

## **HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW AS IT AFFECTS ARMED CONFLICTS SINCE 1945: AN APPRAISAL**

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Although the idea of human rights has been as old as man depending on the culture and traditions of different peoples of the world, however it was the colossal damages of the World War II that made it imperative to institute and affect these inalienable rights and make these rights universal. While it can be said that to a very large extent, the victorious powers through the United Nations achieved their aims of making the basic rights of human beings have universal status. In practice, the purported universality has not yet been achieved. Many peoples of the world still view the universal declaration of human rights as the views and interpretations of the West European countries and therefore they may not be applicable outside Europe. The paper argues that the Universal Declaration of Human Rights may not perfectly represent the views of all the people of the world owing to differences in culture, sex, religion, to mention but a few. Thus it is not a binding rule to all the countries of the world. Nevertheless, it has become a point of reference whenever there is violation of human rights in any part of the world despite the culture and tradition of the people concerned. The paper concludes that despite its non-binding status, the admittance of its existence by states and enshrining human rights issues in their constitutions, the universal declaration of human rights does not only exist but in practice, makes humanitarian human rights law superior to national law and even as it affects armed conflict.

*Key Words:* Human rights, Humanitarian Law, Armed Conflicts, Africa, Europe

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### **Introduction**

International humanitarian law and international human rights law are two distinct but complementary bodies of law. Both seek to protect the individual from arbitrary action and abuse. Human rights are inherent to the human being and protect the individual at all times, in war and peace. International humanitarian law for the most part applies in situations of armed conflict. Thus, in times of armed conflict international human right law and international humanitarian law both apply in complementary manner (Oxam 2010).

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It is difficult to define the term human rights and to understand how they work in practice is more difficult. But in spite of the difficulties associated with human rights definition and its practice; they are rights all persons held by virtue of human condition. They are thus not dependent upon grant or permission of the state and they cannot be withdrawn by fiat of the state. They are rights understood to be rights inherent in human nature and equal for all human beings and therefore, it is universal in character. Elsewhere, it has also been called inalienable rights.

As they relate to the most essential needs and basic values or capabilities of human beings everywhere, they are additionally perceived as fundamental (Sora 2010). While laws under different national legal systems may vary, the human rights to which every person is entitled are rights in international law. For example, the human right to a fair trial is the same for a person who lives under a legal system of common law, civil law or Roman law and other kinds of laws. Human beings despite differences in sex, race, religion and culture, are the same everywhere and therefore have and are protected by the same rights.

However, the differences in culture, sex, race, and religion have not only posed serious threat to these rights but have made the purported universality impossible. In practice what one culture promotes may be diametrically opposed by another culture and what is seen as human rights in one society maybe unknown or unrecognized in another culture. But the centripetal forces of globalization moving the world today have made remarkable attempt in coercing the different peoples of the world to see things largely from one perspective, hence the attempt to declare human rights as universal. But on the contrary, this centripetal force which globalization is inevitably part of its component has been widely viewed, at least by its critics as threats to human rights (Goodhart 2003).

Human world is cruel, full of turmoil, trouble and uncertainty. The only hope of upholding human rights and dignity lies in the proclamation of this right and dignity both nationally and internationally, so that a foreigner has to be protected against his host, the same way as nationals of that country are also entitled to the same protection against their own state (Dada 2012).

The massive and systematic human rights abuses committed during World War 11, including the Jewish holocaust and other related abuses, helped to accentuate the issues in human rights (Basse et al 2013). Reminiscing at the wreck of the World War 11, the world nations especially the countries that gained ascendancy in the war became determined to create an international system of laws and treaties to at least minimize colossal damages of war if total prevention of war is impossible. This was so because the war was waged on an unprecedented scale, the task had to be faced of developing and adapting the humanitarian elements of the international law in the light of the experience gained (ICRC 2009).

The very first veritable instrument for actualizing this noble objective was the United Nations and to a remarkable extent, other regional bodies. In particular, the inclusion of crimes against humanity in the Charter of the International Military Tribunal, which paved the way for the subsequent Nuremberg trials signaled the need to hold the perpetrators of atrocities internationally accountable for their actions irrespective of any domestic provisions to the contrary or the silence of domestic laws (Viotti & Kauppi 2009). At the same time, the drafters of the United Nations Charter sought to highlight the interrelationship between

war prevention and fundamental human rights. Two key ethical considerations underscored the main tenets of the Universal Declaration of Human Rights UDHR: a commitment to the inherent dignity of every human being and a commitment to nondiscrimination.

### **Human Rights and the United Nations**

Although the attempt to declare the Human rights of humans as universal is new, human rights of individuals are not new depending on the culture of the people. For instance, Human rights are not new in Britain as they are as old as Magna Carta known today as the first written Rights Charter in the world. So also, different peoples and cultures of the world have at one time or the other, attempted and/or made certain pronouncement on the rights of her citizens. Meanwhile due to atrocities of the Second World War, there was a need to declare the basic rights of individuals as universal.

Thus, the UN Commission on Human Rights under the chairmanship of Mrs. Eleanor Roosevelt<sup>1</sup> was charged with the responsibility of drafting a universal declaration of human rights. After frequent clashes between champions of the Western and Soviet concepts of fundamental human freedom, the Commission submitted its report to the General Assembly of the United Nations for approval. The Assembly declared it as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction. This approval was made on December 10, 1948, by a vote of 48 to 0, with six nations of the Soviet bloc, Saudi Arabia, and the Union of South Africa abstaining (Palmer & Perkins 2001).

The UDHR comprises 30 articles that contain a comprehensive listing of key civil, political, economic, social, and cultural rights. Articles 3 through 21 outline civil and political rights, which include the right against torture, the right to an effective remedy for human rights violations, and the right to take part in government. Articles 22 through 27 detail economic, social, and cultural rights, such as the right to work, the right to form and to join trade unions, and the right to participate freely in the cultural life of the community (United Nations 2007).

However, the declaration is merely a statement of principles, not a legally binding instrument (Palmer & Perkins 2001). The nonbinding status of UDHR would appear to be one of its major shortcomings. But authoritarian states, which usually sought to protect themselves against what they considered interference in their internal affairs, approved of this feature of the declaration, and even some democratic countries initially worried about the potentially intrusive nature of the obligations that a legally binding document would impose.

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<sup>1</sup> President Harry S. Truman appointed Eleanor Roosevelt as a delegate to the United Nations General Assembly in 1945 and she later became the Chairman United Nations Commission on Human Rights

It can therefore be argued that its nonbinding status is one of the major advantages it has. Its flexibility has offered ample room for new strategies to promote human rights and has become a factor providing opportunity for the development of numerous legislative initiatives in international human rights law. These developments would make someone run away with the idea that, despite its nonbinding status, its provisions has achieved a juridical status akin to that of norms of customary international law.

Some still believe, it would appear, that despite the fact that the Universal Declaration of Human Rights was under the auspices of the UN, it was still the idea of the West. As a result, Universalists and cultural relativists have clashed over the validity and applicability of human rights outside the west. Some argue that the Western Political Philosophy upon which the Universal Declaration of Human Rights is based provides only one particular interpretation of human rights, and that these Western notions may not be successfully applicable to non-western areas due to ideological and cultural differences or religious traditions (Goodhart 2003).

The differences of opinions notwithstanding, one factor contributing to the UDHR's moral authority is precisely that it transcends positive international law. Indeed, it enunciates general moral principles applicable to everyone, thus universalizing the notion of a fundamental baseline of human well-being. Despite its shortcomings, the UDHR was and remains the key reference point for international human rights discourse. For instance, during the obnoxious apartheid era in South Africa, several organs of the United Nations based their condemnation of the racial discrimination on Universal Declaration of Human Rights.

Again, activists throughout the Eastern Bloc seized on these provisions to demand greater political freedom, and established local committees to fight for government compliance (Whiteclay 1999). Even when some human rights monitors were arrested by Soviet authorities in early 1977, Helsinki Watch for-instance was organized to campaign internationally on behalf of the imprisoned monitors in the Soviet Union and Eastern Europe, spearheading efforts to free such leading figures as Yuri Orlov in the Soviet Union, Vaclav Havel in Czechoslovakia, and Adam Michnik in Poland. The group lobbied Western and neutral governments to pressure Eastern bloc signatories to live up to their human rights commitments (Whiteclay 1999).

Even during outright war, the law of war grants fundamental protection to persons and objects other than combatants and military objective. The fundamental protection granted applies to all persons and objects in the power of the belligerent party or the neutral state. It corresponds to basic humanitarian principle and human rights (Mulinen 1987). In fact, UDHR is responsible for making the notion of human rights nearly universally accepted.

The concept of human rights has proven to be a highly dynamic one. Be it in the constant development of certain aspects of already existing rights, the birth of new ones, or the progressive improvement of the protection mechanism in the human rights field (Sora 2010). Again because the Charter of the United Nations is vague and / or ambiguous on issue of human rights, there was need for a covenant that would give a clear meaning to those rights in the UDHR. More so, because of the divided opinion between the democratic

nations and the communist nations on what constitute human rights, the UDHR failed to garner universal support it deserved. To solve the problem; two covenants to take into account the arguments of the two parties and divergent opinions and to find a common ground were adopted.

Sequel to the above, the same day the General Assembly adopted the Universal Declaration of Human Rights, it requested as a matter of priority, a covenant of human rights and draft measure of implementation. The commission completed preparation of the two drafts at its ninth and tenth sessions, in 1953 and 1954. But it was not until 1966 that the General Assembly adopted the covenants (United Nations 2007).

The two covenants are the International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR). These two covenants along with the ensuring human rights treaties and treaty bodies that have been adopted amplified the scope of states existing human rights obligations and consolidated the International human rights regime.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) opened for signature on December 19, 1966 in New York, and came into force on January 3, 1976. The main purpose of the CESCR was to further describe and clarify rights declared in the Universal Declaration of Human Rights. Many of the abstract rights such as self-fulfillment and legal rights were meaningless when one does not possess basic and more concrete rights.

The CESCR protects these rights; they can be grouped into the following categories: workers' rights, family rights, rights to health and to an adequate standard of living, educational rights, and cultural rights (United Nations 2007). Workers' rights entail the freedom to choose one's job, fair wages, and proper working conditions. Family rights include the protection of the family as a fundamental unit of society, paid leave for working mothers, and protection of children from exploitation. Rights to health and to an adequate standard of living include the fundamental right to be free from hunger, the right to proper housing and standard of living. Member states that signed the covenant were required to guarantee the stated rights without discrimination in any form, namely race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth and other status. This covenant is monitored by the Committee on Economic, Social and Cultural Rights (United Nations 2007).

The International Covenant on Civil and Political Rights (CCPR) first opened for signatures on December 19, 1966, and came into force on March 23, 1976. Like the CESCR, this covenant also described and clarified rights stated in the UDHR, and also dealt with new rights. The rights protected by the CCPR can be categorized as the rights protecting sanctity of life, rights protecting accused persons and criminals, mobility rights, and civil rights (United Nations 2007). The rights protecting sanctity of life include the right to be free from the death sentence except for very serious crimes and the right not to be tortured. Rights protecting accused persons and criminals include the right not to be subjected to unfair arrest or detention and the right to be presumed innocent until proven guilty. Mobility rights protect a person's freedom of movement, and the right to leave any

country and the right not to be unfairly denied entrance to one's own nation. Civil rights include the freedom of thought and expression.

Any country bound by the International Covenant on Civil and Political Rights is obliged to protect its inhabitants from having their rights violated. The covenant applies to every human living in a state under the covenant regardless of age, gender or race. The Human Rights Committee was established in 1977 to monitor the state parties and their actions pertaining to the covenant (United Nations 2007).

The preamble of articles 1, 3 and 5 of the two covenants are almost identical. They state the obligation of states under United Nations to promote human rights; remind the individual of his responsibility to strive for the promotion and observation of those rights, and recognized that in accordance with UDHR, the ideal of human beings enjoying civil and political freedom and freedom from fear and want can be achieved only if conditions are created where everyone will enjoy his or her civil and political rights, as well as economic and social rights. Article 5 prevent states from limiting rights already enjoyed within their territories on the ground that such rights are not recognized, or recognized to a lesser extent, in the covenants. Article 28 provides for the establishment of a human rights committee responsible for supervising implementation of the rights set out in the covenant (United Nations 2007).

### **International Humanitarian Law as it Affect Armed Conflicts**

While both international human rights law and the national law effectively address the issue of human rights, when these rights are violated, the law that should apply is still blurring and remains a conundrum to students of international human rights law. The methodological problems that exist in international humanitarian law also exist in international human rights. For instance, it has been argued that the violation of International Humanitarian Law was not due to inadequacy of its rule. But rather from unwillingness to respect the rules, from insufficient means to enforce them, from uncertainties as to their application in some circumstances and a lack of awareness of them on the part of political leaders, commanders, combatants and the general public (Henckaerts 2005).

It is often said that injustices offend the human conscience and cry out for corrective action. But the question remains, is there an agreed common cause for external action on behalf of human rights or does sovereignty legally preclude intervention in domestic affairs? Although it is widely acknowledged that human rights are inalienable. Yet human condition is beset by wide spread abuses and related inter-communal strife, political oppressive regimes, and deeply set prejudices within and across different societies and culture (Viotti & Kauppi 2009). It has been stated that nowhere in the declaration was it mandated that a member state had the right to intervene in another country's affair to stop human right abuses; states sovereignty still ruled (Viotti & Kauppi 2009). Although this idea has been superseded by the Brahimi Report which led to the UN adopting in 2005 the principle of the 'Responsibility to Protect', the idea that states have a duty to safeguard their citizens from mass atrocities, and that international community has a duty to intervene if a state fails in this responsibility (Blair 2010).

But despite the all, and in consistent with its preamble, article 1 and 55 of UN Charter (1945), established the principle of universal respect for, and observance of human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion (Blair 2010). Again, by vote of the UN General Assembly, sovereign states acknowledged the legitimacy of human rights as universal rights (Blair 2010).

Although it is still an enigma, a matter of scholarly controversy on whether the national or the international law should gain ascendancy in times of human rights violation, available evidence would tend to suggest that the international human rights law is supreme. This is so because international or transnational actions in support of human rights often directly challenge or violate state sovereignty. For example, NATO's war against Serbia over Serbian's action in Kosovo clearly violated state sovereignty because Kosovo was recognized by most states as being a province of the Yugoslavian Republic (Blair 2010).

In-fact, trend in international human rights law in recent decades has been towards greater internal and external protections of individual human rights, as well as protection of minority groups (Quinn 1997). Many constitutions of newly independent states state that international law, treaties and accords have precedence over domestic laws, and if there in conflict with domestic law, international standard will prevail (Quinn 1997). For instance, Article 15.4 of the constitution of the Russian Federation, 1993 states that:

The community recognized principle and norms of the international law and international treaties of the Russian Federation shall be a component of its legal system. If an international treaty of the Russian Federation stipulates other rules than those stipulated by law, the rule of International treaty shall apply (Quinn 1997).

From the meeting of the Conference on Security and Cooperation in Europe CSCE on Human Dimensions of October 1991, it can be gleaned that when it comes to the issue of human rights violation, the international standard will prevail over the national law. The conference stated that "the commitment undertaken in the field of the human dimensions... are matters of direct and legitimate concern to all participating states and do not belong exclusively to the internal affairs of the state concerned" (Quinn 1997). In 1990, a Charter of Paris for New Europe CSCE document stated:

...human rights and fundamental freedoms are the birthright of all human beings, are inalienable and are guaranteed by law. Their protection and promotion is the first responsibility of government. Respect for them is an essential safeguard against an over-mighty state. Their observation and full exercise are the foundation of freedom, justice and peace (Quinn 1997).

Moreover, war crimes trials of individuals following the World War II under the international military tribunal at Nuremberg, Germany, set an enormously important precedent for the assertion of international jurisdiction over such cases. It is true that after the adjournment of the Nuremberg tribunal, states resumed first jurisdiction in such matters, but a precedent for international hearing of 'criminal cases' involving individuals had been set (Viotti & Kauppi 2009). For instance, the statute establishing the International

Criminal Tribunal for the former Yugoslavia (ICTY) was adopted by the UN Security Council in May, 1993. The tribunal was mandated to prosecute persons responsible for serious violation of basic international humanitarian and human rights laws. In May 1998, its jurisdiction was extended to take care of the events in Kosovo. Similarly, an International Criminal Tribunal (ICTR) was established in Tanzania to prosecute those suspected of committing atrocities and other serious human right violation during Hutu-Tutsi tribal warfare in 1994. In 1998 two persons including the former Prime Minister of Rwanda were given life sentence (Viotti & Kauppi 2009).

Article 1 (3) of the UN states that one of the purpose of the organization is to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion (Quinn 1997). The charter thus made human rights an international concern, rather than strictly domestic one and the subsequent half century of human right law evolution and state and international practice has been the history of internationalization of these concerns.

In spite of the altruistic posture of the UN on human rights, as has been demonstrated above, human rights issue is understandably a contentious subject. There is always a gap between the ideal and the real. Sanctions are selective. Once the perpetrator is not the target of the 'big powers,' both at the national and international levels, the person can go scot-free. It is still a mystery that even when the UN was aware of Nukunda's long record of human right abuses as the commanding officer of RED-Coma Soldiers who indiscriminately killed civilians, committed numerous rapes and carried wide spread looting in Kisangani in 2002. Despite condemnation of these crimes by the UN High Commissioner for Human rights, Mary Robinson, Nkunda nor other officers was investigated (Turner 2007). But that and its likes are not enough to assume that national law is supreme when it comes to issue of human right violation.

Again despite the abuse of human rights by some world leaders after World War 11, it was not until April 26, 2012, that former Liberian President, Charles Taylor became the first former Head of State since the Nuremberg trials of the Nazi leaders after World War 11 to face verdict before an international or hybrid international court on charges of serious crime committed in violation of international law (Human Rights Watch 2012).

International humanitarian law is quite ambiguous on those who actually would desire a separation or self-determination. For instance, while the provisions of article 3 seeks to apply the basic principles enshrined in the Geneva Conventions to non-international conflict, yet it falls short of the application of the whole corpus of international humanitarian law. While common article 3 is similar to the full range of provision contained in the Geneva Conventions in that it extends protection to those caught up in non-international conflicts regardless of the rebels' causes, this protection is less than that afforded in situations of international conflicts (Higgins 2004). Article 3 does not prevent the established government from punishing the rebels under municipal law, nor does it change their status in law. Those freedom fighters detained as prisoners must, under the provisions be treated 'humanely' but can still be punished and even put to death after a trial under municipal law (Higgins 2004).

International Humanitarian law limits the use of violence in armed conflict to spare those who do not or who no longer directly participate in hostilities, while at the same time weaken the military potential of the enemy. Both in limiting the violence and in regulating the treatment of persons affected by armed conflict in other respects, international humanitarian law strikes a balance between humanity and military necessity (UNOHC 2011). Article 2 common to the Geneva Conventions states that:

In addition to the provisions which shall be implemented in peace time, the present convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the high contracting parties, even if the state of war is not recognized by one of them. The convention shall also apply to all cases of partial or total occupation of the territory of the High Contracting party, even if the said occupation meets with no armed resistance (UNOHC 2011).

Although it is said that traditionally, international human right law is seen as imposing obligations on states only, while international humanitarian law is quite unique in international law in that it is binding not only on states, but also on non-state armed groups (ICRC 2007). On the contrary, despite the fact that Geneva Conventions and Protocols indicate the type of situation they would apply, they have failed in giving a clear definition of armed conflict. Most armed conflicts today are non-international in nature. They take place within the borders of states, and are waged between a state and organized non state armed group(s) or among such groups themselves (ICRC 2008).

As a result a party to a non-international armed conflict, either a state or an armed group will deny the applicability of humanitarian law, making it difficult to engage in a discussion on respect to the war. For instance, governmental authorities might disagree that a particular situation qualifies as an armed conflict. They might claim instead that it is a situation of “tension” or mere banditry and does not amount to non-international armed conflict. On this basis, a state might attempt to hinder or block contact with an armed group or access to the geographical area under its control. Non state groups might also deny the applicability of humanitarian law by refusing to recognize a body of laws created by states or claiming that they cannot be bound by obligation ratified by the government against whom they are fighting (ICRC 2008).

In Africa for instance, by 2004, all 53 African states had ratified the primary international humanitarian law treaties with Southern Sudan following suit in July 2012. Thus African states have concerted to respect and ensure respect for international humanitarian law during peace time and after armed conflict. However this assumed respect for international humanitarian law by state parties does not give a complete picture of the reality on ground. Between 1955 and 2005 more than 200 armed groups were involved in about forty armed conflicts on the African continent. These included wars of liberation and post-independence wars (Ewumbue-Monono 2006). The participation of non-state actors in African conflicts raises some issues with regards to respect for international humanitarian law.

Thirty eight percent of the world’s armed conflicts are being fought in Africa and in 2006; almost half of all intensity conflicts are in Africa (International Action Network on Small Arms 2007). International humanitarian law continues to apply in these complex

situations. In modern warfare, the distinctions between internal and international armed conflict, or between states and non-state actors, distinctions upon which much of the law of war is premised, are breaking down. As Jed Odermatt put it, “how, then, do the laws of war apply and remain relevant to situations of mixed conflicts which do not fit into any neat legal category?” For instance, the conflicts in Great Lake Legion of Africa have deemed to be an internal conflict by some commentators not involvement of combatants from several states (Odermatt 2013).

## Conclusion

Although the universal declaration of human rights by the United Nations General Assembly on the 10th of December 1948 would tend to make human rights look as a new evented rights of humans. However, these rights have been in existence right from the creation of man. These rights are not only fundamental, they are also inalienable. But the differences among humans in terms of race, sex, religion to mention but a few made these rights even when every individual has it, universally acceptable impossible. The wanton destruction of life and property during the Second World War coerced the newly formed United Nations to make proclamation of these rights and to make it universal. Despite the initial difficulty in accepting the universality of these rights and the impotent nature of human right laws, different countries of the world acknowledged the existence of these rights in their constitutions. International human rights law and International humanitarian law are now protect the right of humans both in peace time and the time of armed conflict. Despite the fact that Geneva Conventions and Protocols did not give a precise definition of armed conflict, both international human rights law and International Humanitarian law are now important parameters for many military commanders, advised on the ground by lawyers. While it is not clear in practice whether State or international rights should prevail in times of human rights violation, admittance of the universal declaration of the human rights by states, somehow has made states, though still sovereign, concede to the supremacy of the international human rights law.

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