

HUMANITARIAN INTERVENTION AND RESPONSIBILITY TO PROTECT

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ABSTRACT

International law is the set of rules or a code of conduct which the states must follow. There are several branches of International Law and International humanitarian law is one of them. There are various universal treaties that are made to promote friendly relations among the state and at the same time to protect the basic rights of the citizen. But then also most of the time it can be seen that there is violation of fundamental freedoms of the citizens. Then other state can intervene on certain ground by following the norms of International Law or following the principles of International Humanitarian Law. The international humanitarian law is based in the principles of humanity which says that at even at the time of war basic human rights of the people are to be protected. Geneva Conventions are foundation stone for the International Humanitarian Law. The applicability of humanitarian intervention has now expanded its horizons and a new concept of responsibility to protect is included in it. The concept of responsibility to protect has three pillars ie responsibility to prevent, protect and recreate by following the words of UN Charter. The essence of UN Charter is to create world a better place to live without any clashes and bloodshed. This article tries to search the nexus of humanitarian intervention and responsibility to protect while emphasizing on the legality of war.

The world is now too small for anything but brotherhood.

-Arthur Powell Davies

[Asian Journal of Multidisciplinary Research & Review \(AJMRR\)](#)

ISSN 2582 8088

Volume 2 Issue 2 [April - May 2021]

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INTRODUCTION

From the time immemorial international community or the states of the world tried to keep harmony and peaceful relations between the states. The task of international law is make certain rules that are important to maintain peace and harmony between countries of the world. In this process various treaties were signed like the League of Nations and after the failure of League of Nations United Nations charter came into existence. The chief motive of UN charter is to promote friendly relations among the state and at the same time to encourage the protection of human rights. Even after these universal treaties the rules of international laws are been violated and therefore a new branch of international law comes into existence i.e international humanitarian law. International humanitarian law applies at the time of war and it gives importance to protect the rights of victims of war as well as sick and wounded. This law also give emphasis to restrict use of weapons in war. In the changing scenario the importance is been given to protection of basic rights of the people then only humanitarian intervention can take place. The major issue is the legality of the actions taken by the intervening state. Now the responsibility not ends only by intervening but t is also the duty of the intervening country to protect the state in which it is intervening.

INTERNATIONAL HUMANITARIAN LAW- MEANING AND SCOPE

International humanitarian law is part of universal international law whose purpose it is to forge and ensure peaceful relations between peoples. It makes a substantial contribution to the maintenance of peace in that it promotes humanity in time of war. It aims to prevent - or at least to hinder - mankind's decline to a state of complete barbarity. From this point of view, respect for international humanitarian law helps lay the foundations on which a peaceful settlement can be built once the conflict is over. The chances for a lasting peace are much better if a feeling of mutual trust can be maintained between the belligerents during the war. By respecting the basic rights and dignity of man, the belligerents help maintain that trust. Once it is clear, moreover, that international humanitarian law helps pave the .road to peace, no further proof of its legitimacy is

required.ⁱ International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict. International humanitarian law is part of international law, which is the body of rules governing relations between States. International law is contained in agreements between States – treaties or conventions –, in customary rules, which consist of State practise considered by them as legally binding, and in general principles.ⁱⁱ International humanitarian law forms a major part of public international law (see opposite) and comprises the rules which, in times of armed conflict, seek to protect people who are not or are no longer taking part in the hostilities, and to restrict the methods and means of warfare employedⁱⁱⁱ

HISTORICAL ORIGIN OF HUMANITARIAN LAW

International Humanitarian Law applicable in armed conflicts” means international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems that arise directly from international or non-international armed conflicts From this historical perspective developed the documented origin of IHL in the mid-19th Century^{iv}. Solferino may be said as the starting point of development of IHL In Northern Italy on 24th June 1859 the French and Italian troop fought badly. Henry Dunant who was haunted by the ghastly scenes which he saw at Salferino and wrote a book A Memory of Salferino^v. He made various suggestions also:-

- 1) In every country a volunteer relief society be constituted^{vi}
- 2) Various states meet in Congress and adopt an International and sacred principles guaranteed and sanctioned by a convention to provide legal basis for the protection of wounded enemy soldiers, military hospitals and medical personnel^{vii}.

The impact of these two suggestions was that the first suggestion led to the emergence of Red Cross Society and the second one lead to the origin of International Humanitarian law. The Nuremberg and Tokyo Trials confirmed the status of the Hague Regulations as customary law,^{viii} but by this point international lawyers had considered their provisions on the conduct of

warfare to be outdated and not particularly useful for modern conditions and weaponry, such as aircraft.^{ix} Meanwhile, the 1929 and 1949 Geneva Conventions had adopted and expanded upon some of the humanitarian subjects of the Hague Conventions, in particular, the protection of prisoners of war and the management of occupied territories. These developments encouraged legal commentators to start to separate the ‘Geneva’ and ‘Hague’ traditions of the laws of war in a manner that had not been apparent in earlier texts^x

LEGALITY OF WAR AND MEANS OF WARFARE (DOCTRINES)

International humanitarian law, *or jus in bello*, is the law that governs the way in which warfare is conducted. IHL is purely humanitarian, seeking to limit the suffering caused. It is independent from questions about the justification or reasons for war, or its prevention, covered by jus ad bellum. The purpose of international humanitarian law is to limit the suffering caused by war by protecting and assisting its victims as far as possible. The law therefore addresses the reality of a conflict without considering the reasons for or legality of resorting to force. It regulates only those aspects of the conflict which are of humanitarian concern. It is what is known as jus in bello (law in war). Its provisions apply to the warring parties irrespective of the reasons for the conflict and whether or not the cause upheld by either party is just.

The ius ad bellum (law on the use of force) or ius contra bellum (law on the prevention of war) seeks to limit resort to force between States. Under the UN Charter, States must refrain from the threat or use of force against the territorial integrity or political independence of another state (Art. 2, para. 4)^{xi}. Exceptions to this principle are provided in case of self-defence^{xii} or following a decision adopted by the UN Security Council under chapter VII of the UN Charter.^{xiii}

The distinction between jus ad bellum and jus in bello was drawn in the traditional theory of the just war long before it appeared in modern international law. The theory of the just war is a theory about morality, not law—although most of its earlier proponents understood it as an account of the natural law. In this moral theory, the main reason for the traditional insistence on the separation of jus ad bellum and jus in bello is that the two doctrines must be independent if the orthodox doctrine

of the “moral equality of combatants” is to be justified. The moral equality of combatants is the view that all combatants, irrespective of whether they fight in a just or unjust war, have the same rights, immunities, and liabilities. Under this view, a combatant is not guilty of wrongdoing merely by virtue of fighting for an unjust cause, or in an unjust war.^{xiv}

INSTRUMENTS OF INTERNATIONAL HUMANITARIAN LAW

International humanitarian law is majorly governed by yje Geneva conventions of 1949. They are as follows-

- Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, August 22, 1864
- Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, October 18, 1907
- Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Geneva, August 12, 1949
- Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Geneva, August 12, 1949
- Convention (III) Relative to the Treatment of Prisoners of War, Geneva, August 12, 1949
- Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, August 12, 1949 Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977
- Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977
- Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), December 8, 2005

PRINCIPLES OF HUMANITARIAN LAW^{xv}

Rules of international humanitarian law (IHL) attempt in broad terms to regulate conflict in order to minimise human suffering. IHL reflects this constant balance between the military necessity arising in a state of war and the needs for humanitarian protection.

- distinction between civilians and combatants
- prohibition of attacks against those hors de combat^{xvi}
- prohibition on the infliction of unnecessary suffering
- principle of proportionality^{xvii}
- notion of necessity^{xviii}
- principle of humanity

Persons *hors de combat* and those who do not take a direct part in hostilities are entitled to respect for their lives and their moral and physical integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction. It is forbidden to kill or injure an enemy who surrenders or who is *hors de combat*. The wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transports and equipment. The emblem of the red cross or the red crescent is the sign of such protection and must be respected. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and reprisals, and have the right to correspond with their families and receive relief. Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population

and property. Neither the civilian population as such nor civilian persons shall be the object of attack. Attacks shall be directed solely against military.^{xix}

HUMANITARIAN INTERVENTION AND IMPORTANCE OF RESPONSIBILITY TO PROTECT (R2P)

Normally, the birth of the doctrine of humanitarian intervention is associated with natural law and early international law. The “father” of international law Hugo Grotius (1583-1645) aspired to regulate international relations by introducing new political and moral standards, among others provisions concerning respect for sovereignty and contracted agreements. In order to promote international order he further refined the “just war” doctrine stressing that wars were only allowed if based on specific legal reasons. In his opinion a right to revolution existed, in extreme cases of tyranny, for the subjects of a prince. If, in this context, the suppressed subjects asked for support from a foreign power it might rightfully be given. So, his defense of humanitarian intervention was linked to the doctrine of legitimate resistance to repression and was, ultimately, based on the fact that a prohibition on the use of force was non-existing until the 20th century. Humanitarian intervention is defined as coercive action by states involving the use of armed force in another state without the consent of its government, with or without authorisation from the United Nations Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law.^{xx} . The concept of ‘humanitarian intervention’ has proven an inviable tool for tackling today’s challenges. Therefore, the first step in the development of a new research programme has to be the creation of a new conceptual framework. R2P has, to some extent, successfully taken this step. However, the practical implementation of R2P by means of military interventions is always in danger of suffering from the same opposition as humanitarian interventions, since such interventions could still be equated with humanitarian intervention by their opponents. A new terminology for military interventions for protection purposes would therefore also benefit the practical implementation of R2P.^{xxi}

LEGALITY OF HUMANITARIAN INTERVENTION

The doctrine of humanitarian intervention is one of the most highly controversial issues in the world today. Many interventions have been made under the veil of humanitarian reasons, such as the US intervention in Iraq in 1990. The main responsibilities of the UN Charter are keeping peace and security, respect for sovereignty, non-intervention, and human rights. If country A violates the human rights of country B's citizens in her country, then country A has breached article 55. However, if country A has intervened in country B, then she has breached article 2 (4) of the UN Charter or perhaps article 2 (7) by interfering in country B's internal affairs. To know if humanitarian intervention is permitted or prohibited under the UN Charter, it might first of all be important to explain certain concepts briefly – the concepts of sovereignty, non-intervention, and human rights. Article 55 of the UN states, specifically, that the United Nation Article 55 of the UN states, specifically, that the United Nation shall increase and spread the respect for human rights in all nations, and ensure primary freedom for them. The second one is Article 56, which states that all members should make promises to help the UN organization to achieve the goal of Article 55.^{xxii}

MEANING OF R2P

The Responsibility to Protect - known as R2P - refers to the obligation of states toward their populations and toward all populations at risk of genocide and other mass atrocity crimes. R2P stipulates

Pillar One: Every state has the Responsibility to Protect its populations from four mass atrocity crimes: genocide, war crimes, crimes against humanity and ethnic cleansing.

Pillar Two: The wider international community has the responsibility to encourage and assist individual states in meeting that responsibility.

Pillar Three: If a state is manifestly failing to protect its populations, the international community must be prepared to take appropriate collective action, in a timely and decisive manner and in accordance with the UN Charter.

These principles originated in a 2001 report of the International Commission on Intervention and State Sovereignty and were endorsed by the United Nations General Assembly in the 2005 World Summit Outcome Document paragraphs 138, 139 and 140.

In January 2009, the UN Secretary-General published a report on executing the Responsibility to Protect. Following this, the first General Assembly discussion on the Responsibility to Protect was held in July 2009. At this debate UN Member States reaffirmed the 2005 commitment and the General Assembly passed a consensus resolution (A/RES/63/308) taking note of the Secretary-General's report.

The Secretary-General has since released annual reports in advance of the UN General Assembly Informal Interactive Dialogue on the Responsibility to Protect. During June 2018 the General Assembly held its first debate on the Responsibility to Protect since 2009..

Thus it can be said that in today's era sovereignty is a major issue which states are dealing. Although UN charter plays an important role in reaffirming faith in the fundamental freedoms but member states do not follow the principles settled by UN Charter. Article 2(4) says to refrain from use of force and to maintain peace. But sometimes it becomes important to protect the rights of people for which humanitarian intervention takes place. But it can be seen that many times there is no legal basis of such intervention and states do not follow the principles of responsibility to protect. Another issue is that the working of United Nations Security Council is not impartial and it is not going to intervene in the internal dispute of the state which is one of the area of concern.

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ⁱⁱⁱ The International Committee of the Red Cross (ICRC) (2002) Available at https://www.icrc.org/en/doc/assets/files/other/icrc_002_0703.pdf

^{iv} Origin and Development of IHL, 2016 Available at https://www.researchgate.net/publication/292145433_Origin_and_Development_of_IHL

^v Tripathi ; T.P. An Introduction to the Study of Human Rights(Allahabad Law Agency Publications) 2008, Pg. No.441

^{vi} Ibid pg 442

^{vii} Supra note 5 pg 42

^{viii} Oppenheim (1952) ; L. Oppenheim, International Law: A Treatise (2nd edn, 1912), at 78; L. Oppenheim, International Law: A Treatise, edited by H. Lauterpacht (7th edn, 1952), at 227

^{ix} J.L. Kunz, 'The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision', 45 AJIL (1951) 37, at 59

^x Alexander; Amanda A Short History of International Humanitarian Law The European Journal of International Law Vol. 26 Available at https://oup.silverchaircdn.com/oup/backfile/Content_public/Journal/ejil/26/1/10.1093/ejil/chv002/3/chv002.pdf?Expires=2147483

^{xi} The UN Charter article 2(4): All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

^{xii} Article 51 of UN Charter "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

^{xiii} International Committee of The Red Cross, jus ad bellum and jus in bello 29 OCTOBER 2010 **Available at** <https://www.icrc.org/en/document/jus-ad-bellum-jus-in-bello>

^{xiv} McMahon; Jeff , Morality, Law, and the Relation Between Jus ad Bellum and Jus in Bello pg.46 Available at <http://jeffersonmcmahan.com/wp-content/uploads/2012/11/Morality-Law-and-the-Relation-Between-Jus-ad-Bellum-and-Jus-in-Bello.pdf>

^{xv} Basic principles of IHL available at <https://www.diakonia.se/en/ihl/the-law/international-humanitarian-law-1/introduction-to-ihl/principles-of-international-law/>

^{xvi} Attacking persons who are recognized as hors de combat is prohibited. A person hors de combat is:

[Asian Journal of Multidisciplinary Research & Review \(AJMRR\)](#)

ISSN 2582 8088

Volume 2 Issue 2 [April - May 2021]

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- (a) anyone who is in the power of an adverse party;
- (b) anyone who is defenseless because of unconsciousness, shipwreck, wounds or sickness; or
- (c) anyone who clearly expresses an intention to surrender;

provided he or she abstains from any hostile act and does not attempt to escape.

See common article 3 of Geneva Convention

^{xvii} The principle of proportionality in attack is codified in Article 51(5)(b) of Additional Protocol

^{xviii} Article 48 Protocol I:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives. (Principle of proportionality)

^{xix} The Basics of International Humanitarian Law Available at
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<https://www.lawteacher.net/free-law-essays/military-law/the-legality-of-military-humanitarian-intervention.php>