



The Human Rights Law and the International Humanitarian Law – Origins, Similarities, Differences and Interactions

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Abstract

International Human Rights Law (IHRL) and International Humanitarian Law (IHL) are two complementary branches of Public International Law. Both of them protect human life and dignity. IHRL applies at all times, in peacetime and during war, while IHL applies exclusively in armed conflicts and it regulates the behavior of the parties in an armed conflict or war and the conduct of hostilities. It also ensures the protection of persons affected by the war. Armed conflicts and wars are constant threats to liberty, property and human life that can significantly influence the morality of humanity. The human history is filled with armed conflicts: every era has experienced different kind of conflicts between empires, kingdoms, states and nations. The World War I, the World War II, civil wars and conflicts in different parts of the world are examples and real testimonies that war is still an instrument for promotion of political interests of the states. In the 21st century, wars have completely different dimension, due to changing political dynamics and new technologies. Wars and conflicts need to be regulated by law and because of their international character the laws must be agreed by the international community. International Humanitarian Law, International Human Rights Law and International Laws on War are branches of the Public International Law that regulates wars, conflicts and protection of human life during wars. This paper determines the origins of these two branches of law, it explains the scopes of their implementation in practice and their mutual interactions determined by their similarities and differences, such as their origin, the bodies that implement them and the range of their application.

Keywords: armed conflict; convention; International Humanitarian Law; International Human Rights Law; war.

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1. Introduction

International Human Rights Law (IHRL) and International Humanitarian Law (IHL) are sets of international rules established by customs or treaties. IHRL consists of provisions that claim rights and benefits for individuals and groups and IHL provisions are intended to solve humanitarian problems that are direct consequence of international and non-international armed conflicts and it protects individuals and properties that are already affected or may be affected by a conflict and limits the choices of the parties involved in the conflict to use certain means and methods in the conflict.

International Humanitarian Law and International Human Rights Law are complementary parts of the international law that have similar goals. Both of them protect human lives, the dignity and the health of individuals, although from different perspectives. For that reason, some of their rules are similar by nature. For instance, both laws prohibit torture, discrimination, cruel and inhuman treatment, both of them guarantee special protection of children and women, prescribe and regulate right to health, and so on. However, there are some differences, such as their origins, the bodies and institutions that implement their provisions, the extent of their application, and the application in a situation of emergency, when IHRL allows the state to suspend a specific number of human rights and freedoms in a situation of emergency. There are certain fundamental rights and freedoms that cannot be suspended by the state, such as right to life, freedom of thought, freedom of conscience, right to religion, prohibition of torture and inhuman or degrading treatment or punishment, principle of legality, prohibition against slavery or servitude, and principle of non-retroactivity of the criminal laws. The International Humanitarian Law cannot be suspended, except as provided in the 4th Geneva Convention Relative to the Protection of Civilian Persons in the Time of War (precisely, Article 5 of the Convention) [1].

Implementing and respecting fundamental human rights and freedoms is a legal duty of every state. States need to comply with the IHL and for that reason they introduce legislation at a national level in order to implement their obligations and duties and to take necessary measures to implement its rules and punish violations.

A part of the international law is also the Laws of War (which is not a subject matter of this paper, but it will be mentioned briefly). As a component of international law, it regulates and makes a distinction between two aspects of war: *jus ad bellum* (the conditions for initiating war) and *jus in bello* (the conduct of the parties in war). *Jus ad bellum* is related to justification for imposing a war, while the latter is connected with the behavior and actions during the war once it starts [2].

At first, the term 'laws of war' was used, but later it was replaced with the term 'laws of armed conflicts'. The reason behind it is that the term 'armed conflict' is wider than the term 'war' and it covers not only the internal (non-international) armed conflicts, but it includes also the hostilities that are not formally defined as war by the hostile parties. Although the term international humanitarian law is relatively new, it is widely used today. It was introduced by the common Article 2 to the Geneva Conventions that 'apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.'

The Laws of War (known as the Hague Law) is based on two Hague Conventions: the first Hague Convention was adopted in 1899 and it consisted of three sections and three additional declarations. The second Hague convention was adopted in 1907 and it consisted of thirteen sections (of which twelve were ratified and entered into force) and two declarations. The law of war is distinct from other bodies of law (for example, the domestic law of one of the hostile parties) which may provide additional legal boundaries to the conduct or justification of war.

The IHL (known as the Geneva Law) is based on the four Geneva Conventions adopted in 1864, 1906, 1929 and 1949 and the three Additional Protocols, two of which were adopted in 1977 and the third one in 2005. The Geneva Law and the Hague Law are relatively independent branches of law – the Hague Law regulates the relations between the hostile parties during the conflict, while the Geneva Law regulates the relations between the parties and the protected categories of people outside the actual hostilities. These two branches act like two sides of a medal: the Hague Law is the active side (what the hostile parties are entitled to do) and the Geneva law is the passive side (from what people need to be protected).

2. Origins of IHL and IHRL

In regard to their origins, the IHL was codified under the influence of Henry Dudaunt (the founding father of the International Committee of Red Cross) in the second half of the 19th century. The earlier efforts at creating jurisprudence were named just as laws of war and they differ from the modern definition of the term IHL. Today, the distinction between IHRL and IHL is very much unclear [3:204].

On the other hand, IHRL is more recent and its origins can be found in certain declarations for regulation of human rights and freedoms, which were under influence of the United States Declaration of Independence (1776) and the French Declaration of the Rights of Man and Citizen (1789). Human Rights Law became more visible after the World War II, under the patronage of the United Nations (UN). In 1948, the General Assembly of the UN issued and adopted a non-binding declaration that defined the human rights at international level – that was the Universal Declaration of Human Rights. In 1966, the UN issued two universal treaties for human rights: International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. The IHL is based on the Hague Conventions and the Geneva Conventions and their additional protocols, but also on other international treaties in different areas of humanitarian law.

Speaking of IHRL, one of its characteristics is its complexity. As mentioned previously, it is based on the Universal Declaration of Human Rights, the International Covenants on Civil and Political and Economic, Social and Cultural Rights and series of other international treaties adopted by the UN. However, it is important to note that during armed conflicts, IHRL strengthens and complements the protection that is provided by IHL.

3. A summary of the range of application of IHL

There are four main ranges of application of the IHL provisions: personal, temporal, territorial and substantive.

3.1. Personal range

The aim of International Humanitarian Law is to protect individuals who are no longer part of the hostilities or who has never been part of the hostilities and to protect not only civilians, but combatants who are sick, wounded or war prisoners. Compared to International Human Rights Law, its personal range of application is in peacetime and to all individuals within the State's jurisdiction. The difference between IHL and IHRL regarding the personal range of application is that IHRL does not make difference between civilians and combatants and does not provide special protection for so-called 'protected persons' [4].

3.2. Temporal range

As previously mentioned, the temporal application of IHL and IHRL differs. The IHL is used exclusively in wars and armed conflicts, while IHRL applies at all times, in peace and during wars. Taking into consideration the continuous application of IHRL, international treaties that regulates human rights protection allows derogation of certain obligations during states of emergencies that can threaten the nation's life. But, these derogations (mentioned in the introduction section of this paper) need to be non-discriminatory, necessary, and proportional to the actual emergency and must not be in breach of other rules of the international law, including the rules and provisions of IHL.

3.3. Territorial range

The extraterritorial application of law provisions is another crucial difference between IHRL and IHL. International Humanitarian Law applies extraterritorially, considering its purpose to regulate the behavior and activities of state(s) involved in a war or conflict on the territory of another state. There is no controversy in a situation of non-international armed conflict in which the opposing parties have responsibilities if the conflict reaches beyond the territory of a state. The same approach is applicable in International Human Rights Law, especially on court decisions issued by international and regional courts. There is discrepancy between law and case law regarding human rights. To be more specific, human rights case law is hesitating on the extraterritorial scope of human rights provisions governing the use of force. Contrary to this stance, the human rights bodies admit the extraterritorial application of human rights law in a case of occupation (when a state exercises control over a territory) and detention (of an individual).

3.4. Substantive range

Although the IHRL and IHL share common provisions and rules and there are areas that are regulated by both of them, they also have very contrasting provisions. For instance, IHRL regulates specific aspects of life that are not regulated by IHL, such as the right to vote, the right to assembly, the freedom of the press, the right to strike, etc. On the other hand, IHL regulates some issues that do not correspond to IHRL, such as the question of legality of different kinds of weapons, regulating the status of the prisoners of war, or combatants, etc. Despite that, both laws have an independent and separate existence.

4. Interaction of IHRL and IHL

The interaction between these two branches of the international law is a much discussed issue, because it determines which law will prevail in a certain situation. Considering the fact that IHRL applies at all times, in peacetime and in war, it means that it constitutes the *lex generalis*, while IHL is the *lex specialis*, because it applies only when armed conflict occurs. In a situation of conflict between these two laws, the IHL will prevail, since it is *lex specialis* [5:20].

The *lex specialis* doctrine is considered as absolutely necessary for determining the relation between IRHL and IHL, even though it is a matter of ongoing discussion. Although IHRL and IHL correspond to each other very closely, their relation is not able to solve the complex legal or normative issues that are products of their interactions. Even in a situation when they are applied to the same legal problem, they can give different solutions, due to the different circumstances for which they were created.

5. International Humanitarian Law as *lex specialis*

In the previous chapter the doctrine of *lex specialis* was mentioned. The principle dates back to the Roman Law and is widely recognizable in the maxim *lex specialis derogat legi generali*, meaning that in the case of conflict, *lex specialis* (the special law) will prevail over the *lex generalis* (the general law). This principle is common used as a legal technique in the interpretation of law, in particular, for resolution of normative conflicts [6].

In case in which this principle is applied, there are two possible situations. The first one is where the *lex specialis* is only a technical condition or an upgrade to the *lex generalis*. In the second situation, *lex specialis* need to be applied when both principles are applicable and reliable and there is no hierarchy between these principles that can result in a dead end.

The principle of *lex specialis* is often amplified and overemphasized, because the conflicts between IHRL and IHL are very rare and the similarities numerous, thus, the protection provided by them both is similar in most of the cases.

6. The similarities between IHRL and IHL

There are quite numerous similarities between IHRL and IHL. The most significant is their common respect for the human life and dignity. The principle of humanity, both in IHRL and IHL provide the necessary protection to vulnerable and weaker individuals. For instance, the IHL protects wounded and sick people *hors de combat*, civilians and prisoners of war, while IHRL provide protection to children, women, people with different disabilities, etc.

Another aspect is the adequate care that both laws are providing for individuals: IHRL regulates the right to food and healthcare (Article 25 of the Universal Declaration for Human Rights), while International Committee for Red Cross is responsible for humanitarian work. Similar obligations for state responsibility and individual criminal responsibility for war crimes, genocide, crimes against humanity can be found both in IRHL and IHL.

Reference [7] There are also corresponding provisions in different international treaties regarding the prohibition of torture: the IHL uses the common Article 3 to the four Geneva Conventions from 1949, while IHRL prohibits torture and cruel and inhuman treatment in the Convention against torture issued by the United Nations.

7. The differences between IHRL and IHL

In addition to the interaction and obvious similarities between IHRL and IHL, it is worth to mention the differences, too. First major difference is related to the concept of derogation, which is part of many international treaties regarding the possible situations of emergency [8].

IHRL recognizes this concept, but IHL do not. In IHL this concept can be compared to the concept of military necessity [9]. Another difference is the method of formulating the list of rights or duties. The IHL lists the rules of actions and behaviors that need to be followed by the parties in a conflict and regulates the hostilities and the treatment of specific categories of individuals during the conflict. On the other side, IHRL lists a number of rights that can be claimed by individuals against governments. The IHL operates globally, while IHRL usually operates with provisions that are part of regional treaties for human rights [10].

The last obvious difference is the provision for reparations in war. In the IHRL, the treaties regulate reparations and provide an award for the harm that was caused due to violations of the rights guaranteed by IHRL. Some scholars argued that IHRL instruments should be used in order to enforce IHL, because IHRL has a broad collection of instruments, not only legally-binding, but quasi-judicial, too, and for that reason some enforcement mechanisms were set [11].

8. Legal rights and obligations: complementary sources

The legal sources of both IHL and IHRL can demonstrate the complementarity concerning the rights and obligations in the field of human rights protection.

The Universal Declaration of Human Rights is a declaration of universally applicable principles which are only generally declared in the declaration itself and does not explicitly regulate the protection of human rights in armed conflicts [12].

The four Geneva Conventions barely mention the term human rights. But, after the United Nations International Conference on Human Rights in Teheran, Iran, in 1968, the situation changed. From that year, the United Nations organs started to use both IHL and IHRL simultaneously in almost every aspect of their work related to human rights situations in the world.

Although the main difference between IHL and IRHL is believed to be the period when each of them is applied (IHL in times of wars and armed conflict, and IHRL in times of peace and war), contemporary international law believes that this distinction is not completely true and adequate. The reason for that is the nature of the human rights: they are interdependent, interrelated and indivisible, they are inborn for all human beings, they can be

applied during war and peace, and they exist at all time, no matter of political, economic, social circumstance in the states. There is no international treaty in which is explicitly mentioned that human rights are applicable only in times of peace and not in wars. Consequently, both IHL and IHRL are complementary legal sources of rights, duties and obligations in armed conflicts. Example for this statement is the International Covenant on Civil and Political Rights, which is equally applicable in peace and in war.

9. Conclusion

In a world where the context, the intensity and the nature of wars and conflicts are constantly changing, the law that regulates them needs to be dynamic in the same way.

It is of a great importance to emphasize the dynamic nature of the IHL in armed conflicts and the importance of IHRL in protection of human rights. As indicated throughout the paper, IHRL and IHL are evolving permanently. Armed conflicts and wars change constantly and thus, IHRL and IHL need to adjust to their changes in order to avoid any inconsistencies in the protection that they provide. The correct application of provisions of both IHRL and IHL and providing the adequate protection to individuals require a complete understanding of how those provisions interact and how they complement each other in order to offer the highest possible standard of protection. Their interaction is visible in occasions where IHRL need to be interpreted in the context of IHL or in a situation when one international body requires a recommendation of another, as a mechanism to guarantee maximum protection for the individuals. In that manner, both IHRL and IHL provide broad protections and guarantees for individuals who no longer or not actively participate in hostilities, including civilians, too.

Their complementary application will provide the necessary elements for activating international and national mechanisms for accountability for any violation that was committed during a war or a conflict. They also provide mechanisms to guarantee the right to reparation or a remedy for the victims.

As shown in this paper, the complementary relationship between these branches of law contributed to creation of set of legal instruments with obligations to protect the rights of all individuals affected by wars or armed conflicts.

Future attempts of treaty bodies, international and regional human rights courts can be seen as an effort of the international community to strengthen the protection of individuals in wars and armed conflicts.

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