NATURE OF THE DISTINCTION BETWEEN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW AS BRANCHES OF INTERNATIONAL LAW

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Abstract

Despite the fact that there is a trend in understanding international humanitarian law and international human rights law as two separated branches of international law, discussions about these two concepts and their relationship continues. Rather than looking for which approach is correct, we should analyse what implications these discussions have in both theoretical and applied terms. To achieve that it is necessary to ascertain what is the nature and, consequently, what are the implications of identifying international humanitarian law and international human rights law as branches of international law, as well as the attributing specific norms to a particular branch.

Keywords: *international law, international humanitarian law, legal regulation, human rights.*

1. Introduction

The fairness of the application of the approach widely held in legal theory, according to which the division into branches depends on the object and method of legal regulation , is disputed even with regard to the rules of national law. Thus, some authors insist on the use of criteria such as the 'presence of specific functions' , the purpose and content of the legal regulation, the particularities of the subject composition and the types of legal liability

2. Content

The term ’law of war’[1] has long been used to refer to international legal norms concerning the laws and customs of war, the codification of which began in 1864[2], , but as the ICJ noted in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons. Over time, these norms were given a new name, 'international humanitarian law'. By the mid-1970s in the twentieth century, the concept of ’international humanitarian law’ became associated with the Geneva Conventions, dedicated to the protection of the victims of war, and was separated from the Hague Conventions, which limited the means and methods of warfare. It is this approach that is reflected in the writings of such scholars

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[1]Мартенс Ф.Ф. Современное международное право цивилизованных народов. СПб.: Тип. Министерства путей сообщения (А. Бенке), 1883. Т. 2. С. 513.

[2] ICJ (International Court of Justice), Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, 8 July 1996. Para. 75.

as, for example, D Levin,[3], L. Savinsky[4], as well as K. Ipsen. It is generally accepted that with the adoption of the two Additional Protocols to the Geneva Conventions for the Protection of Victims of War[5] in 1977, this distinction was to some extent overcome[6]. Today, the term 'international humanitarian law' is mainly used as a generic term for the Geneva and Hague Conventions [7].

In addition to the concept of 'international humanitarian law', it has been proposed in academic and educational literature to use terms such as 'law of armed conflict'[8], „law of war'[9] to refer to rules dealing with the conduct of armed struggle and the protection of victims of armed conflict'[10], 'international humanitarian law applicable to armed conflict'[11],'international law during armed conflict'[12].

At the same time, with the polyphony of viewpoints still existing, there is now a tendency to use the term 'international humanitarian law' to refer to international legal norms specifically designed to protect the victims of armed conflict and limit the means and methods of war. One of the most frequently cited is the definition of 'international humanitarian law' formulated by H.-P. Gasser, 'the law applied in armed conflicts ... which attempts to mitigate the manifestations of war by, first, imposing restrictions on the methods of warfare ... and, second, obliging those engaged in hostilities to protect those who do not or have ceased to engage in hostilities'.[13] A similar approach to the definition of this concept has been followed in recent decades by the United Nations, the International Criminal Court as well as the International Committee of the Red Cross (hereinafter ICRC), which is by no means a passive guardian of the Geneva Conventions and their Protocols, but actively contributes to the further development of international legal norms in this field[14].

There are many approaches to the relationship between the concepts of 'international humanitarian law' and international human rights law, but despite the fact that it is still impossible to put an end to the decades-long dispute over the terms, it should be noted that a viewpoint has already been formed that is shared by most researchers. The prevailing view in scholarship is that international humanitarian law and international human rights law are two independent branches of

[3] Полторак А.И., Савинский Л.И. Вооруженные конфликты и международное право. М.: Наука, 1976. С. 80.

[4] Ipsen K. Völkerrecht. München: Beck, 2004. S. 1211, 1219–1220.

[5] Additional Protocol I to the Geneva Conventions of 12 August 1949, relating to the protection of victims of international armed conflicts, dated 8 June 1977.

[6] Heinegg W.H. von. Entschädigung für Verletzungen des humanitären Völkerrechts // Berichte der Deutschen Gesellschaft fuer Voelkerrecht. Bd. 40. Heidelberg, 2003. S. 5-6.

[7] Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, para. 75.

[8] Международное право: Учебник / Отв. ред. С.А. Егоров. 5-е изд. М.: Статут, 2014. С. 997–1004; Арцибасов И.Н., Егоров С.А. Вооруженный конфликт: право, политика, дипломатия. М.: Международные отношения, 1989. С. 19; Белугина А.В. Указ. соч. С. 12; Бирюков П.Н. Международное право: Учебник для вузов. 6-е изд. М.: Юрайт, 2013. С. 517.

[9] *Фердросс А.* Международное право. М.: Иностр. литер., 1959. С. 429.

[10] *Батырь В.А.* Международно-правовая регламентация применения средств ведения вооруженной борьбы в международных вооруженных конфликтах // Государство и право. 2001. № 10. С. 63.

[11] Международное гуманитарное право: Учебник / Под ред. А.Я. Капустина. 2-е изд. М.: Юрайт, 2011. С. 522.

[12] *Бирюков П.Н.* Международное право: Учебник для вузов. 6-е изд. М.: Юрайт, 2013. С. 562–563.

[13] Gasser H.-P. Einführung in das humanitäre Völkerrecht. Bern; Stuttgart; Wien: Haupt, 1991.

[14] URL: // http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf.

international law[15].

It should be noted that J.Pictet, the author of the famous commentaries on the Geneva Conventions who introduced the term 'international humanitarian law' into scholarly circulation, pointed out in his earlier writings its dual nature, including in this concept both the international law protection of human rights and the law of war[16]. Over time, however, his position changed - he came to see international humanitarian law as 'an important part of public international law that draws inspiration from the ideas of humanity and that focuses on the protection of people in times of war[17], indicating that international human rights protection and international humanitarian law are 'close but distinct and should remain so as they complement each other perfectly'[18].

As a generic name for these two branches of G. Pictet proposes to use the term 'humane law'[19]. Another authoritative international jurist, T. Meron, also insists that these branches of law are 'distinct and must remain distinct' and 'there is no point in pretending that international humanitarian law and international human rights law are one and the same'[20].

Proponents of this approach offer definitions of international human rights law that are quite similar in meaning. For example, A. Saidov proceeds from the fact that it is 'a branch of modern public international law which establishes obligations for the subjects of international law with respect to persons under their jurisdiction to guarantee, respect and protect their rights and freedoms'[21]. Y. Kolosov, D. Bekjashev and D. Ivanov understand 'international human rights law' as 'principles and norms governing international cooperation in the promotion and protection of human rights, the respective rights and obligations of the subjects of international law, including the obligation of States to respect the rights and fundamental freedoms of all people without distinction of race, sex, language or religion'. According to V. Gavrilova, 'international human rights law protection' is 'a set of international legal principles and norms that determine the general standards and framework of conduct of States in their activities to recognize, protect and control the observance of socially determined rights and freedoms of individuals and their associations in a particular territory, as well as to regulate inter-State cooperation in this area'. The author specifies that the 'international legal protection of human rights' 'has its own specific sources, special sectoral principles and qualitatively distinct subject matter of legal regulation', which is why its 'must be distinguished from ... international humanitarian law, the norms of which are aimed exclusively at protecting the participants and victims of armed conflicts and limiting for this purpose the means and methods of warfare'[22]. The existence of two branches - international humanitarian law and the international

[15] Shaw M. International Law. 6th ed., Cambridge: Cambridge University Press, 2008. P. 1167–1170; International Law / Ed. by M.D. Evans. 4th Ed. Oxford: Oxford University Press, 2014. P. 783–790, 821–831.

[16] Pictet J., *Le droit humanitaire et la protection des victims de la guerre*. Leiden: Sijthoff, 1973. P. 11.

[17] Pictet J., *International Humanitarian Law: Definition // International Dimensions of Humanitarian Law. International Dimensions of Humanitarian Law*. Geneva: Henry-Dunant Institute/UNESCO, 1986. P. XIX.

[18] Пикте Ж. Развитие и принципы международного гуманитарного права. М.: МККК, 2001. С. 11.

[19] Гассер Х.-П. Международное гуманитарное право. Введение. М.: МККК, 1999. С.12.

[20] Meron T. International Criminalization of Internal Atrocities // American Journal of International Law. 1995. Vol. 89. P. 100.

[21] *Саидов А.Х.* Указ. соч. С. 11.

[22] Пак там, С. 480.

protection of human rights - was the basis for the advisory opinions of the International Court of Justice on the legality of the threat or use of nuclear weapons in 1996 and on the legal implications of the construction of a wall in the Occupied Palestinian Territory in 2004, as well as the 2005 decision in the case of 'Democratic Republic of Congo v. Uganda'[23].

In addition to this approach to the relationship between the concepts of 'international humanitarian law' and international human rights protection, scholarship presents others, the essence of which is that the scope of these two concepts are fully or partially inclusive. Some scholars, when formulating the concept of 'international humanitarian law', start from the meaning given to the term 'humanitarian' - 'relating to man and his culture; directed to the human person, to the rights and interests of man'. So, according to I. Blishchenko, A. Sukharev and O. Smolnikova, 'international humanitarian law' is 'a set of international legal norms defining the regime of human rights and freedoms in peacetime and in times of armed conflict, as well as a set of legal norms defining the limitation of the arms race, the restriction and prohibition of certain types of weapons and disarmament.'[24]. O.I. Tiunov also uses the concept of 'international humanitarian law' as a general one, including in it 'contemporary international norms relating to human rights in all aspects of these rights ('human rights law')', and 'humanitarian norms that have evolved with regard to the protection of the individual in a particular situation, namely in armed conflict'[25], which the author also calls 'international humanitarian law'[26], clearly based on the possibility of appealing to this concept in a broad and narrow sense.

A. Kapustin adheres to a similar position, understanding by 'international humanitarian law' the norms of international human rights law, as well as 'international humanitarian law applicable in armed conflicts.'[27]. D. Yagofarov also notes that 'international humanitarian law essentially includes human rights norms applied ... in times of war and/or armed conflict'[28]. The same approach is used by Biryukov, however, using the concept of 'international humanitarian law' to mean 'a body of international legal principles and norms governing the provision and protection of human rights and freedoms both in peacetime and in times of armed conflict, the regulation of cooperation between States in the humanitarian sphere, the legal status of all categories of persons, and the establishment of responsibility for violations of human rights and freedoms.' Accordingly, calling 'international law in time of armed conflict' a branch of international law that

[23] ICJ: Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, para. 25; Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004. Paras. 102, 106 http://www.icj- cij.org/docket/index.php?p1=3&p2=4&k=5a&case =131&code=mwp&p3=4 (далее – Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory); Case Concerning Armed Activities on the Territory of the Congo, Democratic Republic of the Congov. Uganda, Judgment, 19 December 2005. Paras. 217–219 [Электронный ресурс]. http://www.icj-cij.o

[24] Блищенко И.П. Обычное оружие и международное право. М.: Международные отношения, 1984. С. 75; Смольников О.Ю., Шапочка А.Г. Красный Крест и международное гуманитарное право в современном мире. М.: Медицина, 1989. С. 9.

[25] Тиунов О.И. Указ. соч. С. 10.

[26] Пак там С. 151.

[27] Международное гуманитарное право: Учебник / Под ред. А.Я. Капустина. 2-е изд. М.: Юрайт, 2011. С. 9.

[28] Ягофаров Д.А. Международное гуманитарное право // Права человека: энциклопедический словарь / Отв. ред. С.С. Алексеев. М.: Норма: ИНФРА-М, 2013. С. 523.

'determines the permissibility of the means and methods of warfare, provides for the protection of victims of armed conflict, establishes the relations between belligerent and non- belligerent States'[29].

Another approach to the relationship between the concepts of 'international humanitarian law' and international human rights protection is that, on the contrary, international humanitarian law, which contains rules that grant individuals subjective rights, is in this part included in international human rights law. This position has been consistently held by Kartashkin, who since the mid-1970s has written that 'human rights as a branch of international law are a set of principles and norms embodied in three ... groups of international instruments': the first includes 'principles and norms relating to human rights mainly in conditions of peace,' the second 'international conventions for the protection of human rights in time of armed conflict,' and the third 'international instruments which regulate responsibility for criminal violations of human rights both in peaceful[30]. Accordingly, the scholar provides the following definition of this industry: 'a set of principles and norms that define the obligation of states to guarantee and respect fundamental human rights and freedoms without discrimination of any kind, both in peacetime and during armed conflict, and also establish responsibility for criminal violations of these rights'[31]. This point of view is shared by N. Morozov[32], as well as A. Saidov, directly stating that 'international humanitarian law is included in international human rights law in the part that relates to the rights of victims of war'[33]. Indeed, international humanitarian law and international human rights law have both similarities and differences. The generality and even interconnectedness of these norms is due to the fact that both branches of international law pursue the same goal - the protection of the individual[34]. Moreover, human rights and international humanitarian law have influenced each other in their development[35]. The Universal Declaration of Human Rights[36] was taken into account in the formulation of the provisions of the Geneva Conventions for the Protection of Victims of War of 1949, and the provisions of the International Covenants of 1966 were taken into account in the texts of the two Additional Protocols to the Geneva Conventions adopted in 1977. At the same time, the branches of international humanitarian law and international human rights law have different histories, are codified in different sources and are only partially applicable to the same relations[37]. Unlike international human rights law, international humanitarian law is specifically designed to regulate armed

[29] Бирюков П.Н. Международное право: Учебник для вузов. М.: Юрайт, 2013. С. 562–563.

[30] Карташкин В.А. Права человека: международная защита в условиях глобализации. С. 50–51; Карташкин В.А. Международное право и личность // Современное право. 2012. № 11.С. 110-118.

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[32] Морозов Н.В. Права человека: Учеб. пособие. М.: Московский фил. ЛГУ им. А.С. Пушкина, 2012. С. 268-269.

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[34] Пикте Ж. Развитие и принципы международного гуманитарного права. М.: МККК, 2001.С. 11; Эйде А. Внутренние волнения и напряженность / Международное гуманитарное право / Аби-Сааб Д. и др. М.: Ин-т проблем гуманизма и милосердия, 1993. С. 341.

[35] Gasser H.-P., *International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint Venture or Mutual Exclusion?* // German Yearbook of International Law. 2002. Vol. 45. P. 152–153.

[36] Всеобщая декларация прав человека от 10 декабря 1948 г. Резолюция 217 А (III). Генеральной Ассамблеи ООН // Действующее международное право. Т. 2. С. 5.

[37] Gasser H.-P. Op. cit. P. 161–162.

conflict and therefore deals with such concepts as 'military objectives', 'military necessity', 'combatants', 'direct participation in hostilities', 'collateral damage', 'internment' and many others[38], i.e. if human rights are based on the principle of humanity, then international humanitarian law is a compromise between the requirements of humanity and military necessity. Finally, if fundamental human rights are universal, the application of international humanitarian law is limited both by the type of armed conflict and by the category of persons to which a person falls [39].

So, the treaty norms of international humanitarian law emerged much earlier than international human rights treaties, humanitarian law obligations extend to other actors, including non-state actors, the specificity of norms in this sector is to limit their application to armed conflict and occupation. International humanitarian law, like international human rights law, has developed its own system of principles. Moreover, the norms of international humanitarian law and international human rights law have long been enshrined in various international treaties. All this cannot but provide a basis for isolating the body of international legal norms designed to regulate the situation of armed conflict from all others, including the norms of international human rights law. In general terms, the division of international law norms into those related to international humanitarian law and those related to international human rights law is a manifestation of the fragmentation of international law, a natural process of norm diversification due to the expansion of the subject matter of regulation and the geographical, institutional and functional decentralization of international law-making and law enforcement bodies.

Despite the fact that there is a trend in understanding international humanitarian law and international human rights law as two separated branches of international law, discussions about these two concepts and their relationship continues. Rather than looking for which approach is correct, we should analyse what implications these discussions have in both theoretical and applied terms. To achieve that it is necessary to ascertain what is the nature and, consequently, what are the implications of identifying international humanitarian law and international human rights law as branches of international law, as well as the attributing specific norms to a particular branch.

The fairness of the application of the approach widely held in legal theory, according to which the division into branches depends on the object and method of legal regulation, is disputed even with regard to the rules of national law. Thus, some authors insist on the use of criteria such as the 'presence of specific functions'[40] , the purpose and content of the legal regulation, the particularities of the subject composition and the types of legal liability.

In international law, which is a separate legal order, these two criteria obviously cannot be applied: in international law, one method of legal regulation is used - that is the method of 'coordinating, harmonizing the wills of states'[41] .

At least three main approaches have

[38] *Гассер Х.-П.* Международное гуманитарное право. Введение. С. 27.

[39] Greenwood Ch. Historical Development and Legal Basis // The Handbook of Humanitarian Law in Armed Conflicts / Ed. by D. Fleck. Oxford: Oxford University Press, 2003. P. 9.

[40] Радько Т.Н. Теория государства и права. М.: Проспект, 2011. С. 403.

[41] Ануфриева Л.П. Соотношение международного публичного и международного частного права (сравнительное исследование правовых категорий): дис докт. юрид. наук. М.,2004. С. 240.

been presented in the scholarly literature that are proposed to be used in the process of dividing international law into branches. First, the recognition of the existence of a branch of international law may be based on the attribution to rules governing a particular group of relations with the properties of 'autonomous' or 'self-contained' regimes. Secondly, a functional approach may be used, where a set of norms is considered as a 'special regime'[42]. Finally, third: this can be an extremely utilitarian approach. This occurs when a number of norms governing a particular area of relations, based on a set of criteria, are combined under a certain general concept for ease of understanding, teaching or application. Without, however, claiming to clearly distinguish the norms of that industry from others.

If we are to understand an autonomous or self-contained regime as 'an interrelated set of rules on a particular subject matter, together with rules designed to create, interpret and apply, modify and terminate those rules', i.e. as a regime isolated from general international law, then we must recognize that M. Koskenniemi was right to conclude, in a report on the fragmentation of international law prepared under his direction, that none of the regimes claiming to be self-sufficient is completely closed, if only by virtue of clause 3(c) of Article 31 of the Vienna Convention on the Law of Treaties, which subjects every treaty to the 'principle of systemic integration'[43]. Accordingly, neither international humanitarian law nor international human rights law are autonomous regimes stricto sensu.

In considering whether international human rights law can be considered an autonomous regime in the broad sense, i.e., isolated not from general international law but from other branches, it would be fair to draw a line between the individual international human rights treaties that provide for the creation of a jurisdictional body, on the one hand, and the general body of international law governing human rights, on the other. But even individual international human rights treaties cannot be considered autonomous regimes, since Article 31(3)(c) of the Vienna Convention on the Law of Treaties indicates that, in addition to the context, the interpretation of the rules takes into account 'all relevant rules of international law applicable in the relations between the parties'. Even if we were to recognize these treaty regimes as autonomous, this isolation is not an inherent property of the entire body of international human rights law, but merely an artificial construct designed to resolve pragmatic problems related to the need to establish and limit the competence of treaty bodies. Going beyond this institutional perspective, it should be concluded that, in general, the norms of international human rights law cannot be regarded as an autonomous regime, since they do not exclude reference to general norms not only of the law of treaties, but also of international responsibility, recognition of subjects of international law, succession, territory, etc., including the norms of international humanitarian law. Therefore, neither international humanitarian law nor international human rights law can be recognized as autonomous regimes, neither in a narrow nor in a broad sense.

The next step is to determine whether these sets of rules constitute 'special regimes'. Unlike the concept of 'autonomous regime', which is based on the opposition of

[42] Международное право: Учебник для бакалавров / Под ред. А.Н. Вылегжанина. 2-е изд. М.: Юрайт, 2012. С. 42.

[43] Виенска конвенция за правото на договорите от 1969.

a special set of rules to general international law, the concept of 'special regime' implies the possibility of distinguishing it from other 'special regimes' by the subject matter of regulation[44]. But is it possible to clearly separate international humanitarian law and international human rights law in terms of the subject matter of regulation? The subjects of regulation of these branches do overlap, insofar as international humanitarian law contains human rights norms. As the ICJ stated in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, three situations are possible: 'some rights may be exclusively governed by international humanitarian law, others may be exclusively governed by human rights law, and some may be subject to both branches of international law'[45]. Therefore, it cannot be concluded that international humanitarian law and international human rights law are 'special regimes'.

In general, despite the fact that almost every modern textbook on international law is based on the branch system of international law, there is still no common understanding in Russian and foreign scholarship on international law regarding the criteria to be used for dividing norms into branches of international law and in relation to the name and number of branches. As a rule, a utilitarian approach is used in classifying norms: a set of norms regulating homogeneous social relations is distinguished as an independent industry, provided that it has special principles, a large body of normative material and a number of other criteria that vary according to the theoretical views of the authors[46]. This approach is undoubtedly voluntaristic[47] and the classification made on its basis cannot serve as one of the preconditions for drawing conclusions related to the application of specific rules of international law.

However, it must be recognized that this approach is at the heart of the qualification of international humanitarian law and international human rights law as two independent branches of international law. These branches regulate overlapping, but not completely overlapping, relationships, are based on different international treaties, and are each based on their own set of special principles. In international humanitarian law, these are the principles of humanity, distinction, proportionality, precaution, military necessity and responsibility for violations of international humanitarian law[48], and in international human rights law, the principles of inalienability of rights, universality, non-discrimination, equality and interrelatedness. Thus, behind the attribution of international legal norms to the first or second branch is a desire to give a certain generic concept to a number of rules in order to facilitate understanding, application or teaching; behind such an act of naming there are neither clear criteria nor the will of States themselves to divide norms into independent groups and, accordingly, such a division does not imply logical

[44] Усенко Е.Т. О системе международного права // Советское государство и право. 1988. № 4. С. 117-126.

[45] Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, para. 106.

[46] Фельдман Д.И. О системе международного права // Советский ежегодник международного права. 1977. М., 1979. С. 105–107; Курс международного права. В 7 т. Т. 1: Понятие, предмет и система международного права / Ю.А. Баскин, Н.Б. Крылов, Д.Б. Левин и др. М.: Наука, 1989. С. 264–267.

[47] Ушаков Н.А. Международное право: основные понятия и термины. М.: Изд-во ИГиП РАН, 1996. С. 17.

[48] Котляров И.И. Международное гуманитарное право. М.: Юнити-Дана, 2013. С. 16-17.

'purity', i.e. non-overlapping scopes of these concepts.

It follows that the discussion of the scope of the concepts of 'international humanitarian law' and international human rights protection, their relationship, and the attribution of a particular rule of international law to the first or second branch, is of no practical significance, and the use of these concepts, as well as the identification of these branches, is of a purely utilitarian nature. At the same time, this does not alleviate the acute problems that arise in determining the relationship between the various rules of international law that regulate fundamental human rights in armed conflict.

3. Conclusions

Thus, in deciding which norm of international law should apply and how it relates to another, the separation of rules into branches of international humanitarian law and international human rights law cannot be relied upon. On the other hand, the approach to analyse the relationship directly between the rules of international law governing fundamental human rights in armed conflict will be based on the substance and content of the individual rules, rather than their affiliation to international human rights law or international humanitarian law, as this classification has no clear criteria is not the result of scholarly consensus and does not reflect the will of the creators of the rules of international law themselves.

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