is currently a Legal Adviser at the ICRC where she works on privileges and immunities of the ICRC. Prior to joining the ICRC in 2018, she worked with Judge Theodor Meron at the International Residual Mechanism for Criminal Tribunals, and Women's Initiatives for Gender Justice, an NGO based in The Hague combatting sexual and gender-based violence. Ms Raab graduated with distinction from the University of Oxford, where she read the MJur, and holds a law degree from the University of Vienna. For her academic achievements, she received a number of scholarships and awards, including the Oxford Global Justice Internship Fund and the Volterra Fietta Prize in International Dispute Settlement.

Dr Tilman Rodenhäuser is a Legal Adviser at the ICRC.

Yuval Shany is the Hersch Lauterpacht Chair in Public International Law at the Hebrew University of Jerusalem; Vice-President for Research at the Israel Democracy Institute; and member of the Human Rights Committee (2013–20).

Claire Simmons is a Senior Research Officer at the Human Rights Centre and School of Law of the University of Essex, UK. She is one of the authors of the *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* published by the Geneva Academy of International Humanitarian Law and Human Rights and the International Committee of the Red Cross (ICRC). Claire completed her PhD at the University of Essex Law School in 2021 on the independence and impartiality of military investigations into violations of international humanitarian law.

Ilya Sobol is a PhD candidate in International Law at the Law Faculty of the University of Geneva.

Marie-Louise Tougas works as an IHL expert for the Panel of Experts on Yemen of the UN Sanctions Committee established pursuant to UNSC Resolution 2140. From 2011 to 2017, she worked as a legal adviser for the ICRC in Abidjan, Geneva and New York. She is a lawyer admitted to the Québec Bar. In the past, she also worked for defence teams before the UN International Criminal Tribunal for Rwanda and for a human rights association in Cambodia.

Marten Zwanenburg is Professor of Military Law at the Netherlands Defence Academy and at the University of Amsterdam. Previously, he worked as a senior legal counsel for the Ministries of Defence and Foreign Affairs of the Netherlands. He is on the editorial board of the Military Law and the Law of War Review and the *Militair Rechtelijk Tijdschrift*. Prof. Zwanenburg holds an LL.M. and a PhD from Leiden University. His PhD (Martinus Nijhoff, 2005) was on the topic of accountability for violations of International Humanitarian Law by peace operations.

Abbreviations

ACHPR	African Charter of Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACJHR	African Court of Justice and Human Rights
AfComHPR	African Commission on Human and Peoples' Rights
AP(s)	Additional Protocol(s)
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
ATT	Arms Trade Treaty
CAT	Convention against Torture
CDR	Call Data Record
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CIDT	Cruel, Inhuman or Degrading Treatment or Punishment
CmAT	Committee against Torture
CmEDAW	Committee on the Elimination of All Forms of Discrimination Against Women
CmERD	Committee on the Elimination of Racial Discrimination
CmESCR	Committee on Economic, Social and Cultural Rights
CPED	Convention for the Protection of All Persons from Enforced Disappearance
CRC	Convention on the Rights of the Child
CRMW	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRPD	Convention on the Rights of Persons with Disabilities
DDR	Disarmament, Demobilization and Reintegration
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EPLF	Eritrean People's Liberation Front
FARDC	Armed Forces of the Democratic Republic of Congo
FPU	UN Formed Police Unit
GC(s)	Geneva Convention(s)
HRC(ttee)	Human Rights Committee
IAC	International Armed Conflict

IAComHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFRC	International Federation of Red Cross and Red Crescent Societies
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
IMO	International Maritime Organization
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IRMCT	International Residual Mechanism for Criminal Tribunals
ISAF	International Security Assistance Force
LOAC	Law of Armed Conflict
LOLE	Law of Law Enforcement
LOW	Law of War
MD	Montreux Document
MONUC	UNO Mission in the Democratic Republic of Congo
MONUSCO	UNO Stabilization Mission in the Democratic Republic of Congo
NAC	North Atlantic Council
NATO	North Atlantic Treaty Organization
NDFP	National Democratic Front of the Philippines
NIAC	Non-International Armed Conflict
NSAG	Non-State Armed Group
OAG	Organized Armed Group
OHCHR	Office of the High Commissioner for Human Rights
PMSCs	Private Military and Security Companies
POW	Prisoner of War
PYD	Democratic Union Party (Syria)
ROE	Rules of Engagement
SCSL	Special Court for Sierra Leone
SGBV	Sexual and Gender-Based Violence

SSR	Security Sector Reform
STANAG	NATO Standardization Agreement
STL	Special Tribunal for Lebanon
UDHR	Universal Declaration of Human Rights
UK	United Kingdom of Great Britain and Northern Ireland
UN(O)	United Nations (Organization)
UNCLOS	UN Convention on the Law of the Sea
UNMIK	UN Mission in Kosovo
US	United States of America
USNS	United States Naval Ship
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WPS	Women, Peace and Security

Introduction to the *Research Handbook on Human Rights and Humanitarian Law*

Robert Kolb, Gloria Gaggioli and Pavle Kilibarda

International human rights law (IHRL) and international humanitarian law (IHL) both establish a framework for the protection of human beings, but the two bodies of law have very different historical origins and sometimes a conflicting philosophy. IHL seeks to mitigate the inherent violence and protect the victims of armed conflicts; its basic assumption is that the only legitimate objective of the belligerent parties to a conflict is to weaken the military potential of the enemy, meaning that conflict-related violence is primarily observed through the lens of military necessity. IHL is an ancient branch of law, its rules traceable to thousands of years ago and to all of the world's cultures. Conversely, although many principles underlying IHRL had long existed at the domestic level, it is one of international law's most recent branches. As a body of law regulating the relationship between States and individuals, it posits inherent rights and freedoms in every human being, which are either absolute or may be limited for narrowly defined purposes provided by the law itself.

The continued application of IHRL during armed conflicts has been affirmed at the United Nations (UN) level at least as early as the 1968 Teheran Conference and has since been given judicial backing and shape by the International Court of Justice (ICJ) on several occasions. In its 1996 *Nuclear Weapons* and 2004 *Palestinian Wall* advisory opinions, and its 2005 judgment in *Democratic Republic of Congo v Uganda*, the Court established that the protection of human rights instruments does not cease in times of war and armed conflict, that IHL and IHRL may then apply synchronously to the same situation, and (at least initially) that their relationship is, in case their application leads to different results, governed by the principle of *lex specialis* – namely, that IHL, as the body of law tailored for armed conflicts, prevails over the more general IHRL. Although all UN and regional human rights bodies have accepted the application of the various human rights instruments during armed conflicts, the *lex specialis* principle has been more controversial, and the manners in which these bodies resolved divergences between IHL and IHRL have been as varied as they have been nuanced.

It is thus difficult, if not impossible, to give an *a priori* response regarding the interplay between IHL and IHRL in all situations. How a conflict of norms will be resolved or avoided will – in practice – depend as much on which norm is currently being applied as who is applying it. The implications of different approaches will sometimes be symbolic, and at other times they will carry a fundamental importance for ascertaining the legal obligations of belligerent parties and the possibilities of international oversight. This means that the only meaningful way of examining the interplay is to do so from different perspectives, and of course, through an analysis of individual rights and topics of concern.

The previous edition of this Handbook already raised a number of important questions, of a theoretical and practical nature, regarding the IHL-IHRL interplay. These multifaceted legal, political and practical issues remain as controversial today as they were when the first edition was published. Therefore, rather than simply updating the old edition with more recent

practice, we rather conceived the present one as a sort of companion or sequel: it expands the list of issues treated earlier to address new ones, while fully acknowledging the continued importance of the older discussions. Thus, some of the topics examined in the previous edition which have undergone significant evolution are also considered in this volume, but most of the chapters deal with subjects that were not covered last time and which have gained momentum in recent years.

Given the multitude of stakeholders dealing with issues pertaining to the interplay between IHL and IHRL and the variety of views that exist on the matter, this volume is split into two parts. Part I provides an overview of academic, military, judicial and humanitarian perspectives on the relationship between IHL and IHRL. Part II deals with select contemporary issues identified in legal practice. What follows is a brief overview of the chapters.

PART I: CONVERGING AND DIVERGING PERSPECTIVES

The section on *Academic Perspectives* revolves around the relationship between IHL and IHRL and the concept of *lex specialis*, focusing on the differences and similarities between these two branches in terms of treaty interpretation, their general principles and whether they may have converged into a single body of law.

1. The first chapter by **Yuval Shany** initiates the academic discussion of the interplay between these two bodies of law by highlighting the inherent difficulties in harmonizing IHL and IHRL. According to the author, both bodies of law contain different normative assumptions, are applied by experts coming from a different background, and rely on different values. Shany questions the importance of the *lex specialis* rule as a universal remedy for IHL and IHRL conflicts, at least as presumed in favour of the former, and foresees the rise of ‘hybrid forms’ as a means of side-stepping some of the thornier problems of co-application.
2. **Vaios Koutroulis** deals with the intriguing question of whether IHL and IHRL may still be considered two distinct branches of international law, a topic which has gained much attention in academic circles. The author adds a twist to the discussion by focusing on *why* this question even matters in the first place. Following an analysis of practice before human rights bodies, Koutroulis finds that a distinction is made by States, although it has little more than theoretical relevance. Distinguishing between IHRL and IHL is primarily used to symbolically ensure the specificities of IHL and safeguard it from intrusive ‘spill-overs’ of IHRL.
3. In the third chapter, **Eirik Bjorge** examines the differences in interpretation of IHL and IHRL treaties, noting that the treaties serve different purposes and are drafted at different levels of generality: whereas the Geneva Conventions were written to be applied by soldiers, the human rights treaties give expression to fundamental values. But not all IHL provisions are so specific, wherefore it is also difficult to presume that there should always be a *lex specialis* presumption in favour of IHL treaties. IHRL itself can be more specific in some areas, particularly when it comes to the treatment of prisoners and persons in occupied territory.
4. **Marco Pedrazzi** revisits the principles of military necessity and humanity in IHL and scrutinizes how they have been influenced by IHRL. The relationship between these two

principles in IHL in particular has been modified by IHRL, which has tipped the balance in favour of the latter. The principle of military necessity, which is distinct from that of necessity in general, has however been less exposed to IHRL influence. Even so, in situations where States exercise a reasonable degree of control over a situation, such as in territories they occupy, a presumption is made for the application of the law enforcement paradigm over conduct of hostilities. Human rights bodies themselves have shown a measure of deference towards IHL in this regard, but their approach has not been uniform.

The section on *Military Perspectives* examines the interplay between IHL and IHRL in specific contexts and the application of IHRL by different stakeholders in military operations.

5. **Marten Zwanenburg's** chapter examines the applicability of IHL and IHRL to UN peace operations, noting the general acceptance that the UN is bound to respect human rights and humanitarian law but also the lack of consensus concerning the legal basis for such a conclusion. The author discusses the way IHL applies to UN peace operations and the IHL status of their members and the interplay between IHL and IHRL when applied by peacekeepers, including matters which are specific to peace operations.
6. The chapter by **Marie-Louise Tougas** focuses on private military and security companies (PMSCs) and their application of, and status under, IHL and IHRL. The author seeks to present a comprehensive view of PMSCs under international law by examining their applicability of IHL and IHRL to their activities before turning to the rules on State and individual criminal responsibility. The use of PMSCs continues to be controversial and present legal and practical challenges, and there have been a number of initiatives in recent years to better regulate their deployment and use.
7. **Wolff Heintschel von Heinegg** draws attention to a somewhat neglected sphere of IHL-IHRL interplay, namely the applicability of IHRL to naval warfare. The law of naval warfare is largely a complete body of law, but there are still some important gaps which need to be resolved. For example, it does not deal with individuals unless they qualify for protected person status under the Second and Third Geneva Conventions. As the crews and masters of neutral merchant vessels are not covered by these instruments, nor are individuals in distress at sea if their situation is unrelated to the ongoing hostilities, their position is unregulated by IHL. In addition, IHL does not provide standards for detention aboard warships for any reason. There is thus considerable room for IHRL standards to be 'imported', and Von Heinegg examines the ways in which this may be done, concluding that an important issue that remains unresolved is the existence of an obligation to provide assistance at sea.
8. An examination of the NATO approach is undertaken by **Camilla Guldahl Cooper**. When undertaking joint operations, NATO members may have different human rights obligations and have a differing view of the interplay between IHL and IHRL. The concept of 'self-defence' is also commonly employed in the context of NATO operations. Cooper attempts to trace the legal basis for self-defence in NATO rules of engagement, traversing IHL, IHRL and criminal law to find it applicable at all times, therefore also in armed conflicts and valid for military personnel. But she recalls that the primary paradigm is not self-defence, but IHL in times of armed conflict, and self-defence is at any rate unsuitable for fighting an armed conflict.

The section on *Judicial Perspectives* focuses on the way interplay has been tackled by the International Court of Justice, human rights bodies and international criminal tribunals.

9. **Pavle Kilibarda** and **Robert Kolb** look at the approach of the International Court of Justice (ICJ) to the relationship between IHL and IHRL. Perhaps the most important judicial confirmation of the continued applicability of human rights in armed conflict, as well as a conception of the relationship between the two bodies of law, comes from the World Court. However, the ICJ's jurisprudence and use of *lex specialis* is not fully developed and is inadequate to frame this interplay in all cases. The authors also raise, in addition to the well-known cases on IHL and IHRL, that the Court's statements on elementary considerations of humanity deserve a place in this 'family' of case-law, as the elementary considerations of humanity have been used to describe a core of rules applicable both in times of peace and armed conflict and thus common to IHL and IHRL.
10. **Walter Kälin** and **Jörg Künzli** undertake an analysis of the practice of human rights treaty bodies and regional courts to the application of their respective treaties in times of armed conflict. The authors examine the existence of an armed conflict as a basis for derogation from human rights treaties, as well as the problems of extraterritoriality raised by many contemporary armed conflicts. They finally describe several different legal strategies used by human rights bodies to resolve issues that may arise when IHL and IHRL apply together and identify a global trend of convergence between them in recent jurisprudence.
11. The chapter on international criminal courts and tribunals by **Yasmin Naqvi** focuses on these bodies' statements on the relationship between IHL and IHRL. The *ad hoc* and permanent international criminal courts have considerably fleshed out the content of international criminal law (ICL), normally as a flipside of IHL, but have also been influenced by IHRL where appropriate. According to Naqvi, these tribunals' approach has largely been to treat IHL and IHRL as convergent and to interpret ICL according to both. This has had the advantage of shaping out many specific rules and providing context to mass atrocity crimes in a way that respects the principle of legality, but an uncompromising convergence approach may foster unrealistic expectations of combatants in armed conflict situations.

The *Humanitarian Perspectives* come from stakeholders working directly with victims and engaging belligerent parties to mitigate suffering and strengthen respect for the law in situations of armed conflict.

12. **Knut Dörmann** and **Andrea Raab** of the International Committee of the Red Cross (ICRC) summarize their organization's role in promoting IHL and supporting its development. The chapter recalls the ICRC approach and main instruments produced by the organization to advocate for improving the legal framework governing armed conflicts. It also presents the ICRC's rich legacy in the development, drafting and adoption of IHL treaties.
13. **Ezequiel Heffes** returns to the matter of human rights obligations of non-State actors, specifically non-State armed groups (NSAGs). The author attempts to deconstruct the discourse on NSAG's obligations in armed conflict settings to identify their basis, taking into account specifically why the argument is made and who makes it. Heffes takes his analysis beyond positive law and towards the circumstances surrounding its creation and discussion in order to discern how the IHRL and NSAGs 'discourse' is produced by States, international organizations, non-governmental organizations (NGOs) and humanitarian

organizations and academic circles, as well as the reasons for which these stakeholders engage in the dialogue.

PART II: CONTEMPORARY ISSUES: CAPITA SELECTA

Part II of the Handbook moves from providing different perspectives on macroscopic issues to give detailed treatment to individual topics. We have grouped these chapters according to whether they deal with a specific issue (*Old Topics, New Concerns*) from various points of view, or with the application of individual rights more generally (*Fundamental Rights*).

14. **Stuart Casey-Maslen, Christof Heyns and Thomas Probert** open the first section with a piece on the use of less-lethal weapons in armed conflicts and a reflection on the 2020 *Guidance on Less-Lethal Weapons in Law Enforcement* published by the Office of the High Commissioner for Human Rights (OHCHR). As the law enforcement paradigm governs use of force even in times of armed conflict when taking place outside the conduct of hostilities, the authors recall the importance of using less-lethal weapons and providing adequate equipment, training and instruction to law enforcement personnel even during such times. In conflict situations, improper use of force may further exacerbate tensions, and only full compliance with international standards will serve the interests of the public at large.
15. **Gloria Gaggioli and Ilya Sobol** examine the role of IHL and IHRL in the fight against terrorist networks. Their extensive research into the practice of various States in this regard provides an invaluable resource for any student of counterterrorism and international law. The chapter seeks to ascertain in particular how attempts at ‘accommodating’ for counterterrorism under IHL strain the boundaries of armed conflict, its duration and rules on targeting, as well as the human rights implications of domestic legislation on terrorist offences. The authors also try to propose solutions to the problems they identify, for example in relation to violent extremism and the field of *non-refoulement*.
16. **Claire Simmons** deals with the matter of investigations of violations of IHL and IHRL in situations of armed conflict. As the two branches provide different standards on investigations, their interaction in this respect has important implications both for policy in general and in individual cases involving loss of life. Challenges include discerning the legal basis and scope of the obligation to investigate in times of armed conflict and the standards governing the investigation. Simmons looks for a way of overcoming these challenges based on the notion of effectiveness of the investigation, a term common to both IHL and IHRL.
17. The section is completed by a chapter on sexual and gender-based violence (SGBV) in IHL by **Helen Durham and Vanessa Murphy**. The authors first establish the relevant framework on SGBV in armed conflict in IHL as supported by human rights treaties before placing a boundary between sexual violence and broader gender-related violence and providing a gendered approach to the application of IHL treaties. Their review considers the existing IHL framework on sexual violence in armed conflict before proceeding to develop a holistic overview of the gendered impact of armed conflict.

The section on *Fundamental Rights* revisits the topics of detention, non-discrimination, torture and the right to privacy in situations of armed conflict.

18. **Tilman Rodenhäuser** scrutinizes the impact of partnering and joint military operations on detention. The author pays special attention to the practice whereby States ask coalition partners to take care of detention or transfer their detainees to them, and seeks to pinpoint responsibility in partnered operations, the role of the principle of *non-refoulement* in detainee transfers and the attribution of internationally wrongful acts committed towards detainees in coalitions.
19. Non-discrimination is a well-established principle and right under IHRL, but it also continues to apply in times of armed conflict. **George Dvaladze** establishes its scope under IHRL and IHL in order to identify commonalities and divergences between the regimes, as well as their interplay. The author particularly examines how IHL and IHRL complement each other and the importance of human rights bodies' oversight regarding non-discrimination in armed conflicts.
20. **Pavle Kilibarda** reviews the international law framework on torture and other forms of ill-treatment, looking for a common denominator to the various approaches taken by different human rights bodies. It is uncontested that torture and other forms of cruel, inhuman and degrading treatment or punishment (CIDT) are prohibited by international law at all times, thus also during armed conflict where IHL and IHRL converge. Nevertheless, what constitutes the various prohibited acts is more controversial, in particular how to distinguish torture from the 'lesser' forms of abuse. This is particularly challenging in situations involving the non-custodial use of force. The chapter provides a summary of the framework and attempts to identify the key contours of customary law.
21. **Asaf Lubin** undertakes a detailed analysis of rights to privacy and data protection under IHRL and IHL, bringing light to the neglected matter of how wartime deployment of digital technologies impacts individual privacy. His chapter explores the data protection obligations during belligerent occupation, the link between mass surveillance and targeting in armed conflict, and the collection of evidence for criminal investigations related to conflicts.

All the contributors to the present volume have considerable expertise in their respective fields and have been able to shed some light on existing debates as well as offer a fresh perspective on many different subjects. The chapters are of a primarily legal nature, but many authors integrate a multidisciplinary approach to their topics and successfully present them in the 'big picture'. We are grateful to the contributors for their hard work and persistence, without which this new volume would not have been possible.

Late in the work on the present volume, we received the tragic news of the passing of Professor Christof Heyns, former UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and member of the Human Rights Committee. He was a beloved professor who firmly believed in the values underlying human rights law and who contributed significantly to the advancement of this field. Professor Heyns co-authored Chapter 14 of this Handbook and, while we are deeply saddened by his loss, we are honoured to present some of his work posthumously.

The Editors