

**THE *LEX SPECIALIS* PRINCIPLE AND TRANSFORMATIVE JUSTICE:
ANALYSIS OF THE EUROPEAN COURT OF HUMAN RIGHTS'
DECISIONS IN HASSAN AND JALOUD**

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ABSTRACT

International Humanitarian Law (IHL) and International Human Rights Law (IHL) are separate fields of international law. The use of the lex specialis principle blurs this distinction and subordinates IHRL to IHL. The absence of decisions from the International Court of Justice and regional courts such as the European Court of Human Rights to distinguish the lex specialis principle from its sister doctrines, the lex posterior derogat priori and the lex superior derogat inferior further complicates the need to use IHRL to deal with acts of State in conflict situations. We argue in this article that the lex specialis principle must not be invoked in a manner that gives IHL primacy over IHRL. The basis of our argument is three pronged: first, IHL and IHRL are two separate fields of international law which must not be developed by invoking an amorphous and elusive general principle. Second, the lex specialis principle is frequently confused with its sister principles and courts usually use it to the detriment of victims of State repression, mostly unarmed civilians. Third, the rule is simply a pillar of judicial restraint. Clearly, it is an avoidance doctrine used by the courts to use technical arguments to deprive victims the chance to obtain effective remedies under international law such as reparations or healing.

Key Words:*lex specialis principle, transformative justice, International Humanitarian law and International Human Rights law*

Introduction: The background of the Hassan and Jaloud Cases

Briefly, the facts of the case of *Hassan v United Kingdom*¹ are as follows. Tarek Hassan was arrested on April 23, 2003 by the British forces in Iraq which suspected him of being a combatant. The British forces detained him in a joint British-American camp, thereby limiting or restricting his right to liberty. Later, in September 2003, Hassan's body was found

¹ Appl. No. 29750/09 (ECtHR 16 September 2014).

700 kilometers from the camp, bearing signs of torture but British records indicated that Hassan had been released on May 2, 2003, after they had concluded that he was a non-combatant. The European Court of Human Rights (ECtHR) exonerated the United Kingdom (UK) and found that the UK had not violated Hassan's right to life, because evidence indicated that he was killed after having been released. Regarding *Hassan's* personal liberty, the court applied the *lex specialis* doctrine to make a finding that the UK was again not liable since IHL and not IHRL applied under the circumstances.²

By way of comparison, in *Jaloud v Netherlands*³, the deceased had died as a result of 28 shots fired by Dutch soldiers at a vehicle which had not stopped at a vehicle checkpoint. It was also believed that some shots had been fired by the Iraqi Civil Defence Corps. What occasioned the shooting was that on the fateful day, 21 April 2004, at around 2.12 a.m., an unknown car had approached a vehicle checkpoint (VCP) [located on a road in] south-eastern Iraq [and] fired at the personnel guarding the VCP, all of them members of the Iraqi Civil Defence Corps (ICDC). The guards returned fire. No one was hit; the car drove off and disappeared. Called by the check-point commander, a patrol of six Netherlands soldiers led by Lieu-tenant A. arrived on the scene at around 2.30 a.m. Some fifteen minutes later a Mercedes car also approached the VCP at speed and hit one of several barrels which had been set out in the middle of the road to form the checkpoint, but continued to advance. Lieutenant A. fired 28 rounds and Mr Azhar Sabah Jaloud, a passenger inside the car was hit and subsequently died.

Even though the Netherlands was found to have violated the victim's right to life by failing to investigate his death effectively, because: (a) key documents were not made available to judicial authorities or to the applicant, (b) the precautions taken to pre-vent collusion among witnesses and suspects were insufficient, (c) the autopsy was inadequate, and (d) evidence had been misplaced, the court remarked that there was no need to turn to IHRL for a legal basis for the state's duty to effectively investigate suspected deaths of civilians.⁴ In the end, the *lex specialis* rule was used to show the inherent problems that arise out of a rigid

²Bohrer, 'Human Rights v Humanitarian Law or Rights v Obligations: Reflections following the Rulings in Hassan and Jaloud', 2015.

³ App. No. 47708/08 (ECtHR 20 November 2014)

⁴ Bohrер (note 3 above).

interpretation of the complementary link between IHL and IHRL. The argument in this article is that IHRL and IHL must continue to be treated as separate fields of law and by parity of reasoning, the *lex specialis* rule should not be used to create a hypothetical hierarchy between two separate fields of law. Regional courts such as the ECtHR and the International Court of Justice should seek to interpret it within the context of each field as is done in domestic law. Furthermore, no field of law should be sacrificed under the altar of ‘specificity’. Rule-based complementarity should not be a rule of thumb and should only be resorted to as a last resort when a lacuna exists in international law.

Defining Transformative Justice

Transformative justice is described here as synonymous with transitional justice. Transitional justice is an important and decisive phase for societies liberated from a long era of dictatorial or sectarian rule.⁵ When transitional justice is not achieved, society will suffer violent chain reactions associated with different social groups.⁶ In this article, transformative justice is explained from a liberatory approach to violence which seeks safety and accountability without relying on alienation, punishment, or State or systemic violence, including incarceration or policing.⁷ The core beliefs of transformative justice include: firstly; that individual justice and collective liberation are equally important, mutually supportive, and fundamentally intertwined the achievement of one is impossible without the achievement of the other.⁸ Secondly; the conditions that allow violence to occur must be transformed in order to achieve justice in individual instances of violence.⁹ Therefore, transformative Justice is both a liberating politic and an approach for securing justice.¹⁰ Thirdly, State and systemic responses to violence, including the criminal legal system, not only fail to advance individual and collective justice but also condone and perpetuate cycles of violence.¹¹ Although the views above were made in relation to prisoners, we find them to be relevant in this article because our analysis is based on the need for international or regional courts to protect victims of IHRL and IHL violations using both fields of law. Generally, transformative

⁵ A. Mamouri, ‘Transitional Justice Fails oin Iraq’ (2014).

⁶ Id.

⁷ Prison Culture, ‘Transformative Justice’, (2012), Prison Culture.

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ Id.

justice is more concerned not only with the need to provide restitution to the victim, but with the need to improve the overall situation for the victim, the offender, and the community. As such, humanitarian violations must also be assessed using human rights considerations which lead to the realisation of transformative justice.

The Legal Importance of the *Lex Specialis* Rule

The *lex specialis derogat legi generali* is widely accepted as constituting a general principle of law.¹² In its general usage under both domestic and international law, the principle means that a law governing specific subject matter overrides a law governing general matters. This description has not been clearly explained in the relationship between IHRL and IHL. Basically, the need for one branch of law to override another area of law stems from the fact that the *lex specialis* rule widely entails that when two norms apply to the same subject matter, the rule which is more specific should prevail and be given priority over that which is more general.¹³ The notion is frequently invoked in the articulation of the relationship between IHRL and IHL in situations of armed conflict.¹⁴

The above position was underscored by the International Court of Justice (ICJ) in its discussion on the legality of the threat or use of nuclear weapons in 1996 when it stated that although during hostilities IHRL generally applies alongside IHL, the test for what constitutes a violation of a human right ‘falls to be determined by the applicable *lex specialis*, namely IHL.’¹⁵ There are critics who argue that due to the implications that IHL prevails over IHRL, the language of *lex specialis* should be abandoned when discussing the relationship between the two bodies of law.¹⁶ This is notwithstanding that the principle, together with its sister principles *lex posterior derogat priori* (a later law repeals an earlier law)¹⁷ and *lex superior derogat inferior* (a lower-level regulation contradicts the higher-level regulation is no longer considered applicable)¹⁸, fit in the definition of “general principles of law” as

¹² S. Borelli, ‘The (Mis)-Use of General Principles of Law: *Lex Specialis* and the Relationship between International Human Rights and the Laws of Armed Conflict’, (2015).

¹³ Id.

¹⁴ Id.

¹⁵ ICJ, ‘*Legality of the Threat or Use of Nuclear Weapons*’ [1996] ICJ Rep 226, par 25 cited in Z. Bohrer, ‘Human Rights v Humanitarian Law or Rights v Obligations: Reflections following the Rulings in Hassan and Jaloud’, 2015.

¹⁶ Borelli (n2 above).

¹⁷ A. X Fellmeth and M. Horwitz, ‘Guide to Latin in international Law’ (2009).

¹⁸ ICJR, ‘The *lex superior derogat legi inferiori*’ Principle must be Used, All regional Regulations Must Comply with KUHP, (2015).

contained in Article 38(1)(c) of the ICJ Statute, insofar as they are (a) norms of general legal reasoning, which (b) are recognized in the majority (if not all) domestic legal systems, and (c) can be transposed to and applied at the international level.¹⁹

We argue in this article that the three sister principles above appear to have been used interchangeably much to the detriment of the development of IHRL jurisprudence. If both fields of law are founded on a normative foundation, it follows that regard must be had to the normative value of international criminal justice and judicial institutions must prioritize on victim-led justice. Institutions with an international touch can do more in victim-led justice by correcting legal notions which work to the detriment of victims who endeavor to realise transformative justice. We advance the respectful argument that the ECtHR did not grapple with the distinctions in the two crucial decisions under review in this article. For instance, it is clear that the ECtHR did not make the rule less amorphous by developing a regionalized legal approach of the *lex specialis* rule. In the end, the rule remained amorphous and elusive since no consensus also exists among international lawyers or jurists outside Europe on what really constitutes general principles of international law.

There is also no general consensus on the extent to which the general principles of international law can be formalised across the globe in a uniform basis. What is clear at the moment is that the ECtHR has intimately identified the *lex specialis* rule with the primacy of IHL in conflict situations.²⁰ However, we posit an argument that in instances where States or their representatives flagrantly violate the sanctity of human life or arbitrarily interfere with civil liberties of individuals in conflict situations, the scope of specificity in applying the *lex specialis* rule demands serious purposive interpretation if transformative justice is to be realised. Further, it is undeniable that it is almost impossible to hold States accountable. The *specialis* rule allows courts to choose the weakest course of deciding international cases and

¹⁹ Borelli (n2 above).

²⁰ This position was affirmed in the *Hassan v United Kingdom*, App No. 29750/09 (ECtHR 16 September 2014) and the *Jaloud v Netherlands* App. No. 47708/08 (ECtHR 20 November 2008). In *Hassan*, the ECtHR affirmed the ICJ position to deny the applicant protection of his right to life. It was clear that although Hassan was murdered after the British authorities had already released him, there was no clarity between what had happened during the release and the time of Hassad's death. Essentially, I argue that the court was not supposed to use the primacy of IHL as a way of showing that all rights-based notions of right to life will be discarded once IHL and IHRL are subject of judicial interpretation.

to leave the most crucial aspects such as the embedment of a sustainable culture of international human rights.

The contention above is made from the perspective of the doctrine of State responsibility which entails that States are enjoined to protect the rights of individuals within their territory. The *lex specialis* doctrine as developed in recent case-law of the International Court of Justice (the ICJ) contains a category error, insofar as it brings human rights law and humanitarian law into a (primacy) relationship with each other; for example, that of ‘complementarity’.²¹ Put pithily, a general principle of law must not cripple a court’s jurisdiction to determine the extent of the protection of individuals in conflict situations using a rights-based system or transformative approach to justice. This is buttressed by the fact that the *lex specialis* principle, like other general principles of law, has exceptions attached to its use.²² In the *Hassan* case, the European Court of Human Rights (ECtHR) considered it exceptional to require a State to protect the rights of individuals outside of its territory or a territory under its effective control (i.e., under its belligerent occupation).²³

Hassan’s case was ruled to be such an exception, as the British, despite not having yet occupied the Basra region, were deemed to have had ‘personal jurisdiction’ over Hassan because of his detention (irrespective of his custody being shared with the Americans).²⁴ But the court went on to absolve the United Kingdom from any wrongdoing considering that using the *lex specialis* principle. It is argued here that this approach was wrong since the interpretation of IHRL should be informed but not determined by IHL.²⁵ Further, the mistaken view that IHL displaces or reduces the protections of IHRL is far more dangerous than any view about when IHL starts to apply.²⁶ After all, *whenever* IHL applies, it is the relationship between IHL and IHRL that determines the legal protections that individuals

²¹ B. Bowring, ‘Fragmentation of International Law, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights’ (2010).

²² *Hassan v United Kingdom*, App No. 29750/09 (ECtHR 16 September 2014)

²³ *Bohring* (n 22)2.

²⁴ *Id* citing paragraphs 70-77 in the *Hassan* decision.

²⁵ A.A Haque, ‘Human Rights in Armed Conflicts’ (2016).

²⁶ *Id*.

enjoy against death, injury, and detention.²⁷ As such, scholars should directly challenge this mistaken view, not resign themselves to containing its consequences at the margins.²⁸

Essentials for the Application of IHL in Conflict Situations

Basically there are two schools of thought on when and how IHL should be applied in conflict situations. The schools of thought either use the high or low threshold test of State authority to use force on non-State armed groups or civilians. The commonly understood test, the wide threshold test, for determining whether IHL applies to a situation where a State is fighting a non-state armed group rests on two factors: organization and intensity.²⁹ Using this test, the non-State armed group must be sufficiently organized and the hostilities must reach a minimum level of intensity. If these requirements are met, then the violence rises to the level of a “non-international armed conflict” (NIAC) and, as a matter of international law, the relevant rules of IHL become fully applicable. We argue here that although the British and Dutch authorities were operating in situations of armed conflict, their dealings with private individuals who were not part to the conflict did not justify the use of IHL principles to determine how individual had been violated.

The contention is made on the basis that the *Hassan* and *Jaloud* judgments did not try to deal with the distinction between belligerents and unarmed civilians. Even if it were to be found that the deceased individuals were part of the belligerents (which was not), we argue that the ECtHR was supposed to be informed by the low threshold in determining whether maximum restraint should have been used in the *Jaloud* case. The low threshold test followed by Professor Adil Haque shows that the organization and capacity of the group is sufficient to distinguish military operations by or against the group from acts such as internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, all of which fall below the (high) threshold test.³⁰

Critical issue for reflection

We argue here that the critical issue that falls for determination are:

²⁷ Id.

²⁸ Id.

²⁹ J. Horowitz, ‘Laws of War: Humanitarian Stallion or Trojan Horse?’ (2016).

³⁰ Id.

- i) Whether or not in light of the overwhelming evidence of the violation of individual rights under IHRL; the proceedings in the regional court were in real and substantial justice when it absolved the United Kingdom and the Netherlands using the tenets of IHL.

Analysis

When commenting about the confluence between human rights-based legal systems and obligations-based systems, Robert Cover notes that some legal systems are rooted in the notion of ‘human rights’, while others in the notion of ‘obligations’.³¹ Further ‘there are certain kinds of problems which a jurisprudence of obligations manages to solve rather naturally.³² Similarly, a jurisprudence of rights naturally solves certain problems while stumbling over others.³³ It is not that particular problems cannot be solved, in one system or the other — only that the solution entails a sort of rhetorical or philosophical strain.’³⁴ We argue that the approach by Robert Cover is important in so far as it allows researchers to philosophize or conceptualize legal issues such as the confluence between rights of individuals and responsibilities of State actors in conflict situations. This is because conceptualizing issues allows legal scholars to go beyond using untested assumptions to reach legal conclusions. Such an approach also allows legal researchers and scholars to balance between theory and practice in discourses on access to justice.

From the *Jaloud* case, agents of several States controlled some territory (Americans at the macro-level, British regionally, Dutch locally, and Dutch and Iraqis jointly on the spot).³⁵ While we admit the need to refer to rules of law when adjudicating legal disputes, the abandonment of the *specialis* principle can produce a cathartic effect that enables the country emerging from conflict or repressive rule to transcend the violence and acrimony caused by technical resolutions of important cases. Designing a clear conceptual framework or legal theory would have enabled the ECtHR to abandon the *lex specialis* rule in the interests of justice and in a way which contributes to the protection of the right to life. We find it hard to associate with the argument that it is more advantageous to deem it to be the *duty* of a military commander to effectively investigate a suspicious death in which his forces were

³¹R Cover, ‘Obligation: A Jewish Jurisprudence of the Social Order’ (1987) 69

³² Id.

³³ Id.

³⁴ id.

³⁵ Bohrer (note above) 13.

involved, than to grant the deceased (by way of his family) the right to have his death effectively investigated³⁶. This is so if regard is had to the fact that the ECtHR found that the evidence was suppressed and was therefore enjoined to protect the deceased, a mere passenger who killed as a result of lack of restraint. We also argue with respect that the finding in *Hassan*, after his release, must have proceeded from IHRL than IHL. In this argument, we also not associate with the view that had the detaining British forces been scrutinized on the basis of an obligations-oriented jurisprudence, they would have been more strongly reprimanded proving again that developing IHL is often a more appropriate course of action than wartime application of IHRL.³⁷

IHRL empowers courts to deal with acts of the State and equips courts with wide powers to grant effective remedies to victims or their families. It matters not how the proceedings attracted the application of the *lex specialis* principle, destroy the need to apply human rights or create the need to apply humanitarian laws. What matters is that as long as the application of the rule is found to threaten real and substantial justice, the principle must be abandoned. On this basis, the regional courts such as the ECtHR, and the ICJ, are implored to discard the *lex specialis* rule as a lethal weapon against the realization of fundamental rights and freedoms.

Whether or not the proceedings in the *Hassad* and *Jaloud* were in real and substantial justice

It is not in dispute in both cases that the Applicants' rights to life were violated. The facts in the *Jaloud* case show that the Dutch soldiers had directly contributed to the death of Mr. Jaloud. The factual matrix clearly established the need for the protection of the human rights of citizens. The defence of military necessity in view of such overwhelming evidence of the use of maximum restraint, ought to have been determined using the need to protect the sanctity of human life. The deceased in this case was not shown to have acted in any belligerent way. He was a passenger and did not disobey any instructions to stop at the checkpoint. Further, with the evidence of another vehicle having fired warning shots at the ICDC guards, there is no sound basis why the court did not give considerable attention to the

³⁶ Bohrer (nabove) 13

³⁷ Id 15.

fact that the 28 shots fired by a lieutenant in the Dutch forces constituted unjustifiable use of maximum restraint. Further, there was no cogent evidence on whether or not the ICDC had actually fired any shots at the car which contributed to the death of Mr. Jaloud.

The deceased may have been in a car which had failed to stop but still there is nothing to show that this gave the Dutch soldiers the irresistible impulse to shoot to kill using 28 shots. This was a proper case where the court should have treated the *specialis* rule in terms of human rights principles and not in terms of humanitarian principles. The chances of abandoning the complementarity route were very high in this case. IHRL provides minimum requirements for government behaviour in all spheres of policing, including a government's efforts to deal with the legacy of a violent conflict.³⁸ Similarly, a right-based approach to the *Hassan* case would have gone a long innovative way in determining the extent to which the UK protects human rights at the international level. Had the ECtHR abandoned the *lex specialis* rule, its individual justice model would have immensely strengthened the value of regional judicial precedent in dispensing justice.

From the foregoing, we conclude by arguing that inasmuch as courts should not ignore odd, or sometimes downright bizarre behaviour by victims in areas marred by conflict, time has come to avoid armchair approaches to the interpretation of the *lex specialis* rule. This principle does no more than treating IHRL as a sub-species of IHL. The *Hassan* case shows how the court appeared to treat the right to life using IHRL and did not even invoke the *lex specialis* principle when it finally exonerated the United Kingdom on the basis that Hassan was killed after the British authorities had already released him. But surprisingly, and in without justification, the court invoked the rule when dealing with the right to liberty, when evidence clearly showed that Hassan was arrested at his home and not in a war situation. Under the circumstances, the deprivation of his liberty ought to have been considered on the basis of IHRL than IHL. The findings in *Hassan* were therefore not in real and substantial justice because the court failed to distinguish between war situations warranting the use of maximum restraint of the right to liberty. In the *Jaloud* case, there was also no need to resort to 'shoot to kill' using 28 shots in the absence of evidence to show that the Dutch officials had witnessed a previous shooting incident involving civilians.

³⁸ E. Brems, 'Transitional Justice in the Case Law of the European Court of Human Rights' (2011).

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