

The Comparative Study on the Role of Procedural and Substantive Rules of Humanitarian Law and International Criminal Law in the Development of Both Legal Systems

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ABSTRACT

The law of war involves rules in order to regulate the strategies and conduct of armed conflicts. The mission of this part of the law of war that is responsible for humanizing conflicts is international humanitarian law. International Criminal Law is a branch of public international law in which international crimes and the jurisdiction of international criminal courts to prosecute for the perpetrators of these crimes are studied. These two very important branches of public international law in the procedural and substantive rules have many similarities and differences for the development and evolution of each other.

INTRODUCTION

International humanitarian law is a developed and reinforced form of traditional international war law (wartime law). In fact, there is a public-private relationship between the law of war or the law of armed conflicts and humanitarian law. The establishment of the International Criminal Court as an objective manifestation of international criminal law, equipped humanitarian law with a tool to remedy the deficiencies and shortcomings of the current system that seemed inadequate and often overlooked [1]. International humanitarian law and international criminal law are both very important branches of modern international law that are interdependent in some way. In such a way that the development of one causes the development of the other [2].

The subject of international humanitarian law and international criminal law is human beings, and on the other hand, the sources of international humanitarian law and international criminal law are not completely separate from the sources of international public law referred to in Article 38 of the Statute of the International Court of Justice. Also, in terms of treaty law standards, international humanitarian law treaties (e.g., The Geneva conventions of 1949) and the Statute of the International Criminal Court is subject to the international treaty system, like other treaties and conventions. Now, the fundamental question in this field is: How is the comparative study of the commonalities and differences of the procedural and substantive rules of humanitarian law and international criminal law in the development and evolution of both legal systems? To answer

this question in the first step: the comparative study in the area of procedural rules is done including the rules of the law of treaties and universal jurisdiction over some common crimes. at first, a comparative study in the field of procedural rules is realized, including the standards of the law of treaties, universal jurisdiction over some common crimes, then a comparative study in the field of substantive rules is expressed, including common international crimes, erga omnes obligations and Jus cogens in both legal systems including Jus cogens and *Erga omnes* obligations to comply with humanitarian rules, article 103 of the UN charter and humanitarian law, and international crimes subject to *Erga omnes* obligations and Jus cogens to realize similarities and differences in the development and evolution of both legal systems.

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TEXT

Unlike conventional treaties, humanitarian law treaties don't have a commercial or exchange nature.

It can be stated that the exercise of the right of reservation is generally possible on legislative (humanitarian and criminal) treaties and the ruling regime is the same as the 1969 Vienna convention regime in the area of law of treaties. In order for these treaties to maintain their unity, compilers of these treaties must explicitly declare a ban on the exercise of their reservation. Also, the suspension, reversal and deviation from of international humanitarian law treaties are in no way permissible for member states and non-member states regarding the points referred to above. But suspending or postponing the investigation or prosecution of the enforcement of the decisions of the international criminal court is permissible only in one case by the UN Security Council for 12 months based on Article 16 of statute of the international criminal court, which is one of the important weaknesses of the international criminal court in implementing the statute.

There is a general legal principle stating that compliance with legal requirements of a humanitarian nature cannot be subject to reciprocal behavior. Also, In the convention on international criminal law (statute of the international criminal court), the issue of conflict or reciprocal transaction between member states and non-member states is not stated.

Humanitarian law treaties and treaties of international criminal law are therefore explicitly and implicitly among the objective and legislative treaties for having the protection of human rights in their nature; for this reason, it is possible for them to succeed from the former state to the successor state, which is a point of commonality in both legal systems.

International law on universal jurisdiction, taking into account national sovereignty and independence, and not merely the sovereignty and independence of governments and rulers, along with other jurisdictions, it provides an important basis for the protection of fundamental human rights by domestic and international criminal institutions against some core crimes. Examples of international crimes, known as the compelling law, are rape, genocide, crimes against humanity, war crimes, piracy, slavery, torture, and so on. As a result, the basis of all of these crimes is part of the compelling law [3]. These crimes are known as the compelling law because they affect the general interests of the universal community, peace, and security of humankind and gave a huge shock to humanity's conscience. Crimes that describe the compelling law do not reflect all the elements present. Rape is a threat to peace and security, but not aggressive acts are threats to the peace and security of mankind, while genocide and crimes against humanity give a shock to the conscience of humanity; certain cases of such acts may threaten peace and security. For example, slavery, its practices, and its torture shock humanity's conscience,

while rarely threatening peace and security. Piracy that is less present today sometimes threatens peace and security and shocks humanity's conscience. War crimes, which are domestic crimes under international criminal law and humanitarian law, may threaten peace and security and during armed conflicts, while it may occur with international or non-international characteristics, to what extent it affects human conscience and creates shock depends on its breadth and quantity [4]. In this regard, Article 8 of the Statute of the International Criminal Court, concerning war crimes, shall serve as the common point of humanitarian law and international criminal law; not all of the provisions of this Article describe the compelling law and general obligations; rather, only those instances with compelling law and general obligations are included in this Article that shock humanity's conscience very greatly. In other words, against the physical integrity and dignity of humans, it is based on the human rights set forth in Article 8 of the Statute. For example, in Article 8 of the Statute regarding war crimes; deliberate killing of human beings, torture, severe damage to physical integrity, casualties, medical tests on people, the use of inappropriate weapons and strangling gases on civilian populations, etc., are seen as actions that shock the conscience of humanity very greatly and therefore, have the compelling law and general obligations contained in this article.

CONCLUSION

Humanitarian law and international criminal law have many commonalities and differences in public international law, regarding both substantive and procedural issues. Recognizing those commonalities and differences has led to the development of both legal systems. Because through recognizing commonalities and disparities, the shortcomings of both systems become clear and explicit and effective suggestions can be made for the development and evolution of both legal systems. The results and arguments of this study, inter alia, include:

- A) Explicit prohibition of reservation law in international humanitarian law treaties such as the treaty of international criminal law.
- B) Non-suspension in the treaty of international criminal law on the part of the Security Council in the effective implementation of the decisions of the international criminal court.
- C) The existence of universal jurisdiction in the treaty of international criminal law, along with complementary jurisdiction.
- D) Paying more attention to international crimes included in the general obligations and compelling rules set forth in Article 8 of the ICC statute.
- E) Human rights obligations are among the compelling rules and universal obligations. The compelling rules

cannot be changed unless with a new compelling rule with the same characteristics.

- F) There has been no discussion of humanitarian law in the United Nations Charter, but human rights are mentioned in the introduction and Articles 13, 55, 62, 68 and 76. In fact, by extending the interpretation of humanitarian law, we can put humanitarian law that is specific to human rights under the umbrella of human rights in general. Because, undoubtedly, the basis of humanitarian law as well as human rights is founded on war and its effects and on the protection of humanity and human beings. Because humanitarian law is considered as a part of the UN members' obligations under the Charter and shall not be separate from the Charter of the United Nations and Article 103.
- G) The pillars of the United Nations, including recommendations and decisions of the General Assembly, binding Security Council resolutions, adversarial opinions and the advisory opinions of the International Court of Justice, each of them has tried in its own way to promote and enhance humanitarian law, regarded as a commitment by UN members to the Charter and shall prevail over other international obligations and shall not be separate from the Charter of the United Nations and Article 103.
- H) The main pillars of the United Nations have been trying to use from the capacity of the Charter to strengthen humanitarian law. In most of the Seventh Chapter Security Council resolutions, in the introduction and executive clauses, consistently, they call for respect for human rights in the implementation of international obligations and these resolutions. Therefore, humanitarian rights will not be separate from the Charter and Article 103.

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