The (Mis)-Use of General Principles of Law: *Lex Specialis* and the Relationship Between International Human Rights Law and the Laws of Armed Conflict

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Abstract The maxim *lex specialis derogat legi generali* is widely accepted as constituting a general principle of law. It entails that, when two norms apply to the same subject matter, the rule which is more specific should prevail and be given priority over that which is more general. In the international legal system, the concept is frequently resorted to by courts and tribunals as a tool of legal reasoning in order to resolve real or perceived antinomies between norms. One area in which the notion of *lex specialis* is frequently invoked is in the articulation of the relationship between international human rights law and international humanitarian law in situations of armed conflict. This has particularly been the case following the use of the term by the International Court of Justice in the *Nuclear Weapons* and *The Wall* Advisory Opinions. On closer analysis, it appears that those seminal decisions of the International Court of Justice, in using the language of *lex specialis,* did not intend that international humanitarian law should prevail over international human rights law. Rather, when it comes to the relationship between these two branches of law, what is commonly referred to as an application of the *lex specialis* principle is in reality no more than an application of the principle that treaties should be interpreted in the light of any relevant rules of international law binding on the parties. The chapter suggests that, due to the implications that international humanitarian law prevails over international human rights law, the language of *lex specialis* should be abandoned when discussing the relationship between the two bodies of law.

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1 Introduction

The principle commonly expressed in the maxim *lex specialis derogat legi generali* is a general principle of legal reasoning which has roots dating back—at least—to Roman law,[1] and is accepted in the majority of legal systems. The purpose of the principle may be seen as being to provide a basis for choice to resolve the normative antinomy resulting from two conflicting rules which apply to and regulate the same subject matter. In order to solve such conflicts, the principle *lex specialis derogat legi generali* entails that, when two rules regulating the same subject-matter conflict, priority is to be given to that which is more specific.[2]

The present chapter analyzes the way in which the principle *lex specialis derogat legi generali* has been utilized in international legal discourse, and in particular by international courts and tribunals, in order to articulate the relationship between the norms of two branches of international law, namely international humanitarian law and international human rights law, which are concurrently applicable to situations of armed conflict. Although much discussion in that regard has turned on the application of the *lex specialis* principle, it is suggested that the principle is not in fact an appropriate mechanism to resolve those situations in which international humanitarian law and international human rights law provide for diverging standards.

2 The Principle *Lex Specialis Derogat Legi Generali* in International Law

Within the international legal system, Article 38(1) of the Statute of the International Court of Justice (ICJ) is widely accepted as an enumeration of the sources of international law.[3] Article 38(1)(c) includes among those sources "the general principles of law recognized by civilized nations". Such "general principles" were similarly previously included in the equivalent provision contained in Article 38 of the Statute of the Permanent Court of International

[1]For discussion of the origins of the maxim, see, e.g., Lindroos (2005), p. 35.

[2]The precise operation of the principle is of course far more sophisticated and nuanced than this basic description implies and there exists a wealth of literature which attempts to identify the exact contours of the principle, including, e.g., when two rules should be regarded as regulating the same subject-matter. For an overview of the principle and discussion of many of these issues from the perspective of international law, see Koskeniemi (2004); International Law Commission Study Group on Fragmentation (2006a), pp. 30–114; see also Prud'homme (2007). For a jurisprudential discussion, see, e.g., Zorzetto (2013).

[3]Statute of the International Court of Justice (San Francisco, 24 October 1945), 25 UNTS 993. The provision in question formally constitutes merely a definition of the law which the ICJ is to apply in fulfilling its function of deciding "in accordance with international law such disputes as are submitted to it" [ibid., Article 38(1)].

Justice (PCIJ), on which Article 38 of the Statute of the present Court is substantially based.[4]

The PCIJ never referred expressly to Article 38(1)(c) of its Statute, whilst the ICJ, for its part, has only rarely made express reference to the category of general principles referred to in Article 38(1)(c),[5] and has refrained from outlining the contours of the notion, or expressly confirming that specific principles fall within it.[6] As a result of the reticence of the PCIJ and ICJ in expressly relying on Article 38(1)(c), "international lawyers have never reached agreement on the definition of the general principles mentioned in Art. 38".[7] Nevertheless, it is relatively clear that their essential characteristics are that they should be "unwritten legal norms of a wide-ranging character", which are "recognized in the municipal laws of States", and which must be capable of transposition at the international level.[8]

There is little doubt that the principle *lex specialis derogat legi generali*, together with its sister principles *lex posterior derogat priori* and *lex superior derogat inferior*, fit the definition of "general principles of law" as contained in Article 38(1)(c) of the ICJ Statute, insofar as they are (a) norms of general legal reasoning, which (b) are recognized in the majority (if not all) domestic legal systems, and (c) can be transposed to and applied at the international level.[9]

The resolution of conflicts between norms through application of the maxim *lex specialis derogat legi generali* has frequently been resorted to in the international legal system. In contrast to the principles of *lex posterior* and *lex superior*, the

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[4]Statute of the Permanent Court of International Justice (Geneva, 16 December 1920), League of Nations, Treaty Series 6, 390. The drafting history of the provision reveals that the intention of the Advisory Committee of Jurists in including general principles amongst the sources of law which the PCIJ could apply was in large part to avoid any possibility of a *non liquet* resulting from the silence of the positive rules of conventional or customary international law: see the discussion of the debate in the Advisory Committee in Pellet (2012), pp. 739–742 (paras. 21–33) and 832 (para. 250).

[5]See Wolfrum (2011), para. 36; Pellet (2012), pp. 833–834 (para. 253). In a number of cases, the Court referred to the concept in summarizing the arguments of the parties, but then avoided taking any firm position as to whether the particular principle invoked qualified as a general principle within Article 38(1)(c) on other grounds: see, e.g., *Right of Passage over Indian Territory*, *Merits* [1960] ICJ Rep. 6, p. 43; *North Sea Continental Shelf* (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*) [1969] ICJ Rep. 3, p. 21 (para. 17). Notwithstanding the lack of express reference to Article 38(1)(c), the Court (and individual judges) have frequently invoked "general principles": for discussion, see Pellet (2012), pp. 838–839 (para. 265).

[6]In *South West Africa* (*Ethiopia v. South Africa; Liberia v. South Africa*) [1966] ICJ Rep. 6, p. 47 (para. 88), the Court denied that the "*actio popularis*", or right resident in any member of a community to take legal action in vindication of a public interest was at that time recognized as a matter of public international law, and held that it could not be "imported" into international law as constituting a general principle within the meaning of Article 38(1)(c).

[7]Pellet (2012), p. 834 (para. 254).

[8]Ibid., p. 834.

[9]The principle *lex specialis generalibus derogat* was indeed one of the examples given during the drafting of the provision which become Article 38(1)(c) of the Statute of the PCIJ; see Cheng (1953), p. 26, citing PCIJ, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee*, *June 16th–July 24th*, *1920*, *with Annexes*, 1920, p. 337. Cf. however Matz-Lück (2010), para. 14.

principle *lex specialis* does not figure among the rules of coordination included in the Vienna Convention on the Law of Treaties (VCLT),[10] nor has it been codified elsewhere as a rule of general application in international law. Nevertheless, it is frequently given effect in specific circumstances.

By way of example, Article 55 of the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission (ILC) in 2001, entitled "*lex specialis*", provides that the norms embodied in the remainder of the Articles do not apply "where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law".[11]

In addition, the *lex specialis* principle has been recognized and applied by international courts and tribunals in a variety of contexts.

A first manner in which the *lex specialis* principle has been used is in order to explain the point that, in general—and to the extent that the relevant customary rule does not constitute *jus cogens*—States are free by entering into a treaty to modify the obligations which would otherwise be applicable between them under customary international law.[12] In other words, as a general matter, a treaty obligation, being more specific, will prevail over customary international law, as the more general.[13]

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[10]Vienna Convention on the Law of Treaties (23 May 1969), 1155 UNTS 331. The principle of *lex posterior* as a principle of coordination is given effect in Article 30(3) of the VCLT as regards the relationship between subsequent treaties dealing with the same subject matter; see also Article 59 of the VCLT (Termination or suspension of the operation of a treaty implied by the conclusion of a later treaty). The *lex superior* principle finds expression in the provisions relating to the concept of *jus cogens* in Articles 53 and 64 of the VCLT; see also Article 103, Charter of the United Nations (San Francisco, 26 June 1945), 1 UNTS 16.

[11]International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001), in *Report of the International Law Commission*, *53rd Session*, *ILC Yearbook 2001*, vol. II, part two, pp. 26–143. See similarly, Article 64 of the ILC's Articles on Responsibility of International Organizations (2011), in *Report of the International Law Commission*, *63rd Session*, UN Doc. A/66/10 (2011), chapter V. Cf. Article 17 of the ILC's 2006 Articles on Diplomatic Protection, in *Report of the International Law Commission*, *58th Session*, *ILC Yearbook 2006*, vol II, part two, p. 24.

[12]See, e.g., *Continental Shelf* (*Tunisia/Libyan Arab Jamahiriya*) [1982] ICJ Rep. 18, p. 38 (para. 24).

[13]The point was implicitly recognized by the ICJ in *Military and Paramilitary Activities in and against Nicaragua* (*Merits*) [1986] ICJ Rep. 14. In the specific circumstances of that case, the Court ruled solely on the basis of the relevant obligations of the United States under customary international law, which were the only obligations over which it had jurisdiction. Nevertheless, it emphasized that, where parallel rules exist as a matter of both custom and conventional obligation, "in general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim" [ibid, p. 137 (para. 274)]. For a particularly clear statement of the point (although without express reference to *lex specialis*), see *Dispute regarding Navigational and Related Rights* (*Costa Rica v. Nicaragua*), [2009] ICJ Rep. 213, p. 233 (para. 35). For an application of the *lex specialis* principle in the context of investment treaty arbitration, see, e.g., *García Armas and García Gruber v. Venezuela*, Decision on Jurisdiction, 15 December 2014, paras. 158 and 167–175.

The application of the principle in this manner is qualified, in the sense that a treaty will only apply as *lex specialis* if and to the extent that the relevant treaty obligations between the parties make special provision for the specific question in issue, and the parties may thus be taken, to that extent, to have agreed to exclude the otherwise applicable rules of customary international law.[14]

The second manner in which the *lex specialis* principle may be used is as a means for articulating the relationship between norms contained in the same treaty, or in connected instruments, which are potentially applicable to the same subject-matter.[15] The principle of *lex specialis* has been extensively used in this way by the European Court of Human Rights (ECtHR) to explain the articulation between provisions within the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[16] which deal with the same subject matter. For example, the European Court has emphasized that the right pursuant to Article 5(4) of the ECHR of anyone deprived of their liberty to have the legality of their detention determined by a competent judicial body (*habeas corpus*) constitutes *lex specialis* as regards the more general right under Article 13 of anyone whose rights under the Convention have been violated to an effective remedy at the domestic level.[17] Similarly, it has held that the right to a fair trial under Article 6(1) of

[14]As put by the Tribunal in the *OSPAR Convention* arbitration, "our first duty is to apply the OSPAR Convention. An international Tribunal will also apply customary international law and general principles unless and to the extent that the parties have created a *lex specialis*" (*Dispute Concerning Access to Information under Article 9 of the OSPAR Convention*, Final Award, 2 July 2003, RIAA, vol. XXIII, 59, p. 87 (para. 84). The Tribunal added, ibid, that "even then, it must defer to a relevant *jus cogens* with which the Parties' *lex specialis* may be inconsistent". See also *Amoco International Finance Corporation v. Iran*, Iran-US C.T.R, vol. 15, 1987-II, p. 222 (para. 112).

[15]For instance, in the *Beagle Channel* arbitration, the Court of Arbitration had recourse to the principle as a subsidiary ground for rejecting the existence of a supposed conflict between the terms of Articles II and III of the Boundary Treaty of 23 July 1881 between Chile and Argentina insofar as those provisions attributed particular territory to one or other of the Parties. In that regard, the Court of Arbitration observed that: "all conflicts or anomalies can be disposed of by applying the rule *generalia specialibus non derogant*, on which basis Article II (*generalia*) would give way to Article III (*specialia*), the latter prevailing"; *Beagle Channel Arbitration* (*Argentina/Chile*), Award of 18 February 1977, RIAA, vol. XXI, 53, p. 100 (para. 39).

[16]Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols no. 11 and no. 14 (Rome, 4 November 1950).

[17]See, e.g., *Nikolova v. Bulgaria*, judgment of 25 March 1999, ECtHR, Rep. 1999-II, p. 25, para. 69. For a recent restatement of the relationship between the remedy enshrined in Article 5(4) and the more general right to an effective remedy under Article 13, see *A. v. United Kingdom* (App. no. 3455/05), ECtHR [GC], judgment of 19 February 2009, para. 202; see also ibid., para. 225, where the Court held that, in light of the findings as to Art. 5(4), it was not necessary separately to examine applicants' complaint under Article 13. Cf., however, *Georgia v. Russia* (*I*) (App. no. 13255/07), ECtHR [GC], judgment of 3 July 2014, paras. 210–16.

the ECHR constitutes *lex specialis vis-à-vis* the right to an effective remedy under Article 13.[18]

As regards articulation of rules relating to the same subject matter contained in different treaties, an example is given by the ILC Study Group on Fragmentation, which notes that, whilst the Ottawa Convention on Anti-Personnel Landmines[19] may be regarded as laying down the general law as to landmines, from another perspective it regulates "a 'special' aspect of the general rules of humanitarian law".[20] As a consequence, to the extent that the general rules of international humanitarian law (both treaty-based and customary) permitted the use of landmines by belligerents in an armed conflict, for the parties to the Ottawa Convention, their right to do so is now limited.

Nevertheless, the application of rule *lex specialis* in such circumstances is not automatic. In the *Southern Bluefin Tuna* arbitration, the UNCLOS Annex VII arbitral tribunal recognized that there was some support in international law for the proposition that, where there was a framework treaty and an implementing treaty, the latter might operate as "*lex specialis* that governs general provisions of an antecedent treaty".[21] However, it went on to emphasize that:

> [I]t is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder. The current range of international legal obligations benefits from a process of accretion and cumulation; in the practice of States, the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention upon the parties to the implementing convention.[22]

[18]See, e.g., *Yankov v. Bulgaria* (App. no. 390847/97), ECtHR, judgment of 11 December 2003. By contrast, the Court has rejected the argument that Article 5(5) of the ECHR, which provides that everyone who has been the victim of an arrest or detention in contravention of Article 5, "shall have an enforceable right to compensation", constitutes *lex specialis* vis-à-vis the general power of the Court, contained in what is now Article 41 of the ECHR, to grant just satisfaction; see, e.g., *Neumeister v. Austria* (*Article 50*) (App. no. 1936/63), Series A, no. 17 (1974), paras. 29 and 30. The ECtHR has also invoked the *lex specialis* principle in order to justify examining complaints relating to an interference with freedom of assembly only under Article 11, despite the fact that Article 10 was, at least potentially, also implicated; see, e.g., *Ezelin v. France*, judgment of 26 April 1991, *Series A*, no. 202 (1991), para. 35; *Djavit An v. Turkey*, judgment of 20 February 2003, ECtHR, Rep. 2003-III, p. 251, para. 39.

[19]Convention on the prohibition of the use, production, stockpiling, and transfer of anti-personal mines and on their destruction (Ottawa, 18 September 1997), 2056 UNTS 241.

[20]ILC Study Group on Fragmentation (2006a), para. 111.

[21]UNCLOS Annex VII Arbitral Tribunal, *Southern Bluefin Tuna* (*Australia-Japan*; *New Zealand-Japan*), Award on Jurisdiction and Admissibility, 4 August 2000, RIAA, vol. XXIII, 1, p. 40 (para. 52).

[22]Ibid.

The operation of the *lex specialis* principle in the international legal system has been the subject of in-depth (if not always clear) discussion in the context of the work of the ILC on Fragmentation of International Law. In its "Conclusions" adopted in 2006, the ILC's Study Group on Fragmentation described the maxim *lex specialis derogat legi generali* as "a generally accepted technique of interpretation and conflict resolution in international law",[23] and noted that it "suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific".[24]

In the more detailed study underlying those final conclusions, the Study Group postulated that "the *lex specialis* principle" might operate in two ways, "[a] particular rule may be considered an *application* of a general standard in a given circumstance. The special relates to the general as does administrative regulation to law in domestic legal order. Or it may be considered as a *modification, overruling* or a *setting aside* of the latter".[25] However, in that regard, the ILC also noted that "whether a rule is seen as an 'application', 'modification' or 'exception' to another rule depends on how we view those rules in the environment in which they are applied, including what we see as their object and purpose".[26]

3 *Lex Specialis* as the Coordinating Principle Between International Humanitarian Law and International Human Rights Law?

In light of the preceding overview of the application of the *lex specialis* principle generally in public international law, the focus turns to the manner in which it has been used (and arguably abused) in articulating the relationship between international humanitarian law and international human rights law.[27] The present section will examine first the approach of the ICJ to the relationship between the two branches of law, before briefly surveying the way in which selected international human rights monitoring bodies and courts have dealt with the issue.[28]

[23]ILC Study Group on Fragmentation (2006b), para. 5.

[24]Ibid. see also ILC Study Group on Fragmentation (2006a), pp. 34–64, para. 55 ff.

[25]ILC Study Group on Fragmentation (2006a), para. 88 (footnotes omitted).

[26]Ibid. para. 97.

[27]For overviews, see e.g. Doswald-Beck and Vité (1993) and Arnold and Quénivet (2008). See also Sassòli and Olson (2008).

[28]The discussion in Sect. 3.2 below is limited to some of the most significant examples. For a detailed survey of the practice of UN human rights bodies and regional systems, see van den Herik and Duffy (2014).

3.1 The Approach of the International Court of Justice

The classic statement that *lex specialis* in some way constitutes the principle governing the interrelationship of international humanitarian law and international human rights law as applied in situations of armed conflict is the ICJ's *Nuclear Weapons* Advisory Opinion. There the Court, in discussing the applicability of the International Covenant on Civil and Political Rights (ICCPR)[29] in situations of hostilities, observed that:

> [T]he protection of the [ICCPR] does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[30]

The notion that international humanitarian law constitutes "*lex specialis*" in relation to the rules of international human rights law was subsequently reiterated and expanded upon by the ICJ in 2004 in *The Wall* Advisory Opinion.[31] The Court, having cited the relevant passage from the *Nuclear Weapons* Opinion, reiterated that, subject to the possibility of derogation recognized by human rights treaties, international human rights law continued to apply in case of armed conflict.[32] It then went on to explain that:

> 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.[33]

Although the ICJ did not in that context suggest any general coordinating criterion for the third situation (i.e. those in which the rights in question were "matters of both … branches of international law"), the language of *lex specialis* again made an appearance in the following lines. The Court went on to note that, in order to answer the question facing it, i.e. whether the actions of Israel were inconsistent with its international obligations, and, if so, what were the consequences, it had to "take into

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[29]International Covenant on Civil and Political Rights (New York, 16 December 1966), 999 UNTS 171.

[30]*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep. 240 (hereinafter "*Nuclear Weapons*"), para. 25.

[31]*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep. 136 (hereinafter "*The Wall*").

[32]Ibid., para. 106.

[33]Ibid.

consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law".[34]

The Court's recourse to the term *lex specialis* in its two Advisory Opinions to denote the role of international humanitarian law is problematic, and raises as many questions as it answers.

As Marko Milanovic has convincingly shown in his recent study on the "lost origins" of the *lex specialis* principle as the mechanism for articulating the relationship between international humanitarian law and international human rights law,[35] it appears that the principle was not generally invoked in the academic literature as regulating the relationship between the two bodies of law prior to the *Nuclear Weapons* Opinion.[36] Further, the "*lex specialis*" principle was not widely relied upon by the States which made submissions in *Nuclear Weapons*; it would appear to be traceable back to a single (ambiguous) passage in the written submission of the United Kingdom before the Court, which itself did not make reference to the Latin maxim in extenso.[37]

In the two Advisory Opinions, the ICJ itself did not invoke the full form of the maxim *lex specialis derogat legi generali*, nor did it as such refer to the "*lex specialis* principle"; rather, it used the abbreviated tag *lex specialis* to characterize international humanitarian law. Indeed, the manner in which the Court used the tag does not appear to correspond to the principle as contained in the Latin maxim as such. That maxim, in its strict sense, and as is clear from the word "derogat", implies the (partial or total) disapplication or displacement of the general law in favor of the special law. However, in both *Nuclear Weapons* and *The Wall* the starting point of the Court's analysis was precisely that—subject to any relevant derogation permitted in accordance with the terms of the relevant instrument—international human rights law was *not* disapplied or displaced by the existence of an armed conflict, and instead continued to apply *in parallel* with international humanitarian law.

In any case, the use of the words *lex specialis* in *Nuclear Weapons* occurred in the specific context of the Court's discussion of the narrow question of the operation in situations of armed conflict of the right to life under Article 6 of the ICCPR, which prohibits the "arbitrary" deprivation of life. In that regard, what the Court appeared to have envisaged by its reference to *lex specialis* is that, whilst both international humanitarian law and international human rights law apply to situations of armed conflict, the relevant rules of international humanitarian law can be taken into account in determining when a deprivation of life is to be considered "arbitrary" for the purposes of Article 6. Far from being an application of

[34]Ibid.

[35]See Milanovic (2014b).

[36]In his review of the literature predating the *Nuclear Weapons* Advisory Opinion (Ibid.), however, Milanovic omits to mention the use of *lex specialis* in this sense in Bothe et al. (1982), p. 619.

[37]See Milanovic (2014b).

the *lex specialis* principle, such an approach is, in fact, far closer to the principle of systemic interpretation. That principle, which is embodied in Article 31(3)(c) of the VCLT, and forms part of the generally applicable rules of treaty interpretation, requires that, in interpreting a treaty provision, the interpreter should take into account “any relevant rules of international law applicable in the relations between the parties”.

Understood in this sense, the reference to the *lex specialis* nature of international humanitarian law has nothing to do with international humanitarian law *prevailing over* or *displacing* international human rights law, but rather would appear to be used as shorthand for the proposition that, where human rights obligations fall to be applied in a situation of armed conflict, due effect should be given to the requirement to interpret the relevant obligations in light of, and consistently with, the equally applicable rules of international humanitarian law.

In order to elucidate what the ICJ may have intended by referring to *lex specialis*, it is instructive to examine the manner in which the Court went on to apply the relevant standards of international humanitarian law and international human rights law in *The Wall*.

The ICJ identified a variety of applicable obligations, under both international humanitarian law and international human rights law, which were potentially implicated by Israel’s construction of the security barrier and the associated regime,[38] before proceeding to examine whether the conduct of Israel was in principle inconsistent with those obligations. In considering the potential violation of the relevant international human rights law instruments, the Court did not use international humanitarian law to inform its reading of the scope of Israel’s obligations under the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR)[39] and the Convention on the Rights of the Child.[40] The Court discussed both the possibility of derogation under some of the instruments, and the “qualifying clauses” contained therein, solely in terms of international human rights law[41] and held that neither affected the conclusion that Israel’s

[38] *The Wall*, paras. 132–134.

[39] International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966), 993 UNTS 3.

[40] United Nations Convention on the Rights of the Child (New York, 20 November 1989), 1577 UNTS 3. Prior to considering the relevant obligations under international human rights law, the Court discussed the consistency of Israel’s conduct with the various relevant rules of international humanitarian law. Whilst acknowledging that some rules of international humanitarian law enabled account to be taken of “military exigencies in certain circumstances”, the Court held that either the relevant norms did not permit such considerations to be taken into account, or (to the extent that they did) that it had not been established that the relevant conduct had been “absolutely necessary” (*The Wall*, para. 135).

[41] Ibid., para. 136.

conduct was inconsistent with its obligations under international human rights law.[42] As observed by Bethlehem, the Court "did not undertake any further analysis of the relationship between the applicable international humanitarian law rules and those of the ICCPR that it held to apply, simply commingling in its analysis various provisions from both strands".[43]

It thus appears that the ICJ, in characterizing international humanitarian law as *lex specialis* in its two Advisory Opinions, did so in a very particular sense. It is relatively clear that it did not intend to refer to the maxim *lex specialis derogat legi generali*, or, at least, that it did not intend the consequence to be the disapplication of international human rights law in favor of international humanitarian law. Rather, the recourse to Latin appears to have been used merely to indicate that the rules of international humanitarian law were to be given effect, as far as possible, where relevant in the assessment of whether there had been compliance with obligations under international human rights law.

The ILC, in its 2006 Study on Fragmentation, appears to have perceived the difficulty in characterizing the ICJ's approach in *Nuclear Weapons* as one involving application of the maxim *lex specialis derogat legi generali* in its strongest form. On the one hand, it recognized that the Court had expressly affirmed that international human rights law continued to apply, noting that "the two fields of law applied concurrently, or within each other".[44] Nevertheless, in an apparent attempt to square the Court's use of the term with the fact that the maxim *lex specialis* implies the disapplication of the general norm in favor of the special, it went on to suggest that:

> [F]rom another perspective … the law of armed conflict – and in particular its more relaxed standard of killing – set aside whatever standard might have been provided under the practice of the Covenant.[45]

The suggestion by the ILC that international humanitarian law had "set aside" the standard otherwise applicable under the "practice" of the ICCPR in respect of the right to life is misleading. Notwithstanding the Court's reference to *lex specialis*, the applicable standard under Article 6 of the ICCPR remained at all times that of arbitrariness; what the Court suggested was rather that what was to

[42]As regards the ICESCR, the Court found that the *regime* created by Israel infringed several of its obligations thereunder, and noted merely that this was the case since the restrictions on the relevant rights "fail to meet a condition laid down by Article 4 [ICESCR], that is to say that their implementation must be 'solely for the purpose of promoting the general welfare in a democratic society'" (Ibid.). Similarly, in verifying whether the interference with the right to freedom of movement under Article 12 of the ICCPR constituted a permissible limitation, the ICJ adopted wholesale, and without further elaboration, the relevant standards as articulated by the Human Rights Committee, and made no reference to any qualification in that regard resulting from the rules of international humanitarian law (Ibid.).

[43]Bethlehem (2013), p. 185.

[44]ILC Study Group on Fragmentation (2006b).

[45]Ibid., 53, para. 96 (emphasis added).

be considered as “arbitrary” had to be interpreted taking account of the circumstances, including the fact that the situation in question was an armed conflict to which the laws of armed conflict applied.

It is notable that, since *The Wall,* the ICJ appears to have deliberately avoided making use of the language of *lex specialis* in articulating the relationship between international humanitarian law and international human rights law. In its 2005 judgment in *Armed Activities on the Territory of the Congo*, one of the questions facing the Court was whether the conduct of members of the Uganda People’s Defence Force (UPDF), which the Court had found to be attributable to Uganda, constituted a breach of the latter State’s obligations under international humanitarian law and international human rights law. Having cited the passage from *The Wall* as to the three possible situations as regards the applicability of international humanitarian law and international human rights law,[46] it summarized its finding in that case as having been that “both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration”.[47] Notably, it omitted the specification that, in doing so, international humanitarian law was to be treated as *lex specialis*.

Thereafter, in assessing whether Uganda had breached its various obligations under international human rights law,[48] the Court did not discuss how the relevant standards were to be interpreted in light of the existence of an armed conflict and the concurrent applicability of international humanitarian law rules. Admittedly, the absence of any reference to the fact that international humanitarian law was to be taken into consideration as *lex specialis* might be explained on the basis that the conduct at issue was blatant and egregious, and was prohibited equally under both international humanitarian law and international human rights law. Nevertheless, it is striking that the Court carved out the citation from *The Wall* in such a way as to avoid any reference to the notion of *lex specialis*.

Most recently, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, the parties had debated the issue of whether acts which were lawful as a matter of international

[46] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), [2005] ICJ Rep. 168 (hereinafter “*Armed Activities*”), para. 216.

[47] Ibid., para. 216.

[48] Ibid., para. 117. The ICJ listed a variety of international humanitarian law and international human rights law instruments without making distinction as between *lex generalis* and *lex specialis*, namely the 1907 Hague Regulations (which the Court deemed to be applicable to both Uganda and the Democratic Republic of Congo due to its customary status); the Fourth Geneva Convention; the ICCPR; Additional Protocol I to the Geneva Conventions; the African Charter on Human and Peoples’ Rights (ACHPR) (Banjul, 27 June 1981); the Convention on the Rights of the Child, and its Optional Protocol on the Involvement of Children in Armed Conflict (New York, 25 May 2000), 2133 UNTS 161.

humanitarian law could constitute the *actus reus* of genocide. In that regard, the Court emphasized that the Genocide Convention and international humanitarian law:

> [A]re two distinct bodies of rules, pursuing different aims. The Convention seeks to prevent and punish genocide as a crime under international law (Preamble), "whether committed in time of peace or in time of war" (Article I), whereas international humanitarian law governs the conduct of hostilities in an armed conflict and pursues the aim of protecting diverse categories of persons and objects.[49]

Although it took the position that, in light of the limited scope of its jurisdiction, it was not required to "rule, in general or in abstract terms, on the relationship between the Genocide Convention and international humanitarian law",[50] the Court nevertheless added that:

> [I]n so far as both of these bodies of rules may be applicable in the context of a particular armed conflict, the rules of international humanitarian law might be relevant in order to decide whether the acts alleged by the Parties constitute genocide within the meaning of Article II of the Convention.[51]

Further, later in its judgment, in the context of its examination of Serbia's counter-claim, the Court observed that:

> [T]here can be no doubt that, as a general rule, a particular act may be perfectly lawful under one body of legal rules and unlawful under another. Thus it cannot be excluded in principle that an act carried out during an armed conflict and lawful under international humanitarian law can at the same time constitute a violation by the State in question of some other international obligation incumbent upon it.[52]

The Genocide Convention, to the extent it may properly be characterized as a human rights instrument, is obviously of a very different type from the ICCPR or ICESCR; it is concerned with the prohibition, prevention and criminalization of the crime of genocide at the international level, rather than with the conferring of specific rights on individuals with corresponding obligations to respect those rights imposed upon States. Nevertheless, the Court's observations resonate with the overarching question of the articulation of the relationship between different standards in different areas of law. They appear to mark both a further step in the careful retreat from use of the term *lex specialis*, and recognition that the question of the interaction of norms deriving from different areas of law is substantially more complex, and cannot be resolved solely through an application of the *lex specialis* principle.

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[49] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v. Serbia*), *Merits*, Judgment of 3 February 2015 (hereinafter "*Croatian Genocide*"), para. 153.

[50] Ibid., para. 154.

[51] Ibid. See also ibid., para. 85.

[52] Ibid., para. 474.

3.2 The Relationship Between International Humanitarian Law and International Human Rights Law in the Practice of Human Rights Bodies

Despite the somewhat different perception by some academic commentators, the majority of human rights bodies appear not to have subscribed to the suggestion by the ICJ that the relationship between international humanitarian law and international human rights law is one of *lex specialis/lex generalis*.

The terminology of *lex specialis* is notably absent from the practice of the Human Rights Committee. The Committee's General Comment no. 31 was adopted on 29 March 2004, several years after the *Nuclear Weapons* Advisory Opinion and only a few months before the ICJ handed down its decision in *The Wall*.[53] In dealing with the question of the continued applicability of the ICCPR in times of armed conflict, the Committee noted that:

> [T]he Covenant applies also 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.[54]

This approach, whilst corresponding in broad terms to the approach of the ICJ to the applicability of the ICCPR to armed conflict, is far more subtly and carefully phrased. On the one hand, whilst not specifying which, the Committee limits the potential relevance of international humanitarian law to the interpretation of only certain rights under the ICCPR. On the other, although recognizing that the rules of international humanitarian law "may be specially relevant" for the *interpretation* of the Covenant, it eschews the use of the language of *lex specialis*, and the corresponding ambiguity as to whether the relationship is one in which international humanitarian law prevails over the ICCPR.

Other monitoring bodies have adopted the notion of *lex specialis* in part, although without giving priority to international humanitarian law. For instance, in *Coard v. United States*, in discussing the continued applicability of the American Declaration on Human Rights[55] in situations of armed conflict and occupation, and rejecting the argument by the United States that "the situation denounced was governed wholly by international humanitarian law",[56] the Inter-American Commission on Human Rights observed that:

> [I]n a situation of armed conflict, the test for assessing the observance of a particular right, such as the right to liberty, may, under given circumstances, be distinct from that

[53]Human Rights Committee, "General Comment No. 31. Nature of the General Legal Obligation Imposed on States Parties to the Covenant", 29 March 2004, UN Doc. CCPR/C/21/Rev.1/Add.13.

[54]Ibid., para. 11.

[55]American Declaration on the Rights and Duties of Man, OAS Res. XXX, adopted on 2 May 1948, reprinted in *American Journal of International Law Supplement* 43, 133.

[56]*Coard v. United States* (Case 10.951), I/ACommHR, Rep. no. 109/99, 29 September 1999, para. 38.

> applicable in a time of peace. For that reason, the standard to be applied must be deduced by reference to the applicable *lex specialis*.[57]

The Commission went on to emphasize, however, that:

> [A]s a general matter, while the Commission may find it necessary to look to the applicable rules of international humanitarian law when interpreting and applying the norms of the inter-American human rights system, where those bodies of law provide levels of protection which are distinct, the Commission is bound by its Charter-based mandate to give effect to the normative standard which best safeguards the rights of the individual.[58]

The Commission has adopted a similar approach under the American Convention on Human Rights (ACHR),[59] Article 29(b) of which provides that no provision of the Convention "shall be interpreted as … restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party". For instance, in *Abella* the Commission noted that that the provisions of the American Convention and humanitarian law instruments may apply concurrently, and observed that Article 29(b) of the ACHR required it "to take due notice of and, where appropriate, give legal effect to applicable humanitarian law rules".[60] However, at the same time, it observed that:

> [W]here there are differences between legal standards governing the same or comparable rights in the American Convention and a humanitarian law instrument, the Commission is duty bound to give legal effort to the provision(s) of that treaty with the higher standard(s) applicable to the right(s) or freedom(s) in question. If that higher standard is a rule of humanitarian law, the Commission should apply it.[61]

By contrast, the Inter-American Court of Human Rights (IACtHR) has taken a different approach. It has implicitly rejected any application of the *lex specialis* principle, and has adopted a far more radical line, according to which, for parties to the ACHR, their obligations thereunder prevail, and the conduct of a State falls to be assessed solely in accordance with the obligations under the American Convention, whether or not that conduct is permitted under any other body of law.

In *Las Palmeras* (*Preliminary Objections*), the IACtHR held that it was competent "to determine whether any norm of domestic or international law applied by a State, in times of peace or armed conflict, is compatible or not with the American Convention".[62] At the same time, it emphasized that it was con-

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[57]Ibid., para. 42 (footnote omitted; the relevant footnote referred to the *Nuclear Weapons* Opinion).

[58]*Coard v. United States*, para. 42.

[59]American Convention on Human Rights (San José, 22 November 1969), 1144 UNTS 123.

[60]*Abella v. Argentina* (Case 11.137), I/ACommHR, Rep. no. 55/97, 18 November 1997, para. 164.

[61]Ibid., paras. 164–165; for further discussion, see Zegveld (1998).

[62]*Las Palmeras* Case (*Preliminary Objections*), I/ACtHR, Series C no. 67 (2000).

cerned only with the compatibility with the American Convention of the conduct of States in purported application of international law, and that it had no jurisdiction as such to assess compliance with instruments of international humanitarian law:

> [I]n order to carry out this examination, the Court interprets the norm in question and analyzes it in the light of the provisions of the Convention. The result of this operation will always be an opinion in which the Court will say whether or not that norm or that fact is compatible with the American Convention. The latter has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions.[63]

On the other hand, although applying solely the American Convention (and/or other relevant instruments over which it has jurisdiction), the Inter-American Court has asserted the possibility of having recourse to considerations deriving from international humanitarian law in interpreting the provisions of the American Convention in situations of armed conflict.[64] In addition, although not going so far as to assert its competence to declare a State internationally responsible for violations of international humanitarian law, it has stated that it is able to "observe" whether the conduct of the respondent State was also contrary to international humanitarian law.[65]

By contrast, at least until very recently, the ECtHR has refrained from making any reference to the possibility of inconsistency between the ECHR and international humanitarian law. Further, it has not sought to apply (nor has it until comparatively recently even mentioned) the notion of *lex specialis* in this context. Even when faced with cases involving alleged violations of provisions of the European Convention which had occurred in situations of occupation or armed conflict, the Court made no mention of the relevant observations of the ICJ in the *Nuclear Weapons* and *The Wall* Advisory Opinions in its reasoning, and did not even refer to the relevant passages.[66]

Most notably, in a number of cases arising out of the internal armed conflict in Chechnya, the Court was faced with questions relating to the conduct of the

[63]Ibid., paras. 32–34.

[64]See, e.g., *Bámaca Velásquez v. Guatemala*, IACtHR, Series C no. 70 (2002), where the Inter-American Court, having noted that the capture and disappearance of a former guerilla commander had occurred in a situation which was properly characterized as an internal conflict (paras. 121(b) and 207), found that "the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention" (para. 209). Nevertheless, as noted by van den Herik and Duffy (2014), p. 15, a more careful look at the Court's approach in applying the relevant norms "brings into question to what extent it really used international humanitarian law as a tool of interpretation of the relevant Convention provisions"; see further Moir (2003).

[65]*Bámaca Velásquez v. Guatemala* cit., para. 208.

[66]The first instance in which the Court made reference to the relevant passages from the case law of the ICJ in the "Relevant International Law Materials" section of its judgment (which does not form part of its reasoning on the merits) was *Al-Skeini v. United Kingdom* (App. no. 55721/07), ECtHR [GC], judgment of 7 July 2011, where the Court set out the relevant passage from *The Wall* (para. 90), as well as referring to *Armed Activities* (para. 91). See previously the joint dissenting opinion of judges Fura-Sandström, Björgvinsson and Ziemele attached to the Chamber judgment in *Kononov v. Latvia* (App. no. 36376/04), ECtHR, judgment of 24 July 2008 (para. 5); the notion does not make an appearance in the subsequent Grand Chamber judgment of 17 May 2010.

Russian armed forces resulting in the killings of civilians.[67] In those cases, which raised issues of violations of Article 2 of the ECHR in both its substantive and procedural aspects, the Court, whilst recognizing the fact that the conduct at issue had taken place in the context of the State response to an armed insurgency, made no express mention of the relevant standards under international humanitarian law. Rather, it simply sought to apply, in a way which took into account the fact that the conduct at issue had taken place in the context of military operations, the standards on the use of force which it had elaborated in its case law under Article 2 of the ECHR in cases involving law enforcement operations.[68]

More recently, an express mention of international humanitarian law appeared in the decision of the Grand Chamber in *Varnava v. Turkey*, handed down in 2009. In that case, which concerned disappearances in Cyprus during the Turkish invasion and subsequent occupation of the northern part of the island in 1974, the Court limited itself to holding that Article 2 of the ECHR had to "be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict".[69] However, the Court did not make any mention of international humanitarian law as constituting *lex specialis*, but squarely based its recourse to relevant rules of international humanitarian law on the principle of systemic interpretation.

4 Recent Developments: Testing the *Lex Specialis* Approach

The vast majority of the cases in which the *lex specialis* approach has been applied in practice, as well as most theoretical musings on the principle, deal with the "textbook" example of protection of life in armed conflict. Two recent cases, however, have thrown into stark relief the complex and difficult issues resulting from the parallel application and inter-relationship of international humanitarian law and international human rights law in relation to other rights, notably the right to liberty.

[67] *Isayeva v. Russia* (App. no. 57950/00), ECtHR, judgment of 24 February 2005; *Khashiyev and Akayeva v. Russia* (App. nos. 57942/00 and 57945/00), ECtHR, judgment of 24 February 2005; *Isayeva*, *Yusupova*, *and Bazayeva v. Russia* (App. nos. 57947/00, 57948/00, and 57949/00), ECtHR, judgment of 24 February 2005. For commentary, see Abresch (2005), Orakelashvili (2008), Bowring (2009).

[68] See, e.g., *Isayeva v. Russia* cit., para. 175.

[69] *Varnava and others v. Turkey* (Apps. nos. 16064-6/90 and 16068-73/90), ECtHR [GC], judgment of 18 September 2009, para. 185; see also, although less explicitly, the Chamber judgment of 10 January 2008, para. 130.

The cases in question are the decision of the Grand Chamber of the European Court in *Hassan v. United Kingdom*[70] and that of the High Court of England and Wales in *Serdar Mohammed v. Ministry of Defence*.[71] Both cases arose under the ECHR, and approach the question of the interaction between the European Convention and international humanitarian law on the assumption that the Convention is in principle applicable extraterritorially, including in situations of armed conflict.[72] In both cases, the ECtHR was confronted with the question of the compatibility of detention in armed conflict with Article 5 of the ECHR, a provision which, both in its terms and in the way in which it has been interpreted by the European Court, is extremely specific both as to the limited nature of the catalogue of permissible grounds for deprivation of liberty, and as to what is required in terms of procedural guarantees for those detained.[73]

4.1 Hassan v. United Kingdom: Disapplication by Interpretation?

The decision of the Grand Chamber of the ECtHR in *Hassan v. United Kingdom*, handed down in September 2014, concerned the alleged violation of Convention rights arising out of the arrest, detention, and interrogation of an Iraqi civilian in the period immediately preceding the declaration of the "end of active hostilities" in the 2003 invasion of Iraq.[74] The application to the Court complained of violations of, inter alia, Article 5 of the ECHR, on the ground that the detention of Mr. Hassan

[70]*Hassan v. United Kingdom* (App. no. 29750/09), ECtHR [GC], judgment of 16 September 2014 (hereinafter "*Hassan*").

[71]*Serdar Mohammed v. Ministry of Defence* [2014] EWHC 1369 (QB) (2 May 2014) (herein after "*Serdar Mohammed*").

[72]See, e.g., *Al-Skeini v. United Kingdom* cit.; *Al-Jedda v. United Kingdom* (App. no. 27021/08), ECtHR [GC], judgment of 7 July 2011.

[73]The Court has consistently emphasised (including as regards cases of domestic preventive detention) that the grounds for detention set out in Article 5(1) are an exhaustive list: see, e.g., *Ireland v. United Kingdom* (App. no. 5310/71), ECtHR, judgment of 18 January 1978, para. 194; *Saadi v. United Kingdom* (App. no. 13229/03), ECtHR [GC], judgment of 21 January 2008, para. 43; *A and others v. United Kingdom* (App. no. 3455/05), ECtHR [GC], judgment of 19 February 2009, paras. 162–163; *Al-Jedda v. United Kingdom* cit., paras. 99–100.

[74]The applicant was the brother of Tarek Hassan who had been arrested by UK troops on 23 April 2003, a few days before the declaration by the Coalition that "major hostilities" had ended (1 May 2003) and the commencement of the occupation the Coalition. Following his arrest, Tarek Hassan was detained in the US-run military facility at Camp Bucca and interrogated by UK intelligence agents. Having been cleared for release, he was released on 2 May in an unspecified location in Basra province. His body was discovered several months later in a location some 700 km from Basra. In addition to the alleged violation of Article 5, the application before the Court alleged violations of Articles 2 and 3 of the ECHR.

had not been in compliance with Article 5(1), and that he had been denied the procedural guarantees enshrined in Article 5(2) to (4).

The *lex specialis* rule played a central role in the arguments of the UK government before the European Court. The point was first raised in relation to the question of whether the victim had been within the "jurisdiction" of the UK for the purposes of Article 1 of the ECHR. In that regard, the United Kingdom argued, inter alia, that the jurisdictional link of "State agent authority"—according to which an exercise of jurisdiction for the purposes of Article 1 might be found to exist "where the Contracting State's agents operating outside its territory exercised 'total and exclusive control' or 'full and exclusive control' over an individual"[75]—did not find application during the active phase of an international armed conflict. It did so on the basis that in such a situation "the conduct of the Contracting State would, instead, be subject to all the requirements of international humanitarian law".[76] The European Court rejected that argument, noting that "to accept the government's argument on this point would be inconsistent with the case law of the International Court of Justice, which has held that international human rights law and international humanitarian law may apply concurrently".[77]

The language of *lex specialis* then appeared again in the primary argument of the UK government in resisting the merits of the claim as to violation of Article 5. In this regard, the United Kingdom argued that, where the ECHR fell to be applied in an international armed conflict, "the application had to take account of international humanitarian law, which applied as the *lex specialis*, and might operate to modify or even displace a given provision of the Convention".[78] In the alternative, it argued that, if the Convention were not as such modified or displaced, nevertheless, Article 5 had to be interpreted consistent with other rules of international law, and that, in particular, the list of permissible grounds for detention under Article 5(1) "had to be interpreted in such a way that it took account of and was compatible with the applicable *lex specialis*, namely international humanitarian law".[79]

Finally, as regards the possibility of derogation from Article 5 under Article 15 of the ECHR, the United Kingdom argued that "consistently with the practice of all other Contracting Parties which had been involved in such operations" it had not derogated. In a somewhat circular, question-begging manner, it suggested that:

> [T]here had been no need to do so, since the Convention could and did accommodate detention in such cases, having regard to the *lex specialis*, international humanitarian law.[80]

[75]*Hassan*, para. 71.

[76]Ibid.

[77]Ibid., para. 77. The Grand Chamber also noted that in *Al-Skeini v. United Kingdom* cit., which was also concerned with a period when international humanitarian law was applicable, it had found that the United Kingdom exercised jurisdiction under Article 1 of the ECHR (ibid.).

[78]Ibid., para. 88.

[79]Ibid., para. 89.

[80]Ibid., para. 90.

Having noted that detention under the Third and Fourth Geneva Conventions could not be regarded as "congruent" with any of the grounds set out in Article 5(1)(a) to (f),[81] the Court went on to note the possibility of derogation under Article 15, and that the United Kingdom had not availed itself of that possibility in respect of its operations in Iraq.[82]

The Court then noted that the case was the first in which a Contracting State had requested the Court to "disapply its obligations under Article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law".[83]

The Court concluded that there had been no violation of Article 5(1), on the basis that, in an international armed conflict, Article 5 was to be interpreted in the light of international humanitarian law, and as permitting detention in compliance with the Third and Fourth Geneva Conventions.[84]

In reaching that conclusion, although referring to the case law of the ICJ on the relationship between international humanitarian law and international human rights law, the Court did not invoke any version of the *lex specialis* principle. Rather, it justified its conclusion on the basis of the rules of interpretation contained in the VCLT and, in particular, the principle of systemic interpretation contained in Article 31(3)(c).[85]

In that regard, having referred to and quoted, inter alia, the views expressed by the ICJ in *The Wall* as quoted in *Armed Activities*, the Court stated that it was required "to interpret and apply the Convention in a manner which is consistent with the framework under international law delineated by the International Court of Justice".[86]

On that basis, it accepted that the absence of derogation under Article 15 did not prevent taking international humanitarian law into account in interpreting Article 5[87] and held that:

> [I]n situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law.[88]

[81]Ibid., para. 97.

[82]Ibid., para. 99.

[83]Ibid. The issue had previously arisen in *Cyprus v. Turkey* (Apps. nos. 6780/74 and 6950/75), Report of the Commission of 10 July 1976, in which the Commission had refused to examine allegations of breach of Article 5 relating to detention of prisoners of war (para. 313). Somewhat pointedly, the Grand Chamber in *Hassan* noted that in *Al-Jedda v. United Kingdom* cit., which had likewise concerned detention by the UK military in an international armed conflict, the UK had not sought to argue that Article 5 had been modified or displaced by reason of the powers of detention contained in the Third and Fourth Geneva Conventions (*Hassan*, para. 99).

[84]Ibid., para. 102.

[85]Ibid., paras. 100 and 102.

[86]Ibid., para. 102.

[87]Ibid., para. 103. That conclusion was reached on the basis that there existed a subsequent practice among the States parties not to derogate from Article 5 in respect of military operations abroad.

[88]Ibid., para. 104.

As a consequence, it accepted that:

> [B]y reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions.[89]

The Court accordingly concluded that:

> [I]n cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, … Article 5 could be interpreted as permitting the exercise of such broad powers.[90]

The Court emphasized that any detention nevertheless had to be "lawful" under international humanitarian law, and had to be in keeping with the fundamental purpose of Article 5(1) of protecting individuals from arbitrariness,[91] but then in practice proceeded to read down the remaining provisions of Article 5 relating to procedural safeguards in light of international humanitarian law. In particular, it held that, as concerns detention in an international armed conflict, the safeguards contained in Article 5(2) and (4) (information as to the reasons for detention, and the right to judicial review of the legality of detention) were to be interpreted "in a manner which takes into account the context and the applicable rules of international humanitarian law".[92] As regards the requirement under Article 5(3) (i.e. that persons detained pursuant to Article 5(1)(c) must be brought promptly before a judge, and are entitled to trial within a reasonable time, or release pending trial), it somewhat disingenuously held that the safeguard was not applicable on the basis that, in the case of security detention or internment under international humanitarian law, individuals were not detained pursuant to Article 5(1)(c).[93]

The decision of the Court in *Hassan* is indicative of the dangers of conceptualizing or describing the relationship between international humanitarian law and international humanitarian law as one of *lex specialis*/*lex generalis*, with the implied assumption that, in case of conflict, international humanitarian law should necessarily prevail.

Whilst the Court avoided any express reliance on the principle of *lex specialis* to justify its decision, the effect of the decision is that international humanitarian

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[89]Ibid.

[90]Ibid.

[91]Ibid., para. 105.

[92]Ibid., para. 106. In that regard, the Court accepted that the "competent body" for periodic review of detention as foreseen by Articles 43 and 78 of the Fourth Geneva Convention need not necessarily be a "court" as required by Article 5(4). Nevertheless it was careful to add that the competent body "should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness", and that the first review should take place shortly after the start of detention, with subsequent reviews taking place at frequent intervals thereafter (ibid.).

[93]Ibid.

law displaces the relevant rules of the ECHR just as effectively as if the Court had simply treated international humanitarian law as *lex specialis*, and applied the principle *lex specialis* in its strongest form.

As noted above, the constant jurisprudence of the ECtHR treats the grounds for detention set out in Article 5(1) as constituting an exhaustive list.[94] Yet in *Hassan*, basing itself on the principle of systemic interpretation, the Court effectively implied into Article 5(1) an entirely new additional basis for detention (i.e. detention consistent with international humanitarian law), albeit limited only to situations of international armed conflict. This interpretation finds no foothold in the text of the provision, nor in the previously consistent jurisprudence of the Court interpreting it.

Insofar as the Court's approach in *Hassan* is incompatible with the express terms of that provision, it involves resort to a *contra legem* interpretation which is, in itself, clearly inconsistent with the fundamental principles of textual and teleological interpretation set out in Article 31(1) of the VCLT, i.e. that a treaty is to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[95]

The Court's approach to the other provisions of Article 5 is likewise symptomatic of the same approach. Insofar as it was held that the stringent procedural safeguards applicable under Article 5 either had to be effectively equated to the less demanding requirements under international humanitarian law, or were held to be inapplicable, they were effectively gutted of any content. Although the Court attempted to soften the effect of its ruling by purporting to require that the competent body should be offered sufficient guarantees of impartiality and due process so as to protect against arbitrariness, those requirements add little to the (very basic) protections which are commonly understood to exist under international humanitarian law itself. The net result is, again, in substance, precisely the same as if the Court had concluded that Article 5 of the European Convention had been fully displaced by the applicable provisions of international humanitarian law as *lex specialis*.

4.2 *Serdar Mohammed v. Ministry of Defence: A "Modest" Role for the Lex Specialis Principle*

In contrast to *Hassan*, the decision of the High Court in *Serdar Mohammed* contains a detailed and insightful discussion of the relationship between the ECHR and international humanitarian law in terms of *lex specialis*.

[94] See cit., footnote 71.

[95] Cf. *Serdar Mohammed*, para. 291, where Leggatt J. expressed the view that, "given the specificity of Article 5, there is little scope for *lex specialis* to operate as a principle of interpretation".

The complaint concerned the prolonged detention of an Afghani citizen, suspected of being a high-ranking member of the Taliban forces, by UK troops operating as part of the United Nations International Security Assistance Force (ISAF).[96] The applicant claimed that his detention had no legal basis, and constituted a violation of Article 5 of the European Convention.

The decision grappled with a number of complex, controversial and inter-linked issues relating to the interpretation and application of the ECHR. Those issues included the relationship between the Convention and the applicable rules of international humanitarian law, which, in light of the circumstances of the case, it was common ground were the rules applicable in non-international armed conflict.[97]

In that context, one of the principal arguments advanced by the UK government in denying any breach of Article 5 of the ECHR, as summarized by Leggatt J., was that:

> [A]rmed conflict is an exception to the normality of peace. Human rights law is designed to apply in peace time or, even if also applicable during an armed conflict, is not specifically designed for such a situation. By contrast, international humanitarian law is specifically designed to apply in situations of armed conflict. In such circumstances, rules of international humanitarian law as *lex specialis* qualify or displace applicable provisions of a human rights treaty, such as Article 5 of the Convention.[98]

In order to address that argument, Leggatt J. engaged in a detailed discussion of the issue of the relationship between the Convention and international humanitarian law, in the process carrying out an analysis of the meaning and effect of what he termed the "*lex specialis* principle".[99]

Having observed that, "although easy enough to state in general terms, the exact meaning and effect of the *lex specialis* principle is more elusive …",[100] the judge distinguished three ways in which the *lex specialis* principle could be said to operate.[101] The three potential variants identified by the judge were:

(a) the "total displacement" version of the principle, according to which "in a situation of armed conflict, international humanitarian law as the *lex specialis* displaces Convention rights altogether";[102]

(b) a "weaker version" of the principle, which, whilst accepting that the ECHR continued to apply generally in a situation of armed conflict, required that, in case of a conflict between international humanitarian law and the ECHR,

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[96]Serdar Mohammed was captured by UK soldiers in 2010 in the course of a military operation in northern Helmand. He was detained by the UK in military bases for 110 days, before eventually being handed over to the Afghan authorities.

[97]*Serdar Mohammed*, paras. 231 and 232.

[98]Ibid., para. 271.

[99]Ibid., para. 272. Although the judge made reference to the maxim *lex specialis derogat legi generali* (ibid.), it is clear that, as used in the judgment, the term "*lex specialis* principle" was intended to have a far wider scope.

[100]Ibid., para. 273.

[101]Ibid.

[102]Ibid., para. 274.

international humanitarian law should prevail "as the body of law more specifically tailored to the situation";[103] and

(c) a "more modest" version of the principle which operates merely as a principle of interpretation.[104]

The judge dismissed the total displacement proposition as "impossible to maintain",[105] including in light of the relevant case law of the ICJ.

As for the second version of the principle, the judge observed that even the "weaker" form of *lex specialis*, which would require disapplication of specific ECHR provisions insofar as they actually conflicted with international humanitarian law, was not apt to regulate the relationship between the European Convention and international humanitarian law, since the Convention included a provision (Article 15) which was expressly designed to allow States to derogate from certain obligations in states of emergency, including war.[106]

Finally, as regards the third possible version of the *lex specialis* principle, which treated it not "as a principle for resolving conflicts between different bodies of law but as a principle of interpretation",[107] the judge observed that he could "see no difficulty with this, most modest version of the argument that international humanitarian law operates as *lex specialis*",[108] and its requirement that "in conditions of armed conflict, Article 5 (and other relevant articles) of the Convention should be interpreted so far as possible in a manner which is consistent with applicable rules of international humanitarian law".[109]

The High Court thus, in effect, rejected any application of the maxim *lex specialis derogat legi generali*, in its strict sense of displacement, as a suitable principle of coordination between the ECHR and international humanitarian law. To the extent that it accepted the "modest" version of the *lex specialis* principle as a means of interpretation, the approach adopted is not, in reality, an application of the *lex specialis* in its proper sense at all. Rather, its effects are so close as to be virtually indistinguishable from the principle of systemic interpretation contained in Article 31(1)(c) of the VCLT, as applied by the Grand Chamber in *Hassan*.

5 Conclusion

At base, the general principle *lex specialis derogat legi generali* is a rule to resolve antinomies between norms which concurrently regulate, in different manners, the same subject-matter. It does so by applying the special norm in preference to the

[103] Ibid., para. 282.

[104] Ibid., paras. 288 and 289.

[105] Ibid., para. 275.

[106] Ibid., para. 284.

[107] Ibid., para. 288.

[108] Ibid., para. 289.

[109] Ibid., para. 288.

general norm, which is thereby displaced, in whole or in part. As discussed in Sect. 2 above, the principle has the credentials to be regarded as a "general principle of law recognized by civilized nations" under Article 38(1)(c) of the ICJ Statute. Further, it is frequently relied upon by international courts and tribunals in order to resolve potential normative conflicts between general international law and treaties and to coordinate the interaction of potentially conflicting or redundant rules contained within a single treaty or in interrelated instruments.

When utilized in this fashion, the *lex specialis* principle is undoubtedly a useful tool in the arsenal of judges and provides a mechanism by which to resolve at least some of the normative conflicts (real or apparent), which may arise as a result of the lack of any complete and developed set of formal rules governing the precedence or hierarchy between norms in the international legal system.[110]

However, it is questionable whether the principle, and indeed the very language of *lex specialis*, is either appropriate or useful when discussing the complex issue of the relationship between international humanitarian law and international human rights law.

The very notion of a relationship between a general and a more specific rule presupposes that the rules are *ejusdem generis*. In other words, in order for the *lex specialis* principle even to be capable of application, the rules must be linked by a *genus/species* relationship, which—logically—cannot exist between rules which belong to different, and unlinked, bodies of law. It is accordingly of the essence of the *lex specialis derogat legi generali* rule that the antinomy between rules which requires resolution—or at least a situation of redundancy—must arise between rules existing broadly within the same branch of law.

Of course, despite certain broad similarities of aim, international humanitarian law and international human rights law are fundamentally distinct and different, such that articulation of their interaction through giving primacy to one of them as *lex specialis* is simply not possible from the point of view of legal reasoning.[111] For that reason alone, the language of *lex specialis* is arguably inapt to describe the relationship.

The use of the language of *lex specialis* to characterize international humanitarian law is also inappropriate, however, insofar as the term necessarily and unavoidably evokes the maxim *lex specialis derogat legi generali*, and consequently suggests, at least by implication, that international humanitarian law prevails. This serves to muddy the waters, and lends itself to continued efforts (in particular, on the part of the States confronted with challenges to their conduct in armed conflict) to argue that the protections of international human rights law should give way to international humanitarian law.

In the light of those considerations, although, as discussed above, it is tolerably clear that in using those words the intention was not to refer to the maxim *lex specialis derogat legi generali* as a mechanism of coordination between the two

[110]Lindroos (2005), p. 28.

[111]Cf. Lindroos (2005), p. 66.

bodies of law, the use by the ICJ in its *Nuclear Weapons* Advisory Opinion of the words "*lex specialis*" in relation to international humanitarian law was unfortunate. It has confused matters,[112] whilst at the same time opening the door to instrumental arguments by some States.

The correct articulation of the two bodies of law would appear to be better understood as one essentially akin to systemic interpretation of the norms of international human rights law in the specific context of armed conflict and in light of the applicable rules of international humanitarian law.

Such an approach is clearly permissible, and indeed required, under the general rules of interpretation under the law of treaties. However, such systemic interpretation is subject to certain limits, most notably that the "ordinary meaning" of the words of the relevant provision may not permit a result which reconciles the conflicting rules, and that a harmonious interpretation may well be inconsistent with the "object and purpose" of the treaty.

Even if not used to denote a relationship in which international humanitarian law prevails in case of conflict, but rather a relationship based on interpretation of international human rights law in the light of relevant rules of international humanitarian law, use of the terminology of *lex specialis* is liable to create a bias in favor of the conclusion that international humanitarian law must prevail insofar as interpretation of international human rights law cannot produce a solution which resolves the conflict. One may speculate that, although no express reference was made to the term in its reasoning, the overtones of the *lex specialis* character of international humanitarian law were a contributing factor in the decision in *Hassan* in effect to disapply the clear letter of Article 5(1) of the ECHR.

As such, it would be preferable if the tag *lex specialis* were abandoned altogether in the specific context of the discussion of the relationship between international humanitarian law and international human rights law, and the relationship were rather to be understood as one in which international humanitarian law is to be regarded as simply one of the "relevant rules of international law applicable in the relationship between the parties" [113] which are to be taken into account when interpreting international human rights law.

Whilst international human rights law is applicable in peacetime *and* in war, and international humanitarian law is only applicable in armed conflict, there is no reason why, taken as a whole, international humanitarian law should always and necessarily be seen as more "special" than international humanitarian law in situations of armed conflict. In many cases, the two bodies of law complement each other and can be combined in order to offer greater protection for individuals, whilst allowing courts and tribunals applying international human rights law to take into account the specificities of the situation where the two bodies of rules

[112]Including by leading some commentators to suggest that the ICJ in fact intended to make reference to the principle *lex specialis derogat lex generali*; see, e.g., Abresch (2005), p. 744.

[113]Article 31(3)(c) of the VCLT.

provide for different standards.[114] The principle of systemic interpretation allows the interpreter sufficient latitude to pursue this result.

Nevertheless, there will inevitably be some situations where the letter of the law does not permit such harmonious interpretation. The *lex specialis* principle, for all of the reasons outlined above, is not suitable to provide a solution to this type of situation.

In this regard, it is suggested that the better (and more principled) view is that which acknowledges, on the one hand, that, inevitably, situations may arise in which a harmonizing approach through interpretation is not possible, and, on the other, that, as a result, there may be situations in which conduct which is "lawful under international humanitarian law can at the same time constitute a violation by the State in question of some other international obligation incumbent upon it".[115]

However, States need not necessarily end up facing the dilemma of which set of obligations to respect. First, it is difficult to imagine situations in which international humanitarian law would positively *require* States to take action which would violate their obligations under international human rights law. Insofar as the rules of international humanitarian law are prescriptive in terms of the treatment to be accorded to individuals, the conduct which is prohibited or required will normally a fortiori also be prohibited or required under international human rights law. Conversely, to the extent that the rules of international humanitarian law are permissive, for instance with regard to detention or killings in armed conflict, the State is free not to carry out the relevant conduct insofar as it would violate its international human rights law obligations.

Such an approach, although sustainable from a purely theoretical perspective, is bound to be labeled as idealistic and out of touch with the realities of armed conflict.

Second, and by way of response to such an objection, it should be noted that international human rights law itself is not blind to the exigencies faced by States engaged in armed conflict. All of the principal international human rights treaties contain provisions which permit States to derogate from certain aspects of their obligations in time of war or other public emergency.[116] As such, and notwithstanding the decision of the Grand Chamber in *Hassan*, where States engage in military operations which may involve them acting in a manner which, whilst permitted under international humanitarian law, may be inconsistent with their (derogable) human rights obligations, by far the better solution would be to require them to enter an appropriate derogation. This would require prior consideration of potential human rights issues, ensure at least a degree of legal certainty and transparency, as well as ensuring a minimum of *ex ante* domestic and international

[114]For a nuanced assessment of the impact of international human rights law on military operations, see Sari (2014).

[115]*Croatian Genocide*, para. 474.

[116]See, e.g., Article 4 of the ICCPR; Article 15 of the ECHR; Article 27 of the ACHR. The only notable exception is the ACHPR, which does not make any provision for derogation in states of emergency. For an insightful discussion of the availability of derogation in relation to the extra-territorial conduct of a State, see Milanovic (2014a).

scrutiny of the measures States propose to take. For States which are prepared to take the politically difficult decision of becoming involved in military operations abroad, and profess to be serious about their human rights commitments, such an approach is the least which can be expected.

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