UNIT 17 HUMANITARIAN LAW AND HUMAN RIGHTS

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17.0 OBJECTIVES

In this unit you will read about International Humanitarian law and how is it similar and different from Human Rights law in theory and practice. After going through this unit you should be able to understand:

- meaning and purpose of International Humanitarian Law;
- various conferences and conventions related to Humanitarian law; and
- relationship between International Humanitarian Law and Human Rights Law.

17.1 INTRODUCTION

You have read that universal Declaration of Human Rights and various covenants and treaties like International covenant on Civil and Political Rights deal with human rights of individuals and groups. In addition to these, the international community also recognizes certain principles of protection of minimum human values and norms even during armed conflicts. This acceptance in a codified manner is known as humanitarian law. In simple words, international humanitarian law can be defined as the subject of human rights law applicable in times of armed conflicts both among states or within a state. It places obligations on governments and on other parties to a conflict in relation to victims of that conflict.

17.2 ORIGIN OF HUMANITARIAN LAW

In a way origin of humanitarian law can be traced to ancient times. For example, long back, in India, the laws of armed conflicts were founded on the principle of
humanity. The ancient Hindu texts clearly recognized the distinction between military targets, which could be attacked, and non-military targets, which could not be attacked. In ancient India warfare was largely confined to combatants. As a result, the targets of attack were only the armed forces. Neither cities nor towns were allowed to be destroyed during war. Humanitarian considerations are also a powerful motivating force behind the codification of modern International Humanitarian Law.

In modern period the idea of international action to limit the suffering of the sick and wounded in wars was born in the mind of Jean Henri Dunant, a young Swiss citizen, who witnessed the battle of Solferino that was fought in 1859 between French and Austrian armies. Henri Dunant found himself, more or less by accident, among thousands of French and Austrian wounded soldiers after the battle. He took initiative with the help of other volunteers to ease the sufferings of wounded and sick soldiers. He recorded his war memories and experiences in the book “A Memory of Solferino” published in 1862, in which he suggested that national societies should be created to care for the sick and wounded irrespective of their race, nationality or religion. He also proposed that States should make a treaty recognizing the work of these organizations and guaranteeing better treatment for the wounded. With four friends, Henri Dunant then set up the International Committee for Aid to the Wounded (soon to be renamed the International Committee of the Red Cross). Dunant’s ideas met a wide response. In several countries national societies were founded and at a diplomatic conference in Geneva in 1864 the delegates of 16 European nations adopted the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. This document, the First Geneva Convention, enshrined the principles of universality and tolerance in matters of race, nationality and religion. The emblem, a red cross on a white field, was adopted as the distinguishing mark of military medical personnel. In Islamic countries, the emblem is a red crescent on a white field.

The Convention formally laid the foundations of international humanitarian law. The traditional law of war, from which the modern international humanitarian law is derived was based upon these fundamental principles: (1) that even during the war the conduct of the belligerents is subject to the commands of international law, the violation of which is not justified even by military necessity; (2) that unnecessary suffering and superfluous injury must be avoided; (3) that a distinction must be maintained between belligerent and neutral states, between combatants and non-combatants, and between military and non-military targets; and (4) that laws of humanity and the “dictates of the public conscience” also apply in cases not regulated by the conventional law.

17.3 HAGUE PEACE CONFERENCES AND GENEVA CONVENTIONS

The humanitarian principles are largely articulated in the Hague Peace Conferences of 1899 and 1907 and the four Geneva Conventions of 1949 and its three Additional Protocols. The modern laws of war developed mainly by the Hague Peace Conferences of 1899 and 1907 and the four Geneva Conventions of 1949 and its two Additional Protocols of 1977. India is a party to the four Geneva Conventions of 1949 and has incorporated it into its municipal law.
Although India did not sign the two Additional Protocols, its non formal adoption of the Additional Protocols has not hindered the effective implementation of international humanitarian law in India. In December 2005, a Third Protocol additional to the Geneva Convention of 1949 has been added. The Third Protocol introduces a protective emblem called the red crystal alongside the red cross and red crescent emblems. The adoption of the red crystal reaffirms the determination of the International Red Cross and Red Crescent Movement to consolidate its universality and thereby to enhance its strength and credibility. AP III has come into force on 14 January 2007.

Geneva law deals with protection, namely protection of wounded and sick combatants, prisoners of war and to a limited extent persons belonging to the civilian population. The second branch of humanitarian law, Hague law, deals with means and methods of warfare. The Hague Peace Conferences of 1899 and especially 1907 are a major landmark in the history of law of war. The first Conference produced a Convention with Respect to Laws and Customs of War on Land, subsequently revised in 1907 and known in its new version as Hague Convention IV Respecting the Laws and Customs of War on Land, which became the main source of the law of the land warfare during World Wars I & II. This Convention was based on instructions issued by the United States to its armed forces during the American Civil War prepared from a draft by Francis Leiber. The Second Hague Peace Conference produced in addition to Convention IV, ten other Conventions dealing with opening of hostilities, neutrality and various aspects of war at sea. Certain weapons are prohibited like dum-dum bullets, gas, bacteriological weapons, anti-personal landmines, etc. Following the experiences of World War I, the law of war was further developed by the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare; two Geneva Conventions of 1929, one on the Treatment of Prisoners of War and the other for the Amelioration of the Condition of the Wounded and Sick Armies in the Field; and the 1936 London Protocol Relating to the Use of Submarines against the Merchant Vessels. The lessons of World War II brought about reaffirmation and expansion of the 1929 Geneva Conventions by four Geneva Conventions of 1949, namely, (1) Geneva Convention I deals with the wounded and sick members of the armed forces in the field; (2) Geneva Convention II deals with the wounded, sick and shipwrecked, members of armed forces at sea; (3) Geneva Convention III deals with the treatment of Prisoners of War and (4) Geneva Convention IV deals with the Protection of Civilians in times of War. The Geneva Conventions of 1949 are a legacy of World War II. Starting from the tragic experience gained in that conflict, they greatly improve the legal protection of war victims, in particular of civilians in the power of the enemy. Today, practically all States are party to the 1949 Geneva Conventions. Accepted as they are by the whole community of nations, they have become truly universal law.

These Conventions have been virtually ratified by all States. In 1977, four Geneva Conventions were supplemented by two Additional Protocols. Additional Protocol I, covers the situation arising out of the international armed conflicts, whereas Additional Protocol II deals with the situation arising out of non-international armed conflicts. With respect to methods of warfare the Additional Protocols prescribe for some additional rules, which form parts of international customary law. Most important is the prohibition to attack the civilian population as such. By virtue of Additional Protocol I indiscriminate attacks are outlawed, i.e. attacks
which are of a nature to strike military objectives and civilians or civilian objects without distinction.

International Humanitarian Law (IHL) is applicable largely in two types of armed conflict, whether international or non international.

17.3.1 International Armed Conflicts

International conflicts are wars involving two or more states. These are conflicts between two or more opposing states. The word “international” is used to describe the parties fighting each other.

17.3.2 Non-international Armed Conflicts

Non-international armed conflicts are those in which government forces are fighting against armed insurgents, or rebel groups are fighting among themselves. These are conflicts opposing a state and an organized armed group or two or more such groups. The “non-international” here is not used as a geographic term. Although these tend to be internal conflicts, they can easily have a cross-border dimension.

There are two slightly different legal regimes that regulate such conflicts, one based on Article 3 common to the 1949 Geneva Conventions and one based on the 1977 Additional Protocol II thereto.

Additional Protocol II applies to:

conflicts … between [a state’s] armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” are expressly excluded from the scope of the Protocol.

Although there is no precise formula or checklist for determining the existence of a non-international armed conflict the following elements are relevant:

- parties: a state fighting an organized armed group or two or more such groups fighting among themselves;
- control of territory by the organized armed group is required for Additional Protocol II to apply. This is not necessary under common Article 3 of the Geneva Conventions. In any event it is a significant indicator of the level of organization of an armed group;
- a certain level of violence and intensity of fighting;
- resort to military means;
- protracted violence.

It is by no means straightforward factually to determine if a situation is “unrest” or isolated or sporadic act of violence or a conflict. Moreover, the determination and acceptance of the existence of a non-international conflict is an extremely sensitive political issue.
In general international humanitarian law is to be applied in all situations of armed conflict, during which principles of humanity are to be safeguarded in all cases. They hold further that non combatants and persons put out of action by injury, sickness, capture or other causes must be respected and protected and that person suffering from the effects of war must be aided and cared for without discrimination. International humanitarian law prohibits the following acts in all situations:

- murder;
- torture;
- corporal punishment;
- mutilation;
- outrages upon personal dignity;
- hostage-taking;
- collective punishment;
- executions without regular trial;
- cruel or degrading treatment.

The same instruments also prohibit reprisals against the wounded, sick or shipwrecked, medical personnel and services, prisoners of war, civilians, civilians and cultural objects, the natural environments, and works containing dangerous forces. They establish that no one may renounce, or be forced to renounce, protection under humanitarian law. Finally, they provide that protected persons must at all times have resort to a protecting power (a neutral State safeguarding their interests), the International Committee of the Red Cross, or any other impartial humanitarian organization.

17.4 THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND INTERNATIONAL HUMANITARIAN LAW

How does the International Committee of the Red Cross (ICRC) carry out the mandate given to it by states to assist and protect persons affected by armed conflict? The ICRC is also the promoter and guardian of international humanitarian law, the body of rules applicable in armed conflict which, protect those not or no longer taking active part in hostilities and regulate permissible means and methods of warfare.

- Pre-emptively, by disseminating international humanitarian law to armed forces in time of peace.
- In the heat of conflict by:
  - obtaining access to persons in need;
  - making interventions to parties to the conflict (states and organized armed groups) with a view to putting an end to violations;
  - dealing with the consequences of such violations, by the provision of emergency assistance: including water, shelter, food and medical care;
  - re-establishing family links;
  - visiting persons detained in relation to the conflict.
The ICRC also makes a determination of whether a particular situation amounts to an armed conflict. This "qualification" of a situation, as we call it, is necessary both to determine whether international humanitarian law is applicable and for the ICRC to commence its traditional activities.

Check Your Progress 1

1) Who founded the International Committee of Red Cross? When was it founded?

2) Trace the genesis of Modern International Humanitarian Law.

3) Briefly describe the purposes of Hague conventions and Geneva Conventions.

17.5 HUMANITARIAN LAW AND HUMAN RIGHTS

You have already read that Human rights can be defined as fundamental and inherent rights essential to all human beings. These are:

- civil and political rights;
- economic, social and cultural rights;
- solidarity rights.

Civil and political rights can be exemplified as the right to life, prohibition of torture and slavery, right to freedom, right to privacy, freedom of opinion and expression, etc. These rights have certain elements in common, namely

- the State's freedom of action is limited as the State is obliged to respect such rights;
they are clearly individual rights;

all States have the responsibility to respect these rights, irrespective of the political system and level of development;

they are justiciable, which means that a court or a tribunal is able to assess, if a violation has occurred.

The following rights are examples of economic, social and cultural rights: the right to work, the right to education, the right to health, the right to social welfare, the right to food, the right to housing, etc. They have partly some elements in common, namely:

- the State must try to achieve the full realization of these rights;
- they are clearly individual rights;
- the possibility to respect these rights is due to the level of development and the economic wealth of the country;
- the rights are not justiciable.

Examples of solidarity rights are the right to peace, the right to environment and the right to development. It is the latter right which in particular has been given attention, and is the only solidarity right, which has been expressed in an international instrument, namely the UN Declaration on the Right to Development. Solidarity rights are of another character in so far that they are collective rights. It is no longer the individual human being, who is the beneficiary, but the people at large. Any person will, of course, benefit from the right to development as a member of the collective, but primarily it is not directed to the individual. Some States have been negative to the right to development as a human right and have argued that there is no need of a collective right to development. The same result will be achieved by respecting economic, social and cultural rights, which can be seen as the individual correspondence with the collective right to development.

17.5.1 Interface between International Humanitarian Law and Human Rights Law

While international humanitarian law only applies in times of armed conflict, human rights law applies at all times; in times of peace and in times of armed conflict. The concurrent application of these two bodies of law has been expressly recognized by various international tribunals, including the International Court of Justice, the UN Human Rights Committee, the European Court of Human Rights, the Inter-American Commission on Human Rights and Inter American Court of Human Rights and, of course, numerous national courts.

The goals of human rights law and humanitarian law overlap. Both humanitarian law and human rights are designed to restrict the power of State authorities, with a view to safeguarding the fundamental rights of the individual. Human rights treaties (supported by customary law) achieve this objective in a comprehensive way insofar as they cover almost all aspects of life. Their rules must be applied to all persons and be respected in all circumstances (although a number of rights may be suspended in time of emergency). Humanitarian law, however, applies only in time of armed conflict. Its provisions are formulated in such a way as to take into account the special circumstances of warfare. They may not be abrogated.
under any circumstances. Usually they apply “across the front line”, i.e. the armed forces have to respect humanitarian law in their dealings with the enemy (and not in relation with their own nationals). In internal armed conflicts, however, human rights law and international humanitarian law apply concurrently.

In other words, humanitarian law is a specialized body of human rights law fine tuned for times of armed conflict. Some of its provisions have no equivalent in human rights law, in particular the rules on the conduct of hostilities or on the use of weapons. Conversely, human rights law covers several domains which are outside the scope of humanitarian law (e.g. the political rights of individual persons). Despite their overlapping, human rights law and humanitarian law remain distinct branches of public international law.

The scope of application of the two bodies of law is slightly different. International humanitarian law binds all actors in armed conflicts: states, organized armed groups and individuals. Human rights law, on the other hand, lays down rules that regulate states in their relations with individuals. While there is a growing body of opinion according to which organized armed groups – particularly if they exercise government-like functions – must also respect human rights, the issue remains unsettled. Although individuals do not have specific obligations under human rights law, the most serious violations of human rights, such as genocide, crimes against humanity and torture, are criminalised by international law and are often crimes under national criminal law.

The essence of some of the rules of international humanitarian law and human rights law is similar. For example, both bodies of law aim to protect human life, prohibit torture or cruel treatment, prescribe basic rights for persons facing criminal proceedings and prohibit discrimination. However, care must be taken to ensure the proper articulation of the relationship between the two sets of rules.

There may be certain matters for which international humanitarian law lays down a “self-contained” set of rules. In these cases the provisions of international humanitarian law apply to the exclusion of human rights. A case in point is the rules relating to prisoners of war found in the Third Geneva Convention which, with regard to most matters, is a self-contained system. For example, this means that prisoners of war can be deprived of their liberty until the end of hostilities and a right to challenge the deprivation of liberty cannot be inferred from human rights law.

On the other hand, international humanitarian law can be vague or silent on particular questions, in which case it is proper to turn to human rights law for guidance to interpret the rules in question. This is most notable in relation to fair trial provisions, where international humanitarian law only contains general provisions, like a reference to entitlement to “judicial guarantees recognized as indispensable by civilized peoples”. The precise contents of such guarantees can be inferred from human rights law. Human rights law is also an important source of rules and protection in non-international armed conflicts, where the international humanitarian law treaty rules are few. In recent years we have been seeing the emergence of extremely interesting and important case law from human rights and national courts as they grapple with this complex relationship.

Human rights and humanitarian law are mostly seen as two different disciplines of public international law, as if there is no or only little connection between
them. However, the borderlines between the two branches are artificial. The events in former Yugoslavia, in Rwanda and in Chechnya in the 1990s clearly demonstrate the difficulty to distinguish between human rights and humanitarian law. To the public at large only human rights violations takes place, while particular knowledge is a prerequisite to decide, which atrocities meant a violation of human rights and which a violation of humanitarian law.

17.5.2 Similarities between Human Rights Law and Humanitarian Law

There are several examples of the close connection between the two branches. The Statute of the newly established International Criminal Court deals with breaches of both human rights law and of humanitarian law. The act of genocide is sometimes considered as a violation of human rights, sometimes as a violation of humanitarian law. The 1989 Convention on the Rights of the Child is not only a human rights instrument. There are important provisions, which belong to humanitarian law as well. When the age limit for soldiers (combatants) should be raised, this was achieved by an Optional Protocol to the Convention on the Rights of the Child, not by amending the corresponding provision in Additional Protocol I to the 1949 Geneva Conventions. Torture is prohibited under the UDHR, ICCPR and also by 1949 Geneva Conventions and the Additional Protocols. There are a number of rules in Additional Protocol I to the Geneva Conventions, which clearly are influenced, if not copied, after human rights provisions, in particular article 75 on “Fundamental Guarantees”. However, in most situations human rights and humanitarian law are still seen as separate regimes. Such a conclusion must be drawn from the way the branches are developed, promoted and discussed on the intergovernmental and governmental level, by NGOs and academics.

It is obvious that human rights and humanitarian law both deal with individual rights or individual protection. There are, however, similarities also in substance. For instance, according to the 1949 Geneva Convention on Prisoners of War the protected persons must be treated humanely, he/she must be given a decent shelter, food, medical care, torture is prohibited, etc. The same rules can be found in several human rights instruments, for instance, in the Standard Minimum Rules for the Treatment of Prisoners, in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. It lies close at hand to look upon the Prisoner of War Convention as a human rights instrument, although it is only applicable under certain circumstances. And the Geneva Convention relating to wounded and sick combatants are treaties on medical ethics, a subject which otherwise is seen as part of human rights. The Civilian Convention comprises mostly rules, which have a correspondence in human rights law. It is a close relation between civil and political rights and Geneva Law.

Hague law on the other hand does not provide individual protection. When it is prohibited to attack the civilian population, and when indiscriminate attacks are outlawed and when weapons that cause unnecessary suffering cannot be used, it is the civilian population and the combatants at large, who are the beneficiary. Hague Law encompasses collective rights, corresponding with individual civil and political rights, in particular the right to life and the prohibition of torture.
Human rights implementing mechanisms are complex and, contrary to IHL, include regional systems. Supervisory bodies, such as the Human Rights Council, are either based on the UN Charter or provided for in specific treaties. The Human Rights Commission and its Sub-commissions have developed a mechanism of special rapporteurs and working groups, whose task is to monitor and report on human rights situations either by country or by topic. Seven of the main human rights treaties also provide for the establishment of committees of independent experts charged with monitoring their implementation. The seven universal human rights treaties are as follows:

1) **International Convention on the Elimination of All Forms of Racial Discrimination** - 1965
2) **International Covenant on Civil and Political Rights** - 1966
3) **International Covenant on Economic, Social and Cultural Rights** - 1966
4) **Convention on the Elimination of All Forms of Discrimination Against Women** - 1979
5) **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** - 1984
6) **Convention on the Rights of the Child** - 1989
7) **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families** - 1990

The Office of the UN High Commissioner for Human Rights (UNHCHR) plays a key part in the overall protection and promotion of human rights. Its role is to enhance the effectiveness of the UN human rights machinery and to build up national, regional and international capacity to promote and protect human rights and to disseminate human rights texts and information.

**Check Your Progress 2**

1) What are the areas of concern for Humanitarian law and Human Rights law?

2) Describe the similarities and differences between purposes of Humanitarian Law and Human Rights Law.
17.6 LET US SUM UP

In this unit we have read that both Human Rights Law and International Humanitarian Law are basic humanitarian concerns for dignified human life of individuals.

Historically the main difference between traditional human rights law and humanitarian law lies in the fact that human rights were applicable in time of peace, while humanitarian law was applicable in time of war. This distinction is no longer relevant: important parts of human rights law are always applicable, and as stated above, important parts of humanitarian law is applicable under all circumstances without it being necessary to classify the armed conflict at stake.

The duty to implement IHL and human rights lies first and foremost with States. Humanitarian law obliges States to take practical and legal measures, such as enacting penal legislation and disseminating IHL. Similarly, States are bound by human rights law to accord national law with international obligations. IHL provides for several specific mechanisms that help its implementation. Notably, States are required to ensure respect also by other States. Provision is also made for an enquiry procedure, a Protecting Power mechanism, and the International Fact-Finding Commission. In addition, the ICRC is given a key role in ensuring respect for the humanitarian rules.

17.7 ANSWERS TO CHECK YOUR PROGRESS

EXERCISES

Check Your Progress 1

1) Henri Dunant along with four friends in 1862 after Battle of Solferino that took place in 1859.

2) Origin of modern International Humanitarian law is linked to the Hague Peace conferences of 1899 and 1907 and Geneva Conventions of 1949.

3) Write on the basis of section 17.2

Check Your Progress 2

1) International Human law is concerned with situations of armed conflicts. Human Rights law is applicable to all individuals at all times.

2) Write on the basis of sub-section 17.4.2