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Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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THE RELATION BETWEEN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW

AUTHORED BY - HARSHITA JAIN¹

ABSTRACT

International humanitarian law and international human rights law are the part of International law. International law is the law which governs the relations of states inter-se, with international bodies, and to some extent with citizens, as stated by Oppenheim.² Since the two are the branches of International law, they are by some, confused as the same thing and by some others, are regarded as so distinct as having no connection. Both of these two extreme notions cannot be regarded as true. International humanitarian law (IHL) and international human rights law (IHRL) are different from each other in their definition, development, scope of application and their implementation. On one hand IHRL is a series of rights and on other hand IHRL is a series of duties that combatants have to obey. This distinction, however, does not mean that they function in a four cornered wall without getting influenced by each other. This Article aims to bring fourth the similarities and differences between these two branches of International Law and thereby analyse the relation between them.

Keywords: *International, Human Rights, Humanitarian, Relation*

INTRODUCTION

International Law is the law consisting of rules and principles governing the relations between the Nations. It aims to protect and promote the human rights in the world and maintain international peace and security. It has two major branches, International Human Rights Law, which aims to protect and promote human rights in the world and ensures that International peace is not hampered by an armed conflict. International Humanitarian Law, on the other hand, provide a set of rules which seek to limit

¹ Author is an Assistant Professor, IILM Law School, IILM University, Gurugram, India.

² Mark W. Janis, "The New Oppenheim and its theory of International Law" 16 (2) *Oxf J. Leg Stud* 329 (1996).

the effects of armed conflict, if it occurs in between two or more nations. These two branches are considered as different, however, they are also dependent on each other. The lawyers of human rights continuously turn to humanitarian law to interpret its provisions. Similarly a lot of provisions of humanitarian law are influenced by the human rights law. Thus these two branches of international law may be different from each other, yet they complement each other for a better functioning.

DIFFERENCES

IHRL seeks to regulate the relationship of the government to its population in order to spur the government to do what is necessary to ensure the safety and well-being of its population while allowing the population to pursue their desires unencumbered by unwarranted government intrusion. IHL, on the other hand is more limited in its scope. It applies only during armed conflict and seeks to regulate the means and methods of warfare and protects those who are not or no longer directly participating in hostilities. While IHRL has a fundamental mission of transforming the relationship between the government and the population, IHL aims primarily to limit the effects of hostilities on populations, whether civilians, detainees, the wounded, the sick, or those otherwise hors de combat.³ The difference between IHRL and IHL would be better understood if one considered that the first is a system based on rights, whereas the second should be viewed as a system based on obligations.⁴ Following are the differences between the two laws:

Definition:

IHL: International humanitarian law is a set of rules which seek to limit the effects of armed conflict. Generally it applies to the time of armed conflicts. IHL does not see to stop or prohibit war, but it sets out rules to regulate the war and mitigate the sufferings of the war victims and others involved. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. It is also known as the law of war or the law of armed conflict.

³ Understanding Core Differences between Human Rights and International Humanitarian Law in Armed Conflict, available at: <http://www.hpcrresearch.org/blog/dustin-lewis/2012-04-17/understanding-core-differences-between-human-rights-and-international-h> (last visited on April 28, 2023).

⁴ On the relationship between IHL and IHRL 'where it matters' once more: Assessing the position of the European Court of Human Rights after Hassan and Jaloud, available at: <http://www.qil-qdi.org/on-the-relationship-between-ihl-and-ihrl-where-it-matters-once-more-assessing-the-position-of-the-european-court-of-human-rights-after-hassan-and-jaloud/> (last visited on April 28, 2023).

IHRL: International human rights law is the body of international law designed to promote human rights on social, regional, and domestic levels.

Scope

IHL: IHL primarily mentions the agreements between states on how to conduct war, and on protection of enemy civilians and combatants.

IHRL: IHRL extends to the agreements between states regulating the relationship between each state and the individuals over whom it has jurisdiction.

Development

IHL: The evolution of International Humanitarian law dates back to Battle of Solferino in 1859, when Henry Dunant saw the sufferings of 1000s of soldiers. This marked a formal beginning of the Modern IHL, as Henry Dunant called for an international agreement for the treatment of the battlefield casualties. Since then with the codification of first Geneva Convention in 1864 began the formal codification of IHL. Later in 1906 and 1929 two more Geneva Conventions were adopted, and all these were revised in 1949 with the adoption of a fourth Geneva Convention.⁵ All these 4 Geneva Convention in addition to the three Additional Protocols adopted in 1977 and 2005, are together known as IHL.

IHRL: Human rights law is a more recent body of law, which came to be officially recognized after the World War II, with the establishment of United Nations. Nevertheless the Human Rights Principles have always prevailed, and its roots could be traced to the time immemorial. But its formal recognition came later in years with the adoption of UN Charter and UDHR 1948.⁶ And it was only in 1966 when the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, were adopted. Thus the UDHR, ICCPR and ICESCR are together known as Human Rights Instruments.

⁵ Development of modern international humanitarian law, *available at:* <https://www.icrc.org/eng/who-we-are/history/since-1945/history-ihl/overview-development-modern-international-humanitarian-law.htm> (last visited on April 29, 2023).

⁶ The Foundation of International Human Rights Law, *available at:* <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (last visited on April 29, 2023).

Applicability

IHL: IHL applies primarily in the times of armed conflict. The application and scope of IHL is so strict that the state parties can in no circumstance derogate from the provisions of it, nor do they have the right of reservations under IHL.⁷

IHRL: IHRL applies at all times, i.e. in peacetime and during armed conflict. Human rights treaties permit governments to derogate from certain obligations during public emergencies that threaten the life of the nation. Derogation must, however, be necessary and proportional to the crisis, must not be introduced on a discriminatory basis and must not contravene other rules of international law – including provisions of IHL. However few of the international human rights principles which have acquired the status of Jus Cogens like, the right to life, the prohibition against torture or cruel, inhuman or degrading treatment or punishment, the prohibition against slavery and servitude and the prohibition against retroactive criminal laws, can never be derogated.⁸

Right holders and duty bearers:

IHL: Under IHL, States and individuals are both the right holders and the duty bearers.

IHRL: Under IHRL the duty bearers are the States and the rights holders are the Individuals and the states.

personal scope of application

IHL: IHL aims to protect persons who are not or are no longer taking direct part in hostilities. It protects civilians and hors de combat, such as the wounded, the sick and the shipwrecked or prisoners of war.

IHRL: Human rights law applies to all persons within the jurisdiction of a State. Unlike IHL, it does not distinguish between combatants and civilians nor does it provide for categories of 'protected

⁷ International Humanitarian Law and Human Rights: Similarities and Differences, *available at:* <http://www.gsdrc.org/document-library/international-humanitarian-law-and-human-rights-similarities-and-differences/> (last visited on April 29, 2023).

⁸ *Ibid.*

person'.

Implementation mechanism:

IHL: Rome Statute adopted on 17 July 1998 and came into force on 1 July 2002, establishes a permanent International Criminal Court (ICC). The court has the jurisdiction to try cases relating to four offences: War crimes, Crimes against Humanity, Genocide and Crimes of Aggression. This court has the complementary jurisdiction to try the breach of IHL. Apart from ICC, there are other courts also which have been specifically established to deal with particular cases of violation of humanitarian principles or the principles laid down under IHL, such as International Criminal tribunal for Rwanda, International Criminal Tribunal for Yugoslavia, Nuremberg tribunal or the Tokyo tribunal.⁹

IHRL: Human Rights Violations are addressed by the International HR courts such as the International Court of Justice, or by the Security Council itself. Apart from the Courts, every treaty has a monitoring body which regulates the state party report and make recommendations to the state parties in a manner that these states fulfil the obligations undertaken by them in the treaty.¹⁰

SIMILARITY

Despite a number of differences between IHL and IHRL, they are complementary bodies of international law that share some of the same aims. Both IHL and IHRL strive to protect the lives, health and dignity of individuals, thus they may be very different in formulation but in essence they seek to work towards a common goal. Many of the rules of these two bodies of law are similar, for example, both IHL and IHRL prohibits torture or cruel treatment, prescribe basic rights for persons subject to criminal process, prohibit discrimination, contain provisions for the protection of women and children, and regulate aspects of the right to food and health.¹¹

⁹ Implementing International Humanitarian Law: from Law to Action *available at:* https://www.icrc.org/en/download/file/5450/implementing_ihl.pdf (last visited on May 01, 2023).

¹⁰ Effective implementation of international human rights instruments, *available at:* <http://www.ohchr.org/EN/HRBodies/Pages/DocumentsSystem.aspx>, (last visited on April 28, 2023).

¹¹ What is the difference between IHL and human rights law, *available at:* <https://www.icrc.org/en/document/what-difference-between-ihl-and-human-rights-law> (last visited on April 15, 2023).

There are a number of provisions and instances which prove that IHL and IHRL are complementary to each other, and the two do not work in isolation, which are as follows:

Co-application

The applicability of IHRL is neither stayed, nor rejected, even during an armed conflict. It gives certain human rights, and since human rights are possessed by people by virtue of being human, they always possess them, without regard to armed conflict or the time peace. The application of Human rights was considered necessary for the first time in Tehran Conference of 1968. In this conference, the Secretary General of UN adopted a resolution to examine the development of humanitarian law and to consider steps to be taken to promote its respect.¹² Thus, this conference brought the IHL and IHRL more close. But in case of conflict between a rule of IHL and a rule of IHRL, the concept of *Lex Specialis*, i.e. law governing a specific subject matter would apply.¹³

Common Goal – Humanity¹⁴

The main objective with which UN was established was to promote humanity. Thus the main aim of IHRL is to foster the principle of humanity, aimed at protecting human life and dignity. Similarly IHL also seeks to protect the principle of humanity which is aimed at protecting human life and dignity, as gathered from the Martens Clause and Art. 1(2) of AP I.

Common provisions

- a) **Non-Discrimination:** The fundamental rule of IHL is guarantee of Human rights without discrimination, as specifically provided not only in United Nations Charter but also in all human rights treaties. Similarly IHL is based on the premise that the protection accorded to victims of war must be without any discrimination, as mentioned under Article 27¹⁵ of the Fourth Geneva Convention of 1949.

¹² Louise Doswald-Beck and Sylvain Vite, “International Humanitarian Law and Human Rights Law” 33 *IRCC* 94 (1993).

¹³ *Ibid.*

¹⁴ Jacques Meurant, “Humanitarian Law and Human Rights Law — Alike yet Distinct” 33 *IRCC* 89 (1993).

¹⁵ Fourth Geneva Convention, Art 27: “All protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion”.

- b) Slavery: IHL imposes a complete ban on slavery and recognizes it as a customary right. Similarly IHL prohibits slavery under Additional Protocol II.¹⁶ As far as the prohibition of slavery is concerned, this is explicitly laid down in 1977 Protocol II.
- c) Children and Women: The protection of children and family life is importance in humanitarian law. It is taken into account in a number of different ways, such as the provision made for children's education and physical care, the separation of children from adults if interned (unless they are members of the same family), and special provisions for children who are orphaned or separated from their families.¹⁷ Similarly IHRL provides for similar guarantees.
- d) Common Article 3: IHRL seeks to prohibit torture or cruel treatment through Convention against Torture (CAT), prescribes basic rights for persons subject to a criminal justice process (Art. 14, ICCPR), regulates aspects of the right to food and health, etc. All of these provisions are also found in IHL under Common Art. 3 to the 1949 GCs, humanitarian assistance, etc.¹⁸

Preamble to Additional Protocol I to Geneva Conventions

The Preamble to AP I states, “Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.” The preamble through this statement recognize the importance of UN Charter i.e. IHRL. It provides that UN Charter prohibits the state parties to use force against another state, which is the most essential principle of IHL.

Preamble to Additional Protocol II to Geneva Conventions

Preamble to AP II states, “Recalling that every State has the duty, in conformity with the Charter.... inconsistent with the purposes of the United Nation”

Also “Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience”

Preamble to AP II repeats the statement of Preamble to AP I, and in addition it recognizes another

¹⁶ Additional Protocol II to four Geneva Conventions, Art 4 (2) (f).

¹⁷ Denise Plattner, “Protection of Children in International Humanitarian Law” 24 *IRRC* 140, (1984).

¹⁸ Marco Sasso`li* and Laura M. Olson, “The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts” 90 *IRRC* 599 (2008).

principle which states that in cases where there is no law, a person shall be given the protection of humanity i.e. basic principles of human rights shall always be applied in all circumstances, especially in the absence of an express law in force.

Dual Provisions

Certain treaties today include provisions from both bodies of law. For example, Convention on the Rights of the Child under Art 38¹⁹ and through its Optional Protocol on the Participation of Children in Armed Conflict seeks to protect both IHL and IHRL. Also Article 1 of The Convention on the Prevention and Punishment of the Crime of Genocide provides “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”

Thus, many of the treaties forming part of IHRL recognize principles of both the bodies of law i.e. IHL and IHRL.

Referral and deferral powers of Security Council

Article 13(b) provides the power to Security Council to refer cases to ICC (International Criminal Court). And similarly Article 16 of the Rome Statute vests the Security Council with the power to defer any case, pending before ICC, for a period of 12 months, with an objective that the Security Council may conduct an independent investigation on it. Thus the Rome Statute also reserves a role for the United Nations Security Council. The Council can refer situations in which one or more crimes which the ICC is empowered to try, appears to have been committed in any State, under Chapter VII of the Charter of the United Nations, regardless of whether such a state has ratified the Statute of the Court or not. The main reason for such referral and deferral powers of Security Council is that the Council has been given the primary responsibility for maintaining peace and security in the world.

¹⁹ Convention on the Rights of the Child, Article 38 (1) States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

(2) States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

(3) States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

(4) In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Similarly ICC is operating to maintain peace in the world and to ensure that no crimes against humanity or crimes of aggression, war crimes or genocide takes place in the world. Thus Security Council has been given this power of referral, which it has used in number of cases like in case of Sudan (Darfur) in 2005, and in Libya in 2011²⁰, but has never used its deferral power, which again protects the autonomy of the ICC. Thus the international organization working under the name these two different bodies of law, are helping each other in maintaining peace in the world.

Judicial decisions

There are a number of decisions given by a number of international judicial bodies, wherein they have stated the existence of a relation between IHL and IHRL. Some of those cases are as follows:

A. *Isayeva v. Russia*²¹

The European Court of Human Rights in the present case stated the importance of Human rights in Armed Conflict, by providing that “in the planning and execution even of a lawful action against fighters, any risk to life and the use of lethal force must be minimized.”²²

B. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Case* (advisory Opinion).²³

The international court of Justice in July 2004 explained the relation of IHL and IHRL in its advisory opinion given in the present case. The court said that with regard to the relationship between international humanitarian law and human rights law, there are three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. thus the court specifically stated that some of the matters overlap both the branches of law and hence the two branches have certain relation.

²⁰ The International Criminal Court and the United Nations Security Council: Perceptions and Politics, available at: http://www.huffingtonpost.com/tiina-intelmann/icc-un-security-council_b_3334006.html (last visited on April 17, 2023).

²¹ *Isayeva v. Russia*, 57950/00, Council of Europe: European Court of Human Rights, 24 February 2005.

²² *Isayeva v. Russia*, 57950/00, Council of Europe: European Court of Human Rights, 24 February 2005, Para 175.

²³ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004.

C. *Prosecutor v. Kunarac*²⁴

International Criminal Tribunal for former Yugoslavia on 22 February 2001, in the present case explained the relation of IHRL and IHL as follows, “Because of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights law. Because of their resemblance, in terms of goals, values and terminology, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law. With regard to certain of its aspects, international humanitarian law can be said to have fused with human rights law.”²⁵

Thus ICTY explains that precedents of IHRL help in the development of IHL principles. Also it clearly states that the bodies of law have similar goals, values and terminology.

D. *Coard et al. v. United States* (Case No. 10.951)²⁶

The Inter-American Commission of Human Rights, on 29th September 1999, in the present case explained the relation of the two bodies of law, by stating that though international humanitarian law pertains primarily in times of war and the international law of human rights applies in times of peace, but the potential application of one does not necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity, and there may be a substantial overlap in the application of these bodies of law.²⁷

Thus, the above similarities show that IHL and IHRL are branches of complementary branches of international law.

CONCLUSION

In general sense, IHRL is perceived and understood as a branch of law which seeks to ensure human rights to all and seeks to prohibit war, except on certain circumstances in which humanitarian

²⁴ *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Appeal Judgment), IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 12 June 2002.

²⁵ *Ibid* at para 467.

²⁶ *Coard et Al. v. United States*, Report N. 109/99 - Case 10.951, Inter-American Commission on Human Rights (IACHR), 29 September 1999.

²⁷ *Ibid* at para 39.

intervention is allowed. On the other hand IHL is understood as that branch which seeks to regulate war, but it is now less perceived as a code of honour for combatants than as a means of sparing non-combatants as much as possible from the horrors of war.

IHRL and IHL are different in their language, scope, development, application and implementation. But both are complementary to each other and cannot function in complete isolation to each other. Human rights are the same in international and non-international armed conflicts and outside armed conflicts. We cannot in any sense dissect the two branches so much that we tend to identify them moving in opposite directions. A number of similarities, mentioned before, show us how these two different branches of international law are complementing each other. Both of these branches are continuously influencing each other. One cannot understand a particular branch in isolation to the other. Since, the two carry similar rights and similar provisions, interpretation of provisions of one branch have to be done in light of the provisions of other branch. Moreover, since both, IHL and IHRL, are branches of international law, it is clear that certain of the basic notions of the two are same. For example, both tend to protect the right to life, right against torture, right to non-discrimination. In other words, the customary human rights are specifically protected by the humanitarian law.

The aim of international human rights law is to promote and secure peace and security in the world. Similarly, the goal of International humanitarian law is also to mitigate the sufferings of the war victims and to regulate the wars in such a manner that the peace and security of the states and the world is not harmed in such a manner that the concepts of peace and security are not vanished and also in a manner which does not open the doors for a World War III. The two branches, in essence have similar, if not same, goals. Thus, the two cannot function in isolation, rather they complement each other.