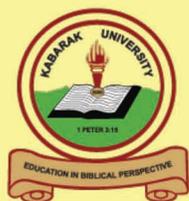


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International Human Rights Law versus International Humanitarian Law in Situations of Armed Conflict:

A Critique of Invocation of the Doctrine '*Lex Specialis Derogat Legi Generali*' with Reference to the Duty to Protect Life

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Abstract

This paper examines the interplay between international human rights law and international humanitarian law especially in situations of armed conflict. When this overlap occurs, the general position in international law is that international human rights law shall apply in times of peace as '*lex generalis*', or general law, while international humanitarian law shall apply in situations of armed conflict as '*lex specialis*', or special law, thereby displacing or keeping in abeyance general law. The position is reliant on the doctrine '*lex specialis derogat legi generali*' meaning that special or specific law suspends general law.

The paper, therefore, examines the appropriateness of using the doctrine '*lex specialis derogat legi generali*' in situations of interplay between the

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two fields of international law, especially when it comes to the question of sanctity of life. With reference to the duty to protect life, the paper notes that, the doctrine of '*lex specialis*' does not adequately clarify the coordination which must desirably exist between the two fields of international law, and in any case it places limits on protection of victims.

The paper argues, therefore, that, a well-coordinated application of international human rights law and international humanitarian law is vital to ensuring adequate protection of victims during all situations of armed conflict, because the general trend in the world today is to move towards broader protection of victims, and not towards limitation. In conclusion, therefore, the paper advocates for the need to substitute the '*lex specialis*' doctrine with a more coherent theory which balances the reality of conflict with the respect for humanity and protection of life.

1.0 The Issue at Stake

The question of interplay between International Human Rights Law (IHRL) and International Humanitarian Law (IHL) generally has been a subject of much discussion,¹ because there are many areas of overlap between the two fields of international law. Many of the violations of humanitarian law principles are also violations of human rights laws, and *vice versa*. However, the general position in international law is that, while international human rights law applies in times of peace, international humanitarian law applies in situations of armed conflict.

This assertion is based on the doctrine of interpretation of legal principles emanating from Roman Law and which has become part of general principles of international law today, that: '*lex specialis derogat legi generali*', meaning that 'special

¹ See for example: Roberta Arnold, Noëlle N. R. Quéniwet (2008), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, BRILL; Committee on Human Rights (2005), "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", Resolution No. 2005/35, U.N. Doc. E/CN.4/2005/L. 10/Add. 11 (19 April 2005); Orna Ben-Naftali (2011), *International Humanitarian Law and International Human Rights Law*, Oxford University Press; Anthony E. Cassimatis. (2007), "International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law", *The International and Comparative Law Quarterly*, 56(3), 623-639; Moir, Lindsay (2003), "Decommissioned? International Humanitarian Law and the Inter-American Human Rights System". *Human Rights Quarterly*, 25(1), 182-212; Forsythe, D. (2006), "Human Rights and the Military: Legal Rules", *International Studies Review*, 8(3), 504-506.

law displaces or keeps in abeyance general law' when both are relevant and can be applied in the same situation. On the basis of this doctrine, then international human rights law is supposed to apply in times of peace as *lex generalis*, or general law, while international humanitarian law is supposed to apply in situations of armed conflict as *lex specialis*, or special or specific law, thereby displacing or keeping in abeyance general law.

However, while this remains the position at international law, an argument is developing to the effect that human rights cannot be suspended or kept in abeyance at any point in time, because they have achieved the status of *jus cogens*,² hence, regarded as part of peremptory norms of international law for which no derogation is permitted. This argument is especially stronger when it comes to the duty to protect life. It is cemented by the fact that many international armed conflicts are started under lame excuses, but end up in loss of so much life. Then perpetrators go unpunished simply because life was lost in the context of an armed conflict.

This fact calls for the need to re-examine the invocation of the doctrine '*lex specialis derogat legi generali*' to see if it is still appropriate in clarifying the coordination which must desirably exist between the two fields of international law, namely international human rights law and international humanitarian law. This re-examination should be in view of moving towards broadening rather than limiting protection.

² See: Roberta Arnold, Noëlle Quéniévet (2008), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, BRILL, pp. 356-374; Aman Ullah (2011), "Derogation of Human Rights under the Covenant and their Suspension during Emergency and Civil Martial Law in India and Pakistan", *Research Journal of South Asian Studies*, Vol. 26, No. 1, January-June 2011, pp. 181-189; Dennis, Michael (2005), "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", *The American Journal of International Law*, 99(1), 119-141; Watkin, Kenneth (2004), "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict", *The American Journal of International Law*, 98(1), 1-34; Hafner-Burton, E., Helfer, L., & Fariss, C. (2011), "Emergency and Escape: Explaining Derogations from Human Rights Treaties", *International Organization*, 65(4), 673-707; Gerd Oberleitner (2015), *Human Rights in Armed Conflict*, Cambridge University Press, pp. 168-171; Andrew Clapham, Paola Gaeta (2014), *The Oxford Handbook of International Law in Armed Conflict*, OUP Oxford, pp. 662-665; Louise Doswald-Beck (2011), *Human Rights in Times of Conflict and Terrorism*, OUP Oxford, pp. 100-102; Ingrid Detter (2016), *The Law of War*, Routledge pp. 180-181; Anders Henriksen (2017), *International Law*, Oxford University Press, pp. 93-195.

2.0 International Human Rights Law and International Humanitarian Law

2.1 *International Human Rights Law*

Human rights refer to the basic *rights* and *freedoms* to which all human beings are entitled.³ A simple but elegant definition asserts human rights literally as the rights (or entitlements) that one has simply because one is a human being.⁴ Thus, the holders of human rights are individuals, not other actors such as states or corporations.

Since human rights are enjoyed simply on the basis that individuals are human beings,⁵ these rights are enjoyed equally by all humans beings, universally, and without regard to their national legal systems.

Human rights jurisprudence is built on some very fundamental concepts. These are: universality, equality and non-discrimination, indivisibility, and inter-dependence. All these four concepts are very fundamental to our discussion. Universality of human rights entails that certain moral and ethical values are shared by all peoples, in all the regions of the world, and apply in all life situations without regard to place or any other peculiarities. Equality and non-discrimination connotes that international human rights law affords the same protection equally to all people just by virtue of their humanity, regardless of gender, sex, nationality, race, ethnicity, culture, or position in life. Indivisibility entails that human rights should be addressed as an indivisible body, including civil, political, social, economic, cultural, and collective rights. Inter-dependence essentially follows the concept of indivisibility.

It entails that human rights should apply to all spheres of life: at home; at school; at workplace; in the courts; in the markets; everywhere! One right depends on the other, and a single act can result into several violations. For example, armed robbery can violate the right to security of person; the right to property; the right against torture; and the right to privacy. Thus, human rights violations

³ Civil and political rights are enshrined in articles 3 to 21 of the Universal Declaration of Human Rights (UDHR) and in the International Covenant on Civil and Political Rights (ICCPR). Economic, social and cultural rights are enshrined in articles 22 to 28 of the Universal Declaration of Human Rights (UDHR) and in the International Covenant on Economic, Social and Cultural Rights (ICESCR), and many other regional instruments.

⁴ Donnelly J., (2003), *Universal Human Rights in Theory and Practice*, 2nd Ed., p. 17.

⁵ Mackie J. L., (Jeremy Waldron, Ed.) (1984), "Can There be a Right-Based Moral Theory?" in: *Theories of Rights* Oxford: Oxford University Press, pp. 168 & 179.

are interconnected; loss of one's right detracts other rights. Similarly, protection of human rights in one area supports the protection in other areas.

The body of international human rights law is composed of many instruments whereby the key milestones include the Universal Declaration of Human Rights of 1948, followed by the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights, both of 1966. Then, many other human rights instruments have been developed in various specific areas of protection or on specific groups or categories of people.⁶

2.2 *International Humanitarian Law*

International humanitarian law, on the other side, is premised around the need to have regard and care for humanity in the conduct of warfare. It is about conducting warfare while remaining humane. Obviously, this thinking sometimes appears as a 'contradiction in terms' and defeating the foundations of logic because war in any of its forms is an inhumane way of resolving conflicts. Thus, war is against the very foundations of any reasonable humanity. Therefore, one cannot speak about having regard to and care for humanity in a situation where human reason has clearly failed. In any case, war is sometimes difficult to avoid. As a result, humanitarian law has to deal with consequences and effects of armed conflict, not the root causes of it. Therefore, it sets in when the armed conflict will have started, which means when reason will have failed to prevail.

In any case, the fundamental rules of humanitarian law are closely linked to the survival of human beings, not only as individuals but as populations and the things that surround them. This includes: safeguarding cultural objects and places of worship,⁷ and objects indispensable to the survival of the civilian population;⁸ protecting medical establishments and units (both civilian and military), public works, and critical installations for the survival of a society (like dams, dikes, and

⁶ These include: *International Convention on the Elimination of All Forms of Racial Discrimination*; *Convention on the Elimination of All Forms of Discrimination against Women*; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; *Convention on the Rights of the Child*; *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*; *International Convention for the Protection of All Persons from Enforced Disappearance*; and *Convention on the Rights of Persons with Disabilities*.

⁷ Convention of The Hague of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict is reaffirmed in Article 53.

⁸ Article 43, Protocol I; Article 14, Protocol II.

nuclear power plants)⁹and the preservation of the natural environment.¹⁰ By its very nature, humanitarian law aims, through acts of humanity, to preserve the survival of humankind to ensure that ‘civilized life’ is still possible, and to maintain the necessary conditions for a return to peace even during a continuation of conflict. As Denise Bindschedler-Robert, puts it, “the law of armed conflicts is certainly not a substitute for peace. Nevertheless, in the last analysis it preserves a certain sense of proportion and human solidarity as well as a sense of human values amid the outburst of unchained violence and passions which threaten these values”.¹¹

Humanitarian law may be expressed through the provision of bilateral treaties which can be concluded before hostilities begin, or during the continuance of hostilities in the form of truces and instruments of surrender, or at the end of conflict in the form of ceasefires and peace treaties. These would set out the treatment which ought to be given to civilians, prisoners, the sick and wounded, and neutral intermediaries.

Humanitarian law may also be formed through multilateral agreements which are usually concluded in reaction to or in the aftermath of a bloody conflict. For example, each of the set of humanitarian law codified in Geneva from 1864 to 1977 came after a war that shocked everyone. For example, the battle of Solferino (1859) between Austrian and French armies was the reason for the conclusion of the First Convention of 1864. The naval battle of Tsushima (1905) between Japanese and Russian fleets prompted adjustments to the Convention on War at Sea in 1907. World War I brought about the two 1929 Conventions, which include a much broader protection framework for prisoners of war. World War II led to the four 1949 Conventions and an extensive regulation of the treatment of civilians in occupied territories and internment. And decolonisation and the Vietnam War preceded the two 1977 Additional Protocols,¹² which introduced written rules for the protection of civilian persons and objects against hostilities.

The terminology used to refer to the body of law on humanitarian issues may vary between ‘humanitarian law’, ‘international humanitarian law applicable in

⁹ Article 56, Protocol I; Article 15, Protocol II.

¹⁰ Article 55 of Protocol I.

¹¹ DENISE, Bindschedler-Robert, (1969) “A Reconsideration of the Law of Armed Conflicts”, Report to the Conference on the Law of Armed Conflict, Carnegie Endowment, Geneva, 15-20 September 1969, p. 61; Keen, S., (1986), “Faces of the Enemy: Reflections on the Hostile Imagination: The Psychology of Enmity”, Harper & Row, San Francisco, 1986, p. 181.

¹² Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

armed conflicts', 'laws of war', 'law of Geneva', 'Red Cross Conventions', 'Law of The Hague', or 'human rights in armed conflicts'. All these expressions subscribe to the same objective, namely, the quest to limit the use of violence in armed conflicts.

There are two types of situations in which international humanitarian law applies. The first is international armed conflict where the Geneva Conventions and Additional Protocol I apply. Then there is a non-international armed conflict where Article 3 common to the four Conventions and Additional Protocol II apply.

3.0 The Doctrine 'Lex Specialis Derogat Legi Generali'

3.1 An Overview

The doctrine '*lex specialis derogat legi generali*', in legal theory and practice, is a doctrine that emanates from Roman law relating to the interpretation of laws, and can apply both in domestic and international law contexts. The doctrine entails that, a specific law displaces, or misapplies, or suspends, or keeps in abeyance a general law when the two (specific law and general law) apply on the same matter in the same situation.

In international law, the doctrine has emerged in the context of existence of a number of specialized and autonomous rules of international law or rules pertaining to particular subject-areas such as: human rights, the environment, trade, international crimes, and so on, when applied *vis-a-vis* general principles of international law. This autonomy has sometimes led to conflicts between such specialized sets of rules and the general law as well as between different sets of specialized rules. Thus, analytically, it is possible to distinguish between two types of normative conflict, namely: between general law (*lex generalis*) and particular or special law (*lex specialis*), and between two types of particular or special laws.

The question of how to deal with specialized sets of rules in their relationship to general law and to each other is usually dealt with by two doctrines. The first, which exists in the Latin maxim, and which is the subject of this discussion is *lex specialis derogat legi generali*, meaning that a specific law keeps in abeyance the general law. The second is the doctrine of self-contained regimes. These are regimes of international law that are confined to a certain geographical space,¹³ or to a certain subject matter.¹⁴ In this paper we will confine ourselves to the first.

¹³ For example the African human rights system is considered a self-contained regime.

¹⁴ For further discussion see: Michael Runersten, (2008), *Defining 'Self-contained Regime: A*

3.2 *Genesis and Context within which the Doctrine 'Lex Specialis Derogat Legi Generali' Applies*

There are two ways in which law takes account of the relationship between a particular rule (*lex specialis*) and a general one (*lex generalis*). *Lex generalis* is often termed a principle or a standard. A particular rule may be considered as directing as to how the general rule should apply in a given circumstance. That is to say, it may give instructions on what the general rule needs in order to apply in the case at hand. Alternatively, a particular rule may be conceived as an *exception* to the general rule. In this case, the particular rule derogates from the general rule. The maxim *lex specialis derogat legi generali* explains this phenomenon, and is usually dealt with as a conflict of laws situation, depicting the second situation as elaborated above.

As to whether every *lex specialis* will end up displacing *lex generalis*, it is a matter of context. That is why we have already observed that, some *leges speciales*¹⁵ are just there to direct as to how the *lex generalis* is to apply, not to replace it altogether. In both cases, that is, either as a modality for application of, or an exception to the general law, the bottom-line and mainstay of the doctrine of *lex specialis* is to indicate as to which rule should be applied or how should a rule be applied. Thus, whether the special law shows how a general one ought to apply, or the special law replaces the general one, it is still a question of determination of which rule to apply given a certain situation.

The idea that a special or particular rule overrides a general rule has a long pedigree in international law jurisprudence. Its rationale is well expressed by Grotius as exemplified in the question: "What rules ought to be observed in such cases' [i.e. where parts of a document are in conflict], for which the answer is that special provisions are ordinarily more effective than general ones,¹⁶ meaning that a special rule is more to the point (as it approaches more nearly to the subject matter at hand) than a general one and it regulates the matter more effectively than general ones do. This could also be expressed by saying that special rules are better able to take account of particular circumstances than general ones. The need to comply with them is felt more acutely than it is the case with general rules.

Case Study of the International Covenant on Civil and Political Rights, Master's Thesis, Faculty of Law University of Lund; Bruno Simma and Dirk Pulkowski (2006), "Planets and the Universe: Self-contained Regimes in International Law", *The European Journal of International Law*, Vol. 17 no.3, pp. 483-529; Bruno Simma, (1985), "Self-contained regimes", *Netherlands Yearbook of International Law*, Volume 16, pp. 111-136.

¹⁵ The plural for '*lex specialis*'.

¹⁶ Hugo Grotius, *De Jure belli ac pacis. Libri Tres*, Book II Sect. XXIX.

Specific rules have greater clarity and definitiveness and are thus often felt “harder” or more “binding” than general ones which may stay in the background and be applied only when no specific rules are there. It is, therefore, no wonder that legal literature generally accepts the *lex specialis* doctrine as a valid general principle of law, and, hence, one of the sources of international law as per article 38(1)(c) of the Statute of the International Court of Justice.¹⁷ However, the question is whether every time there is interplay between *lex specialis* and *lex generalis*, then the latter is displaced. How about a situation in which the former only stipulates or guides as to how the latter ought to properly apply?

From practice, *lex specialis* (special law) may relate to *lex generalis* (general law) in three distinct ways: firstly, the *lex specialis* is expressly envisaged and foreseen by the relevant *lex generalis* either as a specific application of or an exception to it; secondly the *lex specialis* is expressly prohibited by the relevant *lex generalis*; and thirdly, the relevant *lex generalis* remains silent as regards any *lex specialis*.

In most cases, general international law does not, on the face of it, provide either for a specific authorization or a prohibition of the creation of special law on the same subject-matter. Thus, it remains a question of interpretation of the relevant specific law vis-a-vis the general law in question to determine the impact of the former on the latter and possibly to determine as to which is supposed to apply in a certain situation. This is the foundation of the logic in this paper when considering the interplay between international human rights law (hereby considered as *lex generalis*) and international humanitarian law (hereby considered as *lex specialis*).

4.0 Overlaps and Interplays between International Human Rights Law and International Humanitarian Law

4.1 A General Theoretical and Legal Framework

Overlaps between international human rights law and international humanitarian law typically occur when an act committed in the context of an international armed conflict, invokes the application of international humanitarian

¹⁷ The principle is, in truth, a general principle of law recognized in all legal systems, and it was cited as an example of such in the drafting of Article 38 of the Statute of the Permanent Court of International Justice. It follows that if the *lex specialis* contains dispute settlement provisions applicable to its content, the *lex specialis* prevails over any dispute settlement provision in the *lex generalis*.”, ITLOS, *Southern Bluefin Tuna* case, (27 August 1999), para 123.

law, and at the same time, it is also prohibited by international human rights law, and *vice versa*.

A typical example is genocide, which is usually accompanied with other heinous acts such as mass killings of civilians, torture, mass and systematic rape in detention centres and elsewhere; the creation of refugees, terrorization, and the calculated slaughter of males together with the systematic rape of women within a defined group as a means of altering the ethnic composition of a group or even preventing further births within that group. Thus, genocide, which is essentially a “deliberate and systematic destruction of a racial, political, or cultural group,”¹⁸ is conceptually linked to crimes against humanity.¹⁹ Article I²⁰ affirms that genocide, “whether committed in time of peace or in time of war, *is a crime under international law*” that ratifying parties must prevent and punish. On the other hand, article II²¹, the substantive core of the Genocide Convention, defines “genocide” as a variety of acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; or forcibly transferring children of the group to another group.²² This is the case whether or not the acts associated with genocide are committed in time of peace or war.

Further, the acts of civilian killings, torture, mass and systematic rape in detention centres and elsewhere, the creation of refugees, terrorization, and the calculated slaughter of males together with the systematic rape of women within a defined group as a means of preventing further births within that group, which clearly fall within the list of genocide acts as set out in article II, are also acts of torture, cruel, inhuman and degrading treatment covered by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, also known as the ‘Torture Convention’, which is typically an international human rights instrument. Torture is also considered an international crime, regardless of whether it is committed in time of war or peace. As such, it overlaps with the grave breaches provisions of the 1949 Geneva Conventions and

¹⁸ Webster’s Ninth New Collegiate Dictionary 511(1987).

¹⁹ BARBARA Harff, *Genocide and Human Rights: International Legal and Political Issues*, at 11-12

²⁰ Of the Genocide Convention, 1948.

²¹ *Ibid.*

²² Art II, Convention on the Prevention and Punishment of the Crime of Genocide

the 1977 Additional Protocols.²³ The Torture Convention itself states that violent physical abuse becomes torture when it causes “severe pain and suffering, whether physical or mental” and is intentionally inflicted on a person to intimidate, coerce, or punish.²⁴

The period of applicability of humanitarian rules is also subject to discussion because of a lot of overlaps in the process. Often, the actual hostilities are brief, and a lightning war gives way to a long period that no longer belongs to war, but is not yet peace. During this period, which may last for several years, victims and prisoners remain in detention years after the cessation of hostilities. This was the case in the Western Sahara conflict; the Iraq-Iran conflict; and the conflict between Iraq and Kuwait. So, civilian populations come under attack or remain under military occupation. So, what started as a humanitarian law issue ends typically as a human rights issue, and for a longer period of time.

There is also an overlap between human rights law and humanitarian law in providing the protection of certain individual rights. Both bodies of law guarantee the freedom from torture;²⁵ freedom of religion²⁶ and the fundamental guarantees enshrined in Common Article 3. Article 75 of Additional Protocol I and Articles 4-6 of Additional Protocol II is reinforced by their link to fundamental human rights. These guarantees, especially Common Article 3, apply both to international and internal armed conflicts, whereby the former attracts the application of international humanitarian law *per se* and the latter international human rights law *per se*. These guarantees reaffirm in categorical terms certain rights which are non-derogable under human rights treaties, such as the right to fair trial. Further, Articles 27 to 34 of the Geneva Convention IV include extensive references to basic human rights in armed conflict, including the right of individuals to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs; as well as prohibition of pillage, taking of hostages, and taking reprisals against civilians.

²³ U.N. Doc.A/CN.4/22/1950, *reprinted in* M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 222 (1992).

²⁴ Art. 1, Torture Convention.

²⁵ Article 7 ICCPR, Article 3 ECHR; Common Article 3 GCs, Article 75 I AP

²⁶ Article 18 ICCPR, Article 9 ECHR; Article 58 Geneva Convention IV

4.2 Invoking the Doctrine 'Lex Specialis Derogat Legi Generali' in Every Situation of Overlap between Human Rights Law and Humanitarian Law

It seems clear, at least in the absence of evidence to the contrary, that the laws of war must be regarded as *leges speciales* in relation to rules laying out the peace-time norms relating to the same subjects which it overrides.²⁷ From the adoption of the United Nations Charter in 1945 onwards, the interplay between international human rights law and international humanitarian law has been subject to many questions to which scholars, judges and institutions still struggle to provide clear answers. At present, there are a number of divergent stances on the parallel application of the disciplines, but they are generally elusive as to their exact methodology and supporting legal basis.

5.0 The Consequences of Applying Humanitarian Law to the Exclusion of Human Rights Law during Armed Conflict

5.1 Situating the Problem

The normative frameworks under which International Human Rights Law and International Humanitarian Law operate are sometimes in conflict with one another. Thus, despite the growing convergence of various protective trends, significant differences remain. Unlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage.²⁸

Although the rights to life and to physical security are among those fundamental rights enjoyed by all human beings under any scheme of human rights,²⁹ the intentional killing of human beings during armed conflict is the condition *sine qua non* of international humanitarian law, the body of law that regulates the conduct of hostilities. As one commentator notes, “on a normative level, humanitarian law contemplates a starting point of death, violence, and destruction that is repugnant to the essence of human rights law.”³⁰ While

²⁷ Jenks C.W (1953), *The Conflict of Law-Making Treaties*, XXX BYIL 446.

²⁸ J.D., New York University School of Law, 2003; B.S., B.A., University of Dayton, 1999

²⁹ Universal Declaration of Human Rights, G.A. Res. 217A (III), Art. 3 International Covenant on Civil and Political Rights, Art. 6.

³⁰ Audrey I. Benison (1999) *War Crimes: A Human Rights Approach to a Humanitarian Law Prob-*

contemporary international humanitarian law is rooted in statist conceptions of rights, human rights law requires any action to be justified in terms of individual rights, thus creating a tension between the two legal frameworks.

5.2 Problems Associated with Suspension and Derogation from Human Rights Law in Situations of Armed Conflict

The International Court of Justice in its Advisory Opinion on the *Legality of Threat or Use of Nuclear Weapons* case³¹ decided to examine the relationship between Article 4 of the International Covenant on Civil and Political Rights and the laws applicable in armed conflict. Article 4(2)³² establishes the right of an individual not to arbitrarily be deprived of life. This right, the Court pointed out, applies also in hostilities. However, the Court went on to say: “The test of what is an arbitrary deprivation of life 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”. This effectively implies that, while acknowledging application of human rights law in all situations, the Court nonetheless subjects its interpretation to the *lex specialis* (the law governing war), effectively watering down the impact of the general law. The finding of the Court, while affirming the right to life on one hand qualifies it by the other...”

Thus, although international human rights law stipulates the right to life, the right to be free from slavery, the right to be free from torture and the right to be free from retroactive application of penal laws as non-derogable rights, it also recognises that human rights can be limited or even pushed aside during times of national emergency,³³ although rights that have attained the level of *jus cogens* cannot be derogated from for reasons of national security alone.

However, in modern conflicts, such as the war that followed the 1994 genocide in Rwanda, armed conflict can occur alongside other atrocities.

Civilians may play a role in such atrocities, and a soldier encountering genocide being committed by a civilian would fully be justified in shooting the civilian if

lem at the International Criminal Court, 88 GEO, L.J. 141, 152.

³¹ International Court of Justice advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ 2.

³² Which refers to Article 6(1) of the same which provides that: “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.

³³ The emergency must be actual, affect the whole population, and the threat must be to the very existence of the nation. The declaration of emergency must also be a last resort and a temporary measure.

doing so were the only way to stop the genocide.³⁴ Nevertheless, the above analysis suggests that there are some circumstances in which the intentional³⁵ killing of civilians may be justified, and even required from a human rights perspective. But how can we incorporate this concern without losing the simplicity of the rule barring any attack on non-combatants? Here we must examine the lawfulness of attacking combatants.

Under a human rights-based approach, combatants do not lose their right to life simply by donning uniforms or taking up arms. Violations of combatants' right to life, either by killing them or sending them to be killed, must be justified by an appeal to human rights. A typical example of this paradox is a situation where an insurgency kidnaps children or even adults, then forces them to put on uniforms and make them march towards their enemy's side. Do they immediately become a legitimate target just because they have put on uniforms? That is why the question for a human rights-based principle is whether there are some criteria grounded in human rights that would justify killing combatants as a class, simply based on their membership in the combatant class. To answer this question, we must examine the possible moral justifications for taking the life of a combatant, and see if these justifications are compatible with a human rights-based law of war.

The existing primary justification for allowing the loss of a combatant's life is proposed in the 'just war tradition'.³⁶ The roots of the just war tradition lie in the doctrine of 'protection of the innocent'. In this context 'the innocent' are defined not as the opposite of 'the guilty' but as 'the harmful'. In the just war approach, combatants are legitimate targets in war because they pose a threat, not just because they don uniforms.³⁷

A modern version of this theory is described by Rawls in his imagining of a war between a well-ordered people and an outlaw state: "the reason why enemy combatants may be attacked directly is not that they are responsible for the war, but that well-ordered peoples have no other choice. They cannot defend themselves in any other way, and defend themselves they must."³⁸ In the human rights perspective, the threatened army is justified to take steps to safeguard the

³⁴ James F. Childress (1982), "Moral Responsibility in Conflicts", *Kennedy Institute of Ethics Journal*, pp. 63-94.

³⁵ The term "intentional" here is used in the sense that the deaths were part of the results forecast.

³⁶ Art 1 and 2, U.N. Charter; Article 4, International Covenant on Civil and Political Rights.

³⁷ Thomas Nagel (1972), *War and Massacre in War and Moral Responsibility*, *Philosophy and Public Affairs*, Vol. 1, No. 3.

³⁸ John Rawls (1999), *The Law of Peoples*, Harvard University Press, p. 96.

same right to life in a similar way a person is justified in killing an assailant who is bent on killing that person. Unfortunately, the just war tradition is rooted in a statist morality, which at times may be in direct conflict with the idea of human rights which focuses primarily on an individual.³⁹ Combatants could be considered a threat simply by being soldiers and a part of a military apparatus that poses a threat to another state's military forces, not because they pose threat to individuals.

6.0 Taking an Approach of Coordination of International Human Rights Law and International Humanitarian Law

6.1 *The Essence and Basis of the Coordination Approach*

In essence, both international human rights law and international humanitarian law protect individuals objectively, without regard to their nationality. International tribunals have repeatedly affirmed that humanitarian treaties have a specific objective character because they protect not the interests of contracting states but the fundamental rights of individuals or their groups. Thus, the norms of humanitarian law serve as a further elaboration of the parameters of the right to life in armed conflicts, and define circumstances in which deprivation of life is not arbitrary.

In addition, Article 57 of Additional Protocol I to the Geneva Conventions requires that the commanders who plan military attacks verify whether the respective attacks will bring about more civilian casualties than absolutely necessary for ensuring tangible military advantage, and if the answer is positive, then cancel the attacks. Furthermore, the independent relevance of the human rights provisions regarding the prohibition of arbitrary deprivation of life is increased in the context of military occupation where the considerations of military necessity are no longer as pressing as in the case of hostilities. In such situations, Article 6 of the International Covenant on Civil and Political Rights, together with other relevant human rights provisions, can directly determine the legality of the relevant actions of States or their armed forces.⁴⁰

³⁹ Charles R. Beitz(1983), "Cosmopolitan Ideals and National Sentiment", 80 J. PHIL. Pp.591 and593

⁴⁰ Article 6(1) of the International Covenant on Civil and Political Rights states that; "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

In the Judgment of the Inter-American Court of Human Rights in *Las Palmeras Case*,⁴¹ the Court refused to examine the compatibility of deprivations of life involved in that case from the perspective of Common Article 3 of the 1949 Geneva Conventions.⁴² At the merits stage of the case, the Court concluded, through the use of human rights standards only, that the deprivation of life of the relevant persons contravened Article 4 of the Inter-American Convention on Human Rights. This approach confirms that human rights law can at times be self-sufficient in dealing with the relevant violations in situations of armed conflict, without needing assistance from humanitarian law. Such independent standing of human rights law is both understandable and indispensable because human rights law is designed to be able to respond to the situations it applies to in an autonomous way, if needed.

6.2 Actions under International Humanitarian Law to be in Conformity with International Human Rights Law: A Focus on the Power of Derogation from Human Rights

In the coordination thesis, actions taken in the realm of international humanitarian law should be in conformity with principles of international human rights law, especially the rules to do with derogation from human rights.

Under Article 4 of the International Covenant on Civil and Political Rights and Article 15 of the European Convention on Human Rights, in time of public emergency which threatens the life of a nation and the existence of which is officially proclaimed, the States Parties may take measures derogating from their obligations under the relevant treaties to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law. In this way, certain basic rights in international human rights which are also fundamentally relevant from the viewpoint of humanitarian law, such as the right to life and freedom from torture, should be exempted from the power of derogation.

Derogation measures from other treaties, such as ICCPR, also have to be in accordance with the provisions of humanitarian law treaties, as well as other

⁴¹ *Las Palmeras v. Colombia*, Inter-American Court of Human Rights, 2001. The case involved a situation where the army and police opened fire to students and teachers at Las Palmeras school and donned them on military uniforms to show that they were combatants fighting the government, hence legitimate targets.

⁴² *Las Palmeras*, Judgment of February 4, Series C, No 67, para. 28

humanitarian law provisions, presumably of customary law status,⁴³ and the requirements of the latter body, especially its imperatives on the distinction between civilian and military targets, necessity and proportionality, and humane treatment of protected persons represents the bottom line below which the derogation from human rights treaties cannot justify the freedom of action of states. In other words, while derogations from human rights caused by states of emergency are possible, from humanitarian law point of view, these emergencies are only those which would, in the first place, justify the application of international humanitarian law itself, namely the breakout of armed conflict which threatens the survival of a nation and its people. In any case, for both human rights law and international humanitarian law the protection of human life is the primary goal. Article 6(1) of the International Covenant on Civil and Political Rights states that; “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” While accepting that combatants engaged in an armed conflict will be exposed to life-threatening situations, international humanitarian law seeks to limit harm to civilians by requiring that all parties to a conflict respect the principles of distinction and proportionality.

7.0 Observations and Conclusion

As we have noted right from the beginning, the intention of this Paper was to examine the interplay between international human rights law and international humanitarian law, especially in situations of armed conflict. As we have noted also, the general position in international law is that international human rights law shall apply in times of peace as general law, while international humanitarian law shall apply in situations of armed conflict as special law, thereby displacing or keeping in abeyance general law. The paper has examined the appropriateness of using the doctrine ‘*lex specialis derogat legi generali*’ in situations of interplay between the two fields of international law.

The point of convergence for both international human rights and international humanitarian law is the protection of human life, which is the primary goal for both. However, there is also a point of variance in that, in international human rights law the right to life is absolute, even outside the judicial process, and cannot be derogated from in any way, while in international humanitarian law the right is

⁴³ Pieter van Dijk, et al.(2006), *Theory and Practice of the European Convention on Human Rights*, Intersentia, p. 1067.

not absolute in certain situations in the realm of armed conflict. Thus, there is the need to fall back to the application of international human rights law, especially on rules and principles relating to derogation from human rights, such that the exceptions created by international humanitarian law should be in consonance with the derogations permitted in international human rights law.

This paper puts forward an argument that human beings should not lose their right to life unless this sacrifice can be justified by an appeal to human rights. However, it does not suggest the premise that human rights automatically invalidate warfare on the grounds that armed conflict will always violate human rights. Penal and civil sanctions may serve important and essential roles in the implementation of a human rights-based law of war. For example, many of the rules of Additional Protocols I and II have been translated into rules of criminal law in Article 8 of the Statute of the International Criminal Court.⁴⁴

Regarding the doctrine *lex specialis derogat legi generali*, one of the difficulties follows from the relative lack of clarity of the distinction between “general” and “specific”. Every general rule is particular too, in the sense that it deals with some particular substance. This is reflected in the distinction made by many domestic laws between laws and acts. Generality and speciality are thus relational. A rule is never “general” or “special” in the abstract sense but in relation to some other rule. Thus, there may be a rule that is general in subject-matter but valid for only in a special relationship between a limited numbers. It follows, therefore, that no rule can be determined as general or special in abstract, without regard to the situations in which its application is sought. Thus, a rule may be applicable as general law in some respect while it may appear as a particular rule in other respects.

That is the reason why this paper suggests the need for a substitute doctrine which would insist that any armed conflict, pursued for whatever reason or justification, should be pursued consistent with human rights to remove any lame excuses through which human life is lost.

⁴⁴ Art 8, Rome Statute of the International Criminal Court; Art. 6(a), Charter of the International Military Tribunal, Aug. 8, 1945.