

August 2021

INTERRELATIONS BETWEEN HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW ACCORDING TO SEPARATION WALL CASE

Wulan Kristianti

Follow this and additional works at: <https://scholarhub.ui.ac.id/ijil>



Part of the [International Law Commons](#)

Recommended Citation

Kristianti, Wulan (2021) "INTERRELATIONS BETWEEN HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW ACCORDING TO SEPARATION WALL CASE," *Indonesian Journal of International Law*. Vol. 7: No. 3, Article 3.

DOI: 10.17304/ijil.vol7.3.233

Available at: <https://scholarhub.ui.ac.id/ijil/vol7/iss3/3>

This Article is brought to you for free and open access by the Faculty of Law at UI Scholars Hub. It has been accepted for inclusion in Indonesian Journal of International Law by an authorized editor of UI Scholars Hub.

Interrelations Between Human Rights and International Humanitarian Law According to Separation Wall Case (ICJ Advisory Opinion 2004)

Wulan Kristianti¹

According to the ICJ, Israel has violated International Human Rights Law (IHRL) namely the right to liberty of movement under the 1966 International Covenant on Civil and Political Rights (ICCPR), the right to work, the right to health, the right to education, and to an adequate standard of living under the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) and the 1989 Convention on the Rights of the Child (CRC).² This paper will discuss whether those norms are also covered under International Humanitarian Law (IHL) applicable in the occupied territory. It is without doubt that Geneva Convention IV in the occupied territory applies since the military occupation occurred³ and the victims who are the Palestinian inhabitants are regarded as protected persons.⁴ Israel has not become a party to the 1977 Additional Protocol I, consequently, those provisions do not apply unless those provisions are considered customary law.

Keywords: International humanitarian Law, Separation Wall Case

I. Introduction

The wall has cut off communications from Palestinian land without their having other means of subsistence and has forced them to leave their own land.⁶ It has deprived Palestinians of the freedom to choose their residence. The process will continue as more of the wall is built and coupled with the establishment of the Israeli settlements which tend to alter the demographic composition of the Occupied Palestinian Territory.⁷ Hence Israel has impeded the liberty of movement of the local inhabitants and violated the ICCPR.

¹ The author is a law lecturer at the Faculty of Law Padjajaran University, Bandung.

² Para. 134 ICJ Advisory Opinion

³ Article 42 Hague Regulation, Article 2 Conventions IV and para. 89-101 ICJ Advisory Opinion

⁴ Article 4 (1) Conventions IV

⁵ Article 12 (1) ICCPR

⁶ Para. 133 ICJ Advisory Opinion

⁷ Ibid.

IHL outlaws protected persons of the occupied territories being deported and forcibly transferred either outside or inside the territory of the occupied power.⁸ It moreover emphasizes the prohibition against the Occupying Power deporting and transferring its own population into the territory it occupies.⁹ The violation of this provision is considered a grave breach.¹⁰ The only exception which applies to this provision is when it is necessary for the security of the population and imperative military reasons.¹¹ The facts demonstrate that the route established by the military commander (even the alternate route) is disproportionate compared to the injury to the local inhabitants.¹² Hence the construction of the wall, coupled with the establishment of the Israeli settlements, is incompatible with the exception under either the ICCPR or the IHL.¹³

II. Violations under ICESCR and CRC

1. Right to work¹⁴

The wall has effectively cut off the land and workplaces of the Palestinians residing between the wall and Green Line. At Qalqiya, 600 shops and business have shut down and 6000 to 8000 people have already left the region.¹⁵ The Court therefore declared that Israel has violated the right to work of the inhabitants in the occupied territory. Article 6 of the ICESCR enshrines “the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts and will take appropriate steps to safeguard this right”¹⁶

⁸ Article 49 (1) Convention IV

⁹ Article 49(2) Convention IV

¹⁰ Article 147 Convention IV

¹¹ Article 49(2) Convention IV. This exception also applies under Article 12(3) ICCPR which emphasizes that such restrictions which are provided by law are necessary to protect national security, public order public health or morals or the rights and freedoms of others, and are consistent with the other rights under ICCPR

¹² See HCI, *Beik Sourik Village Council v The Government of Israel*, HCI 2056/04 in Marco Sasoli and Antoine A Bouvier, *How Does Law Protect in War*, Volume I, 2nd Edition (Geneva : ICRC, 2008) p.1189-1204

¹³ Para.137 ICJ Advisory Opinion

¹⁴ Article 6 and 7 ICESCR

¹⁵ Para.133 ICJ Advisory Opinion

¹⁶ Article 6(1) ICESCR

Geneva Convention IV prohibits the Occupying Power creating unemployment and restricting job opportunities in an occupied territory in order to induce the inhabitants to work for the Occupying Power.¹⁷ The IHL also provides protection to workers in order that they are not compelled to work unless certain conditions apply. The exception is relevant when the work is necessary for the benefit of the occupational forces and for ensuring “public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country” as long as the workers are not children under eighteen years old and the work does not force them to be involved in military operations.¹⁸

There are two main issues pertaining to the protection of workers under IHL provisions:

- a. The commentary on Article 51 (2) of Convention IV states that “those connected with billeting and the provision of fodder, transport services, the repairing of roads, bridges, ports and railways” are considered as necessary for the benefit of occupying forces. Conversely, it is prohibited to requisition the inhabitants to do “construction of fortifications, trenches or aerial bases” since it would involve the workers in military operations. These kinds of work are quite parallel and difficult to be distinguished. It is probably better to prohibit all work that will benefit the occupying forces.¹⁹
- b. Such compulsory work is not recognized under the ICESCR. It therefore can be regarded as a contradiction between Human Rights Law and Humanitarian Law.²⁰

With respect to the working conditions, Article 51(3) of Convention IV elaborates on the proper working conditions which were jointly formulated with the International Labour Organization (ILO), hence the ILO principles which are also laid down in the ICESCR remain in force during war.²¹

¹⁷ Article 52 Conventions IV

¹⁸ Article 51(2) Conventions IV

¹⁹ GASSER Hans-Pieter, Protection of The Civilian Population, in FLECK Dieter (ed), *The Handbook of International Humanitarian Law*, 2nd edition, Oxford University Press, New York 2008, p.296

²⁰ See the further discussion on page 5 of this paper

²¹ Article 7 ICESCR and Commentary Article 51 (3) Conventions IV

2. The right to an adequate standard of living²²

The barrier has separated 30 localities from health services, primary water sources and electric power networks²³ and has caused a serious aftermath for agricultural production and the destruction of land, agriculture and wells that are indispensable to the survival of civilians.²⁴ The ICESCR provides the right of everyone including children to have an “adequate standard of living comprising adequate food, clothing and housing and to the continuous improvement of living conditions”.²⁵

The IHL enumerates a series of provisions which render the duty of the Occupying Power to ensure food and medical supplies for the populations in the occupied territory. The Occupying Power is obliged to provide such supplies and may requisition them for use by the occupation forces only if the requirements of the civilian population have been taken into account.²⁶ In the event of inadequate supplies, the Occupying Power must facilitate relief action to assist by authorizing free passage of relief supplies and warranting their protection²⁷ These provisions show that the IHL also affirms the right to an adequate standard of living, predominantly basic needs which are essential for civilian survival. The IHL also recognizes the fundamental right of everyone to be free from hunger as explicitly stipulated under Article 11 (2) of the ICESCR.

3. Right to health²⁸

The barrier has also isolated the Palestinians from access to their health services. The right to health such as the enjoyment of and access to health services, including the development of primary health, care are guaranteed under the ICESCR. The States have to take all appropriate measures to pursue the implementation of these rights, particularly for women and children.

²² Article 11 ICESCR

²³ Para.133 ICJ Advisory Opinion

²⁴ *ibid*

²⁵ Article 11 ICESCR and Article 27 CRC

²⁶ Article 50(4) (for children) and Article 55 Conventions IV

²⁷ Article 59 Convention IV

²⁸ Article 12 ICESCR: and Article 24 CRC

Under the IHL, the Occupying Power must provide medical and hospital establishments for the civilian population as well as public health and hygiene and maintain cooperation with the local authorities in order to maintain such conditions.²⁹ The Occupying Power may not requisition the civilian hospital unless it is urgent and necessary for the treatment of injured and sick military personnel.³⁰ If medical supplies are inadequate, the Occupying Power must import them or accept relief consignments³¹ since it has to ensure that medical the needs of the civilians in their territory continue to be satisfied

4. Right to education³²

The right to education has been greatly affected by the construction of the wall. The ICESCR recognizes the right of everyone to an education since it is essential for human personality and dignity. The States have to guarantee that primary education is compulsory and secondary and higher educations have to be accessible to all.

The IHL also contributes to the provision of this right to children and young people. As general protection in international armed conflict, the IHL protects the right to education of orphaned and unaccompanied children.³³ Particularly during a military occupation, the Convention obliges the Occupying Power to take all necessary steps in cooperation with local authorities to provide adequate education infrastructure for children.³⁴ In specific circumstances, such as where children and young people are interned, the Detaining Power must allow the internees to continue their studies outside or inside the internment places.³⁵ These provisions demonstrate that the IHL also strengthens the legal framework regarding the right to education as one of the basic needs along with clothing, shelter, and nutrition, particularly for children and young people.

²⁹ Article 56 (1) Convention IV

³⁰ Article 57 Convention IV

³¹ Article 59 Convention IV

³² Article 13 and 14 ICESCR and Article 28 CRC

³³ Article 24 Conventions IV

³⁴ Article 50(1) Conventions IV

³⁵ Article 94 Conventions IV

III. The contradictions between the IHRL and the IHL

According to the violations of the IHRL cited in this case, the only norm which appears to be a contradiction between the IHRL and the IHL is regarding the right to work. The gist of this right under the ICESCR is freedom to work, freedom from forced and compulsory labor, freedom from slavery and similar practices and the right to free employment services and to protection of employment.³⁶ Historically, concerning this right, both the IHRL and the IHL departed from the same goal which was to eradicate forced labor and slavery³⁷. However, the former has abolished any form of compelling individuals to work, whereas the latter still allows it with certain exceptions due to the abnormal situation of armed conflict.³⁸ Unlike the ICCPR, the ICESCR does not provide any exception for public emergencies, thus it can be deemed to be, "in principle, fully applicable in times of war".³⁹ Nonetheless, the applicability of the IHL is considered *lex specialis*, i.e. a law which only applies during armed conflict and is designed to regulate the conduct of hostilities.⁴⁰ As long as this derogation is required by the exigencies of the situation, in conformity with the international obligations of the derogating States and they are compatible under the IHL, these contradictions may not be regarded as violations of Human Rights law.⁴¹

IV. Conclusion

The IHRL is designed primarily to function in a normal situation whilst the IHL only applies in theatres of war. Those bodies of law, however, are aimed at attaining the same outcome, namely the protection of individuals. The case shows that the IHRL remains in force during war where some of its norms also contain a similar essence to that of the IHL. This demonstrates that the IHRL and the IHL can apply cumulatively in order to

³⁶ DRZEWICKI Krzysztof, *The Right to Work and Rights in Work*, in EIDE Asbjorn et al (ed), *Economic Social and Cultural Rights*, 2nd edition, Martinus Nijhoff Publishers, London, 2001, p.224-242.

³⁷ For IHRL see *ibid*, p. 224, and for IHL see *Commentary to Article 51 Convention IV*

³⁹ Allan Rosa and Minika Sanvik-Nylund, *Armed Conflict*, in EIDE Asbjorn, *ibid*. p. 413

⁴⁰ *Legality of the Threat or Use of Nuclear Weapons*, 1. C. J. Reports 1996 (I), p. 239, para. 25

⁴¹ SASOLI Marco, *ibid*. p. 439

⁴² HEINTZE Hans -Joachim, *On The Relationship Between Human Rights Law Protection and International Humanitarian Law*, IRRC, December 2004 Vol. 86 No 856, p.794

strengthen the effective applicability of their provisions since sometimes the interpretation of rights and duties in armed conflict must refer to both areas of law.⁴² This cumulative application will also emerge as the greatest effective protection of human beings.