

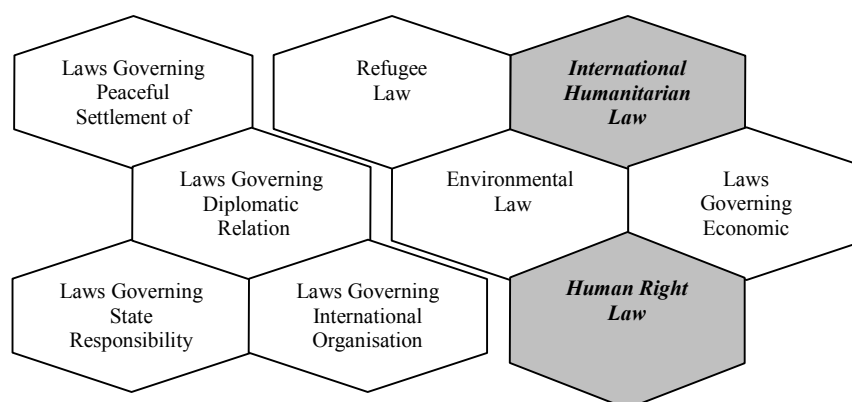
## HUMANITARIAN LAWS AND HUMAN RIGHTS LAW- ANALYSIS OF EXISTING DIFFERENCES AND SIMILARITIES?

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### INTRODUCTION

*“The purpose of international humanitarian law is not to take the war victims to heaven but to save them from hell.”*

In order to make this quotation realistic, it is important for us to understand the relation between humanitarian law and human rights, their similarities, differences along with scope and application. The purpose of this article is to make visible the thin line demarcation between humanitarian law and human rights law, which can only be understood by tracing history of both the concepts and analyze there difference at the nanoscopic level. To begin with as we know that international law offers to States a great scale of means and measures for the peaceful settlement of disputes with a view to an effective abolition of the recourse to war. War is a rot to humanity and involves most brutal and arbitrary violence. The horrifying experiences of the armed conflicts in the Gulf, Somalia and Bosnia and Iraq remind us of the cruelty of the war, suffering, death and destruction. But at the same time war is perhaps a human necessity and no period in human history has there been a protracted golden age of peace. War may have different causes or motives, be it instinctive aggression, possession of lands, greed, women, riches, collective or individual pride or ideology. It is therefore not very difficult to imagine why nations go to war; what however is difficult to imagine is why certain kinds of atrocities are committed like rape, genocide or slavery in the name of war. In case of such kind of aggression individual must be aware of their rights and the right forum to be approached, there are various branches of public international law, which shows the relation of the humanitarian law and human rights with other laws, which can be shown by the help of diagram given below.



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But unfortunately, the prohibition of war proclaimed after World War II are not respected by the nations and the sad reality of today's international relations is that armed conflicts continue to spread and are not ready to disappear, results into irreversible damage to human existence and environment. Like, as we have witnessed burning of the oil refinery in the Gulf War and mass killing in Vietnam and Iraq war.

The key question arises is that whether the behavior of belligerent parties subject to any limitations? The obvious answer to this question is that such limits do exist which aim at the mitigation of the most disastrous effects of armed conflicts results in constitution the body of international humanitarian law. However, as human rights law and humanitarian law have totally different historical origins, the codification of these laws has been very recently followed entirely different lines. But still international humanitarian law is increasingly perceived as part of human rights law applicable in the armed conflict.

## **ORIGIN OF HUMANITARIAN LAW**

The historical development of concept of humanitarian law can be traced by Geneva Convention of 1864. Here the term was firstly used, provided certain rules regarding the conditions of wounded soldiers in land armies.<sup>1</sup> Also, Second Hague Peace Conference of 1907, talked about the right of belligerents<sup>2</sup> and their unnecessary sufferings.<sup>3</sup> Also in Geneva Conventions of 1949, the term humanitarian law was not used but they mentioned only 'humanitarian activities' and 'humanitarian organizations'.<sup>4</sup>

But the basic question arises is about the purpose of existence of international humanitarian law (also called the law of war or law of armed conflicts)? As we know that it is a part of international law and aims to mitigate the human suffering caused by war. In short, we can say its aim is to *humanise war* by restraining belligerents from wanton cruelty and ruthlessness and to provide essential protection *but not end up war*. This position raises lot of unsolved questions like does the very existence of humanitarian law of armed conflict contribute to perpetuating the phenomenon of war? Will war fought in accordance with

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<sup>1</sup> Earlier, Paris Declaration was adopted at Paris on April 16, 1856 wherein it was laid down that (a) Privateering is, and remains, abolished; (b) the neutral flag covers enemy's goods, with the exception of contraband of war; (c) neutral goods, with the exception of contraband of war are not liable to capture under enemy's flag; (d) blockade, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy. The Convention was ratified within three years by all the European Great Powers, as well as by many other States.

<sup>2</sup> Article 22 of the Hague Regulations of 1907.

<sup>3</sup> Article 23(e) of the Hague Regulations.

<sup>4</sup> See Article 9 of the Geneva Convention, Nos. I and III and Article 10 of Geneva Convention No IV.

humanitarian rules last longer than the one fought without any restraints? Does it follow that all restraints should therefore be removed? What ought one to prefer a longer war or a worse war?

To answer these questions we can say, the argument that international humanitarian law may prolong war and therefore ought to be abolished is untenable and amounts to nullification of the basic purpose of international law, which is to maintain international peace and security. *Without legal restraints, war may degenerate into utter barbarism causing great difficulty in restoration of peace between the parties after termination of war.*

The rights and obligation arising from the treaty are covered by maxim *pacta tertiis nec nocent nec prosunt* i.e. it is binding only to the parties to a treaty and not to a third State without its consent.<sup>5</sup> But in case of humanitarian law it shall be binding on all the state irrespective of ratification by the state because of the simple reason that many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and elementary considerations of humanity. As a result, three distinct trends in the law of armed conflict were being formed namely, codification of humanitarian law had been initiated through the **Geneva trend** developed by Dunant, who talked about the condition of war victims. The **Hague trend (Lieber Code)** developed by Francis Lieber, related to the permissible means and methods of war. Lastly, the **New York trend** by United Nations to take an active interest in the law of armed conflict.<sup>6</sup>

## ORIGIN OF HUMAN RIGHTS

*“... as soon as they lay down [their arms] and surrender, they cease to be enemies or agents of the enemy, and again become mere men, and it is no longer legitimate to take their lives.”*

The first thing to be observed while reading human rights treaties is that they are arranged in a series of assertions, each assertion setting forth a right that all individuals have by virtue of the fact that they are human. There are a number of theories that have been used as a basis for human rights law, including those stemming non religion (i.e. the law of God which binds all humans). However, most people would point to theories by influential writers, such as John Locke, Thomas Paine or Jean-Jacques Rousseau, as having prompted the major developments in human rights in 18<sup>th</sup> and 19<sup>th</sup> centuries.

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<sup>5</sup> See Article 49, 50, 129 and 146 of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Geneva Conventions of 1949 respectively.

<sup>6</sup> General Assembly Resolution No. 2444 (XXIII), 19 December 1968.

But recently a major drift made many lawyers to use these rights for legal point of view and emphasized on their implementation in court. The focus of this argument is on the nature of economic and social rights, which many legal theorists argue cannot therefore be described as legal rights. However, the first major international instrument defining “human rights”, namely the 1948 Universal Declaration of Human Rights, contains not only civil and political but also economic and social rights. This in turn made the scope of applicability of human rights more widen than any other right in the matter.

### **DIFFERENCE BETWEEN HUMANITARIAN LAW AND HUMAN RIGHTS**

Although the difference can be seen in the manner in which humanitarian law and human rights treaties are worded. Like IHL is applied during the time of war or armed conflicts alone, the law of human rights is applied in peacetime. Secondly the State, becomes a party to a Human Rights Treaty, bounds within the provisions of the treaty, humanitarian treaties have wider implication. The former indicates how a party to a conflict is to behave in relation to people at its mercy, whereas human rights law concentrates on the rights of the recipients of a certain treatment.

There is also difference in the appearance of the treaty texts is that humanitarian law seems long and complex, whereas human rights treaties are comparatively short and simple. Also there is a phenomenon in human rights law, which is quite alien to humanitarian law, namely, the concurrent existence of both universal and regional treaties, and also treaties make a distinction between so-called “civil and political rights” and “economic, social and cultural” rights. The scene has been further complicated by the appearance of so-called “thin generation” human rights, namely, universal rights such as the right to development, the right to peace, etc.

The humanitarian law originated in notions of honorable and civilized behavior that should be expected from professional armies. Human rights law, on the other hand, has less clearly defined origins. The development of human rights is the existence of various cultural traditions and advocates for social development.<sup>7</sup> Although coming from different starting

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<sup>7</sup> Marx is commonly cited as the origin of this social development, but he was not the only theorist of that period to speak of the importance of social and economic rights. We may refer in particular to Thomas Paine who proposed, in *The Rights of Man*, a plan which resembles a type of social security system, including children's allowance, old-age pensions, maternity, marriage and funeral allowances, and publicly endowed employment for the poor.

points, these influences stressed the importance of providing means to maintain life as well as in assuring protection from economic and social exploitation.

The most important change as far as humanitarian law is concerned is the fact that recourse to war is no longer a legal means of regulating conflict. In general, humanitarian law 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.<sup>8</sup> From human rights point of view, it is on respect for human life and well being, where as the use of force is in itself a violation of human rights.

### **CONCEPTUAL SIMILARITIES IN REGARDS TO THE PRESENT CONTEXT**

A conceptual question can be raised that whether human rights law can be applied in armed conflict as well? The philosophical basis of human rights advocates that by virtue of the fact that people are human, they always possess them. The answer in one sense is that they do continue to be applicable, because certain rights are known as **“hard-core rights”** (those which all such treaties list as being non derivable). These fundamental rights that States are bound to respect in all circumstances.

However, the major difficulty of applying human rights law as enunciate in the treaties is the very general nature of the treaty language. What is therefore needed is a code of action applicable in advance. Human rights lawyer has constantly turned to humanitarian law because, despite of its different origins and formulation, compliance with it has the result of protecting the most essential rights both civil and economic and social type. The protection of children and family life,<sup>9</sup> respect for religious faith of prisoners of war and detained civilians<sup>10</sup> is also given a great deal of importance in humanitarian law.

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<sup>8</sup> The main justification of the continued applicability of humanitarian law is that most of the rules have as their aim the protection of the vulnerable in armed conflict and that these rules can, be applied in practice only if they are applicable to both sides. Further, as with human rights philosophy, humanitarian law has as its major premise the applicability of protection of all persons, irrespective of whether the individuals are perceived as - "good" or "bad".

<sup>9</sup> The articles are too numerous to list individually, but the majority is to be found in the Third and Fourth Geneva Conventions and their Additional Protocols.

<sup>10</sup> Article 34, Third Geneva Convention, and Articles 27 and 38(3), Fourth Geneva Convention.

## **HUMAN RIGHTS AND HUMANITARIAN LAW - MUTUAL INFLUENCE**

In connection of mutual influence Article 3<sup>11</sup> common to the all four Geneva Conventions reveals a real miniature treaty. It diverges from the traditional approach of humanitarian law, which in principle did not concern itself with the relations between a State and its Nationals.<sup>12</sup> International Conference of Human Rights in Tehran, in 1968 considered as the turning point as U.N. for the first times considered the application of human rights in armed conflicts.

The Commission was set up to promote the implementation of human rights, it does not hesitate to invoke humanitarian law when the situation so requires. It is becoming apparent that legal instruments should be drawn up combining elements of both humanitarian and human rights law in order to provide rules that can be applied if peacetime as well as in wartime. This objective was behind till adoption in 1990 of the declaration of Minimum Humanitarian Standards, the so-called **Turku Declaration**. This text makes it clear not to take a position on any dichotomy between humanitarian law and human rights law.

## **APPLICABILITY OF HUMANITARIAN LAW AND HUMAN RIGHT**

International humanitarian law is a branch of international law that provides protection to human beings from the consequences of armed conflicts. The application of humanitarian law as it appears to contravene the general principles of *ex injuria non oritur ius* (no one should obtain a legal benefit from his own illegal action). International humanitarian law obviously has much in common with the law of human rights since both the bodies of rules are concerned with the protection of the individuals.

The International Court of Justice in *Nicaragua* case had observed that the principles of humanitarian law are identical with the elementary consideration of humanity.<sup>13</sup> It being so there is a close relationship between the two. The General Assembly of the United Nations has adopted quite a number of resolutions regarding humanitarian law under the title of **“Respect of Human Rights in Armed Conflicts”**, thus emphasizing for obvious reasons the close relationship existing between them.

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<sup>11</sup> Article 3 lays down the basic rules which States are required to respect when confronted with armed groups on their own territory.

<sup>12</sup> Although the Lieber Code did make some mention of forms of protection that could be accorded in civil wars, treaty law did not do so until common Article 3 of the Geneva Conventions.

<sup>13</sup> ICJ Reports 986, p. 112.

But there are certain reasons why humanitarian laws are not always respected and violations are not always repressed?

This question can be answered in various ways. Some claim that **ignorance of the law** is largely to blame, others that the **very nature of war** so wills it, or that it is because of the international law and therefore humanitarian law is not matched by an **effective centralized system for implementing** the sanctions, among other things, because of the present day structure of the international community. However some measures at international level have received warm welcome like the **penal repression of war crimes** can be seen as one means of implementing humanitarian law.<sup>14</sup> The international community has created a **permanent International Criminal Court**, which will be competent to try war crimes, crime against humanity and genocide.

International humanitarian law applies to all armed conflicts, i.e. international armed conflicts as well as non-international armed conflicts (like civil war, civil strife and threshold internal conflicts). The above question was raised and distinction was drawn in two Protocols adopted on June 3, 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which finally stated that the Humanitarian law is applicable to both the categories of armed conflicts. The extent of applicability of humanitarian law has been extended various areas.

### **APPLICABILITY IN *JUS AD BELLUM* AND *JUS IN BELLO***

The purpose of the international law is to limit the suffering caused by war by protecting and assisting its victims as far as possible. It is regulated only those aspects of conflict, which are of humanitarian concern. It is what is known as *jus in bello* (law in war). Its provision applies to the warring parties irrespective of the reason for the conflict although it is hard to determine the guilt. That is why *jus in bello* must remain independent of *jus ad bellum* or *jus contra bellum* (law on the use of force or law on the prevention of war).

### **APPLICABILITY IN TERRORIST ACTS**

Terrorist acts occur during arm conflicts and in the time of peace as well. As international humanitarian law applies only in situations of armed conflicts, it does not regulate terrorist

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<sup>14</sup> In particular Human Rights Watch, which has used humanitarian law in a number of its reports, e.g. *Needless Deaths*, issued in 1992, on the Second Gulf War. "A large number of these organizations have recently begun a campaign to reduce the severe problems caused by the indiscriminate Use of land mines by calling for better respect for existing humanitarian law and for the eventual ban of the use of anti-personnel mines."

acts in peacetime. The requirement to distinguish between civilians and combatants, and the prohibition of attacks on civilians or indiscriminate attacks lies in the humanitarian law. In addition to an express prohibition of all acts named at spreading terror among the civilian population<sup>15</sup>, IHL also proscribe the following acts, which could be considered as terrorist attacks like attacks on civilians and civilian objects<sup>16</sup>, indiscriminate attacks<sup>17</sup>, attacks on places or worship<sup>18</sup>, attacks on works and installation containing dangerous forces<sup>19</sup>, taking of hostages<sup>20</sup> and murder of persons not or no longer taking part in hostilities<sup>21</sup>.

### **APPLICABILITY IN “NEW” CONFLICTS**

The expression of “new” conflicts is in great debate, questioning its applicability. Basically it covers different type of armed conflicts those known as “anarchic” conflicts and other in which group identify become the focal point arises out of weakening or breakdown of State structure. In such situations, armed group takes advantage of political vacuum to grab power. Admittedly, the humanitarian rules are harder to apply in these types of conflicts.

### **APPLICABILITY ON REFUGEES**

According to the definition of a refugee which has been provided under Article 1 of the 1951 UN Convention, the term “refugee” applies to any person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to, return it.” Under the Fourth Geneva Convention and Additional Protocol I and 1984 Cartagena Declaration has broadened the definition and general protection of humanitarian law has been extended from civilians to refugees also.

### **INDIAN STAND**

In India also the awareness regarding to the rights of the individual had gone through the

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<sup>15</sup> Article 51, Para 2, Protocol 1; and Article 13, Para 2, Protocol II.

<sup>16</sup> Article 51, Para 2 and 52, Protocol 1; and Article 13, Protocol II.

<sup>17</sup> Article 51, Para 4, Protocol 1.

<sup>18</sup> Article 53, Protocol 1; and Article 16, Protocol II.

<sup>19</sup> Article 56, Protocol 1; and Article 15, Protocol II.

<sup>20</sup> Article 75, Protocol 1; and Article 3 common to the four Conventions; and Article 4, Para 2b, Protocol II.

<sup>21</sup> Article 75, Protocol 1; and Article 3 common to the four Conventions, and Article 4, Para 2a, Protocol II.



pivotal shift as Justice J.S. Verma while addressing United Nations Commission on Human Rights,<sup>22</sup> detailed the increasing concerns of India and positive contribution to the jurisprudence of human rights and to an understanding of their universality and indivisibility.

The Supreme Court in the year 2000 had delivered a plethora of judgements to set precedents and had brought radical change in the concept of human rights. The Court had discussed the universality of human rights in *Chairman Railway Board v. Chandrima Das*<sup>23</sup> where the issue related to compensation payable to a foreign tourist who was raped at Yatri Niwas was at question. The defendant contented that she cannot invoke Article 21 of the Constitution for compensation, because she was not an Indian national. The court overruled the argument, and held that the fundamental rights enshrined in the Constitution are in consonance with the *Universal Declaration of Human Rights*, 1948. Also court while discussing about the rights of the prisoners in *State of AP v. Challa Ramkrishna Reddy*<sup>24</sup> held that fundamental rights, which include basic human rights, continue to be available to a prisoner. The Court declared that a prisoner does not cease to be a human being, and his rights can't be seized on the ground of sovereign acts.

The NHRC also reminded the government of Justice Krishna Iyer's exhortation *that prison gates are not an iron curtain between the prisoner and human rights*, The NHRC in judgments, directed the government of Uttar Pradesh to pay Rs. 10 lakh to Rakesh Kumar Vij, a victim of severe police torture and Rs. 50,000 to Prabhakar L Mehta, who was picked up at his house after midnight and was brutally assaulted, physically tortured and denied food and water. For the first time in Indian history the Central Government was ordered to pay compensation for human rights violations. All these decisions by courts and commissions has portrayed picture of growing concern of such rights for Indians.

## CONCLUSION

At last I would like to conclude that the justifiability of humanitarian law can only be challenged by saying that it mitigate the sufferings of war making the situation war more acceptable, more endurable. As a result, what baffles international community today is the **problem of implementation of international humanitarian law**. United Nations, the custodians of world peace, has done almost nothing for the betterment of situation. In

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<sup>22</sup> 56<sup>th</sup> session of United Nations Commission on Human Rights at Geneva on April 18, 2000,

<sup>23</sup> (2000) 2 SCC 465.

<sup>24</sup> (2000) 5 SCC 712.

Somalia and Bosnia, everyone including the U.N Peace-keeping Forces has completely forgotten the rules of the game. Although in 1991, the United Nations in order to improve the humanitarian relief formed a post of Under Secretary General for Humanitarian Affairs who headed the Department of Humanitarian Affairs (DHA). The post however, proved to be too low for the purpose of co-ordinating humanitarian relief operations.<sup>25</sup> Such kind of initiative should be warmly welcomed but they should also be backed by strong and permanent set up mechanism. Human rights bodies are also now recognizing the importance of judicial guarantees to protect hard-core rights. This is because those drawing up humanitarian law treaties had seen from experience the crucial importance of judicial control in order to avoid arbitrary executions and their inhuman treatment.

A perception, of human rights has motivated the perception of honour in combat which has otherwise lost influence in modern society. Given that human rights law is primarily concerned with behaviour within a State, it is possible that resistance to further responsibility in internal armed conflicts will be eroded by human rights pressure. Although, law of human rights and humanitarian law are different in respect of origin but now international humanitarian law is increasingly perceived as part of human rights law applicable in the armed conflict because both are based on human considerations and therefore the subject of both the laws is protection of human beings. So, there can be no harm even if both are considered as same as far as there question of application arises because ultimate aim of both the laws is to save the persons from suffering of hell on the earth itself.

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<sup>25</sup> International Negotiation Network, The Carter Center, center Atlanta, 17 February 1993.