

International Human Rights and Humanitarian Law in the Global Legal Order

Within Norwegian defence and foreign policy, the establishment of an international legal order and the global rule of law have been identified as key objectives. As articulated in various Norwegian policy documents and statements, these objectives appear to presume (i) that there exists a harmonious and complementary relationship between human rights and humanitarian law, and (ii) that the convergence of the two bodies of law is necessarily a good thing. This policy brief provides a contextual and conceptual overview of the debate on the relationship between human rights and humanitarian law, in order to set out for Norwegian policymakers the full range of approaches to the issue.

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New operational challenges for military planners, force commanders and the individual soldier continue to be engendered by the rise of what have been labelled ‘new wars’. During the 1990s, internal conflict involving one or several non-state actors, rather than international conflict between state parties, became the common form of conflict. Boundaries between combatants and civilians became increasingly blurred, and the percentage of civilian casualties rose drastically. At the same time, the ascendancy of human rights challenged the international community to re-think its obligation to offer protection against human suffering. With the development of the doctrine of the ‘responsibility to protect’ (R2P), human rights protection became a political and military rationale for the use of force by the international community. The emphasis of international operations has increasingly shifted from peacekeeping to peace enforcement, with more robust mandates. Since 2001, the ‘global war on terror’ and the prolonged military engagements in Iraq and Afghanistan have challenged the Western legal and moral order on a profound level. The soldiers fighting these wars are increasingly subcontracted through private military corporations, a development only weakly regulated by international law. Furthermore, protracted urban violence, the deployment of new weapons (such as unmanned drones) and the use of new battlefields (cyberwar) raise the possibility of ‘endless’ war.

In international and domestic politics, these experiences have led to an increased emphasis on the linkages between legality, legitimacy and, more recently, operational efficiency. At the heart of this ‘better war’ discourse are contestations over the relationship between international humanitarian law (IHL) and international human rights law (IHRL). This relationship has important legal and ethical implications for the use of military power: It determines the responsibility of states and senior commanders; it is a ‘bottom-up’ problem from the perspective of the soldier needing clear guidance to avoid behaviour that might entail criminal prosecution; and it may be a life-and-death issue for captured enemy fighters, irregular combatants and civilian victims. The relationship between IHL and IHRL is also important for establishing accountability in the aftermath of conflict.

The realization of an international legal order and the global rule of law are important objectives within Norwegian defence and foreign policy, where there is a presumption that an increasing convergence between IHL and IHRL will make war more human. In reality, however, the international, regional and national institutions that are involved in the work of determining the IHL–IHRL relationship through law-making, adjudication, standard-setting exercises, fact-finding missions and commissions of inquiry take a number of different approaches.

These bodies include the UN General Assembly, the UN Security Council, various special advisers and representatives to the UN Secretary-General, the Human Rights Council and the UN High Commissioner for Human Rights, as well as various UN working groups and the International Committee of the Red Cross. International, regional and select national courts have played key roles in this process – most prominent being the International Court of Justice (ICJ), the European Court of Human Rights, and the Inter-American Court and Commission. Important contributions have also been made by the cluster of international criminal courts that came into existence in the 1990s, particularly the International Criminal Court and the criminal tribunals for former Yugoslavia and Rwanda. Significant national contributions have been made by the Supreme Courts of the United States, Israel and the United Kingdom. In addition, military planners, force commanders and army lawyers make determinations on a case-by-case basis. In the past decade, there has been an avalanche of scholarly publications on the relationship between IHL and IHRL in public international law journals, as well as in more specialized journals in the fields of human rights, humanitarian law, military law, security law, comparative law, and recently also international criminal law and constitutional law.

This policy brief aims to provide a contextual and conceptual map of the debate on this issue. It suggests that the struggle over the IHL–IHRL relationship is being shaped by ongoing changes to the background context of international law, and that the debate is characterized by four distinct legal logics: The dominant *co-applicationist* position sees convergence as a desirable development for IHL, for IHRL, or for both, and believes that such a

development will make armed conflict and occupation more human. Arguing against the co-applicationists, *separatists* hold that convergence is impossible owing to differences in the origin or character of the two bodies of law: legal interpretation has limits and cannot solve what amounts to irreducible political conflict. The *sceptics* interrogate the political agendas underlying the positions of both the co-applicationists and the separatists, attempting to uncover the assumptions that underpin the debate. And, in response to the pervasive problems of practicality that have increasingly dogged this debate, a fourth logic is currently emerging, which may be labelled the *operational perspective*. According to this view, co-application of IHL and IHRL results in a normative vagueness that engenders chaos and insecurity on the ground, and the best way of protecting civilians is through a legal framework that facilitates the fulfilment of military objectives.

On-going Transformations of International Law

The debate about the relationship between IHRL and IHL is taking place in the context of significant changes in the content and formats of international law, as well as how it is made. Three key aspects might be noted here. First, international law is being humanized, particularly through the rise and proliferation of the human rights regime. Second, the institutional structures and processes of international organizations (IO) have gradually become more legalized, and the organizations themselves have turned into important producers of ‘secondary international law’ through standard-setting activities, giving rise to a proliferation of soft-law regimes, non-binding in form, that include recommendations, guidelines, codes of practice and standards. Third, as questions are increasingly being raised about the legal responsibilities of non-state actors, focus is being directed at the accountability of IOs for human rights violations, particularly in the area of peacekeeping and peace enforcement.

Origins of IHL and IHRL

A rudimentary introduction to IHL and IHRL is necessary to contextualize the ongoing push for convergence. The objective of international humanitarian law is to resolve matters of humanitarian concern arising directly from

an armed conflict, whether of an international or non-international nature. The rules restrict the rights of parties to a conflict to use whatever methods and means of warfare they might choose, and seek to protect people and property affected, or liable to be affected, by the conflict. While the origin of IHL dates back to the 18th century, contemporary rules were codified in 1949, when the four Geneva Conventions were adopted. The first three dealt with the wounded and sick, shipwrecked individuals and prisoners of war. The fourth dealt with civilians in the power of an opposing belligerent and civilians in occupied territory. Only in 1977 did two Additional Protocols extend the rules governing the conduct of hostilities to victims of international and non-international armed conflict. Together with customary law, these instruments constitute IHL. Central to the interpretation and implementation of this body of law is a set of core principles that include distinction, military necessity and proportionality. 'Distinction' requires combatants to be distinguished from civilians, and attacks to be limited to legitimate military objectives. 'Military necessity' requires that combat forces engage only in those actions that are deemed necessary to achieve a legitimate military objective. 'Proportionality' prohibits the use of force beyond the level required to accomplish the chosen military objective.

The modern conception of human rights developed in the aftermath of the devastation of World War II and the Holocaust. Human rights instruments include the Universal Declaration of Human Rights (1948) and the international conventions on Civil and Political Rights (1966); Economic, Social and Cultural Rights (1966); the Elimination of Racial Discrimination (1966); the Elimination of Discrimination against Women (1979); against Torture (1984); and on the Rights of the Child (1989). Unlike IHL, IHRL has developed a strong implementation framework, primarily through the institutionalization of individual petition rights and through the establishment of regional human rights courts mandated to adjudicate on a range of civil, political, social, cultural and economic rights. The human rights framework is a complex matrix of rights and obligations: state parties are obliged to respect, protect and fulfil human rights. However, for a human rights convention to become binding upon individu-

al states, it must be ratified by those states, and states may enter substantial reservations upon ratification. Whereas IHL allows for no derogations (exceptions), human rights treaties permit derogations during public emergencies, which either explicitly or implicitly include wartime situations.

Different *de facto* situations activate different legal regimes. IHL travels with armed forces abroad and is by nature extraterritorial, while IHRL has traditionally been linked to the territorial jurisdiction of individual states. In peace, all applicable human rights apply. In the case of disturbances, riots/unrests, disasters or other events deemed to give rise to a state of emergency, human rights apply with permitted derogations. In non-international armed conflict between the states and armed group; between armed groups, and between the state and organized groups with territorial control, relevant non-derogable human rights apply alongside the relevant provisions of IHL. Yet, in international armed conflict the application of non-derogable human rights provisions alongside IHL has in recent years been a tenuous issue. What is the nature of the relationship between IHL and IHRL? Should they apply side by side? What legal principles are used to define their relationship? What are the doctrinal legal obstacles to be solved?

At the outset (around 1945), IHL and IHRL were systematically treated as two separate branches of public international law that were to be interpreted in isolation from each other. From the 1960s, this approach was gradually rejected by the UN Security Council, the UN General Assembly, the Commission on Human Rights and various states, which gradually began to see IHL and IHRL as complementary. This development accelerated from the mid-1990s onwards.

The Debate

Broadly, four different approaches can be discerned in the debate on the relationship between IHL and IHRL and their possible convergence. These are the respective positions of the 'co-applicationists', the 'separatists', the 'sceptics' and the 'operationalists'.

In recent years, the position advocating for a convergence between IHRL and IHL has achieved something akin to dominance in

case law and legal scholarship. The 'co-application' position can be understood as a progress narrative, one that sees the convergence between IHL and IHRL as positive and desirable for IHL, for IHRL or for both. This position sees convergence as having already taken place and the co-applicationists are thus primarily interested in exploring the technical interpretive moves that can be carried out with existing legal tools to resolve potential or actual normative conflicts between the two bodies of law. Co-applicationists argue that despite persisting normative differences, early drafters imagined that IHL and IHRL could function in harmony. Four key ideas inform the co-application narrative: that the codification and institutionalization of IHRL has engendered an inevitable expansion into IHL; that IHRL impacts IHL before, during and after conflict; that IHRL is more than a gap-filler and reshapes key concepts of IHL; and that the application of IHRL in the context of armed conflict reshapes roles and relationships in a positive way.

The 'separatists' hold that convergence is impossible owing to the different origins and character of IHL and IHRL. Legal interpretation has limits and cannot solve what amounts to irreducible political conflict. IHL is by nature conservative, taking armed conflict as a given, while IHRL is inspired by collective action and social justice struggles. There are also systemic differences pertaining to the nature of redress provided: breaches of IHL call for action by one state against another, while IHRL is the province of individual complaint. In addition, the two systems allocate fundamentally distinct roles to the individual and to the state.

While criticizing the political motives sometimes underlying separatist arguments, the 'sceptics' suggest that the co-application paradigm has significant costs. By aiming to reshape the legal relationship between military forces and an enemy population, co-application may delegitimize both IHL and IHRL. Despite a common acknowledgment among co-applicationists of the difficulties of determining how co-application applies in practice, little energy has been invested into tackling *how* human rights law will actually be applied in the day-to-day military operations that characterize armed action abroad. The 'sceptics' also question the assumption that more formal rights means greater enjoyment

of rights and more humanitarian outcomes. Moreover, they suggest, the legalistic insistence on convergence overestimates the practical utility for civilians.

Recently, there has been a call for *operationalizing* the law of armed conflict. Previously confined to commentators with a military background, criticism of the normative vagueness, the legalistic tendencies and the lack of practicality of the co-applicationist position is now also being voiced by humanitarian law specialists, who see it as a threat to the legitimacy of IHL. The argument is that overly technical reliance on prescriptions in conventional and customary law simultaneously handicaps decision makers and undermines civilian protections. Contemporary international operations entail a set of new operational dilemmas, but frequently suffer from a lack of clarity regarding the use of force. By failing to provide ‘bright lines’, IHL offers insufficient guidance on how to address this conundrum. If legal norms are to be effective in a military context, they must be clear and not so complex as to prevent practical application. The operationalist position advocates a legal framework that facilitates fulfilment of military objectives. Civilian protection is best achieved through clear and practical rules.

Does Co-application Make War Better?

Illustrating the life-and-death nature of the struggle over legal interpretive principles, the remainder of this policy brief examines three subdebates within the discussions on convergence: on *lex specialis*, extraterritoriality and the principle of proportionality. As these examples will show, although the co-applicationist approach currently enjoys the upper hand, the debate on convergence is far from settled.

A key element of the co-application framework has been the role allocated to the *lex specialis* principle in governing the relationship between IHL and IHRL. According to this principle, a law governing a specific issue overrides a law governing a general issue. The International Court of Justice (ICJ) has suggested that while some rights may be exclusive matters either of international humanitarian law or of human rights law, others may be matters of both branches of international law; and that, when both bodies of law apply, IHL is *lex specialis*. However, while extensively discussed in academic scholarship, the exact legal standing and meaning of the ICJ doctrine, and how the *lex specialis* principle is to be applied, is unclear. While previously offered as cornerstone of the co-application argument, even co-applicationists appear to have recognized the limited utility of *lex specialis* in furthering their agenda.

A second important theme in the convergence debate concerns the role of extraterritorial application of human rights treaties. Most human rights treaties contain a provision according to which state parties undertake to secure the protection of the rights in question for individuals within their jurisdiction. Jurisdiction involves the assertion of authority, factually or legally. The armed forces of a state can violate IHRL through acts and omissions *outside* the state’s national territory when engaged in an international or non-international armed conflict as part of a peacekeeping or peace enforcement mission. The co-applicationists have achieved significant victories over the past decade, successfully altering and extending the scope of state responsibility. Human rights bodies have determined that extraterritorial jurisdiction requires ‘effective overall control over a territory’. Absent control over territory, human rights bodies have recognized that human rights apply extraterritorially when a person is

‘in the hands’ of the authorities – typically in cases of abduction, detention or ill-treatment. Moreover, human rights bodies aim to hold states responsible for extraterritorial killings when the state controls the infliction of the violation and should have foreseen the outcome. A number of jurisdictions are actively pushing back against these developments.

A third contested issue turns on the use of the concept of ‘proportionality’ within both IHL and IHRL. The concept has a different function within each body of law and employs distinct balancing techniques to determine the legality of an act. In IHL, proportionality springs from the prohibition against indiscriminate attacks and attacks likely to cause disproportionate harm to civilians. Any incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination of the two must not be excessive in relation to the *concrete and direct military advantage* anticipated from a resort to the use of armed force. The proportionality test to be applied in human rights cases envisages restrictions of individual rights for the necessary safeguard of public interests: human rights law requires that the use of force be proportionate to the aim of protecting life. IHL accepts the use of lethal force and tolerates the incidental killing and wounding of civilians not directly participating in hostilities, subject to the requirements of proportionality. In IHRL, on the contrary, lethal force can only be resorted to if there is an *imminent* danger of serious violence that can only be averted by such use of force. While co-applicationists support the use of IHRL’s proportionality considerations in the context of armed conflict, proponents of the operational perspective argue that this represents a distortion of legal principles amounting to ‘lawfare’ – the use of law as a tool of war. ■

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