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International human rights law and the law of armed conflict in the context of counterinsurgency: With a particular focus on targeting and operational detention

Pouw, E.H.

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Chapter III Conceptual Framework for Analysis on the Interplay of Norms of IHRL and LOAC

The purpose of this chapter is to provide a conceptual framework for analysis that provides the parameters necessary to carry out the legal examination of the interplay between IHRL and LOAC in respect of deprivations of life and liberty in counterinsurgency. In essence, the interplay of IHRL and LOAC is an issue of norm relationships. The research question central in this chapter is: what are the rules, principles, concepts, or doctrines of international law underlying the relationship of norms in general, and that of IHRL and LOAC in particular?

Paragraph 1 addresses the issue of norm relationships between IHRL and LOAC. Paragraph 2 focuses on the general meaning of the maxim of *lex specialis*. Paragraph 3 examines the role of the *lex specialis* maxim in the context of IHRL and LOAC. Finally, in paragraph 4, a conceptual framework for analysis will be distilled that will function as the guide for the remainder of the study.

1. Norm Relationships between IHRL and LOAC

When applied to the relationship between IHRL and LOAC, the instrument of complementarity entails that both regimes mutually reinforce each other and, where necessary, complete and perfect each other⁶⁴⁴ by drawing from each other's rules originating from treaty and customary international law, as well as general principles of international law.⁶⁴⁵

As can be inferred from the ICJ in its *Palestinian Wall Advisory Opinion*,⁶⁴⁶ the complementary interplay between IHRL and LOAC finds reflection in three situations:

Firstly, where a matter is regulated by LOAC, *but not by IHRL*, the former may fill the regulatory gaps of the latter;

Secondly, where a matter is regulated by IHRL, *but not by LOAC*: the former may fill the regulatory gaps of the latter.

A *third* situation arises where a matter is regulated by both IHRL and LOAC. In that case recourse must be taken to instruments available within international law capable of regulating norm-relationships.

Of the instruments available in the 'toolbox', the maxim of *lex specialis derogat legi generali* (hereinafter referred to as the maxim of *lex specialis*) is generally considered to be the most appropriate 'tool'.⁶⁴⁷ In the practice of the (quasi-)judicial bodies of international law, the maxim of *lex specialis* is frequently mentioned and applied. In quite a few instances, LOAC has been identified as the *lex specialis* in regulating conduct during armed conflict.⁶⁴⁸ Howev-

⁶⁴⁴ Kleffner (2010b), 73; Droege (2008a), 522. See also (2010c), *Franklin Guillermo Aisalla Molina v. Ecuador, Case IP-02, OEA/Ser.L/V/II.140 Doc. 10 (2010), Judgment 21 October 2010 (Admissibility)*, §§ 121-122.

⁶⁴⁵ For example, on the role of customary IHRL in interpreting LOAC, see Cassimatis (2007), 633-637.

⁶⁴⁶ (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, § 106, confirmed in (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005*, § 216 (although in the latter opinion the ICJ refrains from using the *lex specialis*-rule. It remains unclear as to why it did so).

⁶⁴⁷ Kleffner (2010b), 73.

⁶⁴⁸ (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, § 25; (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, § 106. The UNHRC too has emphasized the *lex specialis* position of LOAC (UNHRC (2004), §

er, the precise meaning of the maxim of *lex specialis*⁶⁴⁹ and its aptness in the regulation of the interplay between IHRL and LOAC,⁶⁵⁰ have been challenged in doctrine, particularly by those who seek to strengthen the role of IHRL in the regulation of armed conflict.⁶⁵¹ This calls for a closer examination of the maxim.

2. *Lex Specialis*

The maxim *lex specialis derogat lex generali* is a historically deeply rooted⁶⁵² and nowadays commonly accepted⁶⁵³ mechanism to regulate normative relationships of two norms being simultaneously valid and applicable to the same subject matter.⁶⁵⁴

In its traditional meaning, the *lex specialis* principle entails that in situations of simultaneous applicability of two norms to a similar factual situation, the more specific norm is awarded priority over the norm that is more general.⁶⁵⁵ This interplay between specific and general norms was already recognized in the writings of classic international law scholars such as

11) but it has also stressed that acts permissible under LOAC, but derogating from the rights set forth in the ICCPR are lawful “only if and to the extent that the situation constitutes a threat to the life of the nation.” See UNHRC (2001), § 3. See further the IACiHR in (1997b), *Abella et al. v. Argentina (La Tablada)*, Case No. 11.137, Decision of 18 November 1997, § 159; (1999), *Third Report on the Situation of Human Rights in Colombia*, IACiHR (26 February 1999), §§ 11, 151-154; (1999f), *Coard and Others v. the United States (US Military Intervention in Grenada)*, Case No. 10.951, Decision of 29 September 1999, § 42; (2002j), *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba*, Decision of 13 March 2002.

⁶⁴⁹ University Centre for International Humanitarian Law (2005), 19-20; Bowring (2009); Milanovic (2010a), 17-18, 24.

⁶⁵⁰ University Centre for International Humanitarian Law (2005), 19-20; Schabas (2007b); Kolb (2006), § 4; Ben-Naftali & Shany (2004); Prud'homme (2007), 383, 385-386: “The broadness of this principle allows manipulation of the law, a maneuvering of the law that supports diametrically opposed arguments from supporters that are both for and against the compartmentalization of international humanitarian law and international human rights law. Ultimately, the vagueness of the theory of *lex specialis* means that using it [as] a conflict-solving or interpretative device leads to decisions being made based on political or other motives rather than on sound legal grounds.”

⁶⁵¹ Lubell (2007).

⁶⁵² The *lex specialis* principle has historical roots in Roman law as part of the *Corpus Iuris Civilis*. See Papinian, Dig. 48, 19, 41 and Dig. 50, 17, 80. The last text states: “*in toto iure generi per speciem derogatur et illud potissimum habetur, quod ad speciem directum est*”, which translates as “in the whole of law, special takes precedence over genus, and anything that relates species is regarded as most important.” See Mommsen & Kruger (1985).

⁶⁵³ The *lex specialis* principle is commonly accepted as an instrument of legal interpretation and conflict-resolution, both in domestic law and in international law. From the viewpoint of international law it is generally seen as a general principle of international law (see (1999j), *Southern Bluefin Tuna, ITLOS Order (27 August 1999)*, § 123. See also Cheng (1987), 25 *et seq.* *Lex specialis* was referred to here as an example of a general principle in the drafting process of Article 38 of the Statute of the PCIJ). Although viewed differently by some (see Judge Hsu, in his dissenting opinion in the *Ambatielos Case*, (1953), *Ambatielos Case, Judgment of 19 May 1953 (Merits), Dissenting Opinion of Judge Hsu*, 87 *et seq.*), it is generally not accepted as a rule of customary law *per se* (see McCarthy (2008), 104). It can, however, be seen to have attained that status through its incorporation, be it not explicitly, as one of the treaty interpretation principles as meant in Articles 31 and 32 of the VCLT,⁶⁵³ recognized by the ICJ as customary (see (1994c), *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment of 3 February 1994, 6, § 41). In the view of Pauwelyn it is a principle of legal logic (Pauwelyn (2003), 388. See also Jenks (1953), 436).

⁶⁵⁴ Hereinafter: the *lex specialis* principle. Alternative formulations are “*generalibus specialia derogant*”; “*generi per speciem derogatur*”; “*specialia generalibus, non generalia specialibus*”.

⁶⁵⁵ Koskeniemi (2007a), 264, § 14(2)(5).

Grotius,⁶⁵⁶ Von Pufendorf⁶⁵⁷ and Vattel.⁶⁵⁸ As concluded by the ILC Study Group, the rationale for such priority is that

special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law. Its application may also often create a more equitable result and it may often better reflect the intent of the legal subjects.⁶⁵⁹

The scope of *lex specialis* is not limited to treaty law, but also extends to customary international law.⁶⁶⁰ It can thus be applied between norms of a single treaty;⁶⁶¹ between norms of different treaties;⁶⁶² between treaty- and non-treaty norms⁶⁶³ or between two non-treaty norms.⁶⁶⁴

While a principle with deep historical roots and a basis as a general principle within public international law, there remains a great deal of ambiguity as to the precise scope and function of the *lex specialis* maxim within contemporary public international law. The ILC Study Group points out that the *lex specialis*-maxim “cannot be meaningfully codified.”⁶⁶⁵ In legal doctrine and jurisprudence, the way the maxim finds application has been subject of criticism and views as to its precise meaning and function differ.⁶⁶⁶ This lack of unity in ap-

⁶⁵⁶ Grotius (1625).

⁶⁵⁷ Pufendorf (1732).

⁶⁵⁸ de Vattel (1758).

⁶⁵⁹ Koskenniemi (2007a), 265, § 14(2)(7). See also

⁶⁶⁰ Villiger (1997), 60; Villiger (1985), 161; Jennings & Watts (1992), 1270-1280; Koskenniemi (2007b), 46-47, § 84.

⁶⁶¹ (1979a), *Beagle Channel Arbitration (Argentina v. Chile)*, 18 February 1977, 141, §§ 36, 38 (“[...] [A]ll conflicts or anomalies can be disposed of by applying the rule *generalia specialibus non derogant*, on which basis Article II (*generalia*) [of a Boundary Treaty of 1881] would give way to Article III (*specialia*), the latter prevailing; [...]”); (2002b), *Case C-96/00, Rudolf Gabriel, Judgment of 11 July 2002*, ECR (2002) I-06367, 6398-6399, §§ 35-36; 6404, § 59; (1993a), *Brannigan and McBride v. the United Kingdom*, App. No. 14553/89; 14554/89, *Judgment of 26 May 1993*, 57, § 76 ([...] since the requirements of Article 13 are less strict than those of Article 5, para. 4, [the latter] must be regarded as the *lex specialis* in respect of complaints under Article 5); (1984b), *De Jong, Baljet and van den Brink v. the Netherlands*, App. No. 8805/79; 8806/79; 9242/81, *Judgment of 22 May 1984*, 27, § 60; (1994b), *Murray v. the United Kingdom*, App. No. 14310/88, *Judgment of 28 October 1994*, 37, § 98; (1999h), *Nikolova v. Bulgaria*, App. No. 31195/96, *Judgment of 25 March 1999*, 25, § 69.

⁶⁶² (1924), *The Mavrommatis Palestine Concessions - Greece v. Britain (Jurisdiction)*, *Judgment of 30 August 1924*, 31 (concerning a conflict between the 1922 Mandate for Palestine and the 1923 Protocol XII of the Treaty of Lausanne: “in cases of doubt, the Protocol, being a special and more recent agreement, should prevail”); (1999n), *Turkey - Restrictions on Imports of Textile and Clothing Products*, 31 May 1999, WT/DS34/R, § 9.92; (1998h), *Indonesia - Certain Measures Affecting the Automobile Industry*, 2 July 1998, WT/DS54, WT/DS55/R, WT/DS59/R, WT/DS64/R, § 4.20.

⁶⁶³ (1985c), *INA Corporation v. Iran, Iran-US Claims Tribunal*, 378 (“we are in the presence of a *lex specialis* in the form of a Treaty of Amity, which in principle prevails over general rules.”); (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Judgment of 27 June 1986 (Merits)*, § 274 (“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”); (1982b), *Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *Judgment of 14 April 1981*, § 24 ([i]t would no doubt have been possible for the Parties to identify in the Special Agreement certain specific developments in the law of the sea [...], and to have declared that in their bilateral relations in the particular case such rules should be binding as *lex specialis*).

⁶⁶⁴ (1957), *Case Concerning the Right of Passage over Indian Territory (Preliminary Objections) (Portugal v. India)*, 44, concerning a conflict between an established practice of transit passage between India vs Britain/Portugal and the general law on transit passage: “such a particular practice must prevail over any general rules”.

⁶⁶⁵ Koskenniemi (2007b), 64, § 119.

⁶⁶⁶ See for example Kammerhofer (2005).

proach may result in differing legal conclusions and thus practical effect of the principle when applied.⁶⁶⁷

Various areas of ambiguity can be detected. For example, it has been pointed out that the *lex specialis* principle does not function when applied to norms belonging to two different systems part of the decentralized and non-hierarchical framework of international law, but finds applicability only in domestic law, which is more unified.⁶⁶⁸ This raises the issue of the aptness of the *lex specialis* principle in relation to LOAC and IHRL, being two distinct regimes,

Others argue that the *lex specialis* principle is used based on the inadequate or dated presumption of the ‘billiard-ball model’ of international law, which takes as a starting point that all states conclude treaties or endorse customary law with the same, unified intent.⁶⁶⁹ However, in practice

[t]here is no single legislative will behind international law. Treaties and custom come about as a result of conflicting motives and objectives – they are “bargains” and “package-deals” and often result from spontaneous reactions to events in the environment.⁶⁷⁰

Thus, in contrast to domestic law, international law consists of a “variety of fora, many of which are disconnected and independent from each other, creating a system different from the more coherent domestic legal order.”⁶⁷¹ As a consequence, international law knows no hierarchy of norms.

An additional uncertainty concerns the position of the maxim of *lex specialis* vis-à-vis other rules of interpretation and maxims of conflict resolution – such as *lex prior*, *lex posterior*, autonomous operation, and legislative intent, *a contrario*, acquiescence, *contra proferentem*, *eiusdem generis*, and *expression unius est exclusio alterius*. It has been argued that the determination of this interplay between interpretative principles and maxims of conflict resolution cannot be determined in a general manner, but is subject to a contextual appreciation.⁶⁷² However, it is submitted that all of these are tools, but they each have a specific function. They exist side by side and are not intrinsically mutually exclusive, but there is a logical function for each. It may thus be that in one point in time the *lex specialis* applies, but that in another point in time another principle or maxim takes precedence, such as the *lex posterior derogat legi priori*-maxim. This plays alongside *lex specialis*, but an older specific rule takes precedence over a newer general rule.

A fundamental area of ambiguity is the very function of the maxim. However, according to the ILC Study Group “[t]here are two ways in which law may take account of the relationship of a particular rule to general one.”⁶⁷³

In the first, more traditional, function of *lex specialis*, referred to as “genuine *lex specialis*”,⁶⁷⁴ the maxim operates *as a means to resolve conflict* between norms that, when applied to the same situation, lead to different results. The norm identified as *lex specialis* then functions as an *exception* to the general rule, by way of which the former “may be considered as a *modification, overruling* or a *setting aside* of the latter”⁶⁷⁵ in so far this is permitted by general international

⁶⁶⁷ Milanovic (2010a), 15; McCarthy (2008), 105.

⁶⁶⁸ Lindroos (2005), 28.

⁶⁶⁹ Simma & Pulkowski (2006), 489.

⁶⁷⁰ International Law Commission (2004), § 28.

⁶⁷¹ Lindroos (2005), 28.

⁶⁷² Koskenniemi (2007b), § 251; Lindroos (2005), 40-41; Matheson (2007), 427; Jenks (1953), 407.

⁶⁷³ Koskenniemi (2007b), 49, § 88.

⁶⁷⁴ Koskenniemi (2007b), 49, § 88.

⁶⁷⁵ Koskenniemi (2007b), 49, § 88.

law.⁶⁷⁶ In these cases, “speciality in the sense of logic implies that the norm that applies to certain facts must give way to the norm that applies to those same facts *as well as to an additional fact present in that situation*. Between two applicable rules, the one which has the larger ‘common contact surface area’ with the situation applies.”⁶⁷⁷ This function of the *lex specialis* is referred to as *lex specialis derogata*. In this function, the *lex specialis* “is a “structural necessity” to preserve the coherence and systematicity in positing the two separate set of rules in a single unitary legal order.”⁶⁷⁸

This function of *lex specialis* has been *misinterpreted* as representing the *single* manner in which the maxim operates, i.e. as an instrument that only applies once it becomes clear that conflict avoidance through harmonization cannot be avoided. It is then viewed as a rule solely designed for conflict resolution.⁶⁷⁹

However, a second, “proper”, function⁶⁸⁰ is that the maxim operates as a *technique of interpretation*. As such, “[...] a rule may [...] be *lex specialis* in regard to another rule as an *application, updating or development* thereof, or, which amounts to the same, as a *supplement*, a provider of instructions on what a general rule requires in some particular case.⁶⁸¹ This function, also referred to as *lex specialis complementa*, “is sometimes seen as not a situation of normative conflict at all, but is taken to involve the *simultaneous* application of the special and the general standard.”⁶⁸² Both norms may point in the same direction in a relationship in which the special norm functions as the “means” and the general norm as the “ends”.⁶⁸³ The focus here is at *conflict-avoidance* through harmonization of the two norms. In essence, the *lex specialis* principle then is applied not to resolve a case of normative conflict, but rather as a partner-norm in a *relationship of interpretation*, in which one of the norms complements the other in its area of ‘weakness’. As such, the *specialis* informs the interpretation of the *generalis*.

Whether applied as an application or as a derogation of the general law, the application of the *lex specialis* does not result in the general law to become invalid or inapplicable. To the contrary, the general law “will, in accordance with the principle of harmonization [...] continue to give direction for the interpretation and application of the relevant special law [...] and will become fully applicable in situations not provided for by the latter.”⁶⁸⁴

Once a norm is identified as more special than another applicable norm because it more closely relates to the factual context and reflects State intent, “the relevant special norm applies, and that is all.”⁶⁸⁵ However, critical steps in the application of the maxim of *lex specialis derogat legi generali* are the identification of a norm as *lex specialis* and the determination of its function as an instrument of conflict resolution or as technique of interpretation in the specific context. This brings us to another aspect of alleged controversy, namely that the principle itself does not provide any guidance as to how to identify a norm as being more special than another in a particular relationship, which makes this determination vulnerable

⁶⁷⁶ Derogation from general law is not permitted in all cases. It is, for example, forbidden to derogate from a general rule that represents *jus cogens*.

⁶⁷⁷ Sassòli & Olson (2008), 604 (emphasis added); Koskenniemi (2007b), § 105.

⁶⁷⁸ Arai-Takahashi (2010), 417; Pulkowski, 12, section 5.

⁶⁷⁹ See (1999n), *Turkey - Restrictions on Imports of Textile and Clothing Products*, 31 May 1999, WT/DS34/R, §§ 9.92-9.96.

⁶⁸⁰ Koskenniemi (2007b), 50, § 91.

⁶⁸¹ Koskenniemi (2007b), 54, § 98.

⁶⁸² Koskenniemi (2007b), 49, § 88.

⁶⁸³ Koskenniemi (2007b), 52, § 93, mentioning (2003d), *Djavit An v. Cyprus*, Appl. No. 20652/92, Judgment of 20 February 2003, § 39.

⁶⁸⁴ Koskenniemi (2007a), § 14(2)(10).

⁶⁸⁵ Koskenniemi (2007b), 52, § 92.

to subjective values and policy-choices.⁶⁸⁶ Generally, however, in most cases the identification of the *lex specialis* is unproblematic, for it obviously was designed to regulate a particular subject-matter. An example is GC III, which is specifically designed to govern the subject-matter of POW. In other instances, the *lex specialis* is expressly presented as such by the relevant general law. This may take place because the *lex specialis* is a specific application of the *jus dispositivum* of general law, which allows parties to establish specific rights or obligations to govern their behavior in treaties.⁶⁸⁷ As such, treaties enjoy priority over custom; particular treaties enjoy priority over general treaties;⁶⁸⁸ and local customs have primacy over general customs. This informal hierarchy follows from a “forensic”⁶⁸⁹ or a “natural”⁶⁹⁰ aspect of legal reasoning. The *lex specialis* may also be specifically appointed as an exception to general law,⁶⁹¹ or as a specific exception within a treaty, e.g. derogation-clauses in human rights treaties.⁶⁹² In other cases, a norm that points at being more specific than another is barred from rising to the level of *lex specialis* in the application of the principle because to do so is an act expressly prohibited by the relevant general law, for example because the ‘other’ norm is a norm of *jus cogens*. This is what the ILC Study Group refers to as “easy” cases: “the speciality of the standard or instrument does not even emerge as an object of argument” and there is no “need to look “behind” or “around” the *prima facie* standard or instrument”.⁶⁹³

However, in some other, “hard” cases, it may be more difficult to categorize a particular norm as special, and as such, as an “application” or “modification” or as an “exception” to another norm. The specialty of a norm and its function vis-à-vis the other norm must be ascertained “through the normal means through which the presence of a tacit agreement, estoppel, effectivités, historic title, *rebus sic stantibus*, or, say, local custom (*Right of Passage* case) is identified.”⁶⁹⁴ This can only take place through interpretation of different considerations that are attached to the particular situation. This is why the ILC Study Group accentuates that the function of one norm vis-à-vis another “depends on how we view those rules in the environment in which they are applied, including what we see as their object and purpose.”⁶⁹⁵ It is thus necessary to examine what is “behind” or “around” the norms in question in determining whether a norm is *lex specialis*, and the function of the maxim. Such appraisal for “more nuanced factors in the process of interpretation,” such as the intention of States when drafting or acquiescing to the norms in question, the search for relevancy and effectiveness in their application in particular factual situations (effectiveness), and the legal clarity of norms or their certainty and reliability (normative weight),⁶⁹⁶ “enables more carefully calibrated conclusions concerning applicability. This leaves space for less categori-

⁶⁸⁶ Lindroos (2005), 42.

⁶⁸⁷ (1969c), *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands)*, § 72: “it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases or as between particular parties.”

⁶⁸⁸ Verdross & Simma (1984), 143-144.

⁶⁸⁹ Jennings & Watts (1992), 26, note 2.

⁶⁹⁰ Villiger (1985), 161. See also Lauterpacht, 86-88.

⁶⁹¹ Jenks (1953). For example, as a legal regime in relation to another legal regime: LOAC constitutes an exception to the rules laying out the peace-time norms. As such, they override the latter norms

⁶⁹² An example of relevance for this study is Article 4 ICCPR, which allows for derogation from certain rights and freedoms “[i]n time of public emergency which threatens the life of the nation”. As we have concluded earlier, such situations include armed conflicts, which allows for the application of LOAC.

⁶⁹³ Koskenniemi (2007b), 48-49, §§ 86.

⁶⁹⁴ Koskenniemi (2007b), 58, § 106.

⁶⁹⁵ Koskenniemi (2007b), 53, § 97.

⁶⁹⁶ McCarthy (2008), 111; Droege (2008a), 524.

cal outcomes while acknowledging that in some circumstances a degree of simultaneous applicability may exist.”⁶⁹⁷ Factors that can be taken into account are the wording and content of the norms, the nature of the norms in question, the degree of effective control exercised by the State involved, the expression of State intent, and State practice.⁶⁹⁸

At the same time, one is cautioned not to confuse the degree of specificity of a norm with its degree of precision. As argued by McCarthy, while often unproblematic, the identification of a norm as *lex specialis* based on their mere clarity, efficacy and relevancy runs the risk of oversimplification. It is in particular the notion of ‘effectiveness’ that is often overrated and therefore not always intrinsically linked to the *lex specialis*, but can instead suitably be applied to the *lex generalis*. General law is capable of governing a particular situation with as much effectiveness as the special law, often because of their generality. In addition, effectiveness (and relevance) are not static, absolute notions strongly attached to an evaluation of the degree of sophistication of the law, but they “are a function of adaptability and evolution,” linked also to the specific facts of a particular situation and thus subject to change. In those cases, special law may turn out to be too narrowly framed and, as a consequence, inflexible to adapt to the situation.⁶⁹⁹ The general law then steps in, in its function as a “fall back” regime.⁷⁰⁰

In its function as a conflict avoiding interpretive instrument, the maxim of *lex specialis* “[...] comes very close to the principle of Article 31(3)(c) of the Vienna Convention on the Law of Treaties, according to which treaties must be interpreted in the light of each other.”⁷⁰¹ While prevalence is awarded to the special norm, the general norm continues to apply in the background. It is just that in the case of a dispute over the relevant obligations, the special norm will be used as the primary basis, and not the general norm. Nevertheless, the principles and purposes of the general norm continue to ‘feed’ the special norm, by conveying its meaning to the special norm.⁷⁰² The crucial point is that there is no controversy between the special and general norm.⁷⁰³ The special norm is simply more detailed and thus “approaches most nearly the to the subject in hand” and is “are ordinarily more effective.”⁷⁰⁴ As the above demonstrates, in determining which norm is the *lex specialis* and whether the maxim is to be applied as *lex specialis derogata* or *complementa*, the maxim of *lex specialis derogat*

⁶⁹⁷ McCarthy (2008), 110; Koskenniemi (2007b), 48-49, §§ 86-87; McDougal, Laswell & Miller (1994), 83.

⁶⁹⁸ Hathaway, Crootoof, Levitz, *et al.* (2012), 1935.

⁶⁹⁹ McCarthy (2008), 116-117.

⁷⁰⁰ Pauwelyn (2006), § 28.

⁷⁰¹ Droege (2008a), 524.

⁷⁰² See for example the ICJ’s reasoning in the *Oil Platforms Case*, where the general law concerning the use of force influenced the meaning of “necessity,” as laid down in the 1955 Treaty of Amity between Iran and the United States. See (2003j), *Oil Platforms Case (Iran v. United States of America) (Merits)*, § ?.

⁷⁰³ The ILC Study Group mentions as an example of this functioning of the *lex specialis* the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, which is the special law in relation to the more general 1985 Vienna Convention on the Protection of the Ozone Layer. Another example is the judgment of the Iran-US Claims Tribunal in the case of *Amoco International Finance Corporation v. Iran I* which it held that “[a]s a *lex specialis* in the relations between the two countries, the [Treaty of Amity between Iran and the United States] supersedes the *lex generalis*, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. On the contrary, the rules of customary law may be useful in order to fill in possible *lacunae* of the Treaty, to ascertain the meaning of the undefined terms in its text or, more generally, to aid interpretation and implementation of its provision.” ((1987a), *Amoco International Finance Corporation v. Iran*, 222.). For their discussion, see Koskenniemi (2007b), §§ 99-102.

⁷⁰⁴ Grotius (1625), Book II, Chapter XVI, Section XXIX, 428.

legi generali does not work as an instrument of *conclusory* procedure.⁷⁰⁵ When applied as such, the maxim operates in an absolute, categorical and mechanical manner, by which the special norm fully *supplants* the general norm to a degree that the latter has no further role to play and is rendered non-applicable.⁷⁰⁶ A conclusory approach is depreciative of the inherent relative, specific contextual manner in which the *lex specialis* principle is to be properly applied. In other words, it does not offer insight in the *interpretative process* that lies underneath the qualification of a norm as *lex specialis*, or in the arguments indicative of the basis (as *derogata* or *complementa*) of its prioritization.⁷⁰⁷ As a result, it allows for *subjectiveness* in the appointment of a norm as being special, based on its character as being more ‘just’.⁷⁰⁸ Support for a conclusory interpretation of the derogative nature of a special rule is exceptional⁷⁰⁹ and must be rejected.

In sum, it follows from the above that the maxim of *lex specialis* may function as an *interpretative tool* aimed at harmonizing differing applicable and valid *norms*, whereby the more general rule is interpreted in light of the more specific rule. In situations where differing norms demonstrate a genuine conflict, the maxim of *lex specialis* functions as a *conflict-resolution instrument*. In determining whether a rule is more specific than another and how the maxim of *lex specialis* is to function, account must be had of the precision and clarity of the relevant norms, the intent of States when drafting or acquiescing to the norms, and the flexibility of the norms to mold to the particularities of the factual situation at hand without losing effectiveness. In other words, the maxim of *lex specialis* is *norm-* rather than (solely) regime-sensitive, as well as *context-sensitive*.

3. *Lex Specialis*, IHRL and LOAC

Having closely examined the maxim of *lex specialis* in more general terms, its role and function in the interplay between IHRL and LOAC must be determined.

The aptness of the maxim of *lex specialis* to the regulation of the interplay between IHRL and LOAC, as well as the generic pronouncement of LOAC as the *lex specialis* by (quasi-

⁷⁰⁵ Analogous to McCarthy (2008).

⁷⁰⁶ McCarthy (2008), 106.

⁷⁰⁷ McCarthy (2008), 103, 108-109; Lindroos (2005), 42, 46; Koskeniemi (2007b), 64, § 120; Krieger (2006), 269; Jenks (1953), 447. See also Simma & Pulkowski (2006), 507 in relation to Article 55 of the Draft articles on state responsibility: “[...] a formal, almost mechanical application of the *lex specialis* principle, based on a presumption in favour of the ‘general’ provision, does not suffice to establish the applicability of the rules on state responsibility. The *lex specialis* maxim is merely an argumentative tool to articulate further, normative considerations.”

⁷⁰⁸ McCarthy (2008), 108. Note, however, that Sassòli and Olson argue that “[t]he systemic order of international law is a normative postulate founded on value judgments. Some consider that in reality the decision-maker first determines which rule is more just and then characterizes it as *lex specialis*. In particular, when formal standards do not indicate a clear result, the teleological criterion must weigh in, *even though it allows for personal preferences*.” Sassòli & Olson (2008), 604 (emphasis EP).

⁷⁰⁹ Proponents of this conclusory view are Anzilotti (1929), 103 (who argues that “*in toto jure genus per speciem derogatur, la norme de droit particulière l'emporte sur la norme generale*”); Erberich (2004), 44-48 (“*bei der gleichzeitigen Geltung verschiedener Regelungskomplexe [gilt dass], wenn der eine die Situations erschöpfend und abschließend regelt und diese Regelungen durch die Anwendung des anderen Regelungskomplexes ausgehebelt würden, der allgemeinere dann verdrängt wird*”); Dennis (2005) and the governments of the United States and Israel with respect to the relationship between IHRL and LOAC, identifying the latter as the *lex specialis*, thus resulting in the non-applicability of IHRL in armed conflict. In relation to the former, see in particular Oral Statements by the United States Delegation to the Committee Against Torture (8 May, 2006), 4, available at www.usmission.ch/Press2006/CAT-May8.pdf.

Judicial bodies of international law has been frequently challenged, particularly by scholars who seek to strengthen the role of IHRL in the regulation of affairs in armed conflict. Much criticism, for example, is aimed at the practice of the ICJ. A *first* complaint is that the ICJ, in its *Nuclear Weapons Advisory Opinion*, does not explain what it means with ‘*lex specialis*’ in functional terms.⁷¹⁰ In this case, the ICJ held, in sum, that the prohibition not to *arbitrarily* deprive a person of his life is not violated when this results from conduct lawful under the *lex specialis* of the law of hostilities under LOAC.⁷¹¹ While some experts have interpreted ‘*lex specialis*’ to refer to its function as the *lex specialis derogat*,⁷¹² others have argued that the way the ICJ applied it points at its function as *lex specialis complementa*.⁷¹³ Yet again, others view it as an indication that while the law of hostilities may be the more specific law, it does not result in the application of the maxim of *lex specialis per se*.⁷¹⁴ *Secondly*, the ICJ has been criticized for not explaining why it persistently points to LOAC as the *lex specialis*. As some argue, in some instances IHRL may be the more specific law.⁷¹⁵ *Thirdly*, the designation of LOAC as the *lex specialis* has raised the question of whether this implies that the regime of LOAC, *in toto*, is the *lex specialis*, or that subject to the concrete circumstances some of its norms assume that position vis-à-vis simultaneously relevant and applicable norms of IHRL. The ICJ, so is the complaint, is not clear: in its *Palestinian Wall Advisory Opinion* it points to LOAC as the *lex specialis*, whereas in its *Nuclear Weapons Advisory Opinion* it refers to a specific subset of LOAC, i.e. the law of hostilities, as the *lex specialis* within the specific context at hand.⁷¹⁶ It is submitted, however, that notwithstanding these arguments, the ICJ’s ruling must be viewed in the proper context in which it occurred, namely that of hostilities in an armed conflict, and that it identifies the law of hostilities as the *lex specialis*, and not the entire body of LOAC.

Some argue for the application of other instruments, such as the maxim of *lex posterior*,⁷¹⁷ so that recent IHRL-norms override pre-dating norms of IHRL, or the *most-favorable principle*, so that the norm offering the most protection prevails, or to stress weaknesses in LOAC to undermine its dominant position of LOAC in the regulation of hostilities. The underlying argument in many instances is that IHRL is generally believed to offer more protection. However, at closer scrutiny, these alternatives must be rejected. For example, the maxim of *lex posterior* finds no application in respect of treaty norms of different regimes, such as IHRL and LOAC, even when the treaties pertain to the same subject-matter (which is a requirement for its application).⁷¹⁸ Instead, States are bound to comply with their obligations as far as possible, “with the view of mutual accommodation and in accordance with the principle of harmonization.”⁷¹⁹ As argued by Milanovic,

⁷¹⁰ Prud’homme (2007), 378; Schäfer (2006), 43-44.

⁷¹¹ (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, § 25.

⁷¹² See most notably the views of the United States and Israel.

⁷¹³ Henckaerts (2008), 264; Alston, Morgan-Foster & Abresch (2008), 192-193; Salama & Hampson (2005), § 57.

⁷¹⁴ Schabas (2007b), in particular 598. Schabas seems to adopt a conclusory approach towards *lex specialis* and submits that that in reality the relationship between LOAC and HRL is not a matter of *lex specialis* and *lex generalis*, but rather one of belt and suspenders: both regimes fill each others gaps.

⁷¹⁵ Milanovic (2010a), 6.

⁷¹⁶ Milanovic (2010a), 6.

⁷¹⁷ Olson (2009), 448, 445.

⁷¹⁸ Milanovic (2010b), 9-10.

⁷¹⁹ Koskeniemi (2007a), § 14(5)(26): “The *lex posterior* principle is at its strongest in regard to conflicting or overlapping provisions that are part of treaties that are institutionally linked or otherwise intended to advance similar objectives (i.e. form part of the same regime). In case of conflicts or overlaps between trea-

When it comes to the IHL and IHRL treaties in particular, not only is there the obvious problem that the law-making in the two areas temporally occurred in several waves, so that it is somewhat absurd to treat these treaties as successive to the other in a *lex posterior* sense, but there is also not the slightest hint of State intent that the relationship between the two bodies of law should be governed by this rule.⁷²⁰

In addition, in Schäfer's view there is only room for the *lex posterior*-principle if a younger rule univocally calls for the setting aside of the old rule, and only if there is a conflict to begin with.⁷²¹ But even in the case of conflict between a newer and an older rule, the more specific rule of the two prevails, and this may very well be the older rule.

Others call for a more expansive application of the most-favorable principle. However, it is submitted that this principle finds no application in the relationship between IHRL and LOAC unless it specifically mandates a party to do so.⁷²² An example of an explicit basis for an appeal on this principle is the Martens clause, which finds codification in Article 75 AP I. Outside such explicit bases attempts to further injection of IHRL within the realm of armed conflict must be approached with caution, *firstly*, because generally, in armed conflict, LOAC provides norms more specific than those of IHRL, and *secondly*, because IHRL need not always provide more protection. For example, in a situation of occupation.⁷²³

[...] experience shows that [...] IHRL can be used to actually undermine the protection of rights and legitimize their violation. The decisions of Israel's High Court of Justice illustrate how the introduction of rights analysis into the context of occupation abstracts and extrapolates from this context, placing both occupiers and occupied on a purportedly equal plane. This move upsets the built-in balance of IHL, which ensures special protection to people living under occupation, and widens the justification for limiting their rights beyond the scope of a strict interpretation of IHL. The different meanings ascribed to proportionality in these two bodies of law are conflated, further contributing to this imbalance. The attempt to bring the 'rule' of rights into the 'exception' of the occupation, rather than alleviating the conditions of people living under occupation may render rights part of the occupation structure.⁷²⁴

To conclude, this study takes the position that the maxim of *lex specialis* is a principal instrument to the interplay of IHRL and LOAC, and that the latter regime, given its specific design for armed conflict, can *generally* be considered the *lex specialis*. However, this position of LOAC is not to be misinterpreted as being all exclusive and unlimited, thus excluding any role for IHRL in the regulation of affairs during armed conflict. The interplay of IHRL and LOAC requires a nuanced approach, with account of the specific circumstances in which the norms apply, and without losing sight of the fundamental characteristics of the regimes to which the norms belong. This may imply that the norm more specifically tailored to the situation applies. This view also finds support from States. Canada, for example, has declared that

a state's international human rights obligations, to the extent that they have extraterritorial effect, are not displaced [in armed conflict]. However, the relevant human rights principles can only be decided by reference to the law applicable in armed conflict, the *lex specialis* of IHL: Critically, in the event of an apparent inconsistency in the content of the two strands of law, the more specific

ties in different regimes, the question of which of them is later in time would not necessarily express any presumption of priority between them."

⁷²⁰ Milanovic (2010b), 9-10.

⁷²¹ Schäfer (2006), 47; Ben-Naftali & Shany (2004), 103.

⁷²² Naert (2008), 405; Schäfer (2006), 47-48.

⁷²³ Gross (2007), 4-5.

⁷²⁴ Gross (2007), 1-2.

provisions will prevail: in relation to targeting in the conduct of hostilities, for example, human rights law will refer to more specific provisions (the *lex specialis*) of humanitarian law.⁷²⁵

4. Resulting Conceptual Framework of Analysis for the Interplay of IHRL and LOAC in the Regulation of Deprivations of Life and Liberty

In view of the above, it is proposed that the interplay of LOAC and IHRL in respect of deprivations of life and liberty is examined by first determining whether each of the regimes provides norms that are *valid* and whether these norms are *applicable*. In other words, it must be established that IHRL and LOAC – in its law of IAC and NIAC – provide norms that govern the concepts of targeting and operational detention of insurgents (in their capacity as non-State actors). In addition to its validity, the applicability of the norm must be determined. Thus, for the purposes of this study, it must be established whether in a particular situational context of counterinsurgency valid norms of IHRL and LOAC regulating conduct resulting in the deprivation of life and liberty apply. This implies, on the one hand, that it must be examined whether IHRL applies, most importantly in extraterritorial situations, and in view of the authority of derogation. On the other hand, it must be established whether it is the law of IAC or the law of NIAC applies to a conflict between a counterinsurgent State and insurgents in a particular situational context of counterinsurgency.

In turn, it needs to be established in so far both IHRL and LOAC provide valid and applicable norms how their relationship must be appreciated. This implies that we must first determine the substantive content of the norms and secondly, it needs to be established, through interpretation, whether both norms are in conflict or not. When the substantive content of both norms is exactly the same, both norms are naturally in harmony. However, in case of a difference in one norm vis-à-vis the other norm, their potential of complementarity must be established. One of two solutions is possible. Either, the conflict between norms can be avoided through the technique of interpretation so as to ensure that both norms remain intact as far as possible and can mutually reinforce each other, or the norm conflict can only be resolved by recourse to a conflict-resolution technique, which implies that one of both norms is prioritized over the other.

In the event that IHRL and LOAC both regulate a certain event or matter in armed conflict, the maxim of *lex specialis* is generally the most appropriate ‘tool’, particularly in view of its binary function as means of conflict-resolution and technique of interpretation. This may imply that:

(1) the specific norm and the general norm can be harmonized via interpretation of the general norm through the specific norm, or (2) the specific norm and the general norm are incompatible.

In the event that, for example, LOAC provides a norm specifically designed for the situation at hand it, as a rule, takes *precedence* over the general rule of IHRL, without ending the latter’s applicability; it does not displace the norm of IHRL. This is of significance, because the norm of LOAC, while being more specific, may nonetheless not be more precise than the general norm of IHRL. In so far this imprecision cannot be clarified through the usual means of treaty interpretation, and by reference to the general principles underlying LOAC,

⁷²⁵ (2008c), *Amnesty International Canada v. Chief of the Defence Staff for the Canadian Forces* (18 January, 2008), Respondents’ *Factum Re: Determination of Two Questions, Pursuant to Rule 107 of the Federal Courts Rules, Regarding the Application of the Canadian Charter of Rights and Freedoms*, 26.

recourse may be had to the general rule of IHRL to offer guidance.⁷²⁶ As such, the norm of IHRL functions as the ‘fall-back’-regime.

In determining the specificity of the norm, recourse must be had to, *inter alia*, the intention of States when drafting or acquiescing to the norms in question, the search for relevancy and effectiveness in their application in particular factual situations (effectiveness), the legal clarity of norms or their certainty and reliability (normative weight), the nature of the norms in question, the degree of effective control exercised by the State involved, and State practice. It remains irrelevant whether the more specific norm offers more or less protection to individuals affected by particular State conduct mandated by that norm.

Where the specific norm is not sufficiently clear or precise to determine the lawfulness of certain conduct, it may be clarified by having recourse to the general norm, but only to the extent that ambiguity in the specific norm cannot first be resolved by recourse to usual instruments of treaty interpretation or to the general principles underlying the regime to which the specific norm belongs.

⁷²⁶ Melzer (2008), 81.