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***Arbitrary Deprivation of Life under International Human Rights and Humanitarian Law:
A Critique of Concurrent Applicability Thesis***

In its advisory opinion on the *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* (2004) the International Court of Justice without much ado claimed that the protections under the International Covenant on Civil and Political Rights do not cease in time of war, except in case of derogation in times of national emergency. On the right to life and arbitrary deprivation it held that the relationship between human rights law and international humanitarian law is ruled by the *lex specialis derogat legi generali* maxim. In situations of armed conflict international humanitarian law applies as *lex specialis*, whereas human rights law constitutes the *legi generali*.

Application of the maxim presupposes the concurrent applicability of both the general and special law. That presupposition is easily confirmed for the ECHR and ACHR (art. 15 and 27.1), which include war as a ground for derogation, but the Covenant only addresses public emergencies (art. 4.1). The applicability clauses of the general human rights treaties suggest a more limited scope, since these affirm the obligation to secure the rights to persons within the jurisdiction of the State (art. 1 ECHR; art. 1.1 ACHR) or within the territory and subject to the jurisdiction of the State (art. 2.1 ICCPR).

Nevertheless, overlap between the two fields of law remains in case of hostilities in the territory of a party or in territory occupied by it. The Court opined that in respect of the non-derogable right to life the same norm applies in hostilities, the prohibition of arbitrary deprivation of life, but whether lethal force in warfare constitutes *arbitrary* deprivation must be assessed under international humanitarian law.

Yet this view seems incongruous. In peacetime any deprivation of life may come about only as a last resort, even with respect to persons representing a risk to the lives of others. But in armed conflict persons in particular groups may be targeted for killing (combatants; civilians directly participating in hostilities) and civilian casualties may lawfully occur when attacking a military objective, if such casualties are not disproportionate to the military advantage anticipated. The better view then is to take *lex specialis derogat legi generali* at its word and consider that an armed conflict situation *derogates* from the human rights obligation, *i.e.* suspends it.