A Comparative Study on the Application of International Human Rights Law and International Humanitarian Law in Armed Conflicts

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Abstract: *The Russia-Ukraine conflict remains unresolved, while the armed conflict between Israel and Palestine continues to escalate, causing significant civilian casualties. To better protect the victims of war in armed conflicts, clarifying the applicability of international human rights law (IHRL) and international humanitarian law (IHL) in such contexts has become an urgent issue. A comparative study on the application of IHRL and IHL needs to address three key questions step by step: First, whether IHRL is applicable during armed conflicts; second, if applicable, how IHRL complements and interacts with IHL; and third, what methods should be adopted to resolve conflicts when IHRL and IHL are applied concurrently. In this context, an analysis of the historical development of IHRL and IHL reveals that the two share a common philosophical foundation, and thus they can be applied concurrently during armed conflicts. From an empirical perspective, IHRL engages with IHL through two approaches: interpreting IHL provisions and directly applying IHRL to armed conflicts, thereby fostering interactive development between the two. In cases where normative conflicts arise between IHRL and IHL, such as in the rules on the use of force and internment procedures, the principles of systemic integration and lex specialis can reconcile these conflicts during the application process.*

Keywords: International Human Rights Law (IHRL) ♦ International Humanitarian Law (IHL) ♦ armed conflict ♦ comparative study

Introduction

International humanitarian law (IHL) initially existed in bilateral agreements among military commanders and was later incorporated into the *Geneva Convention* of 1864, marking the first step towards the codification of rules governing armed conflicts. It is primarily centered around the four Geneva Conventions of 1949 and their two Additional Protocols of 1977, and also encompasses numerous treaties regulating specific areas of IHL, such as the *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, the *Convention on Certain Conventional Weapons,* and the

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Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, among others. IHL is based on the principle of upholding humanity, restricting the warring parties through combat methods and means, and providing legal protection for war victims and cultural heritage in armed conflicts to achieve a balance between military necessity and reducing unnecessary suffering. Moreover, international human rights law (IHRL) is based on humanitarian principles and the protection of individuals' inherent rights by the state. It initially developed as part of national constitutions, entering international law through the human rights provisions in the *United Nations Charter* of 1945. Currently, it is mainly embodied in nine core human rights treaties of the United Nations and some regional human rights treaties, such as the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *European Convention on Human Rights*, and the *American Convention on Human Rights*.

Regarding the research progress on the relationship between IHRL and IHL, many literatures have discussed the applicability of IHRL in armed conflicts in relation to IHL. Analysis of these literature resources shows that scholars have three different views on the applicability of IHRL and IHL in armed conflicts, namely, the schools of separation, integration, and complementarity. The first view is separation. Scholars who hold a separation view believe that IHRL and IHL are completely different legal systems, and any overlap between these two branches of law would lead to harmful chaos. IHL and IHRL are completely independent and should maintain this relationship. When an armed conflict breaks out, IHRL no longer applies and the conflict is fully governed by IHL. Separation scholars, fearing the politicization of IHL, insist on viewing the two international legal systems of IHL and IHRL separately, and on this basis reject any approach that brings the two closer.[1] The second view is integration. Scholars who uphold integration believe that IHL and IHRL are two branches of the same tree and they are largely integrated with each other.[2] Integration scholars are committed to promoting a merger between the two branches of international law. The third view is complementarity. Scholars who hold complementarity believe that although IHL and IHRL are two different systems with different roots, different functions and different application scenarios, they are driven by a common belief, namely respect for human dignity, and there is a specific

[1] D. Suter, "An Enquiry into the Meaning of the Phrase 'Human Rights in Armed Conflicts'," 15 *The Military Law and the Law of War Review* 3 (1976): 393-439.
[2] Robert Kolb and Pavle Kilibarda, "Human Rights and Humanitarian Law," in *Max Planck Institute for Comparative Public Law and International Law* (London: Oxford University Press, 2022), 44-45.

complementary relationship in their application.[3]

It is undeniable that all the aforementioned perspectives are reasonable to a certain extent; however, the intersection and connection between IHRL and IHL cannot be generalized based solely on independent legal systems. Through a thorough review and analysis of the comments made by prominent international jurists, a series of resolutions from the United Nations General Assembly and the Security Council, the drafting materials of human rights treaties, and the records of the United Nations Commission on Human Rights, it becomes evident that the intersection and connection between IHRL and IHL cannot be reduced to a singular viewpoint. This paper initially analyzes and reflects upon existing research findings, subsequently re-examining the relationship between IHRL and IHL through the lens of their historical development. It then employs a substantial number of representative international cases to elucidate the specific application of IHRL within the context of IHL. Finally, it proposes solutions to the conflicts that arise between the two during their application, aiming to clarify the relationship between these two legal domains and enhance the understanding of IHRL's application in armed conflicts.

I. A Historical Perspective: The Evolution of the Relationship Between IHRL and IHL

IHRL and IHL, while belonging to different legal sectors, intersect and merge due to their common philosophical foundation, which is the respect for human dignity and rights. The intersection between the two can be traced back to the comments of famous international jurists, UN Security Council resolutions, international cases, and human rights treaties, and the timeline of the intersection between the two is far earlier than the Tehran Human Rights Conference.

A. Historical evolution of the relationship between IHRL and IHL

As early as the beginning of the 19th century, the international community's concern for the rights of citizens of different countries had already been institutionally manifested. This was evident through the signing of a series of treaties and declarations at the Congress of Vienna from 1814 to 1815, which aimed to protect certain minority groups in Central Europe, Eastern Europe, and the Middle East based on race, religion, and language. Notably, the 1814 *Treaty of Paris* marked the beginning of efforts to prohibit the slave trade and the buying and selling of slaves.[4] From the second half of the 19th century to before World War II, the international community, mainly under the impetus of the International Committee of the Red Cross, formulated

[3] Dietrich Schindler, "Human Rights and Humanitarian Law: Interrelationship of the Laws," *American University Law Review* 31 (1982): 935-941.
[4] He Zhipeng, *Essentials of International Law* (Beijing: Peking University Press, 2023), 290.

humanitarian laws on war. IHL originated from the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* of 1864, signed by the Red Cross, followed by the signing of the second, third, and fourth Geneva Conventions in 1899, 1907, and 1949, respectively.[5] After World War II, the international community became more actively concerned with human rights, with the *UN Charter* proclaiming fundamental human rights. The *Universal Declaration of Human Rights* of 1948 strengthened the human rights perspective globally, followed by the signing of the UN human rights *Covenant*s and other related conventions, and international human rights cooperation in various regions also developed to a new stage.[6]

With the *Universal Declaration of Human Rights* of 1948 and the *Geneva Convention (IV)* of 1949, the interrelationship between IHRL and IHL sparked widespread discussion in the international community. It was not until the Tehran Human Rights Conference in 1968 that Resolution No. 23, titled "Respect for Human Rights in Armed Conflicts," was adopted, marking the first official conceptual intersection between IHRL and IHL, and one of the earliest areas where the missions of the United Nations and the International Committee of the Red Cross came into contact.[7] At this conference, the United Nations called on Israel to apply both human rights conventions and the Geneva Conventions simultaneously in the occupied territories of Palestine.[8] Therefore, the academic community regards the 1968 Tehran Human Rights Conference as a "real turning point," believing that the United Nations considered the applicability of human rights law in armed conflicts for the first time and that the intersection between the two independent legal systems of human rights law and the law of armed conflict began in 1968. Subsequently, the Additional Protocols to the *Geneva Convention* of 1977 was the first treaty to explicitly recognize that IHRL and IHL apply together in armed conflicts, clearly stating the relationship between IHRL and IHL.[9] Many terms in

[5] They respectively refer to the *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (also known as the First Geneva Convention, or the "Land Convention" for short), signed in Geneva in 1864; The *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (also known as the Second Geneva Convention, abbreviated as the "Sea Convention"); The *Convention (III) Relative to the Treatment of Prisoners of War* (also known as the Third Geneva Convention, abbreviated as the "Prisoners of War Convention"); The *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, signed in Geneva in August 1949 (also known as the Fourth Geneva Convention, abbreviated as the "Civilians Convention").

[6] He Zhipeng, *Essentials of International Law* (Beijing: Peking University Press, 2023), 291-292.

[7] Katharine Fortin, "Complementarity Between the ICRC and the United Nations and International Humanitarian Law and International Human Rights Law, 1948-1968," translated by Liao Fan, *International Review of the Red Cross* 4 (2012): 94.

[8] United Nations, Final Act of the International Conference on Human Rights, A/CONF.32/41, page 5.

[9] For example, Article 72 of the *First Additional Protocol* states that the Protocol's provisions "are

subsequent international and regional human rights treaties specifically describe IHL treaties.[10]

From the perspective of historical development and time, there appeared to be no intersection between IHRL and IHL prior to the Tehran Human Rights Conference in 1968. However, this is not entirely accurate. Before 1968, an increasing number of convergent elements had emerged between the two legal domains. There is substantial evidence indicating that IHRL was applicable during periods of armed conflict prior to the 1968 Tehran Human Rights Conference. This includes remarks from renowned international jurists, resolutions from the UN Security Council, international case law, and various human rights treaties. For instance, Claude Pugh, director of the Legal Department of the International Committee of the Red Cross, who was involved multiple times in the drafting of the *Universal Declaration of Human Rights*, asserted in 1949 that the *Universal Declaration of Human Rights* was applicable at all times and in all places, including during armed conflicts.[11] In 1949, the United Nations published the *Law Reports of Trial of War Criminals*. In addressing the types of crimes against humanity, it was proposed that war crimes not violating human rights would not be classified as crimes against humanity. Furthermore, a footnote clarified that crimes against humanity shall be restricted to those that do violate human rights.[12] Evidence supporting the perspective that IHRL was applicable during periods of armed conflict prior to the 1968 Tehran Human Rights Conference can also be found in resolutions of

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additional... to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict." The preamble of the *Second Additional Protocol* also recalls "furthermore that international instruments relating to human rights offer a basic protection to the human person." Both Additional Protocols explicitly confirm that IHRL continues to apply during armed conflicts. In addition, the connection between IHL and IHRL as presented in the two Additional Protocols can be seen in Article 75 (fundamental guarantees) of the *First Additional Protocol* and Article 6 (penal prosecutions) of the *Second Additional Protocol*, which are clearly influenced by human rights clauses, particularly Articles 14 and 15 of the *International Covenant on Civil and Political Rights*. See Katharine Fortin, "The Relationship Between International Human Rights Law and International Humanitarian Law: Taking Stock at the End of 2022?," 40 *Netherlands Quarterly of Human Rights* 4 (2022): 343-353.

[10] See Article 9(1) of the *International Covenant on Civil and Political Rights*, Article 37(2) of *Convention on the Rights of the Child*, Article 5(1) of the *European Convention on Human Rights*, Article 7 of the *American Convention on Human Rights*, and Article 6 of the *African Charter on Human and Peoples' Rights*.

[11] The original text is as follows: Let us add that the *Universal Declaration of Human Rights* does not provide for derogation clauses in exceptional circumstances such as war, internal disturbances or other disasters. It must therefore be applied holistically at all times and in all places. See Katharine Fortin, "Complementarity Between the ICRC and the United Nations and International Humanitarian Law and International Human Rights Law, 1948-1968," translated by Liao Fan, *International Review of the Red Cross* 4 (2012): 101.

[12] United Nations War Crimes Commission, "Law Reports of Trials of War Criminals," *Digest of Laws and Cases* 15 (1949): 135.

the United Nations General Assembly that invoked IHRL during the conflicts of the 1950s and 1960s. For instance, the United Nations Security Council resolution on "the situation in Hungary," adopted in 1953, condemned the ongoing suppression against fundamental rights and political freedoms of the Hungarian people, which occurred under the continued presence of Soviet armed forces. The resolution reiterated its call for the Union of Soviet Socialist Republics and the then-Hungarian authorities to cease their repressive measures against the Hungarian people and to respect Hungary's freedom, political independence, and the enjoyment of fundamental human rights and freedoms by the Hungarian people.[13] Furthermore, the United Nations General Assembly, in its resolution on "the situation in Aden" adopted in 1963, expressed deep concern regarding the critical and volatile situation in Aden resulting from the state of emergency, as well as the arrest and internment of nationalist leaders and trade union members, along with the expulsion of others. These actions constituted a violation of fundamental rights and posed a threat to peace and security in the region.[14] Finally, the evidence of the intersection between IHL and IHRL can also be traced back to the *International Covenant on Civil and Political Rights* (hereinafter referred to as the "*Covenant*"). Article 4 (1) of the *Covenant* stipulates that "the States Parties to the present *Covenant* may take measures derogating from their obligations under the present *Covenant* 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."[15] This phrase "other obligations under international law" encompasses obligations under IHL.

B. The legal basis for the intersection of IHRL and IHL

IHRL and IHL have traditionally been two distinct branches of law; the former aims to protect the fundamental rights of individuals and prevent them from suffering from government abuse of power, while the latter involves the limitation and regulation of the conduct of parties involved in armed conflicts. Although these two independent legal fields have different origins and backgrounds, they share a common philosophical foundation and humanitarian thought, namely, respect for human dignity and rights. International case law and state practice have consistently demonstrated that the two legal systems not only share common humanitarian ideals but also possess numerous points of connection. For instance, the International Criminal Tribunal for the former Yugoslavia in the case of The Prosecutor v. Anto Furundzija and the International Criminal Tribunal for Rwanda in the case of The Prosecutor v. Muhimana both emphasized that the principle of respecting human dignity

[13] General Assembly, The Situation in Hungary, A/RES/1312 (XIII), 1958, page 60.
[14] General Assembly, The Situation in Aden, A/RES/1972 (XVIII), 1972, page 53.
[15] Article 4 (1) of the *International Covenant on Civil and Political Rights*.

serves as the fundamental foundation of the international community and the essential rationale for the existence of IHRL and IHL. This principle is designed to safeguard individuals from actions that infringe upon their personal dignity. In fact, it has become so significant in contemporary times that it has permeated the entire international legal framework.[16] Despite the different origins behind the two legal systems, it has become increasingly clear in recent years that IHRL applies in times of armed conflicts as well as in peacetime. In its Advisory Opinion "on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," the International Court of Justice confirmed that "the protection provided by human rights conventions does not cease in the event of an armed conflict unless derogation is made in accordance with Article 4 of the *Covenant*."[17] The Human Rights Committee also stated that "The *Covenant* applies in situations of armed conflicts, and specific rules of IHL can interpret the *Covenant*; these two fields of law complement rather than exclude each other."[18] Because IHRL and IHL share a common ideal of protecting human dignity and rights,[19] the international community has increasingly accepted the applicability of IHRL during armed conflicts.

Therefore, there are three theoretical propositions on the relationship between IHL and IHRL: the schools of separation, integration and complementarity.[20] Although the complementarity view appears to be more reasonable, IHRL and IHL do not simply complement each other. Instead, in armed conflicts, based on the same humanitarian ideal, they influence each other and promote each other's development in a complementary manner to achieve the greatest protection for humans. This interactive development also reflects the approach to interpretation set out in Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*, which provides that in interpreting a norm, account shall be taken of "any relevant rules of international law applicable in

[16] ICTY, Case of Prosecutor v. Anto Furundzija, Application No. IT-95-17-1-T, 1998, para. 183; ICTR, Case of Prosecutor v. Mikaeli Muhimana, Application No. IT-95-1B-T, 2005, para. 539.

[17]The view of the International Court of Justice is reflected in the conclusion of paragraph 104 of the Advisory Opinion on "The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," and is also confirmed in paragraph 25 of the Advisory Opinion on "The Legitimacy of the Threat or Use of Nuclear Weapons." In other words, the protection under the ICCPR does not cease in times of war, unless certain provisions can be derogated under the implementation of Article 4 of the ICCPR. See ICJ Reports, General List No. 131, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, para. 106. ICJ Reports, General List No. 95, Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons, 1996, page 240, para. 25.

[18]Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CPR/C/21/ Rev.1/ Add.13, 2004, para. 11.

[19] Huang Zhixiong and Tang Xiangjing, "On the Mutual Integration of Contemporary International Humanitarian Law and International Human Rights Law," *Oriental Law* 1 (2009): 129.

[20] Marco Sassoli and Laura M. Olson, "The Relationship Between International Humanitarian and Human Rights Law where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts," 90 *International Review of the Red Cross* 871 (2008): 599-627.

the relations between the parties." Interactive development regards international law as a coherent system of institutions in which different rules coexist harmoniously. Therefore, IHRL can interpret IHL, and vice versa.

II. An Empirical Perspective: The Interactive Development of IHRL and IHL

The interactive development of IHRL and IHL is not only reflected in treaties and the general comments of the United Nations Human Rights Committee, but is also directly reflected in a large number of international cases. Through the analysis of international practice regarding IHRL and IHL, it can be seen that the interactive areas between the two primarily manifest in the basic rights of individuals, such as the prohibition of arbitrary deprivation of the right to life, prohibition of inhumane and degrading treatment, and the right to a fair trial, to achieve dual protection of human rights. IHRL interacts with IHL through two channels: the "interpretation process" and the "application process." The "interpretation process" refers to the interpretation of IHL rules based on the norms or concepts of IHRL, while the "application process" refers to the direct application of IHRL and IHL together in armed conflicts.

A. International practice of IHRL interpreting IHL

IHRL is applicable in armed conflicts by providing a specific interpretation of the rules of IHL. The "interpretation process" not only makes IHL rules more concrete and complete, consolidating and developing IHL, but also allows for a more precise application of IHL rules. When international judicial bodies interpret the IHL rules under review, they often resort to IHRL to prevent the inappropriate expansion of the scope of IHL rules, invoking relevant IHRL rules to interpret IHL rules.

1. Using human rights *Covenant*s to interpret the definition of torture prohibited by IHL

IHRL can serve as a guide to interpreting the specific meaning of the prohibition of torture under IHL. The precedents of IHRL that interpret IHL can be traced back to the cases adjudicated by the International Criminal Tribunal for the former Yugoslavia. In prosecuting the war crime of torture, the Tribunal frequently referenced the provisions of IHRL, particularly the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, to elucidate the meaning of the prohibition against torture, given that international humanitarian law does not provide a definition for torture.[21] In addition, in the Prosecutor v. Anto Furundzija case, the

[21]For instance, Article 5 of the *Universal Declaration of Human Rights* and Article 7 of the *International Covenant on Civil and Political Rights* both assert that no individual shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. Furthermore, Article 1 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* defines the term "torture" as

International Criminal Tribunal for the former Yugoslavia held that the prohibition of torture stipulated in human rights treaties is an absolute right that cannot be derogated even in emergency situations. For this reason, the principle of prohibition of torture also applies to situations of armed conflicts.[22] In the case of Prosecutor v. Zejnil Delalic, the International Criminal Tribunal for the former Yugoslavia relied mainly on IHRL to explain the manifestations of inhumane treatment in armed conflicts. The Tribunal also held that an understanding of the prohibition of torture as a war crime under IHL requires an extensive analysis of the meaning and content of the prohibition of torture in human rights treaties.[23]

2. Invoking human rights conventions to interpret the right to a fair trial under IHL

The right to equality before the law and a fair trial are key elements in protecting human rights. The right to a fair trial is a right that everyone should enjoy. As a procedural safeguard, it plays an important role in protecting the substantive goal of human rights. Both IHRL and IHL incorporate the right to a fair trial. The right to a fair trial is not only reflected in a series of IHL treaties,[24] but also stipulated in international and regional human rights treaties.[25] It belongs to customary international law with two elements: extensive state practice and *opinio juris*. IHRL provides a comprehensive

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any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Therefore, when the International Criminal Court discusses the definition of torture, it often refers to the definitions of torture found in the three aforementioned conventions.

[22] ICTY, Case of Prosecutor v. Anto Furundzija, Application No. IT-95-17-1-T, 1998, para. 144.

[23] ICTY, Case of Prosecutor v. Zejnil Delalić, Application No. IT-96-21-T, 1998, paras. 452-493.

[24]The right to a fair trial is not only reflected in the four Geneva Conventions and their additional protocols, but also in many international criminal conventions. See Article 49 (4) of the *First Geneva Convention*; Article 50 (4) of the *Second Geneva Convention*; Articles 102 to 108 of the *Third Geneva Convention*; Articles 5 and 66 to 75 of the *Fourth Geneva Convention*; Article 71(1) and Article 75(4) of *Additional Protocol I*; Article 6(2) of *Additional Protocol II*; Article 8(2)(b)(vi) and (2)(c)(iv) of the *Statute of the International Criminal Court*; Article 2(6) of the *Statute of the International Criminal Tribunal for the Former Yugoslavia*; Article 4(7) of the *Statute of the International Criminal Tribunal for Rwanda*; Article 3 of the *Statute of the Special Court for Sierra Leone*. Furthermore, Article 17(2) of the *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* also establishes the principle of the right to a fair trial.

[25] Article 10 of the *Universal Declaration of Human Rights*; Article 14(1) of the *International Covenant on Civil and Political Rights*; Article 40(2)(b)(iii) of the *Convention on the Rights of the Child*; Article 6(1) of the *European Convention on Human Rights*; Article 8(1) of the *American Convention on Human Rights*; Article 7 of the *African Charter on Human and Peoples' Rights*; Article 18 of the *American Declaration of the Rights and Duties of Man*; Article 19 of the *Cairo Declaration on Human Rights in Islam*; and Article 47 of the *Charter of Fundamental Rights of the European Union*.

explanation of the nature of the right to a fair trial. According to General Comment No. 32 issued by the United Nations Human Rights Committee, although the right to a fair trial is not explicitly listed among the non-derogable rights in Article 4 (2) of the *Covenant*, states that derogate from the provisions of Article 14 during a public emergency must ensure that such derogation does not exceed the strict requirements dictated by the actual emergency. Furthermore, a general reservation of the right to a fair trial would be inconsistent with the object and purpose of the *Covenant*.[26] General Comment No. 29 issued by the United Nations Human Rights Committee further points out that since IHL clearly stipulates the right to a fair trial during armed conflicts, the Committee sees no reason to derogate from these fair trial principles in emergency situations.[27]

Both IHRL and IHL require that in order to ensure that the accused receives a fair trial, the trial shall be conducted by an independent, impartial and regularly constituted court.[28] However, IHL does not make detailed mention of the meaning of an independent and impartial court. IHRL has elaborated on independent and impartial courts in a large number of international cases and has rich international practice. In the case of Bahamonde v. Equatorial Guinea, the United Nations Human Rights Committee proposed that to maintain independence in performing its functions, the court must be able to be independent from any other government department, especially the administrative department.[29] Fairness requires that the court or judge have no preconceived opinions about the case being tried, and in particular, not assume that the defendant is guilty. In the case of Karttunen v. Finland, the Human Rights Committee proposed that in order to be fair, the judges of the court shall not have preconceived opinions about the case being heard, nor should they act in a manner that favors the interests of one party.[30] The European Court of Human Rights also breaks down the impartiality of judges into subjective and objective factors. As long as there is no evidence to the contrary, the subjective impartiality of a judge in a specific case can be presumed. Objective impartiality requires the court or judge to

[26]UN Human Rights Committee (HRC), *CCPR General Comment No.* 13, *Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, CCPR/C/21/ Rev.1/ Add.5, 1984, para. 4.

[27]UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, CCPR/C/21/ Rev.1/ Add.11, 2001, paras. 3, 9.

[28]Article 3 of the *First Geneva Convention*, Article 84 of the *Third Geneva Convention*, and Article 6 of the *Second Additional Protocol*, among other IHL agreements, provide the establishment of a fair and independent court.

[29]UN Human Rights Committee, Communication No. 468/1991; Bahamonde v. Equatorial Guinea, CCPR/C/49/D/468/1991, 1993, paras. 7, 9.

[30] UN Human Rights Committee, Communication No. 387/1989, Karttunen v. Finland, CCPR/C/46/D/387/1989, 1992, para. 7.

provide sufficient guarantees to eliminate any doubt regarding their impartiality in the case.[31] The Inter-American Court of Human Rights also believes that in addition to the requirement of subjective impartiality, the court must also be impartial from an objective perspective, that is, it must provide sufficient guarantees to eliminate any reasonable doubt about its impartiality.[32]

Therefore, IHL can refer to the international practice of IHRL on the right to a fair trial to explain the independence and impartiality of the courts stipulated in IHL treaties. As the International Criminal Court pointed out when considering the situation in Mali in the case of The Prosecutor v. Al Hassan, given that the *Rome Statute of the International Criminal Court* (hereinafter referred to as the "*Statute*") does not define the concepts of independence and impartiality, the Court, in accordance with Article 21(3) of the *Statute*, and the *European Convention on Human Rights*, the *American Convention on Human Rights*, the *African Charter on Human and Peoples' Rights* and human rights case law all clearly interpret the procedural guarantees of the right to a fair trial, should invoke IHRL to interpret the right to a fair trial that the Court must respect, including the independence and impartiality of the Court and other procedural guarantees.[33]

B. International practice of the direct application of IHRL in armed conflicts

There is also a substantial amount of international practice regarding the direct application of IHRL alongside IHL during armed conflicts. In its concluding observations on State reports, the United Nations Human Rights Committee considered that the *Covenant* applies to both non-international and international armed conflicts. The European Court of Human Rights has recognized that the *European Convention on Human Rights* is applicable in both non-international and international armed conflicts. The Inter-American Commission and the Court have recognized that the *American Declaration of the Rights and Duties of Man* and the *American Convention on Human Rights* are applicable to situations of armed conflicts, incorporating the content of IHRL into armed conflicts, thereby realizing the applicability of IHRL in IHL.[34]

The International Court of Justice also echoed the international practice of the Human Rights Court, and its case law also confirmed that IHRL continues

[31] ECHR, Case of Sainte Marie v. France, Application No. 12981/87, 1992, para. 50; ECHR, Case of Pier-sack v. Belgium, Application No. 8692/79, 1982, para. 30.
[32]InterAmerican Commission on Human Rights, Case of Raquel Matti de Meya v. Peru, Case 10.970, Report No. 5/96, 1996, para. 2.
[33] ICTY, Case of The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Application No. ICC-01/12-01/18-Corr-Red, 2019, para. 378.
[34] Cordula Droege, "Elective Affinities? Human Rights and Humanitarian Law," 90 *International Review of the Red Cross* 871 (2008): 501-548.

to apply together with IHL during armed conflicts. In its advisory opinion on the "Legality of the Threat or Use of Nuclear Weapons," the International Court of Justice formally addressed for the first time the relationship between IHL and the *Covenant*, holding that the protection of the *Covenant* does not cease in wartime, except insofar as certain provisions may be derogated under Article 4 of the *Covenant* in a state of national emergency. However, respect for the right to life cannot be derogated from and the right not to be arbitrarily deprived of life also applies during the conduct of hostilities.[35] Subsequently, in its advisory opinion on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," the International Court of Justice in this case upheld the same view as in its advisory opinion on the "Legality of the Threat or Use of Nuclear Weapons," namely, that in armed conflicts the protection provided by human rights conventions does not cease unless affected by the derogation clause in Article 4 of the *Covenant*. In addition, the International Court of Justice explained in more detail the relationship between IHL and IHRL, stating that there are three possible situations: some rights may be entirely matters of IHL, other rights may be entirely matters of IHRL, and some rights may belong to both branches of international law. The Court must take into account these two branches of international law, namely, IHRL and IHL as *lex specialis*.[36] Based on the goal and purpose of the *Covenant*, the International Court of Justice held that the applicability of human rights in armed conflicts extends from the territories of contracting States to the territories of non-contracting States, that is, human rights treaties have universal applicability.[37]

The International Court of Justice reaffirmed this perspective in the case of the "Democratic Republic of the Congo v. Uganda," recalling its advisory opinion on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," which stated that IHRL applies to the exercise of jurisdiction by States beyond their borders, particularly in occupied territories. The Court further emphasized that in the event of an armed conflict, the obligations undertaken by States under human rights instruments remain in effect.[38] Consequently, it concluded that the actions of the Uganda Defence Force, along with its officers and soldiers, constituted a violation of Article 6(1)(7) of the *Covenant*, as well as Article 38(2)(3) of the *Convention on the Rights of the Child*.

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[35]ICJ Reports, General List No. 95, Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons,1996, page 240, para. 25.
[36]ICJ Reports, General List No. 131, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, para. 106.
[37]Ibid., 107 and 109.
[38] ICJ Reports, General List No. 116, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005, paras. 206-212.

A substantial number of international cases indicate that the international community has widely accepted the view that IHRL indeed applies during armed conflicts.[39] The direct application of IHRL in the context of armed conflicts not only enhances the normative value of IHL rules themselves but also addresses the gaps within IHL regarding the protection of victims of war during armed conflicts, thereby avoiding situations where there is no legal recourse.

III. A Normative Perspective: Conflicts to Which IHRL and IHL Can Simultaneously Apply

As the renowned international law scholar Michael Bothe argues, "International law is fragmented into a large number of problem-related treaty regimes, which are established on specific occasions to solve specific problems caused by certain events and in which there is overlap in the rules of international law. Overlapping rules of international law can reinforce each other, but they can also conflict and create tension."[40]

In general, IHL and IHRL are parallel legal systems that jointly provide legal protection for victims of war during armed conflicts, but the international rules between the two are not always so harmonious. There are normative differences between IHL and IHRL regarding the rules of the use of force and standards of internment, which may lead to conflicts in their application.

A. Different standards of the rules on the use of force in IHRL and IHL

The regulations governing the use of force in IHRL and IHL differ significantly. IHRL does not address the hostile actions between conflicting parties; rather, it focuses on the manner in which force is employed in law enforcement. It establishes that the fundamental principle of law enforcement is the "capture, not kill" approach.[41] This means that the use of force shall be considered a last resort when other methods prove ineffective or fail to yield the desired outcomes, and must align strictly with the legitimate objectives to be achieved, such as preventing crime, facilitating or assisting in the lawful arrest of criminals or suspects, and maintaining public order and security. IHRL therefore examines the legality of rules on the use of force, which require that force be used only when the risk of serious violence is imminent, cannot be merely hypothetical, and cannot be avoided otherwise than by the

[39] Katharine Fortin, "The Relationship between International Human Rights Law and International Humanitarian Law: Taking Stock at the End of 2022?," 40 *Netherlands Quarterly of Human Rights* 4 (2022): 343-353.

[40]Michael Bothe, "The Historical Evolution of International Humanitarian Law, International Human Rights Law, Refugee Law and International Criminal Law," Horst Fischer, U), Crisis Management and Humanitarian Protection, (Berlin: Berliner Wissenschafts Press, 2004), 37.

[41]ICRC, International Humanitarian Law: Answers to your Questions, June 9, 2020, page 38-42, accessed December 11, 2023, https://www.icre.org/en/publication/0703-international-humanitarian-law-answers-your-questions.

use of force. For example, the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted on September 7, 1990, by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, states that "the intentional use of lethal firearms may only be used when it is strictly unavoidable to protect life" and requires a clear warning before the use of firearms and sufficient time to comply with the warning.[42] The European Court of Human Rights has a large number of cases on the requirement to control the use of force and avoid the use of lethal force.[43] The *European Convention on Human Rights* also provides that "Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolute necessity: (a) in defence of any person's unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection."[44] In his report on the Sri Lankan Civil War, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, further noted that "Another element of IHRL is the prohibition of the deliberate use of lethal force in armed conflicts unless it is strictly necessary. In other words, even in times of war, killing must be a last resort."[45]

IHL recognizes that the use of lethal force is inherent in waging war and asserts that the ultimate goal of military action is to defeat the enemy's armed forces. Therefore, the parties to armed conflicts are allowed or at least not legally prohibited from attacking each other's military targets, including enemy personnel, and violent actions against these targets are not prohibited.[46] Moreover, the main principles that govern the use of force under IHL are the principles of distinction, prevention, and proportionality, aimed at avoiding collateral losses of civilian life or damage to civilian objects. One of the primary objectives of IHL is to protect civilians and civilian objects from the consequences of hostilities, necessitating the implementation of precautions to minimize civilian casualties. The loss of civilian life, injuries to civilians, or

[42] Principles 9 and 10, the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*.

[43] For example, the European Court of Human Rights has controlled the use of force in the following cases to avoid the use of lethal force. See ECHR, Case of McCann and Others v. United Kingdom, Application No.18984/91, 1995, paras. 202–213, ECHR, Case of Andronicou and Constantinou v. Cyprus, Application No. 86/1996/705/897, 1997, paras. 181-186, ECHR, Case of Hugh Jordan v. the United Kingdom, Application No. 24746/94, 2001, paras. 103-104.

[44] Article 2(2) of the *European Convention on Human Rights*.

[45]Economic and Social Council, Extrajudicial, summary or arbitrary executions Report of the Special Rapporteur Philip Alston, E/CN.4/2006/53/ Add.5, 2006, para. 29.

[46] ICRC, International Humanitarian Law: Answers to your Questions, June 9, 2020, page 38-42, accessed December 11, 2023, https://www.icre.org/en/publication/0703-international-humanitarian-law-answers-your-questions.

damage to civilian objects resulting from the use of force must not surpass the aim of obtaining a foreseeable, tangible, and direct military advantage.[47]

As mentioned above, a clear area of conflict between IHRL and IHL is the acceptability of the use of lethal force against humans. IHL generally holds that enemy combatants may be targeted in international armed conflicts until they surrender or are incapacitated, regardless of whether they pose a direct threat to human life. However, IHRL limits the acceptability of the unconditional use of force against enemy combatants; in other words, the use of lethal force depends on specific circumstances rather than the target. It means that military personnel must comply with the relevant IHRL rules regarding the use of lethal force when conducting law enforcement activities. In such armed conflict situations, we must decide whether to apply IHL or IHRL.

B. Different standards of internment in IHRL and IHL

IHL and IHRL both establish rules for the humane treatment of detainees and the conditions of internment, but the two can easily conflict on procedural matters related to internment. Regarding detention procedures, IHRL again includes prohibitive norms against arbitrary internment, explicitly stating that an individual may only be detained if they pose a direct, immediate, and imminent threat to others, or if they are being prosecuted for a crime. Furthermore, the *Covenant* emphasizes the right to personal liberty and provides that every detained individual, regardless of the reason, has the right to judicial review of their internment.[48] The United Nations Human Rights Committee has stated that "In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the *Covenant*."[49] IHRL regards the right to personal liberty itself as non-derogable, thus judicial remedies and the right to trial are essential for protecting non-derogable rights, and judicial review of limitations on personal rights must be conducted.

IHL does not prohibit internment during armed conflicts, nor does it require judicial review of the legality of internment. For example, the *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)* allows for the internment of prisoners of war (POW), and the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)* permits internment of protected humans under occupation for "security" reasons and "for imperative reasons of

[47] Cordula Droege, "The interaction between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict," 40 *Israel Law Review* 2 (2007): 310-355.
[48] Article 9 of the *International Covenant on Civil and Political Rights*.
[49]CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, CCPR/C/21/ Rev.1/Add.11, 2001, para.16.

security." It means that internment can be non-criminal based on the degree to which a person's activities pose a threat to the security of the detaining state where "the security of the detaining state makes it absolutely necessary."[50] For instance, the International Criminal Tribunal for the former Yugoslavia in the Case of Prosecutor v. Zdravko Mucic stated that "a party to the conflict may intern civilians or place them in assigned residence if it has serious and legitimate reasons to think that they may seriously prejudice its security."[51]

Therefore, with regard to internment provisions, IHRL, in order to protect the right to life, requires a risk assessment based on space, time and environment, and judicial authorities have the right to review the legality of internment. But IHL allows non-criminal internment for security reasons, but there is no judicial review of the legality of internment. As pointed out in the Case of Prosecutor v. Zdravko Mucic ruling, courts or administrative committees shall be established as soon as possible to review whether internment measures have been taken against civilians.[52]

IV. Solutions to Conflicts in the Application of IHRL and IHL Norms

IHRL and IHL provide parallel protection for human rights and generally do not lead to conflicts and contradictions. However, when it comes to the use of force, IHRL and IHL have different norms. When there is a conflict between these different legal norms, an important legal question arises, namely, which legal system takes precedence. When there are differences between the norms of IHRL and IHL regarding the same legal issue, it is necessary to determine whether the differences between the two norms will result in a conflict. The first scenario is where these two legal systems regulate the same issue differently, but there is no actual conflict between the regulations. In this case, the principle of systemic integration can be used for coordination. The second scenario is where the regulations in the two legal systems actually conflict, and only one legal regime can be applied. In this case, the principle of *lex specialis* shall be invoked to resolve the issue of legal application. According to this principle, more specific legal norms take precedence over more general legal norms.

A. Principle of systemic integration

The principle of systemic integration has long been a neglected principle of interpretation. It was not until the Oil Platforms (Islamic Republic of Iran v. United States of America) in 2003 that the International Court of Justice

[50] Articles 42 and 78 of the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention).*
[51] ICTY, Case of Prosecutor v. Zdravko Mucic aka Pavo, Hazim Delic, Esad Landzo aka Zenga, Zejnil Delalic, Application No. IT-96-21-T, 1998, para. 576.
[52] Ibid., para. 113.

applied this principle to review Article 10 of the *Treaty of Amity, Economic Relations and Consular Rights Between the United States and Iran* using the relevant international law principles of the *UN Charter* and customary international law.[53] The International Law Commission appreciated the principle of systemic integration as a way to solve the so-called fragmentation of international law. The discussion of systemic integration as a tool to oppose the fragmentation of international law and in favor of maintaining the view of international law as a coherent legal system has increased significantly.[54] In the Advisory Opinion on Namibia, the International Court of Justice stated that an international instrument must be interpreted and applied within the entire framework of the prevailing legal system.[55] The Inter-American Court of Human Rights also believes that the interpretation of a treaty must take into account not only the agreements and instruments related to the treaty, but also the international legal system to which the treaty belongs.[56]

The principle of systemic integration is contained in Article 31, para. 3 (c), of the *Vienna Convention on the Law of Treaties*, which states that when interpreting treaty norms, account shall be taken of any relevant rules of international law applicable in the relations between the parties.[57] This principle serves as a method of treaty interpretation, regarding international law as a systematic and complete international legal system where different treaty rules coexist harmoniously. Treaties themselves are products of international law and exist and operate as part of the international legal system. Therefore, for the sake of the systematic integrity of the international legal system, other overall rules of international law need to be taken into account when interpreting treaties. As the International Court of Justice has pointed out, international instruments must be interpreted and applied within the framework of the entire prevailing international legal system.[58]

1. Elements of the principle of systemic integration

The principle of systemic integration requires that any relevant rules of international law applicable between the parties to a treaty shall be taken into

[53]ICJ, Case of Islamic Republic of Iran v. United States of America, Judgment of December 12, 1996, para. 25.

[54] Vassilis P. Tzevelekos, The Use of Article 31 (3) (C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? 31 *Michigan Journal of International Law* 3 (2010): 621-690.

[55]ICJ Reports, General List No.53, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution, Advisory Opinion, 1971, paras. 16 and 53.

[56]Inter-American Court of Human Rights, Series A, No. 16, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, 1999, para. 113.

[57] Article 31 of the *Vienna Convention on the Law of Treaties*.

[58] International Law Commission, United Nation, Supplement No. 10, UN Doc. A/61/10, 2006, Chapter II, page 407-408, para. 251.

account when interpreting a treaty. This provision means that when the court resorts to the principle of systemic integration, it needs to have three elements: the element of the parties, the element of other international law norms, and the element of relevance, that is, which parties other international law rules apply to and which rules shall be considered relevant to the interpretation of the treaty, to prevent the abuse of the principle of systemic integration and the arbitrary expansion of jurisdiction.

First, the element of the parties. The term "Parties" in Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* means the parties to the dispute to which the international rules to be interpreted apply.[59] As to whether an individual can be a party to the principle of systemic integration, the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia, in their advisory opinions and general comments on the interpretation and application of the principle of system integration, held that even if a dispute arises between an individual and a state, the parties involved, as far as the principle of systemic integration in the *Vienna Convention on the Law of Treaties* is concerned, are only one or more states, because an individual does not have the legal capacity to become a party to a treaty.[60] Furthermore, human rights bodies have argued that the norms of IHL invoked in interpreting human rights treaties are binding only on the defendant state;[61] in other words, individuals cannot be parties to the principle of systemic integration. The second is element of other international law norms. According to Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*, interpreters may consider any relevant rules of international law, including treaties, customary international law, and general principles of law. Other rules of international law only consider the existing norms of international law, that is, the existing legally binding norms of international law, and exclude non-binding rules of international law.[62] Finally, there is the element of relevance. According to the provision in Article 31 (3)(c), other rules of international law to be taken into account in interpreting an international norm must be "relevant." The determination of the element of "relevance" tends to consider international law rules that relate to the same subject and matter and shall also be relevant to the rules being interpreted.

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[59] Linderfalk U, "Who are 'The Parties'? Article 31, Paragraph 3 (C) of the 1969 Vienna Convention and the 'Principle of Systemic Integration' Revisited," 55 *Netherlands International Law Review* 3 (2008): 343-364.

[60] Paul de Hert, Stefaan Smis and Mathias Holvoet, "Convergences and Divergences Between International Human Rights," in *International Humanitarian and International Criminal Law* (Oxford: Intersentia publishers, 2018), 289.

[61] Todeschini, Vito, "The Impact of International Humanitarian Law on the Principle of Systemic Integration," 23 *Journal of Conflict and Security Law* 3 (2018): 359-382.

[62] Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff Press, 2009), 432.

The principle of systemic integration implies that IHRL and IHL do not contradict each other, but rather can influence and reinforce each other based on the same principles and values. In this sense, human rights can be interpreted according to IHL, and vice versa.

2. International practice of the principle of systemic integration

The purpose of adopting the principle of systemic integration is not only to strengthen the applicability of IHRL in relation to IHL, but also to avoid normative conflicts between different regulations, especially concerning the use of force and internment.[63] The International Committee of the Red Cross specifically mentioned this method of legal interpretation in its updated commentary, arguing that IHRL law can interpret IHL in accordance with the principle of systematic integration set out in Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* of 1969. In the commentary, the International Committee of the Red Cross used a large number of human rights law rules and case law to interpret concepts such as "judicial guarantees," "torture" and "degrading treatment" in IHL.

The International Court of Justice, the International Criminal Court, and the World Trade Organization's dispute resolution body have repeatedly mentioned and adopted the principle of systemic integration in their rulings. International human rights institutions also adopt the principle of systematic integration to address the normative differences between IHL and IHRL. For example, in the Case of Hassan v. United Kingdom, the European Court of Human Rights referred to the standard contained in Article 31 (3)(c) of the *Vienna Convention on the Law of Treaties*. The Court has repeatedly stated that the interpretation of the *European Convention on Human Rights* must be consistent with other rules of international law, which also applies to IHL.[64] In addition, the Inter-American Court of Human Rights also confirmed in the Molina case that since IHRL and IHL are based on the same principles and values, they can influence and reinforce each other. In accordance with the interpretation method provided for in Article 31(3)(c), of the *Vienna Convention on the Law of Treaties*, any relevant rules of international law applicable to the relationship between the parties can be taken into account when interpreting a norm. This indicates that IHRL can be interpreted in accordance with IHL, and vice versa.[65] In this case, the Inter-American Court of Human Rights not only explicitly invoked the principle of systemic integration, but also linked it to the complementarity of the two legal systems,

[63] Todeschini, Vito, "The Impact of International Humanitarian Law on the Principle of Systemic Integration," 23 *Journal of Conflict and Security Law* 3 (2018): 359-382.
[64] ECHR, Case of Hassan v. the United Kingdom, Application No. 29750/09, 2014, para. 102.
[65] Inter-American Commission on Human Rights, Report No. 112/10 Inter-state Petition IP-02 Admissibility Franklin Guillermo Aisalla Molina, OEA/ Ser. L/V/II. 140 2011, paras. 121, 122.

illustrating the interaction between IHL and IHRL at the micro level.

From the aforementioned international practices, it is evident that the relationship between IHRL and IHL is complementary, serving to fill each other's gaps while also acknowledging the divergences between the two legal systems. Moreover, the principle of systematic integration as stated in Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* not only allows different legal systems to supplement each other but also coordinates the divergences between the two legal systems at a micro level, playing an important role in resolving normative differences and conflicts between IHRL and IHL.

B. The principle of *lex specialis*

The principle of *lex specialis* can be traced back to the Roman law *Code of Justinian*, but the concept of individual law rather than *lex specialis* was adopted in Roman law.[66] This principle has been recognized by renowned international law scholars such as Hugo Grotius, Pufendorf, and Emmerich de Vattel. For example, Grotius stated that "in the case of a conflict between the parts of an agreement document, priority shall be given to the provisions that are most specific and closest to the subject at hand, because special provisions are usually more effective than general ones."[67] According to this principle, when two international law norms apply simultaneously to the same subject matter, the more specific norm shall take precedence over the more general norm, that is, the principle of *lex specialis de grotale gi generali*. The United Nations International Law Commission believes that the principle of special law is more specific than the applicable general law principles and can often better take into account the particularities of the environment in which it is applicable. The application of special laws often produces fairer results and better reflects the intentions of legal entities.[68]

The principle of special law indicates that in cases where two rules may conflict, the specific rule will prevail over the more general one. In order to reconcile the contradiction between the norms of IHRL and IHL, the International Court of Justice applies the principle of *lex specialis* in specific cases. In its 1996 Advisory Opinion on the "Legality of the Threat or Use of Nuclear Weapons," the Court interpreted the right to life stipulated in Article 6 of the *Covenant* as the right not to be arbitrarily deprived of life, which must be interpreted in accordance with the relevant provisions of IHL when applied to armed conflicts.[69] This is the first time that the International Court of Justice

[66] Liao Shiping, "The Principle of Priority of Lex Specialis in International Law," *Chinese Journal of Law* 2 (2010): 186.

[67] Hugo Grotius, On the Law of War and Peace, Batoche Books, Kitchener 2001, Sect. XXIX. page 155.

[68] International Law Commission, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, UN. A/CN.4/L.702, 2006, page 9.

[69] ICJ Reports, General List No. 95, Advisory Opinion on the Legality of the Threat of Use of Nuclear

has explicitly proposed relying on the principle of *lex specialis* to coordinate the simultaneous application of IHL and IHRL, responding to the international community's concerns about the conflict in the application of the two. Subsequently, the principle of *lex specialis* has been widely applied in practice. For example, the International Court of Justice again mentioned the principle of *lex specialis* on the relationship between IHL and IHRL in its Advisory Opinion on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," pointing out that when both laws contain rights, the court must take into account two branches of law, namely, IHRL and IHL as *lex specialis*.[70] Therefore, from these cases, it can be seen that the principle of *lex specialis* can resolve conflicts between the rules of IHRL and IHL.

It should be noted that the applicability of the *lex specialis* principle in times of armed conflict should not be misunderstood as meaning that IHL completely replaces IHRL. Even if the *lex specialis* principle applies, IHRL continues to apply in times of armed conflicts and is not replaced. However, considering that IHL is a *lex specialis* during armed conflicts, human rights treaties should be interpreted according to its provision. This perspective was further affirmed by the United Nations Human Rights Commission in its resolution concerning the protection of human rights for civilians in armed conflicts. Specifically, it acknowledges that during times of armed conflict, when violations of IHRL and IHL occur and their effects on civilians — particularly women, children, and vulnerable groups — are evident, both IHRL and IHL are complementary. It is emphasized that all human rights warrant equal protection, and that the safeguards provided by IHRL remain applicable in situations of armed conflict, while considering the specific circumstances under which IHL is enacted as a *lex specialis*.[71] The principle of *lex specialis* applies only when there is a clear conflict between applicable norms and does not allow for automatic application.[72]

V. Conclusion

The issue of how IHRL and IHL, as two independent domains of law, apply in armed conflicts remains unresolved and controversial. In order to clarify this issue, the author traces back to the historical origins of the two and returns to the provisions of the IHRL and IHL rules themselves. It is found that

Weapons, 1996, page 240, para. 25.

[70]ICJ Reports, General List No. 131, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, para. 106.

[71] UN Human Rights Council, Resolution 9/9-Protection of the human rights of civilians in armed conflict, accessed 12 December 12, 2023, https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_9.pdf. page 2.

[72] Biljana Karovska, "Human Rights Law and Humanitarian Law: Between Complementarity and Contradiction," 17 *Balkan Social Science Review* 2 (2021): 25-41.

although IHL and IHRL have different origins, they are based on a common philosophical foundation and can be applied simultaneously in armed conflicts. In addressing the structural prerequisite for the applicability of IHRL to armed conflicts, this paper uses the relevant practices of the International Court of Justice, the Human Rights Court and the International Criminal Tribunal for the former Yugoslavia to demonstrate the interactive development and specific application of IHRL and IHL. That is, the legal systems of IHRL and IHL not only interact at the level of specific norms, but also further supplement the legal protection provided by IHL through the interpretation and direct application of IHL in international practice. However, in the process of simultaneous application of IHRL and IHL, overlaps between rules are inevitable. Overlapping rules will lead to complex application issues and thus normative conflicts. Therefore, a specific solution path should be developed based on the conflict of norms. The principle of systemic integration and the principle of *lex specialis* should be taken into consideration in resolving the conflict of applicability between IHRL and IHL, and implemented at the micro level according to the specific circumstances, and the specific application scenarios should be determined on a case-by-case basis.

(Translated by *CHEN Feng*)