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 in a legal order and minimize their harmful effects by humanizing them as much as possible. 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. International humanitarian law and international criminal law, as two very important branches of international public law that interdependently, at the same time, they have gone through a period of history and various developments; the main purpose of this research is to survey the comparative study of the formal and substantive rules of international humanitarian law and international criminal law in the development and evolution of both legal systems. The method of the present research is descriptive-analytical in a library manner in order to survey the comparative study; in both legal systems. The results of this research showed that 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.

Key words: International humanitarian law, International criminal law, International criminal courts, International court of justice, Procedural and substantive rules.

I. Introduction

Public international law derives from intergovernmental relations in innumerable ways to drive states from war to peace and regulate the actions of many international entities[3]. 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[4]. 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[5].

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

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[4] Yusuf Aksar, Implementing International Humanitarian Law from The *Ad Hoc* Tribunals to a Permanent International Criminal Court, Routledge, (2005), p. 2.
[5] . Kriangsak Kittichaisaree, International Criminal Law, Translated by: Hossein Aghaei Jannat Makan, Tehran, Second Edition, Jungle Publication, (2008), p. 70.

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. In terms of inherent jurisdiction, part of the jurisdiction of international criminal courts as an objective expression of international criminal law deals with war crimes that are at the same time expressed on humanitarian law. Now, in light of what was mentioned above, 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. In order to answer to this question 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.

II. The comparative study in the area of procedural rules

The comparative study of procedural rules includes standards of law of treaties and jurisdiction.

1. Standards of Law of Treaties

The statute of the international criminal court and the treaties of international humanitarian law are, first and foremost, a multilateral international treaty. The humanitarian law treaties, “Four Geneva Conventions of 1949” and the treaty of international criminal law, “the Statute of the International Criminal Court” are, like other treaties, subject to the system of international treaty law which will be examined in the next section from the perspective of some standards of international treaty law in the area of procedural rules.

2. Right to Reservation

Unlike conventional treaties, humanitarian law treaties don’t have a commercial or exchange nature. Humanitarian law treaties are in fact substantially different from other treaties whose main purpose and function is to support fundamental human rights and freedoms. The law concerning the reservation on humanitarian law treaties, which have a nature of humanitarian law, neither is explicitly according to the law of treaties (especially the 1969 Vienna Convention), nor is prohibited by their own rules, and therefore is permitted by the law of treaties.

Although the prevailing theoretical view holds that because according to standards of the law of treaties, reservation law should not be contrary to the purpose and subject of treaties, and the reservation law on humanitarian law treaties is contrary to their purpose and subject matter and in other words is contrary to the nature of the requirements of such treaties. Therefore, it is not valid, but the practical procedure of countries does not accept such a view. As a result, the law of a variety of reservations has been administered on more or less all humanitarian law treaties from the side of contracting countries. And so far, the attempts of humanitarian groups and humanitarian law organizations have been less effective in preventing or depriving reservation laws. Of course, since the reservation law can only be applied to treaties, its application to compelling rules,

customary rules, and even general legal principles is not appropriate and today, most humanitarian treaty rules have become customary rules, and in some cases even customary rules; therefore, the reservation laws laid down on humanitarian law treaties express non-treaty rules which have greatly undermined their effect. Also, today, there is a theory that all human law treaties involve the absolute prohibition of the right to a reservation.

In view of this theory, it may be possible to include international humanitarian law which has a human legal nature; but in the convention on international criminal law, the statute of the international criminal court, which is governed by the system of international treaty law, Article 120 explicitly prohibits the right to make a reservation because of the fundamental importance of all its articles, which may be contrary to the subject matter, purpose of the treaty, and humanitarian law standards[6]. Therefore, 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 law.

3. Suspension of execution

Humanitarian law treaties, including the Fourth Geneva Conventions of 1949 and its annexed Protocols, do not imply any rules on suspension or derogation; because such a rule is contrary to the requirements of those treaties concerning the protection of human beings.

Humanitarian law, because of its importance to international peace and security, has its own set of jus cogens and Erga omnes obligations. To the extent that, first, the obligations of this branch of international law, due to their humanitarian law nature are absolute and unconditional. Second, its rules are regarded as an exception to the general rules governing international treaties. Third, the rules of humanitarian law are customary, as cited in advisory opinion of the International Court of Justice wall Case in 2004[7]. Fourth, in accordance with Article one of the Fourth Geneva conventions of 1949 and their additional protocols, contracting governments are bound to observe and guarantee all rules stipulated in the convention in all circumstances. Thus, the suspension of the exercise of humanitarian law with reference to the consent of the persons protected under Article 7 of the First, second and third conventions, the fourth convention of 1949, and Article 8 of the fourth convention, reads as follows: "… they cannot in any way disregard a part or all of the rights which this contract or proprietary agreement of the topic of the previous Article has provided for them" It will not be possible. However, in the statute of the international criminal court, the suspension is viewed as the possibility of temporarily suspending the obligations of member states by United Nations Security Council. The Security Council, in addition to its positive role, has a negative role under Article 16 of the statute[8], which under the term suspension of investigation or prosecution, it is extendable for 12 months. Therefore, given the political nature of the Security Council, issuing a resolution by it based on the suspension of the pursuit of the jurisdiction of the court will be restricted and it is possible that it endangers international criminal justice. Therefore, 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.

[6] . Rome Statute of the International Criminal Court, Article 120: No reservations may be made to this Statute.

[7] . Advisory Opinion: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 106.

[8]. Article 16: No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

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.

4. Fundamental Breach

In customary humanitarian law, no contracting party shall be permitted to suspend or terminate such provisions in the face of a fundamental breach of the provisions of the humanitarian law treaties by the other party. This exception is the prohibition of the "principle of contrast or mutual transaction" regarding the provisions of the humanitarian law treaty[9]. Under Rule 140 of customary international humanitarian law, it is explicitly mentioned that "the obligation to observe and ensure compliance with international humanitarian law is not bound to reciprocal behavior. And the practice of governments regards this rule as a customary rule of international law applicable to both international and non-international armed conflicts[10]. The Supreme Court in the Netherlands on the Rauter case in 1948 and the US Military Court at Nuremberg in the Von Leeb case (supreme command trial) in 1948-1947 rejected this reasoning of the respondents based on the idea that because the other side of the venture has violated international humanitarian law, they no longer were obliged to obey it[11]. In its advisory theory on the legitimacy of the threat or use of nuclear weapons, the ICJ has emphasized that many humanitarian law rules are so fundamental that they must be adhered to by all governments, whether or not they have joined the relevant conventions. The Court has made this assessment on the basis of the characteristic of these rules as "Intrans Gressible" and "the principle of prohibition of contrast" in humanitarian law[12] Furthermore, the Court in the case of South West Africa (Namibia) in 1971 and the international criminal court in the case of the former Yugoslavia asked for retribution. In Martic case in 1996 and in their judgment in Kupreskic case in 2000, they stated that: This is a general legal principle stating that compliance with legal requirements of a humanitarian nature cannot be subject to reciprocal behavior.

These statements, as well as the policies used in them, make it clear that this principle is valid for any humanitarian law requirement, whether they are international or non-international conflicts[13]. In other words, neither execution nor guarantee of the implementation of international humanitarian law is based on contrast. The fact is that implementing treaties with humanitarian nature is not dependent on their implementation by other member states, as set in clause 5 of Article 60 of the Vienna convention on the rights of the treaties in 1969. The humanitarian treaty obligations are not subject to the principle of exchange and contrast, and their breach cannot be a legitimate cause for confrontation. 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. But as it is clear from the introduction to the constitution, it has been emphasized that "the most serious crimes of concern to the international community as a whole must not go unpunished, and there is a need to ensure effective prosecution of perpetrators

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[9] . Ziyaii Bigdeli, Mohammad Reza, International Treaties Law, Tehran, Fifth Edition, Ganje Danesh Publication, (2013), p. 48.

[10] Jean-Marie Hankertz & Louise Doswald Beck, Customary International Humanitarian Law, Vol.1 Rules, Cambridge University Press, (2009): p. 705.

[11] . Id, p. 706.

[12] . ICJ Advisory Opinion Concerning the Legality of the Use by a State of Nuclear Weapons in Armed Conflict. (1995), para 79.

[13] . Hankertz & Doswald Beck, supra note 10, at p. 706.

of these crimes by ensuring national measures and enhancing international cooperation[14]". Concerning "international cooperation and judicial assistance", Article 86 of the statute of the international criminal court has established this obligation and cooperation with the court and not with member and non-member states. Therefore, there is no discussion of the principle of contrast or the mutual transaction in the treaty of international criminal law. In other words, we can argue in this way; international criminal law, which punishes natural persons for committing international crimes, has laid down this action based on the principle of the mutual transaction between states and international criminal institutions in order to punish natural persons; and there is no discussion of the principle of contrast or mutual transaction between states and the extradition of offenders is based on a treaty between international criminal law institutions and states. For example, Article 89 of the statute of the international criminal court refers to the surrendering of persons by States to the court.

5. Succession of States

The humanitarian law treaties and the treaty of international criminal law are explicitly and implicitly included in the objective and legislative treaties for they protect various aspects of human rights. And according to the Vienna Treaty in 1978 (in the field of the succession of states to treaties), the principle is that it is transferred from the former state to the successor state. In other words, those treaties continue in all forms of succession. The author argues that in this respect, the process of succession of states does not automatically agree with this issue. Two examples to support this claim can be cited: (a) newly independent governments, after the colonial struggle, opposed this argument for automatic succession by the international committee of the Red Cross in reference to the Fourth Geneva Conventions on humanitarian law. Without exception, they ratified those treaties in their parliaments. (b) The second example relates to the position taken by the human rights committee, that all governments created after the collapse of Yugoslavia and the Soviet Union adopted the same position in reference to the covenant, and it did not automatically succeed from the former state to the successor state and was re-enacted in the states' parliaments in accordance with their laws.

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.

6. Universal Jurisdiction over Some Common Crimes

The term "universal jurisdiction" was first coined in 1945 by Coles. Analyzing state practice, he held that every state has the competence to punish war criminals, regardless of the nationality of the victim, the date of entry into the war, or the location of the crime. Because war crimes like piracy are considered as crimes against the conscience of the civilized world, and every nation benefit from punishing those who committed such crimes.

In addition to the practicality of this principle of universal jurisdiction in maintaining domestic and international public order, it is one of the important legal instruments by which the international community can safeguard and guarantee human rights and humanitarian law. The principle of universal jurisdiction allows any state to prosecute criminals who have committed

[14] . Affirming, that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation

specific crimes. Some scholars have suggested that universal jurisdiction automatically arises from violations of norms that have a compelling and universal characteristic[15].

War crime, which means the violation of the laws and customs of war, is one of the common crimes between the two areas of humanitarian law and international criminal law, included in universal jurisdiction; because the treaty basis of universal jurisdiction for this crime is laid down in Articles 49, 50, 129 and 146 of the first and fourth Geneva Conventions of 1949, respectively. Likewise, under the first clause of Article 85 of the First Additional Protocol, gross violations of this protocol also fall under this regime (universal jurisdiction).

In addition to the treaty provisions, customary international law is also recognized as the basis of universal jurisdiction over war crimes, as reflected in legislation and national judicial procedure[16]. In view of the aforementioned, it should be said that the universal jurisdiction cited in humanitarian law documents does not have an optional side and are mandatory[17]. Therefore, universal jurisdiction over war crimes also Articles from international contract law and customary international law. According to the explicit provisions of these Articles, member states are required to prosecute war criminals and those encouraging such crimes or extradite them to another government seeking their prosecution. Some today believe that the universal jurisdiction of the domestic courts for war crimes includes committing such crimes in the course of domestic armed conflicts[18].

The international court of justice, in its judgment in 27 June of 1986 regarding the case of Nicaraguan[19], states about the obligation of governments to fulfill the obligations mentioned in the Four Geneva Conventions of 1949: "... The United States is bound by the provisions of Article one of the fourth Geneva Conventions to respect these treaties in all respects and to urge everyone to respect them; because such a commitment does not stem solely from these conventions; Rather, it derives from the general principles of humanitarian law, which are explicitly expressed in these conventions "[20]. According to this theory, the common Article one in the 1949 fourth Geneva Convention[21] has become a norm of customary law and is equally binding on all member and non-member states. The international court of justice reiterated ten years later in its advisory theory on the legitimacy of the threat or use of nuclear weapons[22] that:

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[15] . M. Cherif Bassiouni, "Universal jurisdiction for international Crimes: Historical Perspectives and Contemporary Practice", Virginia Journal of international law, 42(1), (2001), pp. 148-152.

[16] . Id, pp. 177, 178.

[17] Theodor Meron, International criminalization of international Atrocities, American Journal of International Law, (1995), p. 576.

[18] . Jamshid Momtaz, Amir Hossein Ranjbarian, International Humanitarian Law - Domestic Armed Conflict, Tehran, Mizan Publication, (2005), pp. 118-205.

[19]. In April 1984, the Nicaraguan government, in a petition to the International Court of Justice, declared the United States government responsible for military and guerrilla actions against its central government. The Nicaraguan government claimed that the United States had breached its explicit international obligations by hiring, training, arming, encouraging, supporting and leading military and paramilitary operations against Nicaragua. The Nicaraguan government has asked the court, while endorsing the matter, to call on the United States to end its breach of obligations and to compensate for the incurred damages.

[20] Mohammad Ali Ardebili, International Criminal Law (Selected Articles 2), Tehran, First Edition, Mizan Publication, (2011), p. 54.

[21]. Article 1 states that "the Contracting Parties undertake to respect and guarantee the present Convention in all circumstances."

[22] the issue of threat or use of nuclear weapons was a question raised by the General Assembly on the basis of Article 96 of the United Nations Charter and in its resolution K 75/49 requesting the International Court of Justice to declare in its advisory opinion about the issue of "Does international law allow us to resort to threat or use of nuclear weapons at all times?"

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"Undoubtedly because many of the provisions of humanitarian law during armed hostilities for respecting human beings and for "basic human considerations", according to the court in judgment of April 9, 1949 in the case of the Corfu Strait,[23] are so fundamental that the Fourth Hague Convention and the 1949 Geneva Convention have been accepted widely by governments. These basic rules will work for all governments, whether or not they have ratified the instruments of these conventions, because they constitute infringing principles of customary international law[24].

Thus, war crimes, which is a common crime between humanitarian law and international criminal law, according to the provisions of the Fourth Geneva Conventions in 1949 and customary international humanitarian law, which fall within the scope of universal jurisdiction, are included in international humanitarian law

Although the statute of the international criminal court does not require states to accept universal jurisdiction over its list of crime, including war crimes, in the introduction and Article 1 of the Statute, it has referred to complementary jurisdiction. However, several countries have listed the Statute in their war crimes cases and have given their courts the jurisdiction to prosecute persons suspected of committing war crimes on the basis of the principle of universal jurisdiction[25]. Belgium, dated April 11, 2000, in order to punish perpetrators of the most important international crimes that perpetrated human sentiment anywhere in the world, in 1993 and 1999, enacted laws that put the country at the forefront of the domestic courts' fight against these crimes.

Belgium's 1999-1993 law on the prevention of violations of international humanitarian law and the crime against humanity allowed the courts of the country to prosecute those charged with war crimes and crimes against humanity on the basis of the principle of universal jurisdiction; On the international arrest warrant issued on April 11, 2000 by a Belgian investigating judge against Mr. Abdoulaye Yerodia Ndombasi, the Congo Foreign Minister, at the time and then the Minister of Education calling for his temporary detention until his request for reasoning to Belgium due to "gross violations of international humanitarian law". Congo has filed a lawsuit to the international court of justice regarding the violation of the immunity of its minister of foreign affairs and requested condemnation of Belgium. The court, on the judgment of February 14, 2002 declared that under international law, foreign ministers are immune from being criminally prosecuted by other states while serving, even if they are subject to accusations such as war crimes.

Judge van den Wingate in the Corfu channel case, in his interim statement in December 8, 2000, emphasized the importance of this issue in expanding new international criminal law. He argued that, of course, the international community was in principle in agreement with the idea that "core crimes" of international criminal law (war crimes, genocide and crimes against humanity) should not remain unpunished. These crimes, on an ideal basis, should be tried by international criminal courts. However, not all such cases can be investigated by such courts. In this case, criminal prosecution by domestic courts is only a means of implementing and enforcing international criminal law. Countries not only have ethical obligations but also have legal obligations under international law to ensure that they are able to prosecute core crimes of international criminal law in domestic courts. Judge van den called attention to the growing effort to uphold the idea that criminal prosecution restrictions (territorial jurisdiction, immunity) cannot be applied to core crimes. This idea has garnered support not only in doctrine but also in domestic

[23] . Total opinions of the Court, 1949: p. 22.
[24] . Ardebili, *supra note* 20, at p. 55.
[25]. For instance, law of Belgium. Canada. Germany. New Zealand. England as well as the draft law of Trinidad and Tobago.

courts such as the decisions of the House of British Lords in the Pinochet case.

In the authors' opinion, universal jurisdiction for governments and international judicial bodies today is not at possible because of the governance, independence and public order of states, rather in the bright future of international law, this will be possible gradually; and, day by day, the wall of governance and independence of nations will become weaker and a way to penetrate universal jurisdiction and the entry of domestic courts and international courts alongside other jurisdictions will become possible; Furthermore, the concrete expression of this view that the wall of sovereignty and independence of the countries has declined has been gradually reflected in the opinions (Congo against Belgium) in 2002 (Djibouti against France), in 2008, and (Belgium against Senegal) in 2012. Thus, in the near future, 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.

III. The Comparative Study in the Field of Substantive Rules

1. Common international crimes

The ICC's jurisdiction to deal with international crimes is limited to "the most painful crimes of concern to the entire international community" (Article 5 of the statute). According to Article 5 of the ICC statute, crimes within the jurisdiction of the court include: genocide, crimes against humanity, war crimes, and rape. In accordance with the principle of legality of crimes, the Court is only competent to deal with the crimes set forth in the Statute. But in the area of humanitarian law, there are rules in order to bring strategy and armed conflict into legal order and to humanize them to reduce their harmful effects as much as possible; in these two areas of international law, war crimes are common crimes in both areas. This does not mean, of course, that the possibility of other crimes or international crimes set forth in Article 5 of the Statute, including crimes against humanity, genocide and rape crimes that are not specific to wartime (unlike war crimes), is not possible to happen in common in these two areas in times of armed conflict, whether international or non-international.

2. General obligations and compelling rules in both legal systems

One of the issues that have been highlighted is the effectiveness and guarantee of the implementation of the compelling rules of international law; In this regard, a hierarchical theory of the rules of international law has been put forward to guarantee and enforce the compelling rule of law in the international community of states, on the basis of which the compelling rule of international law is at the forefront of this hierarchy, and it is obedient to all rules and regulations of international law. Given the frequent catastrophes and violations of fundamental human and humanitarian laws by some governments in recent years, the hierarchical theory of international law has received much attention from international scientific and judicial circles. However, this issue has been traced much earlier in the 1969 Vienna Convention with regard to the Treaties and the International Court of Justice's judgment on the Barcelona Traction case. The court in Barcelona case treats ban on genocide, slavery and racial discrimination as universal obligations[26]. In the advisory theory of the retaining wall, the universality of human rights obligations is also

[26] . ICJ Advisory Opinion Concerning Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa). (1971), para 126 &. Advisory Opinion: Legality of the Use by a State of Nuclear Weapons in Armed Conflict. (1995), para 29.

mentioned[27]. Thus, the notion of the erga omnes obligations, which formally entered international law literature after the 1970 judgment of the International Court of Justice in the Barcelona case, has prompted much debate in international law. But there is no consensus on its definition and its relation to the concept of compelling law[28].

a. Compelling Rules and Universal Commitments in Observing Humanitarian law

The compelling law in the system of international law is considered as erga omnes obligations, but not all of the erga omnes obligations are considered as compelling rules[29]. Recognizing the norms of the compelling law, especially in the field of humanitarian law, for example in the law of war, is an absolute norm in order to maintain minimum fairness, order, civilization and humanity in war and to prevent destruction[30].

Prior to the recognition of the compelling rules by Article 53 of the 1969 Vienna convention on the law of treaties, the commitments contained in the 1949 Geneva conventions were regarded by the international community as universal obligations. In 1935, Alfred Von Verdross began an attempt to establish the recognition of American norms in international law. In his view, some international treaties are invalidated because of their provisions. Including treaties that are in conflict with one of the norms of positive law (which has the general power of international law)[31]. A few decades later, in 1966, he identified some groups of international law as having compelling characteristics. Including all international humanitarian law rules created for humanitarian purposes[32].

At the time of the drafting of the 1969 Vienna Convention on the Law of Treaties at the International Law Commission, some jurists believed that compelling included rules on not using from the force, the right to choose one's destiny, and the prohibition of genocide. Some other members also held the rules on the prohibition of international crimes and rules on respecting human rights were also covered by this concept[33]. The interpretation of human rights in this word must be in the general sense of the word, the set of humanitarian rules; the interpretation of human rights in this regard must be considered in the broad sense of the word that is the set of humanitarian rules (what is today divided into two distinct categories of human and human rights). Article 1 of the fourth Geneva Conventions and the first Additional Protocol very efficiently reflects the description of the Erga omnes obligations in those documents. This Article provides: "the high contracting states undertake to enforce and ensure the implementation of the provisions of the present conventions in all circumstances". In interpreting the fourth conventions, Jean Picted has

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[27] . Advisory Opinion: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. (2004). paras. 88,155.

[28]. Theodor Meron, Human Rights and humanitarian Norms as Customary law, oxford, Clarendon, (1989), pp. 188-201.

[29]. For example, in 1949 the ICJ considered that the international subjectivity of the United Nations Organization was opposable Erga omnes obligations obligation that is as between all States and not only the Members of the Organization.

[30]. L Hannikainen, Peremptory Norms (Jus Cogens) in International Law, Helsinki, (1988), 211.

[31] . Alfred von Verdross, "Forbidden Treaties in international law", American Journal of International Law, (1937), pp. 570-577.

[32]. Mahmoud Masaeli, "The Concept of the compelling law in Contemporary International Law", Journal of Foreign Policy, Fifth Year, No. 2, (1991), p. 447.

[33] .Miyazaki, S, The Martens Clause and international humanitarian law, in: Swinarski, C. (Ed): "studies & essay on international humanitarian law", Martinus Nijhoff Publishers. (1984), p. 437.

explained the new and unusual commitment of the international community comprised of states.[34]

If such an interpretation of Article 1 is accepted, it would only mean accepting the *erga omnes* obligation's description of the obligations of governments in the field of humanitarian law. Article 89 of the First Protocol Commits States to cooperate with the United Nations in the context of the Charter in the event of gross violations of humanitarian law. This commitment reflects the general or *erga omnes* obligations nature of governments' commitments to humanitarian law. It has been claimed that the treaties of 1899, 1907 in The Hague, and 1949 in Geneva are to a large extent not merely including bilateral or purely reciprocal commitments and limited to the framework of relations of two or more states. Rather, they contain absolute and universal commitments[35].

Judge Weeramantry, in his dissenting theory included in advisory opinion of July 8, 1996 on the legality of a state's use of nuclear weapons in armed conflict, stated that the rules of humanitarian law have acquired the status and character of compelling law[36]. Also, the preliminary branch of the International Criminal Court for the former Yugoslavia, in the case of Lassauville, often without reason, has regarded humanitarian law compelling rules[37].

Professor Cherif Bassiouni has argued that the notions of erga omnes obligations and the compelling law are often referred to as two sides of the same coin[38]. The compelling law refers to the legal status of internationally recognized crimes and the existing erga omnes obligations for the legal application of a particular crime with a particular character as the compelling law[39]. The word compelling law has the same meaning as persuasive law, also a norm of compelling law is placed in the highest position among other norms and principles,[40] and it is indisputable and irrevocable[41].

b. Article 103 of the Charter of the United Nations and humanitarian law

Article 103 of the Charter of the United Nations deals with "the obligations of the members of the United Nations under this Charter ...[42]". The assumed requirements in the first phrase are the cases for countries that accept the text of the Charter and submit to the "Rules of Subordination". In other words, the laws that have been adopted by various UN bodies are effective in exercising their power[43]. Article 103 addresses cases of conflict between obligations arising from the Charter and other binding agreements of other member states and establishes the

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[34] . Pictet, Jean, Commentary, I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, I.C.R.C, (1952), p.15.

[35] . Pictet, Jean, Commentary, I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ,Geneva, I.C.R.C, (1952), p. 89.

[36] . Advisory Opinion: Legality of the Use by a State of Nuclear Weapons in Armed Conflict. (1995), para 44.

[37] . ICTY, Lasva Valley Case, Judgement, 2000, para .520.

[38] . Cherif bassiouni, M, international crimes: jus Cogens and obligation Erga omnes obligations obligation, Law and Contemporary Problems, Vol. 59: No. 4, (1996). P. 72.

[39] . Ibid, p. 63.

[40]. Bassiouni, Cherif, (1990), "A Functional Approach to "General Principles of International Law", Michigan Journal of International Law**,** 11(767), pp. 801-809.

[41] . Hannikainen, *supra note* 30, at p. 230.

[42] . Article 103 of the Charter of the United Nations: In the event of a conflict between the obligations of the members of the United Nations under this Charter and their obligations under any other international agreement, their obligations under this Charter shall take precedence.

[43]. L.Voir notamment, L. Kopelmanas, Organization des Nations Unies, Paris, Sirey, 1947, p. 165 ss; T. Flory, « Article 103 », in J.-P. Cot, A. Pellet, La Charte des Nations Unies, Paris, Economica, 2e éd., 1991, p. 1381; R. Bernhardt, « Article 103 », in B. Simma et al., The Charter of the United Nations, (Oxford University Press, 1994), p. 1117.

prevailing principles of the United Nations. Article 103 only foresees conflicts between the obligations arising from the Charter and the contractual obligations and does not address public international law. It is certainly possible to imagine a contract before or even after the Charter to include provisions that conflict with the obligations of the Charter[44].

According to Article 41 of the United Nations, the Security Council may require member states to take compulsory measures, and what is most requested is the discontinuation of air communications or specifying sanctions, especially commercial, financial, etc.[45]. Inevitably, under Article 25 of the Charter, to make such sentences effective, the member state may, after some time, face inconsistent obligations. If it is in conflict with a state with which a particular agreement has been reached, it is here that Article 103 of the UN Charter interferes, which at least in relations between member states, the right is for the United Nations law.

In essence, the subject of Article 103 is the supremacy of United Nations law, but we must exclude the case where a contractual obligation is related to norms of compelling law or a similar domain. This seems to be important in the field of humanitarian law[46]. For example, the status of UN bodies involved in wars has been explicitly addressed by the UN Charter. Article 42 of the Charter foresees the direct actions of the Security Council by the military forces at its disposal. Such acts can undoubtedly be called "sanctions," "coercive measures" and "military action". In reality, the UN is not like this but here, fighting the opponent and therefore out of necessity, in a similar situation, it is as a party to the war or at least the forces it requested from them[47].

However, the issue of UN compliance with international humanitarian law has been seriously raised; not only because the potential appeal of Article 42 stays among the assumptions, but also because of the development of peacekeeping operations. It should be admitted that the United Nations is generally bound by international humanitarian law[48]. On the one hand, many of these laws, at least those aimed at protecting human rights, are now part of customary international law, mandatory for all activists[49]. It should be emphasized that the behavior of UN-dominated forces that violate humanitarian law constitutes illegal international practices that interfere with the international responsibility of the organs. Therefore, also members of UN-dominated forces cannot rely on guidelines for acts that are gross violations of humanitarian law[50].

International crimes included in universal obligations and compelling rules in both legal systems

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

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[44] Christian Dominicé, Jeanne Belhumeur et Luigi Condorelli, L'ordre juridique international entre tradition et innovation, Graduate Institute Publications, Lieu d'édition: Genève, Année d'édition, (1997), p. 231.

[45]. Voir par exempla les résolutions 661 (1990), pour UN embargo commercial et financier complete, et 748 (1992), pour l'interruption des communications aériennes.

[46] Dominicé & Belhumeur, *supra note* 44, at p. 235.

[47] . Id, p. 236.

[48]. Voir notamment la résolution de Zagreb, du 3 septembre 1971, de l'Institut de Droit international intitulée: « Les conditions d'application des règles humanitaires relative's aux conflits armés aux hostilités dans lesquelles les Forces des Nations Unies peuvent être engagées », AIDI, 1992, p. 86.

[49]. Sur ces questions, et les engagements conventionnels pris par l'ONU, voir D. Shraga, « The United Nations as an Actor Bound by International Humanitarian Law », in Les Nations Unies et le droit international humanitaire, Actes du Colloque international à l'occasion du 50e anniversaire de l'ONU, L. Condorelli, A.-M. La Rosa, S. Scherrer (éds.), Paris, A. Pedone, 1996, pp. 317-338.

[50] . Dominicé & Belhumeur, *supra note* 44, at p. 236.

all of these crimes is part of the compelling law[51]. 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[52]. 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.

IV. 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.

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[51] . See M. cherif bassiouni & m. Edward, wise, aut dedere aut judicare, the duty to extradite or prosecute in international law (1995).

[52] . Cherif bassiouni, M, international crimes: jus Cogens and obligation Erga omnes obligations obligation, Law and Contemporary Problems, Vol. 59: No. 4, (1996), p. 70.

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.