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# A STUDY OF CRIMINAL JUSTICE SYSTEM IN INDIA: WITH SPECIAL REFERENCE TO JUDICIAL ATTITUDE TOWARDS SEXUAL VIOLENCE AGAINST WOMEN

*Gitu Singh*[1]

## INTRODUCTION

Women in Indian society have enjoyed a special position from the ancient ages. Women in India are said to be worshiped like goddess. They are considered as '*Shakti*' or '*Devi*'. During the Vedic period women had exalted position and they enjoyed a fair amount of personal freedom and equality with men. Equal opportunity for education was provided to both male and female children. The husband and wife stood at equal footing. This honoured position which the women enjoyed deteriorated with the passage of time. During the British period a number of reform movements were carried out in order to eradicate the problems of women. The most serious problems which required solution was the sati system, the child marriage, education, *pardah* system and property rights.

Post-independence a lot of efforts was made for the women empowerment and protection of the right of women. The Constitution guaranteed the fundamental rights by its various provisions like Article 14 which guarantees equality before law; Article 15 which plays a special role in the empowerment of women by guaranteeing prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. Art. 15(3) of the Indian Constitution empowers the State to make special provisions for the advancement of women and children; the provision of Article 16 which provides equality of opportunity in matters of public employment has actually empowered the Indian women to claim for equal treatment in employment and further secure their future financially and socially. Most importantly Article 21 of the Indian Constitution which is also known as umbrella legislation has enabled the Indian judiciary to protect the rights and empower and enable the women in this society to have a special position and claim for her rights. Art. 39 i.e., the Directive Principle of

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State Policy, the State has to provide equal right for men and women to adequate means of livelihood.

There is a long list of laws passed by the legislature specifically to protect the women from any violence, discrimination, cruelty, harassment, religious and cultural atrocities for e.g., The Immoral Traffic (Prevention) Act, 1956; The Dowry Prohibition Act,1961; The Indecent Representation of Women (Prohibition) Act, 1986; The Commission of Sati Prevention Act,1987; Protection of Women from Domestic Violence Act, 2005; and very recently enacted Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

Apart from the specific legislation for protection of women in India there a number of other legislation which contains provision for the prohibition and prevention of violation of women rights for e.g. The Indian Penal Code, 1860; the Indian Evidence Act, 1872; The Married Women's Property Act, 1874; The Child Marriage Restraint Act, 1929; The Factories Act, 1948; The Minimum wages Act, 1948; The Hindu Marriage Act, 1955; The Maternity benefit Act,1961; the Muslim Women Protection of Right on Dowry Act,1986; National commission of Women Act, 1990; the Protection of Human Rights Act, 1993; The Pre-natal Diagnostic Technique (Regulation and Prevention of misuse) Act, 1994 etc. etc.

In the international level The World Conference on Human Rights, Vienna, 1993, refuted the distinction between public and private spheres, declaring for the first time that women's human rights must be protected not only in courts, prisons and other areas of public life but also in the privacy of the home.[2] The UN Convention on the Elimination of All Forms of Discrimination against Women (1979) guarantees women equal rights with men in all spheres of life, including education, employment, health care, the vote, nationality and marriage. UN International Conference on Population and Development (ICPD), Cairo, 1994, affirmed that women's rights were an integral part of all human rights. UN Fourth World Conference on Women, Beijing, 1995, recognized that "all governments, irrespective of their political, economic and cultural systems are responsible for the promotion and protection of women's human rights". The document also specifically stated that violence is an obstacle to the achievement of women's human rights. The Human Development Report 2000 urges nations to commit themselves to gender equality in order to unleash the energy and productive capabilities of women around the world. Article 51(c) of the

[2] Sandhya B.; Accessibility of Women to Criminal Justice System; Journal of Democratic Policing

Constitution of India also provides that the State shall endeavour to foster respect for international law and treaty obligations in the dealings of organized people with one another.

Several socio-legal measures have been initiated to remove any kind of disparity between men and women. It is almost 67 years of Independence that women have been granted a place in the society equal to that of men by giving them, equal rights of work, wages and vote. Having received so much of protection and security both financially and socially in black and white, do the women in India actually feel protected and secure in the financial and social sphere? Women as a community are considered as the weakest of the weak. It cannot be denied that because of the various socio-legal reforms and developments women have actually reached a status where they are no less than the males but what is the most degrading that somewhere or the other women are being subjected to harsh cruelties and atrocities; mostly they are the victims of sexual violence. Women are sexually abused in their workplace, in the streets where they walk in the educational institutions and also behind the closed door of their houses. Women in India are not safe, anywhere.

On this back drop through this article the researcher would try to define what actually constitutes sexual violence against women, what are the agencies and institutions responsible and their functions for the protection of women against such violence, what are the lacunas in providing proper protection to women with special reference to the judicial attitude towards sexual violence.

## DEFINING SEXUAL VIOLENCE AGAINST WOMEN

Sexual violence is perpetrated against women at an alarming rate in India. In almost all the daily national newspaper every day there is news of sexual assault specifically the incident of rape. Sexual violence is primarily a social phenomenon. It is very difficult to provide an exact or concise definition of the term 'sexual violence'. There are a variety of offence which can be termed as sexual violence e.g. rape, sexual assault, sexual harassment, women trafficking, child abuse etc. Sexual violence is a wide range of sexual acts and behaviour that are unwanted, coerced, committed without consent or forced either by physical means or through threats. As there are very different forms of sexual violence acts it is very difficult to have one definition which would encompass all kinds of acts within it. It cannot be denied that in all kinds of sexual violence acts there must be some essentials elements present in common for e.g. forcefully or without consent or without free consent and of course the use of sexual means. Keeping these things into consideration some attempts have been made to define the term 'sexual violence'.

In the year 2002, two major public health entities, the Centres for Disease Control and Prevention (CDC) and the World Health Organisation (WHO), introduced the term 'sexual violence' into research and policy discussions.

The CDC definition is rooted in public health surveillance models and seeks to codify, as specifically as possible, a set of behaviours that encompass both contact and noncontact sexually violating acts:

'Non-consensual completed or attempted contact between the penis and the vulva or between the penis and the anus involving penetration, however slight; non-consensual contact between the mouth and the penis, vulva or anus; non-consensual penetration of the anal or genital opening of another person by a hand, finger or both object; non-consensual intentional touching, either directly or through the clothing, of the genetalia, anus, groin, breast, inner thigh or buttocks; or non-consensual non-contact acts of sexual nature such as voyeurism and verbal or behavioural sexual harassments. All of the above acts are qualified as sexual violence if they are committed against someone who is unable to consent or refuse.'[3]

The WHO definition was not designed for public health surveillance, so its definition places less emphasis on articulating comprehensive behaviours and instead draws upon another disciplinary focus in public health, namely the social context of health problems:

'Any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.'[4]

The definition of 'sexual violence' by CDC is very expansive and inclusive. The definition provided by CDC is very illustrative and includes both physical and oral sex while the definition provided by WHO is limited to physical sex but includes within it sexual violence even by people who are in some kind of relationship e.g. husband and wife relationship or couple in live-in-relationship. The definitions provided by both the public health entities are very helpful in clearing all kinds of doubts related to the definition of the term 'sexual violence'.

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[3]. Claire M. Renzetti, Jeffrey L. Edlisom, Raquel Kennedy Bergen, Source Book on Violence Against Women; 2nd ed. Sage Publication; 2011; Ch. 5 Defining The Scope of Sexual Violence Against Women; pg. 97.
[4]*Ibid.*

The victims of sexual violence are mainly women. The reason, for women being subjected to sexual violence are many like, our society has created and tolerates power imbalances and socialization processes that devalue and victimize this group of people. Sexual violence is commonly motivated by a desire for power and control of the victim and therefore women, being the vulnerable group suffer the vices of sexual violence.

UN General Assembly Declaration on the Elimination of Violence against women defined violence against women violence against women as "any act of gender based violence that results in, or is likely to result in, physical, sexual or mental harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or in private life."[5]

The definition by the UN general assembly is again a comprehensive definition including not only acts that result in violence against women but also those acts that may cause violence on women. This definition includes within it both physical and mental sufferings. The inclusion of the term 'deprivation of liberty' provides a broad scope of interpretation thereby protecting the rights of women in a wider field.

From the above definition one can conclude that sexual violence encompasses acts that range from verbal harassment to forced penetration, and an array of types of coercion, from social pressure and intimidation to physical force.

Sexual violence includes, but is not limited to:

a. rape within marriage or dating relationships;
b. rape my strangers or acquaintances;
c. Unwanted sexual advances or sexual harassment (at school, work etc.);
d. systematic rape, sexual slavery and other forms of violence;
e. sexual abuse of mentally or physically disabled people;
f. rape and sexual abuse of children;
g. 'customary' forms of sexual violence, such as forced marriage or cohabitation and wife inheritance;
h. denial of the right to use contraception or to adopt other measures to protect against sexually transmitted diseases;

[5] <www.who.int/mediacentre/factsheets/fs239/en> visited on 23rd April, 2014

i. forced abortion;
j. violent acts against the sexual integrity of women, including female genital mutilation and obligatory inspections for virginity;
k. forced prostitution and trafficking of people for sexual exploitation.[6]

There is no universally accepted definition of the term 'sexual violence' the reason being as stated earlier the varied forms or types of acts which come within its scope. Attempting to provide an exact or proper definition may cause to narrow down the scope of interpretation which may result in closing the door for new acts to get acceptance within it. On the other hand there is all means through which the sexual offence against women may be prohibited and combated. One such means is the proper functioning of the criminal justice administration of a country.

## CRIMINAL JUSTICE SYSTEM AND SEXUAL VIOLENCE AGAINST WOMEN

The criminal justice system is the set of agencies and processes established by governments to combat crime and impose penalties on those who violate laws. It is the criminal justice system, the only institution, which is vested with the powers and the authority to intervene and combat violence, by carrying out criminal investigation, protecting the victims, bringing the perpetrators under control, and prosecuting and providing justice in any society. Therefore it can be said that the whole responsibility of maintaining peace and order and providing a safe and secure life to the public at large lies on the shoulder of the country's criminal justice system.

The ultimate aim of criminal law is protection of right to personal liberty against invasion by others – protection of the weak against the strong, law abiding against lawless, peaceful against the violent. To protect the rights of the citizens, the State prescribes the rules of conduct, sanctions for their violation, machinery to enforce sanctions and procedure to protect that machinery. It is utter selfishness, greed and intolerance that lead to deprivation of life, liberty and property of other citizens requiring the State to step in for protection of the citizens' rights. The criminal justice system is expected to provide the maximum sense of security to the people at large by dealing with crimes and criminals effectively, quickly and legally. To put it more specifically, the aim is to reduce the level of criminality in society by ensuring maximum detection of reported crimes, conviction of

[6]<http://apps.who.int/iris/bitstream/10665/77434/1/WHO_RHR_12.37_eng.pdf >; visited 21/4/14

the accused persons without delay, awarding appropriate punishments to the convicted to meet the ends of justice and to prevent recidivism.

## Indian Criminal Justice System

Rule of law, democracy, development and human rights are dependent on the degree of success the governments are able to achieve on the criminal justice front. It is the prime duty of a State to protect the rights and liberties of its people and to save the innocent and punish the guilty. In every civilized society governed by rule of law there is a criminal justice system in place for this purpose. The criminal justice system consists of four important components in India, namely;

A. The Investigating Agency (Police),
B. The Judiciary,
C. The Prosecution Wing, and
D. The Prison and Correctional Services.

India has an "Adversarial System" of criminal justice system which is a legacy of long gone colonial era with its underlying principle that "it is better that all guilty persons go unpunished that one innocent person suffer". Each of the three components has a major role in the justice delivery system. Failure or incompetence on the part of one can result in the whole objective of providing justice only as a myth. Therefore sincerity, honesty and faithfulness is the sine qua non for each of the agency of the criminal justice administration.

A highly respected senior advocate of Supreme Court and a jurist Mr. Fali S. Nariman, have argued that whereas in an adversarial system like ours, the insistence of Court is on the search for Proof rather than the search for truth. "The search for proof pays obeisance to due process values". The effort should be somehow to make proof and truth as synonymous. "The ideal lies somewhere in between, but we have not been able to find it. This, then, is the great dilemma of a fair criminal justice system."[7]

In the search of truth and providing justice the role of the various agencies of the criminal justice system is crucial. The working of all the agencies are so interconnected that if one does not perform

[7] Justice Sudhansu Dhulia, Role of Courts in the Administration of Criminal Justice <http://ujala.uk.gov.in/files/ch2.pdf?> visited on 27/11/14.

its function with care caution and dutifully the others function gets affected resulting in failure of providing justice. Therefore the role of each agency requires a close scrutiny.

**A. The Investigating Agency (Police):** The initiation of a criminal case is done by the police which the first and foremost agency responsible for the administration of criminal justice in India society. It has the duty to register cases, investigate them as per the procedure laid down in the Code of Criminal Procedure (to be referred to as the Code hereinafter) and to send them up for trial. The police force is controlled and regulated by the state under the Indian Police Act, 1861. Along with the state police force the Government of India in the central level has constituted the Central Bureau of Investigation (CBI) under the special enactment called the Delhi Special Police Establishment Act, 1946. Though constituted at the central level the CBI can take up matters of investigation under the state with the prior permission of the concerned state government. Apart from the state police forces and the CBI, There are certain other specialised investigating agencies constituted by the central government, in various departments, namely, the Customs Department, the Income Tax Department, the Enforcement Directorate, etc. They investigate cases falling within their jurisdictions and prosecute them in the courts of law.

**B. The Judiciary (Courts):** India has a four-tier structure of court. The cases instituted by the state police and the Central Investigating Agency are adjudicated by the courts. The Supreme Court of India is the apex court. All appeals against the orders of the High Courts in criminal, civil and other matters come to the Supreme Court. This court is also known as the guardian of the Constitution of India. The law laid down by the Supreme Court is binding on all the courts in the country. The highest court in a state is the High Court. It is an appellate court and hears appeals against the orders of conviction or acquittal passed by the lower courts, apart from having writ jurisdiction. It is also a court of record. The law laid down by the High Court is binding on all the courts subordinate to it in a state. At the district level, there is the Court of District and Sessions Judge. Below these court is the Court of Chief Judicial Magistrates and at the bottom level is the Court of Judicial Magistrates.

**C. The Prosecution Wing:** Prosecution in the court of law has to be done by the State. The State has constituted cadres of public prosecutors to prosecute case at various levels in the subordinate courts and high court of the concerned state. Public prosecutors are appointed by the state governments. At the district level, there are two levels of public prosecutors, i.e., the Assistant Public Prosecutor, Grade-I and the Assistant Public Prosecutor, Grade-II. They appear in the Courts of

Magistrates. The Director of Prosecutions is responsible for the prosecution of cases in the Magisterial Courts. In Sessions Courts, the cases are prosecuted by Public Prosecutors. The District Magistrate prepares a panel of suitable lawyers in consultation with the Sessions Judge to be appointed as public prosecutors. The state government appoints public prosecutors out of the panel prepared by the District Magistrate and the Sessions Judge. The state government also appoints public prosecutors in the High Court. The appointments are made in consultation with the High Court as per section 24 of the Code. The most senior law officer in a state is the Advocate General who is a constitutional authority. He is appointed by the governor of a state under Article 165[8]. He has the authority to address any court in the state. Under section 24 of the Cr.P.C. the central government may also appoint one or more public prosecutors in the High Court or in the district courts for the purpose of conducting any case or class of cases in any district or local area. The most senior law officer of the Government of India is the Attorney General for India, who is a presidential appointee under Article 76[9]. He has the authority to address any court in the country.[10]

The Central Bureau of Investigation has a Legal Division which plays an advisory and prosecutor's role in the organisation. It is headed by a Legal Advisor, who is a deputized from the Ministry of Law of the central government. He is assisted by a number of Law officers who are permanent employees of the CBI, namely, Additional Legal Advisor, Deputy Legal Advisors, Senior Public Prosecutors, Public Prosecutors, Assistant Public Prosecutors, etc. After a decision has been taken to prosecute a case, the law officers conduct the prosecution of cases in the courts. The level of a law officer to prosecute a case is directly related to the level of the court, i.e., the higher the court, the higher the rank of a law officer to prosecute it.

Besides, the CBI also engages Special Public Prosecutors from the bar on a daily fee basis in important and sensational cases.[11]

**D. Prisons and Correctional Services:** The fourth limb in the criminal justice administration system of India is the prisons and correctional homes. The prisons in India are under the control of the state governments and so are the correctional services. It is not only the duty of the prison

[8] The Constitution of India, 1950
[9] *Ibid.*
[10] Sharma Madan Lal, The Role and Function of Prosecution in Criminal justice; <http://www.unafei.or.jp/english/pdf/RS_No53/No53_21PA_Sharma.pdf> visited on 27/11/14
[11] *Ibid.*

authorities to keep the accused protected and away from the society but also to rehabilitate and reform them.

In spite of having a well organized criminal justice system we have to agree with Mr. Fali S. Nariman, in his first book "India's Legal System: Can it be Saved", where he gives instances when two of the Hon'ble Chief Justices of Supreme Court, while demitting their office had said that the criminal justice system in India is either collapsing or has already collapsed! It was time that this problem had to be tackled, and tackled fast.[12] There is no doubt that India has set up a very well organized criminal justice system with a good check and balance system. Despite the fact of setting up a strong criminal justice system the question which is of concern in the present day is related to the safety, security and protection of women. Why is sexual violence against women in India so rampant? Where lies the problem? Who is to blame for the suffering of women? This brings us to the discussion of the problems and drawbacks of the criminal justice system of India in the prevention and protection of sexual violence against women.

Some of the reason why in India sexual violence is increasing significantly is:

A. **Women refusal to report sexual violence**: There are many logical reasons women do not report sexual violence, including:
    (a) inadequate support systems;
    (b) Shame;
    (c) fear or risk of retaliation;
    (d) fear or risk of being blamed;
    (e) fear or risk of not being believed;
    (f) fear or risk of being mistreated and/or socially ostracized;

B. **Crisis in Law Enforcement**:
    (a) lack of an independent, efficient, adequately staffed and technically well-equipped police force;
    (b) the number of police personnel, and the resources at their disposal, are currently inadequate to deal with the challenges they face – both related to crimes against women and for other crimes;

[12] See supra note 13.

(c) demands on the police to investigate the "more important" crimes such as murder and armed robbery take precedence;

(d) an over-stretched and politically controlled police force which have different priorities than what is required for the protection of its citizens;

(e) police excess and abuse affect the weakest the mostly – women and the under-privileged sections of the society;

(f) redressal mechanisms against police abuse are either slow or dysfunctional;

(g) police, the very mentioning of it, does not infuse confidence in people, but on the contrary generates fear and repulsion;

C. **Legal causes**:

(a) Inefficiency/inadequacies of legal machinery;

(b) uncertain, unclear and lack of precise laws;

(c) complex, complicated and ambiguous laws;

(d) standard of proof too demanding;

D. **Social causes**:

(a) patriarchal structure of society and social conditioning;

(b) moral and psychological environment;

(c) culture lag and conflict of ideas;

E. **Criminalisation of politics**.

This list of reasons is not exhaustive but provides few basic/general reasons for the rise in violence against women. The problem does end only on identifying the reasons for such offences. Identification of the reason provides the gateway to find the means of resolving and providing adequate measure for the prohibition and restraining such offences. Thus it is essential to find out judicial attitude towards the offence of sexual offences against women.

## JUDICIAL ATTITUDE TOWARDS SEXUAL VIOLENCE AGAINST WOMEN

Violence perpetrated against women takes many forms. From the womb to the tomb, women face violence and abuse in one or the other form. Violence against women and children is not merely a crime against the physical person of the victim but are crimes against humanity and have serious and far-reaching impact on the victims as well as the society. Violence against women and children as an area of litigation poses peculiar challenges and demands the adoption of special approaches by

judicial officers. It requires special sensitivity from all sections of the criminal justice system, especially the judges. The Supreme Court of India has always recognized the trauma and stigma that victims of sexual offence face as a direct consequence of the violence inflicted on them. The Apex court has many a times through its judgment emphasized that such offences should not be considered normal offences[13] and it is the duty of the courts to deal with such cases with utmost sensitivity.[14]

The Supreme Court in ***State of Madhya Pradesh vs. Babulal***[15] reacting sternly and severely on the offence of sexual violence against women has held;

"Sexual violence apart from being a dehumanizing act is also an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honors and offends her self-esteem and dignity. It degrades and humiliates the victim and leaves behind a traumatic experience. It has been rightly said that whereas a murderer destroys the physical frame of a victim, a rapist degrades and defiles the soul of a helpless female. The Courts are, therefore, expected to try and decide cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized Judge is better armor in cases of crime against women than long clauses of penal provisions, containing complex exceptions and complicated provisos.

Once a person is convicted for an offence of rape, he should be treated with a heavy hand. An undeserved indulgence or liberal attitude in not awarding adequate sentence in such cases would amount to allowing or even to encouraging 'potential criminals'. The society can no longer endure under such serious threats. Courts must hear the loud cry for justice by society in cases of heinous crime of rape and impose adequate sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court."[16]

In the case of ***Sakshi vs. Union of India***[17] while interpreting the term "sexual intercourse" as contained in Section 375 of the Indian Penal Code has especially considered and highlighted the needs to providing protection to a victim of sexual abuse at the time of recording his statement in

[13] *State of Rajasthan v. Om Prakash*, (2002) 5 SCC 745
[14] *State of Karnataka v. Krishnappa*, (2000) 4 SCC 75; *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384
[15] AIR2008SC582;
[16] *Ibid.*
[17] AIR2004SC3566;

court. Reaffirming its earlier decision[18] this court has highlighted the importance of provisions of Section 327(2) and (3) Cr.P.C. and a direction was issued not to ignore the mandate of the aforesaid provisions and to hold the trial of rape cases in camera. It was also pointed out that such a trial in camera would enable the victim of crime to be a little comfortable and answer the questions with greater ease and thereby improve the quality of evidence of a prosecutrix because there she would not be so hesitant or bashful to depose frankly as she may be in an open court, under the gaze of the public. It was further directed that as far as possible trial of such cases may be conducted by lady Judges wherever available so that the prosecutrix can make a statement with greater ease and assist the court to properly discharge their duties, without allowing the truth to be sacrificed at the altar of rigid technicalities", the court once again tried to give importance to the right of the victims of sexual violence through providing special protection.

The court further emphasized that "The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the Presiding Officer of the Court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of Sub-section (2) of Section 327 Cr.P.C. should also apply in inquiry or trial of offences under Section 354 and 377 IPC."[19] The court in its judgment also tried to make the parliament realize that there is an urgent need to make appropriate legislation in this regard with all the promptness which it deserves.

[18] *State of Punjab v. Gurmit Singh* (1996CriLJ1728)
[19] *Ibid.*

In ***State of Maharashtra vs. Madhukar Narayan Mardikar***[20] the Supreme Court held that a woman of easy virtue is entitled to privacy and is not open to any person to violate her person. The fact that a woman is of easy virtue is not sufficient cause to disbelieve her evidence. Furthermore, in the case of ***Narendra Kumar vs. State***[21] it has been unequivocally stated that the character and unchastity of the victim is not a determinative factor in a rape trial.

Persuading the task of enforcement of the directions issued in ***Vishaka and Ors. vs. State of Rajasthan and Ors.,***[22] recently, this court has in ***Medha Kotwal Lele and Ors. vs. Union of India and Ors***. [23] availed the opportunity to remind the Parliament about the then pending 'The Protection of Women Against Sexual Harassment at Work Place Bill, 2010'.[24]

The Supreme Court has emphasized that in cases of sexual violence, undue emphasis should not be placed on minor discrepancies in the evidence of the prosecutrix.[25]

A significant judicial trend in cases of violence against women relates to the issue of consent of the victim in sexual offences. From the famous ***Mathura case***[26] till the present day, the judicial approach to this issue has evolved. In the Mathura case, the fact that the victim did not struggle or raise an alarm was taken to imply that the victim was a consenting party to the sexual act. This approach of the courts can also be observed in ***Jagannivasan vs. State of Kerala***[27] wherein the question whether the victim was a consenting party was raised as the accused was an "attractive catch for girls to be bonded in matrimony". In contrast to this approach, the Supreme Court has subsequently sought to draw a line of distinction between consent and passive submission, and has held that the mere act of helpless resignation cannot be equated with consent. The recent Criminal Law Amendment Act, 2013 which amended Section 375 of the Indian Penal Code now defines consent as an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.

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[20] AIR 1991 SC 207
[21] 2012 CriLJ 3033
[22] (1997) 6 SCC 241
[23] AIR2013SC93
[24] Presently Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013; The Act came into force from 9 December 2013.
[25] *Jugendra Singh v. State of Uttar Pradesh*, (2012) 3 SCC (Cri) 129.
[26] Tukaram v. State of Maharashtra, (1979) 2 SCC 143
[27] 1995 Supp(3) SCC 204.

The Supreme Court of India being the apex court has set up a good number of examples through its judgment on the rules, procedure and guidelines to be followed by the police and the legislature for the protection of women against sexual violence. When required the Apex court has tried to give adequate compensation to victims of sexual violence.[28] One recent example of the Supreme Court acting as the saviour of the rights of women and playing a role of activist for the protects, prohibition and combating of sexual violence against women is the direction given by it to form a commission for the review, recommendation and proposing suggestion relating to required changes in the IPC[29] in regard to the provision of the offence of rape.

The sorrowful Nirbahaya incidence which occurred on Dec. 2013 has provided an opportunity to the apex to rethink and make required changes to remove and eradicate the loopholes and difficulties in the provision of rape under IPC. The Justice Verma Committee was set to relook the rape provision and appropriate suggestions were provided to deal with the drawback and discrepancy of the relevant law.

**Important Aspects of the Justice Verma Committee Report**

The three members Commission which was assigned to review laws for sexual crimes submitted its report on January 23, 2013. It made recommendations on laws related to rape, sexual harassment, trafficking, child sexual abuse, medical examination of victims, police, electoral and educational reforms. The summary of the key recommendations of the Committee are as follows:[30]

The commission was headed by former Chief Justice of India, Justice J.S. Verma. Hon'ble Justice Verma has identified "failure of governance" as the root cause for sexual crime. Further he has criticized the government, the police and even the public for its apathy, and has recommended a dramatic change which is yet to be implemented to reduce the rate of sexual crime and eradicate such offence from the society.

**Rape and Punishment for Rape:** The Committee was of the view that rape and sexual assault are not merely crimes of passion but an expression of power. Rape should be retained as a separate offence and it should not be limited to penetration of the vagina, mouth or anus. Any non-consensual penetration of a sexual nature should be included in the definition of rape. The

[28] Chairman v. Railway Chairman Board,
[29] Indian Penal Code 1860(hereinafter called IPC)
[30] http://www.prsindia.org/; visited on 10/12/2014.

committee supported with its own reasoning has recommended that the punishment for rape should be rigorous imprisonment or RI for seven years to life. It recommends that punishment for causing death or a "persistent vegetative state" should be RI for a term not be less than 20 years, but may be for life also, which shall mean the rest of the person's life. Gang-rape, it suggests should entail punishment of not less than 20 years, which may also extend to life and gang-rape followed by death, should be punished with life imprisonment.

**Sexual Assault:** Currently, "assault or use of criminal force to a woman with the intent to outrage her modesty" is punishable under Section 354 of the IPC with 2 years imprisonment. The term outraging the modesty of a woman is not defined in the IPC. Thus, where penetration cannot be proved, the offence is categorized as defined under Section 354 of the IPC. The Committee recommended that non-penetrative forms of sexual contact should be regarded as sexual assault. The offence of sexual assault should be defined so as to include all forms of non-consensual non-penetrative touching of a sexual nature. The sexual nature of an act should be determined on the basis of the circumstances. Sexual gratification as a motive for the act should not be prerequisite for proving the offence. The offence should be punishable with 5 years of imprisonment, or fine, or both.

**Punishment for Other Sexual Offences:** The panel recognised the need to curb all forms of sexual offences and recommended - Voyeurism be punished with upto seven years in jail; stalking or attempts to contact a person repeatedly through any means by up to three years. Acid attacks would be punished by up to seven years if imprisonment; trafficking will be punished with RI for seven to ten years.

**Acid Attack:** The committee opined that the offence should not be clubbed under the provisions of grievous hurt which is punishable under the IPC. It noted that the offence was addressed in the Criminal Laws Amendment Bill, 2012 which is currently pending in the Parliament. The Bill prescribes punishment of imprisonment for 10 years or life. The committee also recommended that the central and the state government create a corpus to compensate the victims of crime against women.

**Offences against Women in Conflict Areas:** The continuance of Armed Forces (Special Powers) Act (AFSPA) in conflict areas needs to be revisited. At present, the AFSPA requires a sanction by the central government for initiating prosecution against armed forces personnel. The Committee

has recommended that the requirement of sanction for prosecution of armed forces personnel should be specifically excluded when a sexual offence is alleged. Complainants of sexual violence must be afforded witness protection. Special commissioners should be appointed in conflict areas to monitor and prosecute for sexual offences. Training of armed personnel should be reoriented to emphasis strict observance of orders in this regard by armed personnel.

**Trafficking:** The Committee noted that the Immoral Trafficking Prevention Act, 1956 did not define trafficking comprehensively since it only criminalised trafficking for the purpose of prostitution. It recommended that the provisions of the IPC on slavery be amended to criminalise trafficking by threat, force or inducement. It also recommended criminalising employment of a trafficked person. The juvenile and women protective homes should be placed under the legal guardianship of High Courts and steps should be taken to reintegrate the victims into society.

**Child Sexual Abuse:** The committee has recommended that the terms 'harm' and health be defined under the Juvenile Justice Act, 2000 to include mental and physical health, respectively, of the juvenile.

**Punishment for Crimes against Women:** The Committee rejected the proposal for chemical castration as it fails to treat the social foundations of rape. It opined that death penalty should not be awarded for the offence of rape as there was considerable evidence that death penalty was not deterrence to serious crimes. It recommended life imprisonment for rape.

**Medical Examination of A Rape Victim:** The Committee has recommended the discontinuation of the two-finger test which is conducted to determine the laxity of the vaginal muscles. The Supreme Court has through various judgments held that the two-finger test must not be conducted and that the previous sexual experience of the victim should not be relied upon for determining the consent or quality of consent given by the victim.

**Police Reforms:** The Committee has recommended certain steps to reform the police. These include establishment of State Security Commissions to ensure that state governments do not exercise influence on the state police. Such Commissions should be headed by the Chief Minister or the Home Minister of the state. The Commission would lay down broad policy guidelines so that the Police acts according to the law. A Police Establishment Board should be established to decide

all transfers, postings and promotions of officers. Director General of Police and Inspector General of Police should have a minimum tenure of 2 years.

**Reforms in management of cases related to crime against women**

- A Rape Crisis Cell should be set up. The Cell should be immediately notified when an FIR in relation to sexual assault is made. The Cell must provide legal assistance to the victim.
- All police stations should have CCTVs at the entrance and in the questioning room.
- A complainant should be able to file FIRs online.
- Police officers should be duty bound to assist victims of sexual offences irrespective of the crime's jurisdiction.
- Members of the public who help the victims should not be treated as wrong doers.
- The police should be trained to deal with sexual offences appropriately.
- Number of police personnel should be increased. Community policing should be developed by providing training to volunteers.

**Electoral reforms:** The Committee recommended the amendment of the Representation of People Act, 1951. Currently, the Act provides for disqualification of candidates for crimes related to terrorism, untouchability, secularism, fairness of elections, sati and dowry. The Committee was of the opinion that filing of charge sheet and cognizance by the Court was sufficient for disqualification of a candidate under the Act. It further recommended that candidates should be disqualified for committing sexual offences.

**Education Reforms:** The Committee has recommended that children's experiences should not be gendered. It has recommended that sexuality education should be imparted to children. Adult literacy programs are necessary for gender empowerment.

The Indian judiciary needs to be appraised for the fact wherever and whenever required it has responsibly taken up the duty not only to protect the rights of women fraternity but also tried to provide adequate remedy for their loss and sufferings which they undergone because of sexual violence. The Supreme Court has put its best foot forward to help the victims of sexual violence, be it by giving direction to the executive or recommending the setting up of commission to deals with

the lacunas of law or suggesting the parliament to look into the requirement of the time and framing of laws.

In spite of India having all possible ways of making changes in the law when required or having supervision over the executive or the Apex Court being the guardian and protector of right and the remedy provider there is something which requires to be looked into to have a society free from sexual violence against.

## CONCLUSION

One would agree with the fact that law is required to tackle with any kind of violence without laws there would be no means to combat violence of any kind but one has also to agree with the fact that law alone is no remedy to reduce oppression. It is the dire requirement that the objective of the law enacted can be achieved only and only when all the three tier of Criminal Justice administration does its work faithfully, honestly and with due diligence.

Most importantly there has to be training counseling and sensitization of the police force for dealing with the matter of sexual violence against women. Police is the first rescue or ray of hope of victims of sexual violence where they tend to seek help from. The police men have to be lenient and sympathetic towards such victims. They should provide a comfortable environment where a complainant can narrate its sorrow, pain and the incident which is the cause of all sufferings. If the policemen are not co-operating with such people their little ray of expectation of getting relief or remedy is shattered. Only when the case is properly registered, the case properly investigated and the charge sheet efficiently and honestly filed that the Judiciary would be able to provide justice.

The prosecution wing is another agency of the criminal justice administration which has to be dutiful and try to give its best so that the victim gets relief and remedy under the roof of the judiciary. If the prosecution takes no interest in pleading the case and research and argue efficiently the door of getting remedy and punishing the wrong doer would be shut and hence give the offender a privilege to commit more wrongs.

It has also to be considered that if the prisons are not a place only for the convicts to undergo their punishment. The prison is a place from where appropriates rehabilitation, education and personal

skill enhancement programmes may change the lives of many convicts which would help them lead a good and respectable lives in future.

No doubt a great responsibility lies on the criminal justice administration system in protecting crimes and providing justice still the root cause of most of the offences is illiteracy, ignorance of law, societal behaviour, and upbringing. Crime crops from minds if our minds are pure and enlightened with right and wrong there would a hope of a society free from offences, disorder and destitute. Therefore the responsibility lies not the law maker or the executors of law but on the human community as a whole as we human beings are animals converted into human being and therefore we should behave, live and let live like human and not like animals.

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# WAR AGAINST TERRORISM
# NEW TRENDS IN INTERNATIONAL HUMANITARIAN LAW

*Ankit Singh*[1]

## UNDERSTANDING TERRORISM

Terrorism is a social phenomenon with many aspects which vary from case to case. Neither experts in international law nor government representatives have yet agreed on a comprehensive and widely acceptable definition. One International Court of Justice judge has observed- "*Terrorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of States or individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.*"[2] However, as such, much is at stake in the definition of terrorism.[3] To call an act terrorism is to assert not just that it possesses certain characteristics, but that it is wrong. To define an act as a terrorist act also has significant consequences with regard to co-operation between states, such as intelligence sharing, mutual legal assistance, asset freezing and confiscation and extradition.

The difficulty in defining terrorism is that it is caught up with the notion that it can be, in particular circumstances, legitimate to use violence. From George Washington to Nelson Mandela, most struggles for independence from colonialism and claims of self-determination have resulted in some form of violence that can be (and have been) described as terrorism. At the same time, an overly broad definition of terrorism can be used to shut down non-violent dissent and undermine democratic society. The first ill-fated attempt to define terrorism in an international instrument was in the 1937 Geneva Convention for the Prevention and Punishment of Genocide, which defined terrorism as "all criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public." This definition was criticized for its lack of precision, and the Convention never entered into force as it did not receive the necessary number of

[1] B.A.LL.B (Hons.), LL.M
[2] R. Higgins, *The general international law of terrorism,* in R Higgins, M. Flory, (Eds.), *Terrorism and international law* (London, 1997), p. 24.
[3] S. Marks, A. Clapham, *International Human Rights Lexicon* (Oxford, 2005), p. 345.

ratifications. Nonetheless, ensuring an appropriate definition of terrorism is key to an effective international approach to combating terrorism. This is not just because of the political and moral connotations that accompany the term, but also because there are significant legal consequences. Terrorism occurs in many different contexts and takes different forms. Without seeking to define terrorism here, we can consider some of its consistent features including:

- its organized nature (whether the organization involved is large or small);
- its dangerousness (to life, limb and property);
- its attempt to undermine government in particular (by seeking to influence policy and law-makers);
- its randomness and consequential spreading of fear/terror among a population.

A prevailing characteristic of acts of terrorism is that they are crimes even if they have an additional quality that requires that they be considered "terrorist" in nature. Terrorist acts are criminal acts and subject therefore to the normal rigours of criminal law. It does not make a difference to the applicability of human rights standards whether the issue under review is deemed to be a terrorist act as opposed to any other serious criminal act.

The draft Comprehensive Convention on Terrorism currently being considered by the UN attempts to define terrorist action. The definition of terrorism in the current draft of the Convention is controversial. It states in Article 2:[4]

Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes: (a) death or serious bodily injury to any person; or (b) serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or (c) damage to property, places, facilities, or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or abstain from doing any act. This is a wide definition, which has been criticised for its lack of precision. Under the definition, terrorism includes not only action causing death or serious bodily injury, but also "*serious damage* to public or private property" and *any* (not only serious) damage that is likely to result in "major economic loss." This is qualified by a requirement of intent either to intimidate a population, or to "compel a Government or an international organisation to do or abstain from doing any act." The threat of

[4] UN General Assembly, Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Sixth session (28 January-1 February 2002), doc. A/57/37.

any such action, where it is "credible or serious," is also an offence, and it is an offence to attempt terrorist action or to "contribute" to the commission of terrorist offences.[5] Some have argued that in relation to armed conflict, the draft Convention, also fails to properly protect those in a legitimate liberation struggle, whilst providing legal protection to those exercising the use of force unlawfully.

A solution to the difficulty in defining terrorism may be to focus instead on preventing and/or punishing conduct that is of a genuinely terrorist nature. In this regard, the international community, although unable to agree on a definition of terrorism, has agreed that certain acts constitute terrorist offences. These offences, such as airline hijacking, are now the subject of international treaties.

Another example is the 2005 Council of Europe Convention on the Prevention of Terrorism. Although it does not define terrorism, it requires member states to create new criminal offences in relation to acts that may lead to terrorism offences already established by the UN treaties and protocols on terrorism. Under the Council of Europe Convention, states have to extradite and/or prosecute in relation to the new preparatory offences created under the Convention.

At European Union level, member states have agreed on a minimum definition in the EU Framework Decision on Combating Terrorism. This definition sets out a list of criminal acts, which must be considered as terrorist acts for the purposes of international co-operation between EU member states if they have any of the following objectives: to seriously intimidate a population; or to unduly compel a government or international organization to perform or abstain from performing any act; or to seriously destabilize or destroy the fundamental structures of a country or an international organization. While the Framework Decision seeks to harmonize a minimum threshold for offences to be classified as terrorist offences, it does not prevent EU member states from having a more extensive definition of terrorism in their national laws. The United Nations Working Group on Arbitrary Detention said that it is "concerned at the extremely vague and broad definitions of terrorism in national legislation. On several occasions it has noted that either *per se* or in their application, (these definitions) bring within their fold the innocent and the suspect alike and thereby increase the risk of arbitrary detention, disproportionately reducing the level of guarantees enjoyed by ordinary persons in normal

[5] The scope of these provisions is problematic from a human rights point of view, in particular as concerns the principle of legality enshrined in Article 15 ICCPR and Article 7 ECHR. Draft Article 2 highlights the tension between the security and the human rights approach: the broad definition of terrorism creates potential difficulties with freedom of expression, freedom of association, fair trial rights and private life.

circumstances."[6] The problem of vague definitions of terrorism is exacerbated in national legislation referring to the extremely vague notion of "extremism".

## HUMAN RIGHTS & TERRORISM: A GLOBAL RESPONSIBILITY

Since time immemorial civilians have been victims of terrorist acts. Ordinary people going to work by bus or having coffee on the sidewalks are the usual target of indiscriminate violence, not well-known players on the domestic or international scene but bystanders. It may, however, also happen that an act of terrorism strikes persons in the limelight: government officials, opposition leaders, military, or police personnel. Such recourse to unchecked and indiscriminate violence has always been deemed contrary to fundamental rules of law, whether enshrined in international treaties protecting the human being or codified by domestic law, in particular criminal law. No civilization, no creed — and no decent human being —condones acts of terrorism. Moreover, terrorists have always been prosecuted for their crimes.

Terrorist attacks on human lives and property have not only brought suffering and distress to the individual victims, but have often had far-reaching consequences for the life of a nation or even the course of history. In 1914, for example, the killing in Sarajevo of the Austrian Crown Prince triggered the outbreak of the First World War. That event and the revolution which in 1917 disrupted the Russian Empire signalled the end of a long period of stability in nineteenth-century Europe. The twentieth century has seen a spate of terrorist acts all over the world. Few recent conflicts have not been characterized by appalling acts of cruelty against civilians, perpetrated with the sole aim of terrorizing the civilian population of a country at war. To mention only a few examples, there was the war which led to an independent Algeria, the crushing of independence movements by the Soviet Union, the various armed conflicts in Indochina, in particular during the involvement of American and Allied forces in Vietnam, the mass murder of the Cambodian people, the civil war in Sri Lanka and in several African countries, the armed conflict in Colombia, the events which have shaken Northern Ireland for years and, of course, the wars in the Middle East, in particular the ongoing tragedy in Palestine. A cursory look at the contexts in which these events took place shows that acts of terrorism are usually part of or indirectly linked in some way to an armed conflict, i.e. a situation in which peaceful ways of settling disputes among contending groups have failed to end the conflict. It should not, however, be overlooked that acts of terrorism have also been committed in "normal" times. The 1970s witnessed a large number of terrorist acts against civilians, the more spectacular of which

[6] Report of the Working Group on Arbitrary Detention to the UN Commission on Human Rights, doc. E/CN.4/2004/3, 15 December 2003, para. 64.

were linked to the conflict between Israel, the Palestinian people and some Arab States. That was also the time when "terrorism" in general and the international response to such events were placed on the agenda of the United Nations and international governmental organizations. Scholars and the media likewise took up the subject.

Moreover, under the headings of "wars of national liberation" and guerrilla warfare, terrorism became a dominant issue for the Diplomatic Conference which brought about the adoption, on 8 June 1977, of the two Protocols Additional to the Geneva Conventions of 12 August 1949. Having launched the process of updating international humanitarian law, the International Committee of the Red Cross was suddenly confronted with the problem. The destruction, by hijacked passenger planes, of the World Trade Centre's Twin Towers in New York and part of the Pentagon in Washington D.C. on 11 September 2001, and the subsequent armed campaign led by the United States against Afghanistan "to destroy terrorism", have once again thrust "terrorism" to the forefront of international concern. The worldwide reaction to these events has been particularly intense, among other things because of the obvious link between them and the more than thirty years' conflict in the Middle East over the destiny of the Palestinian people.

The world is seeing the use of a considerable amount of violence to support or counter the goals of the contending parties. Suicide attacks by Palestinians against civilians on Israeli territory and retaliatory incursions by the Israeli armed forces into the territories of the West Bank and Gaza, with casualties among the civilian population and destruction of the civilian infrastructure, particularly housing, have generated an incredible degree of hatred between two peoples which history and geography have condemned to live side by side.

## COUNTER-TERRORISM & INTERNATIONAL HUMANITARIAN LAW

The link between the guarantee of human rights and protection from terrorism cannot be over-emphasized. Combating and ultimately overcoming terrorism will not succeed if the means to secure that society are not consistent with human rights standards. The approach of the modern international law should be built on the principle that the guarantee of security requires a multi-dimensional approach. Such an approach shouldn't call for the balancing of liberty and security or suggest that liberty, or aspects of it, must be sacrificed to achieve security. On the contrary, the present scenario should guarantee the protection of human rights as an integral element of security. Counter-terrorism tactics that do not comply with human rights law may ultimately be declared unlawful, resulting in failed prosecutions or overturned convictions. Counter-terrorism tools that do not comply with human rights are therefore liable to be ineffective.

Counter-terrorism, security, human rights and law enforcement are not mutually exclusive. In the context of the threat of terrorism, they should be designed to work together. In most circumstances, they cannot work effectively independently of each other. Counter-terrorism measures need human rights standards to ensure that their implementation does not undermine their very purpose, which is to protect and maintain a democratic society. At the same time, human rights standards may need counter-terrorism measures to ensure that human rights can thrive. What is certain is that human rights are not an optional extra or luxury to any counter-terrorism strategy; human rights must be at the core of that strategy.

Acts of terrorism can be countered in ways that uphold human rights standards. In 2005, UN Secretary General, Kofi Annan emphasized that:

*"Human rights law makes ample provision for counter-terrorist action, even in the most exceptional circumstances. But compromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist's objective — by ceding to him the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits. Upholding human rights is not merely compatible with successful counter-terrorism strategy. It is an essential element".*[7]

International humanitarian law deploys its effect in armed conflict. Thus the 1949 Geneva Conventions deal with acts of terrorism only insofar as they occur in the context of an armed conflict or, in plain language, of a war. Violence against persons and destruction of property are inherent in warfare. The use of deadly force against persons and objects is contrary to international humanitarian law only if such acts transgress the limits established by the international rules. Violence is also one of the salient features of terrorism. International law must therefore draw a line to distinguish the violence which is legitimate in war from acts of terrorism, i.e. illicit recourse to violence. How is this distinction achieved? International humanitarian law approaches the problem from two angles. *First*, the right to use force and commit acts of violence is restricted to the armed forces of each party to an armed conflict. Only members of such armed forces have the "privilege" to use force against other armed forces, but their right to choose methods or means of warfare is not unlimited. On the other hand, only members of armed forces and military objectives may be the target of acts of violence. *Second*, other categories of persons, in particular the civilian population, or of objects, primarily the

[7] UN (former) Secretary General Kofi Annan, "A Global Strategy for Fighting Terrorism", Keynote address to theClosing Plenary of the International Summit on Democracy, Terrorism and Security, 8-11 March 2005, Madrid, available at http://summit.clubmadrid.org/keynotes.

civilian infrastructure, are not legitimate targets for military attacks — they are, in the words of the Geneva Conventions, "protected" and must in all circumstances be spared. International humanitarian law does not grant unfettered licence to use any conceivable form of violence against the other party to an armed conflict. Since time immemorial international rules have drawn a line between methods and means of warfare which are legitimate and those which are not, such as the use of chemical weapons or the assassination of civilians not taking part in the hostilities.

To resort to illegal methods and means violates the legal order and, in aggravated circumstances, can be prosecuted as a crime under domestic law or as a war crime. Consequently, members of armed forces, though entitled to commit acts of violence, may be held responsible for violations of rules protecting persons or civilian property. In other words, officers and ordinary soldiers may (or must) be prosecuted at the domestic or international level and punished for terrorist acts they are found to have committed.

## RULES APPLICABLE TO INTERNATIONAL ARMED CONFLICT

The 1949 Geneva Conventions and their 1977 Additional Protocols refer only twice in a specific manner to acts of terrorism: in Article 33 of the Fourth Geneva Convention and Article 51, para 2, of Protocol I. Under the heading "Protection of the civilian population", Article 51 of Protocol I codifies the basic rules to be respected in military operations. Article 52 adds precise rules banning the destruction of civilian objects, in particular those which are part of the civilian infrastructure.[8] After a reminder of the obligation to protect the civilian population against dangers arising from military operations, an obligation firmly anchored in customary law, paragraph 2 of Article 51 reads: "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."

Paragraph 4 of the same provision prohibits indiscriminate attacks in warfare. This provision covers military operations (or any acts of violence) which

- are not directed at a specific military objective,
- employ a method or means of combat which cannot be directed at a specific military objective, or

[8] As at 30 June 2002, 160 States are party to Protocol I. The United States, Israel, Afghanistan and some other States, including Iran, Iraq and the Democratic People's Republic of Korea, are not bound by Protocol I, which prohibits attacks against civilians and the civilian infrastructure.

- employ a method or means of combat the effects of which cannot be limited as required by the law, and consequently are of a nature to strike military objectives and civilians or civilian objects without distinction. In other words, attacks or acts of violence which, though intended to hit a military target, in fact kill or wound civilians or destroy civilian objects, including the civilian infrastructure, in disproportionate manner are prohibited.

Beyond all doubt, these rules ban terrorist activities insofar as they are directed against civilians. By definition, terrorist acts are acts "the primary purpose of which is to spread terror among the civilian population" (Article 51, para. 2). Acts of terrorism are always either attacks against civilians or indiscriminate attacks which usually strike civilians. However, terrorist acts *need* not necessarily or exclusively strike civilians or the civilian infrastructure. It must be stressed that threats of violence intended to spread terror among the civilian population are also prohibited. The *intention* to spread terror among civilians is a necessary element for defining acts of terrorism, for the simple reason that in war any use of deadly force may create fear among bystanders, even though the attack may be directed at a lawful target (e.g. aerial bombardment of a military target close to a civilian area).

As a first conclusion on this basic point it can be seen that terrorist acts causing harm to civilians or civilian property are clearly prohibited by modern international law governing international armed conflict, in particular by Articles 51 and 52 of the 1977 Protocol I additional to the Geneva Conventions. These prohibitions cannot be bypassed by claiming a right to resort to reprisals; they are absolute. Terrorist acts causing death or serious injury to civilians are grave breaches of the Fourth Geneva Convention, in other words, war crimes. As such, they require that perpetrators thereof be prosecuted and, if guilty, punished by domestic tribunals. Under the conditions laid down by the Rome Statute, those persons may be subject to the jurisdiction of the International Criminal Court. Terrorist acts committed in times of armed conflict most probably will be prosecuted as war crimes (Article 8 of the Rome Statute), while in other situations such acts may be qualified as crimes against humanity (Article 7).[9]

In addition to the general prohibitions established by Articles 51 and 52 (the main parts of which give expression to customary law rules), several other provisions of humanitarian law are also relevant in a discussion on the response of international humanitarian law to terrorism. They

[9] Statute of the International Criminal Court (ICC), adopted in Rome on 17 July 1998, Article 7 (crimes against humanity) and Article 8 (war crimes), in particular para. 2 (a) and (b). — After ratification by more than 60 States the Rome Statute entered into force on 1 July 2002. The United States, Israel, Afghanistan and some other States, including Iran, Iraq and the Democratic People's Republic of Korea, are not party to the Court established to prosecute persons accused of serious war crimes, such as terrorist acts, "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes" (Rome Statute, Article 8, para. 1).

usually cover specific needs for protection, such as the rules on the protection of cultural property from any hostile act,[10] or the legal protection given to installations containing dangerous forces (such as dams, dykes and nuclear power plants).

While we have hitherto examined the protection afforded by international humanitarian law to civilians and civilian property in times of armed conflict, we now turn to the question whether international rules also confer legal protection against terrorist acts targeting members of armed forces. The answer is not self-evident, because soldiers are allowed to shoot and can be shot at. Members of armed forces are unquestionably active participants in, and simultaneously a legitimate target of, military operations. And what appears to be a terrorist act in a civilian context may well be a legitimate act of war if carried out against enemy personnel. However, "the right of parties to the conflict to choose methods or means of warfare is not unlimited", says a fundamental rule of the laws of war. As codified by Article 35, para. 1, of Protocol I, this rule imposes upon warfare limits for the benefit of those who participate in the war effort, i.e. members of the armed forces. Article 35 goes on to state in its second paragraph that "it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering". One example of such illegal behaviour vis-à-vis members of armed forces is perfidy. Article 37 of Protocol I prohibits acts of perfidy, which are acts of violence that betray the trust of the other side. For example, use of violence while feigning civilian, non-combatant status constitutes perfidy. Specific acts of terrorism may well be of a perfidious nature.

This clearly shows that terrorist acts may be considered a crime if committed against members of the armed forces. After analysing those parts of international humanitarian law which set limits to the conduct of military operations, we shall now consider the rules dealing with the fate of persons who have stopped fighting and find themselves in the hands of the adverse party, either as wounded or sick, as detainees or as inhabitants of an occupied territory. The First and Second Conventions reiterate the customary rules that wounded and sick persons who are *hors de combat* — out of action — must be "respected and protected in all circumstances". In particular, "they shall not be murdered or exterminated". "Wilful killing" of a protected person is a grave breach of the First and Second Geneva Conventions, i.e. a war crime.

By virtue of the Third Geneva Convention of 1949, members of armed forces captured and detained by the adverse party as prisoners of war must be dealt with in accordance with a

[10] Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, Article 4. See also Protocol I, Article 53.

detailed code of rules which ensure their humane treatment. Any life-threatening treatment or other form of violence to their person is strictly forbidden; they must at all times be treated humanely. The law gives special attention to the conditions under which detained persons may be interrogated: "No physical or mental torture, nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." Serious violations of these commitments are grave breaches of the POW Convention, and are thus war crimes. [11]

Of particular importance is the legal regime set up by international humanitarian law to protect enemy civilians held by or otherwise under the control of the adverse party, be it on its own territory or in an occupied territory. The goal of the Fourth Geneva Convention is to ensure humane conditions for civilians living under foreign control. The rules codified by that Convention leave no doubt: terrorist acts committed by civilians who find themselves under the control of a party to conflict are illegal. Article 33 is, incidentally, the only provision in the 1949 Conventions which uses the word "terrorism". It reads: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited." Article 33 refers to situations where a person in the power of the enemy is in particular danger of becoming the victim of "measures of intimidation or of terrorism" while in detention or in an occupied territory. The term "terrorism" as used by the Fourth Convention seems, however, to have a narrower meaning than in present-day language. Wilful killing, torture or inhuman treatment, the taking of hostages or "extensive destruction (…) of property" are grave breaches of the Fourth Geneva Convention: such acts are war crimes.[12]

Protocol I considerably reinforces international standards for the protection of civilians insofar as they are directly exposed to the dangers of military operations. The basic rule stipulates that civilians shall not be the target of hostilities. A serious violation of that prohibition constitutes a war crime. The treaty also introduces new rules for the benefit of persons who find themselves under enemy control. Under the heading "Fundamental guarantees", Article 75 codifies those basic standards with which all authorities must comply — as a minimum and in all circumstances — in their dealings with persons belonging to the adverse party. It is a safety net applicable in circumstances where the persons concerned do not benefit from more favourable treatment under more detailed provisions. In its Article 75, Protocol I clearly "borrows" universally

[11] Third Convention, Article 120.
[12] 20 Fourth Convention, Article 147.

accepted standards from the body of international rules on human rights. It should be recalled at this point that international law addresses the behaviour of persons who act on behalf of a party to an *international* armed conflict, i.e. a State. Entities other than States cannot become parties to such a conflict, with the exception of a national liberation movement, which may qualify as a party to an international armed conflict provided that movement fulfils the strict conditions set up by Protocol I. If these conditions are met, the liberation movement assumes the same rights and the same obligations in an armed conflict as those of a State, except for those rights which are linked to the status as a signatory to an international treaty. It can thus be concluded that in an international armed conflict terrorist acts are prohibited without exception or reservation. In particular, reprisals cannot be justified as a reaction to terrorist acts. Reprisals against civilians are, anyway, prohibited in all circumstances.[13]

Violations of the more important rules are considered to be grave breaches of the Geneva Conventions or of Protocol I. In other words, such violations are war crimes. Under certain strictly worded conditions, the International Criminal Court (ICC) has jurisdiction to try persons suspected of having committed the more serious forms of crimes. But the ICC has only a subsidiary role to play. Both under the provisions of the Geneva Conventions and those of the Statute of Rome, the State which has jurisdiction over the person concerned has priority over the powers of the international tribunal.[14]

It is particularly important to note that members of armed forces who have committed terrorist acts amounting to a grave breach of the Geneva Conventions may be brought to justice and prosecuted for their acts. This is also true if they are in the hands of the adverse party and have the benefit of POW status. Combatant or POW status does not grant immunity from criminal prosecution for acts contrary to international law. Nor does the Fourth Geneva Convention, in any circumstances, grant civilians the right to use force. Therefore, any person suspected of having committed violent acts may be prosecuted.

## INTERNATIONAL RULES APPLICABLE TO NON-INTERNATIONAL ARMED CONFLICT

International humanitarian law applicable in non-international armed conflict is the result of a compromise between the concept of sovereignty and humanitarian concerns. In an internal armed conflict at least one party is not a State; it is usually an insurgent group determined to overthrow the government, or a rebel movement fighting for autonomy or secession. It is

[13] Protocol I. Article 51, para. 6. — Some States party to Protocol I have made a reservation to the rules prohibiting reprisals. The United States has expressed its rejection of that rule through other means.
[14] Rome Statute, Articles 1 and 17.

generally accepted today that internal conflicts with a high intensity of violence cannot remain beyond the reach of international law protecting persons from the effects of hostilities, whether those persons are actively involved in acts of violence or not. Indeed, civil wars often have the same devastating effects as armed conflict between States. Since 1949 and 1977 respectively, Article 3 common to the four Geneva Conventions and Additional Protocol II have set the basic standards intended to limit violence and suffering in non-international armed conflict. Customary law confirms and supplements the fundamental Article 3 and the fifteen articles of Protocol II. It is not our intention to blur the dissimilarities between the two types of armed conflict. And yet it can be seen that the norms prohibiting acts of terrorism in non-international armed conflict are basically identical with those applicable in international armed conflict.

Article 3 common to the four Geneva Conventions prohibits acts of terrorism with the following words, though without actually using the word "terrorism": "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

a. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
b. taking of hostages;
c. outrages upon personal dignity, in particular humiliating and degrading treatment;

Protocol II reaffirms and develops these rules. Under the heading "Humane treatment" of those who do not, or no longer, take part in military operations, Article 4, para. 2 (d) even condemns "acts of terrorism" outright as contrary to the law. Moreover, Protocol II — and in this respect it breaks new ground — also codifies standards for the conduct of military operations in internal conflicts. The basic provision is, of course, the obligation to distinguish between those who take an active part in hostilities and those who do not, in particular civilians, the wounded and the sick. Article 13 specifically prohibits attacks on the civilian population as well as on individual civilians. It furthermore states in paragraph 2 that "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited". These same words are to be found in Article 52, para. 2, of Protocol I, which deals with international armed conflict. Neither Article 3 nor Protocol II has a provision similar to Article 35 of Protocol I,

which, for international armed conflict, codifies the long established principle that parties to an armed conflict are not free to choose methods or means of combat to their liking and, in particular, that weapons which cause superfluous injury or unnecessary suffering are outlawed. However, the fourth preambulary paragraph of Protocol II restates the message of the Martens Clause for non-international armed conflict.

The Martens Clause says that, in the absence of a specific prohibition, a rule must be found which is compatible with "the principles of humanity and the dictates of the public conscience". Neither common Article 3 nor Protocol II of 1977 contains any provision on criminal responsibility for (mis)behaviour in an internal armed conflict. It is up to domestic jurisdictions to deal with persons who have committed a crime in such a context. However, the International Criminal Tribunal for the former Yugoslavia (ICTY) has concluded, in an important decision, that the more egregious crimes committed in a non-international armed conflict are to be considered as international crimes. Therefore, international rules do apply in the trial of a person prosecuted for a crime committed in a non-international armed conflict.[15] This means that acts of terrorism committed in a non-international armed conflict may indeed be equated with grave breaches as defined by the 1949 Geneva Conventions. The same rules regarding the jurisdiction of States or the ICC are applicable.

What distinguishes non-international armed conflict from armed conflict between States is the fact that on one side there is a State and on the other one or more groups of individuals who oppose the government's authority. While it is no surprise to learn that State contenders are under an obligation to comply with the international obligations binding for that State (*pacta sunt servanda*), Article 3 and Protocol II also impose obligations on dissident forces and their members, which are non-State contenders. Thus members of those forces must heed the ban on terrorist acts, and commanders of dissident forces are under an obligation to enforce compliance with the international rules. In other words, they must take all necessary steps to enforce the prohibition of terrorist acts, including appropriate measures if that prohibition is violated.

To sum up, it can safely be said that the prohibition of recourse to terrorist acts is as firmly anchored in the law applicable in non-international armed conflict as it is in the rules governing

[15] D*ecision on the Defence Motion for Interlocutory Appeal on Jurisdiction, The Prosecutor* v. *Dusko Tadic*, Case No. IT-94-1-AR 72, ICTY Appeals Chamber, 2 October 1996.
27 See also the International Law Committee's Draft Code

international armed conflict.[16] Acts of terrorism are banned, without exception. This conclusion is important, as non-international armed conflicts are particularly prone to wanton violence.

## INTERNATIONAL HUMANITARIAN LAW AND CRIMINAL LIABILITY OF TERRORISM

**Substantive provisions:** Most terrorist-type conduct committed in any type of armed conflict is already criminalized as various war crimes.[17] This is because IHL prohibits and criminalizes deliberate attacks on civilians or civilian objects, including by indiscriminate attacks; reprisals; the use of prohibited weapons (including incendiaries); attacks on on cultural property, objects indispensable to civilian survival, or works containing dangerous forces; or through illegal detention, torture or inhuman treatment. In addition, the suite of crimes against humanity also applies concurrently in armed conflict to protect civilian populations against widespread or systematic attack.

In addition to such protections for civilians, IHL specially prohibits terrorism. Article 33(1) of the 1949 Fourth Geneva Convention prohibits 'collective penalties and likewise all measures of intimidation or of terrorism' against protected persons 'in the hands of a Party' (as in detention or occupied territory) to an international conflict.[18] The provision was a response to the mass intimidation of civilians in occupied territory in the Second World War.

All civilians in international conflict (including those not 'in the hands of' a party) are protected by Article 51(2) of Protocol I of 1977, which prohibits 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population'. The same acts are prohibited in non-international conflict by Article 13(2) of Protocol II. Both provisions are part of wider prohibitions on attacking civilians.38 Article 4(2)(d) of Protocol II further prohibits 'acts of terrorism' in non-international conflicts.

In the Galic case, the International Criminal Tribunal for the former Yugoslavia found that a violation of Article 51(2) of Protocol I attracts individual criminal responsibility,[19] despite the article not being listed as a 'grave breach' provision. The war crime of spreading terror against a civilian population was committed by a campaign of sniping and shelling of civilians in the besieged city of Sarajevo, by deliberately targeting the routines of everyday life and thereby

[16] See also the International Law Committee's Draft Code of Crimes against Peace and Security of Mankind (1996) whose Art. 20(f)(iv) makes serious acts of terrorism committed in a non-international armed conflict a war crime.
[17] See Hans Gasser, 'Acts of Terror, "Terrorism" and International Humanitarian Law' (2002) 84 International Review of the Red Cross 547.
[18] Fourth Geneva Convention, art 4.
[19] *Prosecutor v Galic* (ICTY, Case No IT-98-29-T, 5 December 2003) [65]-[66]; affirmed in *Prosecutor v Galic (Appeals Chamber Judgment)* (ICTY, Case No IT-98-29-A, 30 November 2006) [87]-[90].

intending to put civilians in 'extreme fear'.[20] The crime requires that the perpetrator possess the primary purpose to spread terror, but the infliction of actual terror is not required. While all civilians caught in conflict are likely to be incidentally afraid, the prohibition on spreading terror targets the special intention (*dolus specialis*) to spread terror.

The war crime of terror is not, however, the same as certain peace-time legal conceptions of terrorism, namely violence committed to compel a government to do or refrain from doing something, or do advance a political, religious or ideological cause. The meaning of terrorism in IHL is thus more limited than many definitions of terrorism outside of armed conflict.

For this reason, certain terrorism offences within the jurisdiction of post-9/11 US military commissions were not IHL offences as the US claimed. A crime of 'terrorism' was defined in a 2003 military instruction as violence 'intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation and coercion'.

This offence was abandoned when the executive military commissions were reconstituted by the US Congress after the US Supreme Court's 2006 decision in *Hamdan vs. Rumsfeld*[21]. However, the 2006 military commissions were given jurisdiction over a new offence of providing 'material support for terrorism',[22] ostensibly as a pre-existing war crime under international law. In reality this offence was derived from earlier US domestic law,[23] with certain jurisdictional differences. The new offence was amongst the principal charges brought against the few convicted in the military commissions after 2006.

The problem was that such an offence was unknown to international law at the time of the alleged conduct, since it imposed liabilities beyond the limited circumstances recognised by the ICTY in *Galic* (and more like peacetime offences). In *Hamdan vs. United States* in 2012, a US civilian appeals court found that the offence was not a war crime under international law at the time of its commission, and that the US law did not authorize retrospective prosecution of offences which were not war crimes at the time. An Australian citizen, David Hicks, has also argued that his conviction for material support is unlawfully retrospective, contrary to the principle of legality under Article 15 of the International Covenant on Civil and Political Rights.[24]

[20] *Prosecutor v Galic* (2003), ibid, [137].
[21] 548 U.S. 557 (2006)
[22] Military Commission Act 2006 (US), s 950v(25)(A); see also Military Commission Manual (2007), Part IV- 18-19 (pp 261-262).
[23] 18 US Code ss 2339A and 2339B.
[24] *Hicks v Australia*, UN Human Rights Committee Communication under the First Optional Protocol to the ICCPR, lodged 20 September 2010.

In addition to IHL offences, domestic criminal (and/or military) law may apply to certain terrorist acts in armed conflict. In international conflicts, the criminal law of the occupied territory will still apply to civilians (including those participating in hostilities), subject to any necessary modifications to ensure the security of the occupying power.[25] In non-international conflict, the state party's domestic criminal law remains applicable, such that non-state actors may find themselves criminalised for terrorism, rebellion, revolution, treason, treachery, sedition, or other extant national security offences. One qualification is that IHL encourages states to confer amnesties at the end of a conflict for participation in hostilities (but not for war crimes and the like).

In 'transnational' non-international conflicts, two domestic legal systems may potentially apply: that of the (non-belligerent) territorial state (which may not be able to practically enforce it), as well as the state whose forces are fighting extraterritorially. In the latter case, the state's domestic criminal law will only lawfully apply if two conditions are met. First, it must have been given prospective extraterritorial effect. Secondly, the offences must be defined with sufficient precision so as to give fair advance notice of the scope of the liability in question. (In this respect, the residents of foreign territory are hardly likely to be au fait with their liabilities under the law of an interloping foreign state.) Both conditions are required so as to comply with the international human rights principles of legality and non-retrospective punishment. Thirdly, the offences must come within the competence of the state to criminalise conduct extraterritorially, namely by reference to the international principles of prescriptive criminal jurisdiction; particularly important may be the protective, nationality, and passive personality jurisdiction.

**B. Trial and prosecution of terrorists:** Some criminal trials since 9/11 have not conformed to the minimum fair trial guarantees of IHL and/or international human rights law. Even before 9/11, military trials of 'terrorists', such as by 'faceless' tribunals in Latin America, raised serious human rights problems. There are extensive guarantees of a fair trial in international conflicts, consolidated in Article 75 of Protocol I, and which approximate the human rights guarantees in Article 14 of the ICCPR.

In non-international conflicts, common Article 3 of the Geneva Conventions provides for a fair criminal trial by 'a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized people. While vaguely worded, that provision should be

[25] Fourth Geneva Convention, art 64; Hague Regulations concerning the Laws and Customs of War, as annexed to Hague Convention (IV) respecting the Laws and Customs of War on Land, adopted 18 October 1907, 205 CTS 227 (entered into force 26 January 1910) art 43.

interpreted dynamically in the light of the explicit guarantees set out in Article 75 of Protocol I and/or Article 14 of the ICCPR.

Another chapter in this book examines the US military commissions after 9/11. In brief, attempts to deviate from minimum international guarantees, as through the US President's first military commissions, were rejected by the US Supreme Court.[26] There were particular concerns about the admission of evidence obtained by coercion or hearsay evidence, restrictions on access to evidence and lawyers, executive interference in trials, and the lack of structural independence and impartiality from the political branch. While the Military Commissions Act 2006 (US) made some improvements, the new trials remained dogged by procedural irregularities.[27] The third system of trials, constituted by President Barack Obama under the Military Commissions Act 2009 (US) was also not free of basic defects.

That is not to suggest that a fair criminal procedure has a static content. Many national legal systems have developed mechanisms for protecting security sensitive intelligence information while balancing the concerns of a fair criminal trial, in particular the right of an accused to see and test the evidence.[28] The problem was that the US military commissions transgressed these outermost boundaries of a fair trial.

## CONCLUSION

The rhetoric and practice of the post-9/11 'war on terror' has focused attention on whether violence by and against 'terrorists' can constitute 'armed conflict' regulated by International Humanitarian Law (IHL), and if so how such conflict should be classified. The basic issue is not new, given that earlier internal insurgencies often exhibited 'terrorist' characteristics, and national liberation struggles for self-determination during post-war decolonisation were often treated as 'terrorist' problems. Some of these situations had cross-border dimensions (particularly in Africa, but also in Asia and Latin America), so that current debates about 'transnational' non-international armed conflicts are also not novel, even if there have been changes in form and scale and the actors involved. The problems of over-classifying, under-classifying, or failing to classify conflicts are also historically well-known. The applicable IHL norms have, however, been overlaid by new international counter-terrorism norms after 9/11, which adds a new legal

[26] *Hamdan v Rumsfeld* (2006) 548 US 557.
[27] James Stewart, 'The Military Commissions Act's Inconsistency with the Geneva Conventions: An Overview' (2007) 5 Journal of International Criminal Justice 26.
[28] See, e.g., *A and others v United Kingdom* App No 3455/05 (ECHR, 19 February 2009); *Canada (Prime Minister) v Khadr* [2010] SCR 44 (Supreme Court of Canada).

dimension; as well as interpretive or policy challenges to the application and adequacy of IHL norms.

Certain terrorist violence may be regulated by the rules of international or non-international armed conflict, including where it has a transnational dimension. There is no need for any special status of 'terrorist' in IHL, which would only serve to diminish existing humanitarian protections. Terrorists can be targeted for direct participation in hostilities; administratively detained where they are dangerous; and prosecuted for war crimes. Human rights law applies alongside the *lex specialis* of IHL to supplement its rules in certain areas, particularly as regards detention in non-international conflict.

The rapid growth of new international counter-terrorism law after 9/11 has also raised potentially serious conflicts with IHL. In general the international treaties adopted prior to 9/11 tended to avoid any collision with IHL norms, by carving out from their scope hostile acts committed by parties to an armed conflict, thus leaving such acts to be regulated by IHL. This separation of regimes has been blurred by post-9/11 measures. In UN Security Council Resolution 1371 (2001),[29] the Security Council authorised states to criminalize terrorism in domestic law but without providing a definition. Many states duly enacted their own terrorism offences or unilaterally banned terrorist organisations. Little difficulty arises where such measures reinforce war crimes against civilians under IHL, or are otherwise limited to protecting civilians (such as by criminalising the preparatory financing of attacks on civilians).

However, some laws have also criminalised acts which are not prohibited by IHL (such as proportionate attacks on military objectives by non-state forces) or proscribed terrorist groups that are parties to such conflicts (such as the LTTE in Sri Lanka). A similar concern has arisen in the drafting of a UN comprehensive terrorism convention since 2000. In both cases such laws may serve as a basis for transnational criminal cooperation to suppress terrorism.

One adverse consequence may be to undermine the effectiveness of IHL and its humanitarian purposes. If non-state groups find themselves branded and delegitimized internationally as terrorist criminals, any incentive for them to comply with IHL is lost. For it then makes sense to fight as long and as viciously as possible to avoid defeat, which would bring only severe criminal punishment (rather than security detention, amnesties and eventual demobilization).

[29] UN Security Council Res 1371 (28 September 2001).

In contrast, where non-state groups are not criminalized, but treated as parties to a conflict, there is greater reason for them to comply with humanitarian principles. Of course, more must be done to induce terrorist groups themselves to comply with IHL. As non-signatories to IHL treaties, their commitment to norms they did not formulate or agree to can be encouraged by, for example, special agreements under common article 3(2), unilateral declarations or deeds of commitment, codes of conduct, training, and the creation of disciplinary systems (including 'courts', like those of the LTTE).[30]

Unlike global counter-terrorism law, IHL was not developed yesterday, but through a gradual and delicate process of codification and consensus building over more than a century. While it is resilient and flexible enough to accommodate new challenges, it is also fragile – and capable of unravelling if powerful states no longer support it. Only terrorists, not states or civilians, will ultimately benefit from the fraying or disintegration of IHL.

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[30] See, e.g., Sivakumaran, above n 19, 538-562; ICRC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts* (Geneva, 2008).

# CUSTODIAL TORTURE: A NAKED VIOLATION OF HUMAN RIGHTS

*Aditya Prakash[1] & Aayushi Chaudhary*


## ABSTRACT

*"If I can love myself despite of my infinite faults, how can I hate anyone at the glimpse of few faults"*

*-Alexander the Great*

The constitution of India gives both fundamental rights and fundamental duties to every citizen of India and several body and institutes are making their best effort to assure the reach and exercise of such rights by the common man. When the state takes away a person's liberty, it assumes full responsibility for protecting their human rights. The most fundamental of these is the right to life. Each year, however, many people die in custody. Custodial Violence is a dark reality in our democratic country governed by "rule of law". In a democratic society, the police have the predominant role of protecting the rights of citizens as enshrined in the constitution. But it is well known that they systematically violate their powers and employ torture as part of their investigation process. The poor, the deprived classes, women & political activists are the worst victims of police highhandedness. The main reason why torture continues to be practiced on such a wide scale throughout India is that the police feel themselves to be immune, they are confident enough that they will not be held accountable, even if they kill the victim & even if the truth is revealed.

This paper examines the causes of deaths in custody, and considers what may be done to prevent these deaths, and to better protect the right to life, and other human rights, of vulnerable people held in the custody of the state.


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## INTRODUCTION

The motto of the National Human Rights Commission is "*Sarve Bhavantu Sukhinah*". Happiness and health for all is sought to be achieved through a rights-based regime where respect for human beings and their dignity is cardinal. President's assent to the Protection of Human Rights Act was a major breakthrough in this direction. Section 3 of the Act provides for the setting up of the National Human Rights Commission (NHRC) and Section 21 provides for the setting up of various States Commissions (SHRC)[2].

As per the Oxford dictionary "custody" means protective care or guardianship of someone or something. In the legal parlance Custody is defined as any point in time when a person's freedom of movement has been denied by law enforcement agencies, such as during transport prior to booking, or during arrest, prosecution, sentencing, and correctional confinement[3]. All over the world, especially in developing countries like ours Custodial death is one of the key sensitive issues with respect to human rights violation. Sudden and unexpected death in custody is commonly associated with allegations of police misconduct, media speculation, rumors, and intense community concern. It is also recognized that law enforcement misdemeanors do occur, hence thorough and objective investigation by the Forensic Pathologist is crucial to provide indisputable facts regarding the cause of death[4].

The concept, "torture" as a term means the infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure. A person or suspect who determined by Law enforcement agents is a person whose freedom is directly controlled or limited[5].Essentially, torture is a deliberate infliction of pain (physical or mental) for a purpose desired by the perpetrator. To the victim of torture, it results in the violation of the dignity inherent in his humanity[6]. It is an instrument to implore the will of the strong over the weak by suffering and

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[2] The Protection of Human Rights Act, 1993. Act 10 of 1994, with Amendment Act, 2006. Springborn RR. Outlook: Death in custody. Department of Justice Criminal Justice Statistics Centre, California. May 2005.

[3] **Gill J, Koelmeyer TD.** Death in Custody and Undiagnosed Central Neurocytoma. Am J Forensic Med Pathol 2009;30: 289–291

[4] Torture in India 2010. Asian Centre for Human Rights, April 2010.p-1

[5] See Bryan G.A. (ed) Black Law Dictionary, 8th Edition

[6] Such as "affront to (prisoners') dignity as human beings, sometimes reaching the dimension of torture": see A. A. Adeyemi, 'Custodial Rights: Rights of Prison Inmates' (1991) 2:11, JUSTICE: A Journal of Contemporary Legal Problems, 48; lumping many inmates in a single room, lack of provision of adequate food and clothing, and even medical care: see Adeyemi, A. A., 'United Nations Human Rights Instruments and Criminal Justice Norms and Standards' in Bassiouni, M. C. and Motala, Z. (eds.), *The Protection of Human Rights in African Criminal Proceedings* (London:

degradation which destroys to a large extent the individual personality of the victim[7]. Assault the detainee with horse whip, inflicting blows on him with a clenched fist and putting him in handcuffs overnight amounts to torture and degrading treatment[8]. Torture means any act by which severe pain and suffering whether physical or mental, is intentionally inflicted by or at the investigation of a public official on a such person for such purposes as obtaining from him or a third person information or conversion, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons[9]. It does not include pain or suffering arising only from, inherent in or extent consistent with the standard minimum rules for the treatment of prisoners[10] but includes continuous detentions of suspects without trial in the circumstances of their HIV positive condition which caused them mental and physical agony which must have exacerbated their fear of death especially as the restriction by their detention must have comprised their access to proper or better medical care.[11]

As per the NHRC guidelines, all custodial deaths are to be reported within 24 hrs and post-mortem examination is to be conducted by a panel of doctors & videography has been made mandatory. NHRC Report from 2001-02 to 2006-7 showed an increase in custodial deaths all over India[12]. Though majority of the cases in custody die due to natural causes, but issues such as negligence in medical aid or improper healthcare facilities cannot be ruled out. This study is an attempt to see the pattern of custodial deaths in North West Chandigarh zone of India so as to bring awareness among law enforcement agencies for better care of prisoners. The analysis of 90 cases of custodial deaths occurred in the last decade during their treatment in PGIMER Chandigarh, who had previously received treatment either in the respective jail hospitals or peripheral health centers. The post-mortem examination of these cases was conducted in the mortuary of the institute as per the

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Martinus Nijhoff Publishers, 1995) p.10. see also Ifaturoti, T. O., 'The Challenges of Nigerian Prisoners in the Light of Human Rights Campaigns' in Bassiouni, M. C. and Motala, Z. (eds.), op. cit., 159.

[7] Even beasts in custody get a better deal. The most ferocious of man-eaters when cages are regularly fed and their health is a cause of great concern and anxiety to many. After all, we do posses the sensitivity to realize that the Mother Nature has meant it that way by instilling in the system of even animals, instincts that are inviolable. That is why the on looker appreciates the majestic coat and gait of a caged man-eater and anyone who harms it knows too well he can do so with impurity to satiate his ego or sheer wantonness that would otherwise freeze or melt

[8] Per Smith J. in Ifeanyi Anyanor v CP, Delta State & 3 ors (2007) CHR pg. 183 @ 196.

[9] Nsereko, D. D. N., 'The Poisoned Tree: Responses to Involuntary Confessions in Criminal Proceedings in Botswana, Uganda and Zambia' in Bassiouni, M. C. and Motala, Z. (eds.), op. cit., p.84

[10] See article 1 of the General Assembly of the Untied Nations adopted without vote resolution 3452 (xxx), a declaration on the protection of all persons from being subjected to torture and cruel, inhuman or Degrading Treatment or Punishment.

[11] See Odafe & ors v Attorney General of the Federation (2005) CHR 309 @ 322

[12] Wobeser W, Datema J, Bechard B, et al. Causes of death among people in custody in Ontario, 1990–1999. Can Med Assoc J. 2002; 167: 1109 –1113.

guidelines laid out by National Human Rights Commission. Relevant information was gathered from post-mortem reports and medical record files. Causes of death were categorized under natural and unnatural (suicides/accidents/homicides). Factors such as sex, age, place of occurrence, treatment protocols, past medical history, allegations of foul play/negligence, etc. were taken into account while analyzing the sequence of the events leading to death in these cases.

Today the society has nearly succumbed to the syndrome of lawless tensions, psychic penury and miseries of conflict, at individual, domestic, local, national and international levels. The legal mutiny far from salvaging man is gnawing at him from within. Incarcerating barbarity has been validated by the popular retributive- deterrent philosophy, this is current sentencing coin in many criminal jurisdictions[13]. It has been observed that in the past decade the toll of deaths in police lock-ups is on the rise. Many deaths have occurred while in detention but so far no attention has been paid. In India police lock-ups are solely managed by the police personnel and such incidents are only possible by their actions. Recently, there was a public uproar in West Bengal against the monstrous acts of the police against the faultless citizens. The Government of India allows torture, so inflicted in police lock-ups, considering it necessary for the administration of justice while providing impunity to the law enforcement officers. Principally, it is believed that the court lock-ups be governed by the judiciary. Although it is seen that even the magistrates are dependent on the police officials for their judicial functions. The root of the problem lies in vesting enormous powers of judiciary to the police officials. Their job begins from the arrest to the conviction of the arrestee. Revelations brought forth that practically the independence of the Judiciary has not been observed. This is taken to be contrary to the tenets of the Constitution and goes against the intention of the Criminal Procedure Code, 1973 that establishes the judiciary to be severed from other parts of the government.

## TORTURE IN POLICE CUSTODY

Torture remained common and integral to law enforcement. Deaths in police custody are reported at regular intervals. These deaths were time and again passed off as suicides, sudden medical complications, self-inflicted injuries and natural deaths. For example, out of the total 84 cases of death in police custody recorded by the National Crime Records Bureau (NCRB) of the Ministry of Home Affairs during 2009, deaths in 80 cases were recognized to hospitalization/treatment (9 cases); accidents (4 cases); by mob attack/riot (2 cases); by other criminals (3 cases); by suicide (21

[13] V.R Krishna Iyer : *Constitutional Miscellany ,* 2nd Edn ( 2003) p. 149, 151

cases); while escaping from custody (8 cases); and illness/natural death (33 cases)[14]. Torture is used to extract confession, demand bribes, settle personal scores etc. Terror suspects are at increased risks of torture given the immense pressure on the police to solve the crimes.

**A. Custodial deaths:** During 2010-2011, the highest number of death in police custody was reported from Maharashtra with 31 cases followed by Uttar Pradesh (15); Andhra Pradesh (14); Gujarat (9); Assam and Orissa (7 each); Bihar, Punjab, Tamil Nadu and Jharkhand (6 each); Karnataka, Madhya Pradesh and West Bengal (5 each); Uttarakhand (4); Delhi and Haryana (3 each); Goa, Jammu and Kashmir, Kerala, Manipur, Mizoramand Rajasthan (2 each); and Nagaland, Tripura and Chhattisgarh (1 each). i. Individual cases of custodial deaths through torture: As ACHR has stated above, a large majority of the cases of custodial deaths took place as a result of torture. Torture remains endemic, institutionalized and central to the administration of justice and counter-terrorism measures. ACHR documented a number of cases of death in police custody during 2010. On 1 January 2010, Mr. Rajendra Yadav (20 years), son of Mr. Dashrath Prasad Yadav, died due to alleged torture at the Chhatarpur Police Station in Palamau district of Jharkhand. Mr Yadav was taken into custody on 30 December 2009 for questioning in a murder case. Post-mortem report of the deceased revealed injury marks[15].

A 20-year-old Dalit R. Jay Kumar died due to alleged torture at the Chitilapakkam Police Station in Kanchipuram district of Tamil Nadu. The deceased, a school van cleaner, was picked up for questioning in connection with a case of assault on 14 November 2010. The deceased was released on 15 November 2010 after his mother allegedly paid a bribe of Rs. 1000. However, he had to be hospitalized at the hospital where he died. The deceased's mother alleged that her son sustained injuries due to torture by two constables, which resulted in his death[16].

In India where rule of law is emanates in each and every action and right to life and liberty is prized fundamental right adorning highest place amongst all important fundamental rights, instances of torture and using third degree methods upon suspects during illegal detention and police remand casts a slur on the very system of administration[17]. Human rights take a back seat in this depressing

[14] 2009 Annual Report of the NCRB
[15] Complaint of Asian Centre for Human Rights to National Human Rights Commission, 5 January 2010
[16] Complaint of Asian Centre for Human Rights to National Human Rights Commission, 3 December 2010
[17] The Sikh Coalition, Custodial Death in Punjab; 1997-2001, available at http://www.sikhcoalition.org/Humanrights4asp accessed on 19th December 2014.

scenario. Torture in custody is at present treated as an inevitable part of investigation. Investigators retain the wrong notion that if enough pressure is applied then the accused will confess[18].The former Supreme Court judge, V.R. Krishna Iyer, has said that custodial torture is worse than terrorism because the authority of the State is behind it[19].

It is a paradox that torture continues to exist in India. This is because India is a liberal democracy with very clearly articulated constitutional and statutory provisions against torture that are constantly being developed and monitored by a strong and independent judiciary. This raises the question how torture continues to persist in India[20].

The crudity of criminal investigation is often blamed on the crudity of resources: the lack of scientific equipment and professionally-trained persons to do the job properly. Although this is an element in the problem, it is not the central one. More important is the sheer impunity enjoyed by law enforcers. This impunity is allowed to flourish for want of laws criminalizing and punishing custodial torture, and also due to corruption and the wanton degeneration of courts and other institutions for the maintenance of law in India. Where a torture victim must wait for years in hope that a judge may one day take up his/her case, while meanwhile the perpetrator is being promoted, the concept of justice is undermined. Custodial torture is universally held as one of the cruelest forms of human rights abuse. The Constitution of India, the Supreme Court, the National Human Rights Commission (NHRC) and the United Nations forbid it. But the police across the country defy these institutions. Therefore, there is a need to strike a balance between the individual human rights and societal interests in combating crime by using a realistic approach[21].

**B. Custodial death through torture - alleged Suicide:** In a number of cases the police claimed that the accused committed suicide in police detention. However, the mystery over as to what had led them to take the extreme act and how they commit suicide with strange objects like shoe laces, blankets, jeans, etc. are never answered. How the victims had access to the means for committing suicide like poisons, drugs, electric cables, etc. in custody remained unknown.

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[18] Asian Human Rights Commission, INDIA: Government of Kerala must criminalise torture to prevent custodial deaths, available at http://www.ahrchk.net/statements/mainfile.php/2006state ments/688/ accessed on 20th December 2014.

[19] The Hindu, Custodial Torture Worse than Terrorism, available at http://www.thehindujobs.com/the hindu/2003/07/27/stories/2003072703510500.htm accessed on 20th December 2014.

[20] Jinee Lokaneeta, Torture in Postcolonial India: A Liberal Paradox?, available at http://www.wicked ness.net/els/els2/lokaneeta paper.pdf accessed on 20th December 2014.

[21] Joginder Kumar v. State of Uttar Pradesh, (1994) 4 SCC 260

Gautam Pal (30 years) died due at Pradhannagar police station in Darjeeling district in West Bengal. The deceased, a resident of Prakashnagar, was arrested along with his friends in connection with a theft case on 26 November 2010. He was produced before court on 27 November and remanded to police custody. According to the police, Gautam Pal was found hanging in the lockup bathroom at about 4 am in the morning of 29 November. The police claimed that Gautam Pal committed suicide by using his trouser (jeans) from the ventilator of the lockup bathroom. However, Gautam Pal's brother refuting the police suicide theory alleged that his brother was tortured as he had seen several injury marks on the body. He further stated that the body was strung up after he died to conceal their crime[22].

The Prison Service uses the term "self-inflicted death" rather than "suicide" when referring to those prisoners who take their own lives while imprisoned. This is because it does not differentiate between the occasions where there is an official Coroner's verdict of suicide and other occasions where people die at their own hand, for example through misadventure. As a result, the Prison Service records around a third more self-inflicted deaths than it would if it measured only suicide verdicts given by Coroners.

**C. Custodial death through torture - alleged medical complications:** A large number of victims who are hale and healthy prior to their arrest suddenly develop medical complications once they are taken into custody and die in police custody. In reality, the victims are subjected to torture and murdered. With the acquiescence of the medical fraternity, the police are able to get away by describing the death as medical complications. There are number of cases of death in police custody as a result of alleged medical complications.

Babu (58 years), a laborer, died due to alleged torture at Kattakada Police Station in Thiruvananthapuram in Kerala. Babu was taken into custody on a warrant in connection with a clash over a land dispute in 2002. Police claimed Mr. Babu collapsed at the police station and was rushed to hospital where he died. However, the deceased's family alleged that he was tortured resulting in the death[23].

Provision of adequate, timely and appropriate medical care to people in detention is an essential element of Article 2, 3 and 8 compliance. Questions of ECHR compliance may arise where a

[22] Complaint of Asian Centre for Human Rights to National Human Rights Commission, 30 November 2010
[23]Complaint of Asian Centre for Human Rights to National Human Rights Commission, 14 January 2010

patient's death arises from inadequate medical care[24], or following a self-inflicted death where psychiatric assessment and treatment has been inadequate[25]. In particular, failures in healthcare or in the response to drug overdoses may breach the detaining authorities' positive obligation under Article 2 ECHR to protect the right to life of those they detain. The Article 2 positive obligation to protect life arises wherever the authorities know or ought to know of a real and immediate risk to the life of a particular person or group of people[26]. This obligation, which is particularly strong in respect of detained persons, is breached if the responsible authorities fail to take reasonable measures within the scope of their powers to avert a real or immediate risk[27].

Medical shortcomings may also breach the right to freedom from inhuman and degrading treatment, under Article 3 ECHR, and the right to physical integrity under Article 8. Inadequate medical treatment provided to a prisoner recovering from heroin addiction was found to breach Article 3 in *McGlinchey v UK*[28]. In that case, a misdiagnosis resulted in inappropriate treatment, and the patient died shortly after being admitted to hospital. The case makes clear that seriously negligent medical treatment of a detained person, even in the absence of any deliberate mistreatment, may lead to a breach of Article 3.

## CUSTODIAL TORTURE OF WOMEN AND CHILDREN

Women are entitled to the equal enjoyment and protection of all human rights in the political, economic, social, cultural, civil, and all other fields[29]. Women are particularly vulnerable in the custody of the security forces due to their gender. The gender based violence includes torture resulting in the death of the victims in custody. Torture of women in custody including rape is reported regularly in India. Custodial rape remains one of the worst forms of torture perpetrated on women by law enforcement personnel. Self-harm is a particular problem amongst women prisoners, largely due to the significant and often imported vulnerability of many women in custody. In 2003, 30 per cent of women prisoners harmed themselves, compared with 6 per cent of men. Women are

[24] *Anguelova v Bulgaria,* App No 38361/97, 13/06/2002— the failure to provide timely medical care in police custody breached Article 2; *McGlinchey v UK* App No 50390/99, 29/04/2003
[25] *Keenan v UK* (2001) 33 EHRR 38
[26] *Keenan v UK, op cit*; *Osman v UK* (2000) 29 EHRR 245
[27] *McFeeley v UK* (1980) 3 EHRR 161
[28] McGlinchey v UK App No 50390/99, 29/04/2003
[29] UDHR, article 2; ICCPR, article 3; Convention on the Elimination of All Forms of Discrimination against Women [hereinafter "CEDAW"], articles 1, 2 and 3; Declaration on the Elimination of Violence against Women [hereinafter "Declaration on Violence against Women"], article 3.

in vulnerable condition just not because of mental problem or drug addicted but also being sexually abused. Many women prisoners are mothers, and have been taken away from their children itself a traumatizing factor.

Mr Ajay Maken, then Minster of State in the Ministry of Home Affairs, Government of India stated in the Lok Sabha that the National Human Rights Commission registered 39 cases of rape from judicial and police custody from 2006 to 2010 up to 28 February 2010. These included 9 cases, including 2 in judicial custody and 7 in police custody, in 2006-2007; 17 cases, including 2 in judicial custody and 15 in police custody, in 2007-2008; 7 cases, including 2 in judicial custody and 5 in police custody, in 2008-2009; and 6 cases, including 1 in Judicial custody and 5 in police custody in 2009-2010 up to 28 February 2010[30].

Death of Smt. Basanti Devi in judicial custody in Bihar The Commission received an intimation dated 27/10/2001 from the Superintendent District Prison, Purnia, Bihar about the death of Smt. Basanti Devi, an under trial prisoner, during treatment in Sadar Hospital, Purnia on 26/10/2001.
In response to the notice issued to the Home Secretary, Government of Bihar, a magisterial inquiry report was received which indicated that Smt. Basanti Devi was arrested by officials of Excise Department on 26/9/2001 and was brutally thrashed. She was produced before the Magistrate after two days, treated in jail and died on 26/10/2001 during treatment in Sadar Hospital. The post-mortem report indicted the cause of death as septicemia which was due to injuries inflicted by the officials of the Excise Department[31].

In another case, a woman was allegedly raped by Narayan Nayak, Inspector in-Charge of Dhusuri police station in Bhadrak district of Orissa. The victim had gone to the police station in connection with a divorce case. The police officer, who was not at the police station, said the victim to reach his official residence adjacent to the police station. However, the moment the victim entered, the accused reportedly increased the volume of the TV and allegedly raped her. The accused was arrested and sent to judicial custody[32].

[30] Starred Question no.175, Answered by Minister of State in the Ministry of Home Affairs, Mr Ajay Maken in the Lok Sabha on 09.03.2010, see Annexure B to the reply at http://164.100.47.132/ Annexture/lsq15/4/as175.htm accessed on 20th December 2014
[31] Death of Smt. Basanti Devi in judicial custody [Case No2435/4/2001-2002-CD]
[32] Probe begins into rape by cop, The Telegraph, 5 May 2010

Across India, the Juvenile Justice (Care and Protection of Children) Act, 2000 amended in 2006 remains poorly implemented. The Act protects the rights of the "juveniles in conflict with law" and the "child in need of care and protection". But the lack of implementation of the Juvenile Justice Act means that children are often illegally detained at police stations and prisons, and subjected to torture. Illegal detention and torture of juveniles in conflict with law were common place. Torture was so cruel that it resulted in the deaths of a number of children in custody.

Many cases happened every day in India related to child torture and it will make the condition of children vulnerable. In a case where three minor children (name withheld), aged between 13-14 years were allegedly tortured at the Sivakasi East Police Station in Virudhunaga district of Tamil Nadu. The minors were picked up by a police team from their houses in connection with a theft case. The police told the family members of the victims that the children were being taken to the police station to identify some suspects. However, the police subjected the minors to torture during questioning in custody. The police pierced needles through T. Kalirajan's nails. All the three victims suffered deep bruises on their bodies[33].

There are many rules framed to save women and children like-

For women, women prisoners shall not suffer discrimination and shall be protected from all forms of violence or exploitation[34]. Women prisoners shall be detained separately from male prisoners[35]. Women prisoners shall be supervised and searched only by female officers and staff[36].Pregnant women and nursing mothers who are in prison shall be provided with the special facilities which they need for their condition[37]. Whenever practicable, women prisoners should be taken to outside hospitals to give birth.

For child, Children who are detained shall be treated in a manner which promotes their sense of dignity and worth, facilitates their reintegration into society, reflects their best interests and takes their needs into account[38]. Children shall not be subjected to corporal punishment, capital

[33] Complaint of Asian Centre for Human Rights to National Commission for Protection of Child Rights, 12 June 2010
[34] CEDAW, articles 1, 6 and 7; Declaration on Violence against Women, articles 2 and 4
[35] Principles on Detention or Imprisonment, principle 5; SMR, rule 8 (a).
[36] Standard Minimum Rules for the Treatment of Prisoners(SMR), rule 53
[37] SMR Rule 23(1)
[38] CRC, articles 3 and 37; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) [hereinafter "Beijing Rules"], rules 1, 5 and 6; United Nations Rules for the Protection of Juveniles Deprived of their Liberty [hereinafter "Rules for Juveniles"], rules 1, 4, 14, 31, 79 and 80.

punishment or life imprisonment without possibility of release[39] Children who are detained shall be separated from adult prisoners. Accused juveniles shall be separated from adults and brought for trial as speedily as possible[40]. Special efforts shall be made to allow detained children to receive visits from and correspond with family members. The privacy of a detained child shall be respected and complete and secure records are to be maintained and kept confidential[41]. Juveniles of compulsory school age have the right to education and to vocational training[42].

Weapons shall not be carried in institutions which hold juveniles[43]. Disciplinary procedures shall respect the child's dignity and be designed to instill in the child a sense of justice, self-respect and respect for human rights[44]. Parents are to be notified of the admission, transfer, release, sickness, injury or death of a juvenile[45].

## LEGAL REMEDIES AGAINST CUSTODIAL TORTURE

Undoubtedly, there is universal prohibition of torture promulgated into law by various Governments internationally. The Universal Declaration of Human Rights 1948[46], the International Covenant on Civil and Political Rights, 1966[47] the American Convention of Human Rights 1989[48],

[39] CRC, article 37 (a); Beijing Rules, rule 27; Rules for Juveniles, rules 64, 66 and 67.
[40] ICCPR, article 10, para. 2 (b); CRC, article 37 (c); Beijing Rules, rules 13.4 and 26.3; Rules for Juveniles, rule 29.
[41] CRC, article 40, para. 2 (b) (vii); Beijing Rules, rule 21.1.
[42] ICESCR, article 13; CRC, article 28; Rules for Juveniles, rules 38 and 42.
[43] Rules for Juveniles, rule 65.
[44] Rules for Juveniles, rule 66.
[45] CRC, article 37 (c) and article 40, para. 2 (b) (ii); Beijing Rules, rules 10.1 and 26.5; SMR, rules 37 and 44; Rules for Juveniles, rules 56 and 57.
[46] Adopted and proclaimed by the General Assembly Resolution 217A (III) of 10th December, 1948. It declared in the preamble that recognition of the inherent dignity and of the equal and unachievable rights of all members of all human family is the foundation of freedom, justice and peace in the world. Article 1 proclaimed that all human beings are born free and equal, in dignity and rights. Article 3 proclaimed that everyone has the right to life, liberty and security of person. Article 5 proclaimed that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
[47] This covenant was adopted by the general assembly resolution dated 16th December, 1966. Article 10 of the covenant provides that all persons deprived of their liberty shall be treated with humility and with respect for the inherent dignity of the human person and the accused persons shall save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. The minimum guarantees to which everyone charged with a criminal offence, is entitled in full equality in article 14(3) of the covenant.
[48] The convention came into force in July, 1978. Article 4(1) provides that every person has the right to his life respected and this right shall be protected by law. Article 5 states the right of every person to have physical, mental and moral integrity respected recognized and it is covenanted between the states who are parties to this convention that no one shall be subject to torture or to cruel, inhuman, or degrading punishment or treatment and that all person deprived of their liberty shall be treated with respect for the inherent dignity of the human person. Rights to human treatment recognized by article 5 cannot be suspended even in time of war, public danger or other emergency situation, as declared in article 27 of this convention.

African Charter on Human and Peoples' Rights[49], all provided that no one should be subjected to torture or inhuman or degrading treatment. In India there are certain laws and regulation which prohibits custodial torture.

## Constitutional Remedies

It has been held in a catena of judgments' that just because a person is in police custody or detained or under arrest, does not deprive of him of his basic fundamental rights and its violation empowers the person to move the Supreme Court under Article 32 of the Constitution of India[50]. Detention does not deprive one of his fundamental rights[51]. They don't flee the persons as he enters the prison although they may suffer shrinkage necessitated by incarceration[52]. However, the extent of shrinkage can and should never reach the stage of torture in custody of such a nature that the persons are reduced to a mere animal existence.

*Article 20*: Article 20 primarily gives a person the rights against conviction of offences. These include the principle of non-retroactivity of penal laws (*nullum crimen sine lege*[53]) i.e. ex-post facto laws thereby making it a violation of the persons fundamental rights if attempts are made to convict him and torture him as per some statute. Article 20 also protects against double jeopardy (*nemo debet pro eadem causa bis vexari*[54]). This Article most importantly protects a person from self-incrimination. The police subject a person to brutal and continuous torture to make him confess to a crime even if he has not committed the same.

*Article 21*: This article has been understood in the Indian judiciary to protect the right to be free from torture. This view is held because the right to life is more than a simple right to live an

[49] Adopted by the 18th Assembly of the Heads of State and Government of the Organization of African Unity (OAU) (now African Union (AU)) on 27 June 1981 at Nairobi, Kenya. It was published in US Congress, House of Representatives, Committee on Foreign Affairs, *Human Rights Docs.*, 1983, pp. 155 *et seq.* Article 5 provides that "every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

[50] V.N. Paranjape, Criminology and Penology, (Central Law Publishing, Allahabad, 12th Edition, 2005) p. 381

[51] Prabhakar Pandurang v. State of Maharashtra, AIR 1966 SC 424; D.B. Mohan Patnaik v. State of A.P, AIR 1971 SC 2092

[52] Sunil Batra (II) v. Delhi Admn., (1980) 2 SCR 557

[53] "No crime, no punishment without a previous penal law", Article 22 of the Rome Statute of the International Criminal Court

[54] "No one ought to be twice troubled or harassed [if it appear to the court that it is] for one and the same cause", available on http://www.wordinfo.info/words/index/info/view_unit/3475 accessed on 24 December, 2014

animalistic existence[55]. The expression "life or personal liberty" in Article 21 includes a guarantee against torture and assault even by the State and its functionaries to a person who is taken in custody and no sovereign immunity can be pleaded against the liability of the State arising due to such criminal use of force over the captive person[56].

*Article 22:* Article 22 provides four basic fundamental rights with respect to conviction. These include being informed of the grounds of arrest, to be defended by a legal practitioner of his choice, preventive detention laws and production before the nearest Magistrate within 24 hours of arrest of the person. Thus, these provisions are designed to ensure that a person is not subjected to any ill-treatment that is devoid of statutory backing or surpasses prescribed excesses.

### Statutory Remedies

*Indian Evidence Act, 1872:* A confession to police officer cannot be proved as against a person accused of any offence (Sec. 25 Evidence Act) and confession caused by threats from a person in authority in order to avoid any evil of a temporal nature would be irrelevant in criminal proceedings as, inter-alia, provided in Sec. 24. Thus, even though custodial torture is not expressly prohibited by law in India, the evidence collected by illegal means, including torture is not accepted in courts.

*Code of Criminal Procedure*: Sec. 46 and 49 of the Code protect those under custody from torture who are not accused of an offence punishable with death or imprisonment for life and also during escape. Sec. 50-56 are in consonance with Article 22. Sec. 54 of the Code is a provision that to a significant extent corresponds to any infliction of custodial torture and violence. According to it, when an allegation of ill-treatment is made by a person in custody, the Magistrate is then and there required to examine his body and shall place on record the result of his examination and reasons therefore[57]. It gives them the right to bring to the Court's notice any torture or assault they may have been subjected to and have themselves examined by a medical practitioner on their own request[58]. A compensatory mechanism has also been used by courts[59]. When the Magistrate does not follow

[55] Sarah Smith, The Right to Life in India: Is It Really the 'Law of the Land, available at http://www.hrsolidarity.net/mainfile.php/2005vol15no05/2446/ accessed on 24th December 2014, Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors, AIR 1981 SC 746a; Bandhua Mukti Morcha v. Union of India, (1997)10SCC549; People's Union for Democratic Rights and Ors v. Union of India (UOI) and Ors, AIR 1982 SC 1473

[56] D.K.Basu v. State of W.B, (1997) 1 SCC 416

[57] A.K Sahdev v. Ramesh Nanji Shah, 1998 CrLJ 2645 at 2650 (Bom.)

[58] Shakila Abdul Gafar Khan v. Vasanttraghunath Dhoble, 2004 (1) GCD 812 at 823 (SC)

[59] J. Y.V Chandrachud & V.R Manohar, The Code of Criminal Procedure, (Wadhwa Nagpur, 18th Edition, 2006) p. 114

procedure with respect to entertaining complaint of custodial torture, it calls for interference by the High Court under Sec. 482 of the Code[60].

Another significant provision with respect to custodial torture leading to deaths is Sec. 176 of the Code where a compulsory magisterial inquiry is to take place on death of an accused caused in police custody. Sections 167 and 309 of the Code have the object of bringing the accused persons before the court and so safeguard their rights and interests as the detention is under their authorization[61].

*Indian Police Act*: Sections 7 and 29 of the Act provide for dismissal, penalty or suspension of police officers who are negligent in the discharge of their duties or unfit to perform the same. This can be seen in the light of the police officers violating various constitutional and statutory safeguards along with guidelines given in *D.K Basu v. State of West Bengal*.[62]

*Indian Penal Code:* After the controversial Mathura Rape case[63], an amendment was brought about in Sec. 376 of the IPC. Sec. 376(1)(b) penalizes custodial rape committed by police officers. This was a welcome change made to the section in question as it finally condemns the acts of police officers who take advantage of their authority. Sections 330, 331, 342 and 348 of the IPC have ostensibly been designed to deter a police officer, who is empowered to arrest a person and to interrogate him during investigation of an offence from resorting to third degree methods causing 'torture'[64]. The Supreme Court is heralded as a beacon of rights against torture. Indeed, since the 1990s, the Supreme Court has come up with two innovative ways of dealing with custodial torture and custodial death cases namely, the right to compensation for custodial death and torture and the formulation of custody jurisprudence.

The case of *Sheela Barse v. State of Maharashtra*[65] has provided for guidelines on rights of the arrested persons especially women. The court in this case also emphasized on the need for Magistrates to inform all arrested persons of their rights. Guidelines were also given by the Supreme Court in *D.K Basu v. State of West Bengal* with respect to rights of arrested persons. The most significant one being the arrestee should be subjected to medical examination every 48 hours during his detention by a

[60] Mukesh Kumar v. State, 1990 CrLJ 1923 at 1925
[61] Bhai Jasbir Singh v. State of Punjab, 1995 CrLJ 285 (P&H) cf. P.C Bannerjee, Criminal Trial and Investigation, (Orient Publishing Co, Allahabad, 3rd Edition, 2003) p. 222
[62] AIR 1997 SC 610
[63] (1979) 2 SCC 143
[64] State of Madhya Pradesh v. Shyamsunder Tviwedi, (1995) 4 SCC 262 at 273
[65] 1983 CrLJ 1923 (Del)

doctor from the approved panel of doctors and copies of all prescribed documents should be sent to the concerned Magistrates. Also, the arrestee may be permitted to meet his lawyer during interrogation.

*Other Authority*: It has been recommended in the 177th Law Commission Report by the 16th Law Commission that requisite amendments should be brought about in the Code of Criminal Procedure making it the duty of the police officers in whose custody there are arrested persons that they should ensure their safety and holding them responsible for failure of the same. Thirty years hence, this amendment has still not been incorporated. The presence of an advocate during interrogation of the arrested person is also a recommendation that has been made. The 185th Law Commission Report also makes recommendation regarding rights of arrested persons with respect to the Indian Evidence Act, 1872 which are with respect to s. 27. The Malimath Committee Report has also emphasized on the need for codification of the rights of the arrested persons[66].

Despite the above, the abominable figures regarding custodial torture have still not improved. One very simple reason behind this could be that persons who are supposed to protect people are themselves the wrongdoers. The criminal justice system in India is supposed to use the reformist approach; however, the approach is such that animals get better treatment.

### Award of Rs 15 lakh to the widow of custodial death victim by Supreme Court

In *Indu Singh & Ors vs State of Uttar Pradesh*[67], The Supreme Court on 10 October ordered the government to compensate a widow with Rs. 15 lakh for the custodial death of her husband 27 years ago, Indu Singh's husband Vinay Singh, a doctor by profession, had died in custody in March 1987, allegedly during an altercation that broke between him on the one hand and two constables on the other. The petitioners were represented by advocates SS Nehra, ND Gaur, and Arun Kumar Tripathi. The respondents had senior advocate Ratnakar Das and advocates Ashutosh Kr. Sharma and Gaurav Dhingra appearing. On 29 August this year the Supreme Court asked the government to show cause why it should not be directed to pay a lump sum compensation to the widow, at which the government sanctioned a an amount of Rs. 5 lakh to be granted to her in compensation.

However, when on the next date of hearing the widow asserted that she is liable to greater compensation since her husband was a doctor and his death took place a long time ago, the bench

[66] Malimath Committee Report, Volume I, Para 7.26.8-7.26.9
[67] (WP Cr 40/2014)

of justices SJ Mukhopadhaya and PC Pant disposed of the case with the grant of an additional Rs. 10 lakh in compensation. The lump sum amount will be recovered from the guilty police constables.

## CONCLUSION

From all the above discourse, it is obvious that custodial torture is a universal problem that has called for the intervention of international organizations and national legislations. There is no doubt that respect for human dignity takes the front seat in international discourse. When the state takes away a person's liberty, it assumes full responsibility for protecting their human rights. The most fundamental of these is the right to life. Each year, however, many people die in custody. Though majority of these deaths are due to natural causes, but improper medical facilities could be an important aggravating factor. Providing healthcare facilities, equivalent to that available in the community is one of the most important remedial measures. The provision of adequate treatment for HIV, communicable diseases, drug and alcohol addiction in detention is essential in order to protect the rights to life. Proper awareness among jail authorities and prisoners in such cases can prevent further spread of infection among the inmates. As held by the Supreme Court, "custodial torture" is a naked violation of human dignity and a degradation which destroys, to a very large extent human personality.

There are certain steps which can help to stop the custodial torture. First, custodial torture must be made a crime. This could be brought in by way of a special law. Secondly, many cases of custodial torture could be prevented if law-enforcing agencies followed the existing laws relating to arrest and detention. The rules established by the Supreme Court--though not a complete remedy--should be applied without failure. Those who fail to comply must be prosecuted.

Thirdly, the public--and especially concerned professional groups, including rights groups and the media--must closely monitor police practices to see that government promises are upheld. The political opposition must also see to it that the Director General of Police submits a report to the legislative assembly, and an investigative report, on every case of custodial death and torture.

Fourthly, the central government should be urged to ratify the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. The government has failed to ratify the treaty on spurious grounds that existing laws are good enough to prevent custodial torture which is evidently not the case. Were that the case, 60 years after independence and despite

numerous concerns and guidelines issued by courts all over India, torture would not persist unabated as it does today.

Fifthly Systemic measures to improve prison conditions, collecting and sharing information on deaths in custody; and commissioning research and implementation of the recommendations by the Government, should be undertaken. The views of the Commissions for better maintenance and running of prisons, better trained and more dedicated staff, including medical staff, and de-crowding of prisons.

Sixthly timely medical diagnosis and treatment, facilities for quarantine in communicable diseases are few of the important issues relating to the healthcare of the individuals in custody. Strictly following guidelines & slight modification in the already laid down procedures, as well as compliance among jail authorities will go a long way reducing the morbidity and mortality among prisoners.

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# CUSTOMARY RULES OF INTERNATIONAL HUMANITARIAN LAW IN THE JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THE PRINCIPLE OF PRECAUTION IN ATTACK

*Pablo Rosales*[*] *and Bertha Prado*[**]

## INTRODUCTION

This article aims to identify the main problems and dangers arising from the interpretation and application of international humanitarian law (IHL) by the Inter-American Court of Human Rights (IACtHR). In the cases Santo Domingo Massacre and Operation Genesis, the Court has employed the principles of distinction, proportionality and precaution in attack of IHL to define the seriousness of human rights' violations in Colombia's armed conflict. Nevertheless, the IACtHR has also gone beyond this function to examine whether or not the principle of precaution has been infringed. The paper seek to emphasize that, in these cases, the Court has escaped from its material competence by qualifying the violation of this humanitarian norm. To support this premise, firstly, it reviews the difference between the application and interpretation in an international court of human rights' work. Secondly, it delves into the misinterpretation of the Court about the principle of precaution. Thirdly, it identifies which ought to be the Court's treatment regarding the relation between IHL and International human rights law (IHRL).

## INTER-AMERICAN COURT OF HUMAN RIGHTS & INTERNATIONAL HUMANITARIAN LAW

According to the International Law Commission (ILC), contemporary international law consists of a series of *self -contained regimes* with rules and subjects which create and obey such

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rules[1]. This is due to the proliferation of contents that have increased, phenomenon known as "functional specialization"[2], which generates rules that do not necessarily reconcile with each other. The possibility of simultaneous applications of legal standards from different normative systems is seen particularly in the relationship between IHL and IHRL, whose origins are different but inspired both in the protection of human beings[3].

Increasingly, the relationship between IHL and IHRL has been the subject of discussion in the jurisprudence of human rights courts. This phenomenon is due to the fact that IHL lacks an institutional development, unlike the IHRL, which has attained the presence of four systems that are the Universal System of Human Rights, the Inter-American System of Human Rights (IASHR), the European System of Human Rights and the African System of Human Rights. Of these only the last three, properly, have courts which establish international responsibility of States in violations of international obligations in this matter. The IASHR is composed by two specialized bodies, which are the Inter-American Commission of Human Rights and the IACtHR, both responsible for ensuring compliance with the ACHR[4]. This means that they have the authority to interpret and/or enforce the rules contained in the ACHR and related inter-American treaties.

The reason why a human rights tribunal interprets humanitarian norms is because many of the contexts it faces constitute international or non-international armed conflicts, and its proper rules do not directly consider this complex reality[5]. In the first case, the work of the European Court of Human Rights[6] stands out and, in the second, the work of the IACtHR. In this line, the Inter-American region has been characterized by the presence of armed conflicts that have formed the basis of fact on which to judge the IACtHR.

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[1] *See Report of the International Law Commission*, United Nations Doc. A/CN.4/L.682, ¶ 15 (2006) (by Martti Koskenniemi).

[2] *Id.*, ¶ 20.

[3] José Antonio Pastor Ridruejo, *Droit international des droits de l'homme et droit international humanitaire : leurs rapports à la lumière de la jurisprudence de la Cour internationale de Justice*, *in* PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW 399, 400 (LIBER AMICORUM : LUCIUS CAFLISCH) (Marcelo Kohen ed., 2007)

[4] American Convention of Human Rights Nov. 21, 1969, O.A.S. T.S. No. 36; 1144 U.N.T.S. 143. Art. 33 of this instrument said that "[t]he following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention: a. the Inter-American Commission on Human Rights, (…) and b. the Inter-American Court of Human Rights (…)".

[5] Theodor Meron, International Law in the Age of Human Rights, General Course on Public International Law, 301RECUEIL DES COURS 9, 75 (2003).

[6] *See*, e.g., Al –Adsani v. The United Kingdom, 2001 - XI Eur. Ct. H.R. 273; Al-Skeini and Others v. the United Kingdom, 2011 Eur. Ct. H.R. referred both to the occupation of the UK in Iraq.

This factual basis led to an early analysis of the Inter-American Commission on Human Rights (IACHR) of several cases involving armed conflicts[7]. While initially the IACHR said that Colombia had violated[8] Common Article 3 to the Geneva Conventions of 1949[9], it can be considered that after the judgment *Las Palmeras v. Colombia* that neither the Court nor the Commission can apply the IHL directly as part of their duties[10].

Despite the clarity of this statement, there have been some inaccuracies regarding the use of IHL by the IACtHR. In this context, the present article focuses on examining the work of the IACtHR regarding the application/interpretation of customary rules of IHL. These are three, namely: the principle of distinction, the principle of proportionality and the principle of precaution. All these principles are reflected in customary humanitarian rules, which have been recently[11] cited by the Court itself in the *Santo Domingo* Massacre[12] and Operation *Genesis*[13] cases.

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[7] *See*, e.g., Christina Cerna, *The History of the Inter-American System's Jurisprudence as Regards Situations of Armed Conflict*, 2 International Humanitarian Legal Studies, at 46 (2011).

[8] Arturo Ribón Avila v. Colombia, Case 11.142, Inter-Am. Comm'n H.R., Report No. 26/97, OEA/Ser.L/V/II.95 Doc. 7 rev., ¶ 202 (Sep. 30, 1997).

[9] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949), 75 UNTS 85; Convention relative to the Treatment of Prisoners of War (1949), 75 UNTS 135; Convention relative to the Protection of Civilian Persons in Time of War (1949), 75 UNTS 287.

[10] *See* Las Palmeras v. Colombia, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 67, ¶ 33 (Feb. 4, 2000).

[11] The first time that the principles of distinction , proportionality and precaution are mentioned in the jurisprudence of the Court is in the Concurring Opinion of Judge *ad hoc* Ramón Cadena Rámila in "Las dos erres" Massacre v. Colombia, Preliminary Objection, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 211 (Nov. 24, 2009). Regarding the principle of distinction, we can cite "The Peace Community of San José de Apartado", Provisional Measures regarding Colombia, Inter-Am. Ct. H.R., ¶ 20 (Mar. 15, 2005). In relation to the principle of proportionality and its importance to IHL , it? can see the concurring opinion of Judge Cançado Trindade in the case Penal Miguel Castro Castro v. Perú, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 35 (Nov. 25, 2006).

[12] The case concerns the international responsibility of Colombia for the violation of the right to life, personal integrity, private property and movement and residence, which led? military operations "Pantera" and "Relámpago" in the village of Santo Domingo (Department of Arauca) in December 1998, and generated the death of many people and injuries and displacement of others. Santo Domingo Massacre v. Colombia, Preliminary Objections, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 259 ¶ 61, 68 – 70, 210, 258 – 260 (Nov. 30, 2012).

[13] The case concerns the international responsibility of Colombia for the violation of the right to life, personal integrity, private property and movement and residence, which was produced? by the military operation "Genesis". This operation took place in February 1997 on the banks of rivers Truandó and Salaquí and was directed against the Revolutionary Armed Forces of Colombia (FARC). In turn, there were confrontations between paramilitary groups and the Colombian army, causing the death of many people and the forced displacement of others. Afro-Descendant Communities Displaced From The Cacarica River Basin (Operation

On both occasions, the Court has used these principles to define the severity of the violation of the right to life and personal integrity in an internal armed conflict, but has also gone further from this function to consider, in the first case, if each of these principles has been violated or not.

The structure of this article is as follows: First, the difference between applying and interpreting in the jurisprudence of an international human rights court. It is argued that both operations are interrelated but in the case of human rights courts, specifically the IACtHR, only the rules of the ACHR and other inter-American treaties can be applied. Second, it examines the Court's interpretation of IHL principles. This section emphasizes that the Court has confused the functions of interpreting and applying in humanitarian norms, which is an excess of its intended purpose. Third, it identifies which should be the treatment of the Court regarding the IHL and international human rights law (IHRL). Finally, it identifies which paths ought to be followed by the Court on its task of interpretation and/or application of IHL.

## DIFFERENCES BETWEEN THE APPLICATION AND INTERPRETATION OF A HUMANITARIAN/HUMAN RIGHTS NORM

The application and interpretation of an international norm are different but interrelated legal operations and that are within the range of possible functions that an international human rights tribunal has. As indicated, the IACtHR is a regional court but it is, in turn, a supervisory body of a treaty that collects universally recognized rights. In this regard, the Court may interpret the ACHR based on the IHL which has a universal scope, not only at the level of Geneva Conventions or its Additional Protocols[14], but also in terms of its customary humanitarian norms. Normally, the IACtHR operates based on the ACHR norms and inter-American treaties, so that their favorite sources of international law are the treaties. As this jurisdictional organ said-

> "*The Court is also competent to determine whether any norm of domestic or international law applied by a State, in times of peace or armed conflict, is compatible or not with the American Convention. In*

Genesis) v. Colombia, Preliminary Objections, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R (ser. C) No. 270 (Nov. 20, 2013).

[14] Especially, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non- International Armed Conflicts (1977), 1125 UNTS 609.

> *this activity, the Court has no normative limitation: any legal norm may be submitted to this examination of compatibility*"[15].

However, nothing impedes that as part of its interpretation, the IACtHR can examine customary international law, as will be discussed below.

The operation of "application" is used to make an international legal norm deploys its effects on a specific event that is being examined[16]. In the case of a human rights tribunal, this process can only be feasible under its competences. For example, neither the European Court of Human Rights nor the IACtHR could apply humanitarian norms, because they are limited by the European Convention of Human Rights and ACHR, respectively. Meanwhile, the act of interpretation implies, in principle, identifying the meaning of a rule, according to the provisions of Article 31 of the Vienna Convention on the Law of Treaties (VCLT)[17]. However, in the case of IHRL, the interpretation of international norm acquires a particular character because is subjected to a dynamic[18] and *pro homine* interpretation[19]. In this context, by interpreting the rights of ACHR, the IACtHR establishes a preference for Article 29 of this treaty and, in second place and as part of general international law, for Article 31 of VCLT, when, in fact, there are similarities between them[20]. The predilection for Article 29 is because the IACtHR controls the ACHR and not the VCLT[21].

While states can implement norms of international treaties they have been a part of, international courts have established their competence of application to the treaties they have overseen. As Tabak said, "although a state may be obligated to respect IHL, this does not imply that any monitoring or supervisory instrument has competence to adjudicate possible

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[15] *See* Las Palmeras v. Colombia, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 67 ¶ 32 (Feb. 4, 2000).
[16] *See* Factory of Chorzów, Judgment, PCIJ, Jul. 26, 1927 (Diss. Op. by M. Ehrlich), (ser. A) No. 9, at 29.
[17] Vienna Convention on the Law of Treaties, May. 23, 1969, 1155 U.N.T.S 331.
[18] *See* Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10 ¶ 37 (Jul. 14, 1989).
[19] CECILIA MEDINA & JORGE MERA, SISTEMA JURÍDICO Y DERECHOS HUMANOS. EL DERECHO NACIONAL Y LAS OBLIGACIONES INTERNACIONALES DE CHILE EN MATERIA DE DERECHOS HUMANOS 74 - 83 (1996).
[20] For example, Art. 29 (b) of ACHR is very similar to Art. 31 (3) d of VCLT. *See* Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 Eur. J. Int'l L. 585, 588 (2010).
[21] Massacre of Mapiripán v. Colombia, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 106 (Sep. 15, 2005).

breaches of IHL without state consent"[22]. In this sense, the material competence of a court is established by the treaty that they have to monitor. However, the interpretation of a court is not only from reading its own treaty. The IACtHR in *Las Palmeras vs. Colombia*[23] and in its most recent case law[24] has indicated that, through consideration of compatibility, it can submit other instruments to their assessment of the interpretation of the ACHR. However, this does not authorize it to declare that a State is responsible for violation of Common Article 3 to the Geneva Conventions of 1949 in the context of an internal armed conflict. This means that the Court may interpret the ACHR in the light of other human rights instruments outside the IASHR[25] and also in light of the customary rules of IHL. However, there would be the possibility of applying these standards outside the IASHR because there is no such authorization by the ACHR. However, the Court has stated in the judgment *Santo Domingo* Massacre the absence of a normative limit on the ACHR regarding their jurisdictional activity, as well as the lack of coherence that would mean recognizing its jurisdiction to rule on cases in context of armed conflict, but not using the principles of IHL for the respective analysis[26].

The IACtHR does not tend to interpret customary rules in isolation, because the development of human rights has been centered in treaties[27] and in accordance with the guidance provided by each of the control bodies, whether judicial or quasi jurisdictional. However, regarding the interpretation of customary law by the IACtHR, this has been facilitated since 2005 due to the codification made by the International Committee of the Red Cross[28]. Therefore, the identification of customary rules does not seem to be a capricious work of the Court: it has chosen the most authorized systematization.

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[22] Shana Tabak, *Armed Conflict and the Inter-American Human Rights System: Application or Interpretation of International Humanitarian Law?*, *in* Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies. International and Domestic Aspects 219, 250 (Derek Jinks, Jackson N. Maogoto & Solon Salomon ed., 2014).

[23] *See* Las Palmeras v. Colombia, supra note 14, ¶ 32.

[24] *See* Rodríguez Vera and others (Missing Persons of the Palace of Justice) v. Colombia, Preliminary Objection, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 287 ¶ 39 (Nov. 14, 2014).

[25] Not only with the IHL, but also with, i.e., the ILO Convention 169. *See* the Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 ¶ 161 (Jun. 27, 2012).

[26] Francisco Roa, *Derecho Internacional Humanitario, Jurisdicción Penal Militar y Responsabilidad del Estado por violación a los Derechos Humanos. Un comentario a la Sentencia de la Corte Interamericana de Derecho Humanos "Masacre de Santo Domingo vs Colombia"*, REVISTA VASCA DE ADMINISTRACIÓN PÚBLICA 149, at 153-154, *available at* https://www.euskadi.net/r61-s20001x/es/t59aWar/t59aMostrarFicheroServlet?t59aIdRevista=2&R01HNoPortal=true&t59aTipoEjemplar=R&t59aSeccion=40&t59aContenido=2&t59aCorrelativo=1&t59aVersion=1&t59aNumEjemplar=95

[27]

[28] J.-M. Henckaerts and L. Doswald Becks, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (3 vol.) (2005).

## THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The ILC has argued that if there are normative conflicts in terms of international law, these can be solved through three techniques. The first criterion is the hierarchy, whereby, for example, a rule of *jus cogens* and *erga omnes* ranks higher than any other international norm. The second one is the temporality, in which the posterior norm replaces the previous norm. And finally, the special rule abrogates the general (*lex specialis derogat generalis*). Of all these tools for solving conflicts, the most used (but also the most debated) technique by IACtHR has been the lex specialis of IHL[29].

Whether the Court employs them or not in its reasoning, the rules of IHL are applicable in situations of armed conflict. The use of *lex specialis* by the IACtHR has been exhibited in the application of rules of IHRL in accordance with IHL in several cases against Colombia and Guatemala and in some recent cases concerning migrants[30]. It is noteworthy that IHL is used to make sense of the rules of the ACHR on the stage of an armed conflict, and not as a criterion for integrating different legal bodies[31].

Under the IHL are the customary rules of distinction[32], proportionality[33] and precaution[34] applicable in international and non-international armed conflicts. There are other principles such as humanity, but the Court has not made use of them nor explained why only these are used here. For the IACtHR, the principle of distinction "(…)establishes that [t]he parties to the conflict must at all times distinguish between civilians and combatants, that attacks may only be directed against combatants and that [a]ttacks must not be directed against civilians"[35]. Meanwhile, the principle of proportionality "(…) establishes a limitation to the purpose of the war, stipulating that the use of force must not be disproportionate, limiting it to what is essential to obtain the military advantage pursued"[36]. Finally, the principle of precaution

[29] Santo Domingo Massacre v. Colombia, supra note 12, ¶ 24. In this case, the Court affirms for first time that IHL is *specific law*.
[30] *See* the Pacheco Tineo Family v. Plurinational State of Bolivia, Preliminary Objections, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 272 (Nov. 25, 2013).
[31] Santo Domingo Massacre v. Colombia, supra note 12, ¶ 187.
[32] Rule 1.
[33] Rule 14.
[34] Rules 15, 17 y 18.
[35] Santo Domingo Massacre v. Colombia, supra note 12, ¶ 212.
[36] *Id*., ¶ 214.

ascertains "the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects"[37].

These definitions assumed by the Court are correct based on customary humanitarian norms. In *Santo Domingo* Massacre and *Genesis* Operation, the Court uses these principles to determine the impact of indiscriminate bombing of inhabitants of the affected zones[38]. If the function of the IACtHR is to examine the IHRL in the framework of the ACHR, to give it content, it is not possible to come to an affirmation of the following type: "[i]n any case, given the lethal capacity and limited precision of the device used, its launch in the urban center of the village of Santo Domingo or nearby, was contrary to the principle of precaution in attack"[39]. The Court has no competence to consider the IHL and assert a violation of their rules. While this breach does not derive in an international responsibility that the IACtHR can examine, it does not seem that making the type of precisions mentioned above ("was contrary to the principle of precaution") is a function of the Court. In any case, the Court seems to have abandoned this dangerous position in the case *Vera Rodríguez and others v. Colombia*, because it does not mention the principles used in the two cases previously cited.

## THE PATH COURT OUGHT TO FOLLOW

The apparent "fragmentation" in the IHRL is solved by a sense of presumption of harmony at the level of the rules of the different systems and humanitarian norms. The Court seems to correctly identify which are the limits of its contentious function: to apply the rules from the ACHR and interpret them with the IHL. However, one of the few times in which, in practice, it has escaped this standard is in the case of *Santo Domingo* Massacre.

The Court has other interesting uses of IHL that can be exploited beyond cite customary rules as in the *Santo Domingo* Massacre and Operation *Genesis* cases already mentioned. Effectively, the IACtHR has used humanitarian norms in two ways that are compatible with its jurisdiction.

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[37] *Id.*, ¶ 216.
[38] Santo Domingo Massacre v. Colombia, supra note 12, ¶ 211. *See also* Operation Genesis v. Colombia, supra note 13, ¶ 191.
[39] Santo Domingo Massacre v. Colombia, supra note 12, ¶ 219.

The first one has been to emphasize that a rule is prone to have a universal scope, beyond the ACHR. For example, in the case of the prohibition of torture, the Court has indicated that it is a norm of jus cogens and has immediately cited several sources of IHRL and IHL containing this prohibition[40].

The second one has been to point out that, in the aftermath of an armed conflict context, some rights remains in force such as the right to truth, as indicated in *Gelman v. Uruguay*[41]. Such uses of IHL tend to just be complementary and do not deviate from the ultimate purpose of the IACtHR, which is solved based on the ACHR, primarily, and, in any case, it could resort, when necessary, to other branches of international law out of the IASHR to interpret the inter-American instruments.

Then, can the Court utilize the cited principles of IHL? Yes. In any case, the IACtHR can employ these too but it is necessary that it does not establish that the State violated them, because it simply does not have jurisdiction for this function.

## CONCLUSION

One of the most fascinating subjects in international law is the relationship of IHRL and IHL. In this field, the jurisprudential trend of the IACtHR has stood out: it has postulated that the rules of IHL serve an important interpretative function in national armed conflicts. However, in the *Santo Domingo* Massacre case, the Court has gone beyond a simple interpretation to indicate the violation of the principle of precaution in attack. In this regard, the Court has engaged in applying the rule of caution when it acknowledges it only has jurisdiction to interpret the IHL. In this sense, the customary nature of the precautionary principle is no reason for the Court to classify an event as contrary to IHL. It is necessary for the Court to refine the argumentative structure and clarify the criteria for using the IHL. Fortunately, in its most recent case law, the Court seems to be limiting itself to the sole use of IHL's norms to strengthen its argument and not to directly apply them in a particular case.

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[40] *See* J. v. Peru. Preliminary Objections, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 275 (Nov. 27, 2013), ¶ 304. *See also* Espinoza Gonzáles v. Peru. Preliminary Objections, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 289 ¶ 141 (Nov. 20, 2014).

[41] Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221 ¶ 210 (Feb. 24, 2011).

# DEVELOPMENT OF HUMAN RIGHTS INDIAN AND INTERNATIONAL PERSPECTIVE

*Malika Nandkeolyar*

## INTRODUCTION

Section 2 (1) (d) of the Protection of Human Rights Act, 1993, talks about Human Rights which states that "the rights relating to liberty, life, equality and dignity of the individual guaranteed by the constitution are human rights". The expression "human rights" has not been defined specifically in any Declaration or Covenant of United Nations. Human Rights are generally defined as "those rights which are inherent in our very nature and without which we cannot live as human beings

The Government of India realized the need to establish an independent body for protection of human rights. The establishment of an autonomous National Human Rights Commission by the Government of India reflects its commitment for effective implementation of human rights provisions under national and international instruments. The Commission came into effect on 12 October 1993, by virtue of the Protection of Human Rights Act 1993. The Act contains broad provisions related with its function and powers, composition and other related aspects.

## CONCEPT OF HUMAN RIGHTS

Human rights are such norms which prescribe certain moral conducts of human beings which are consequently protected by legal and constitutional rights in national as well as international arena. These are universal rights based on egalitarian principle. They cannot be seized by the State except by the due processes of law.

In his Tagore Law Lecture (The Dialectics and Dynamics of Human Rights in India), ***Justice V.R. Krishna Iyer*** [1] describes the width and sweep of human rights in his matchless words said-

*"Human rights are writ on a large canvas as large as the sky. The law makers, lawyers and judges must make the printed text vibrant with human values, not be scared of consequences on the status quo orders. The militant challenges of today need a mobilization of revolutionary consciousness sans which civilized systems cease to exist remember, we are all active navigators, not ideal passengers on space ship, earth as it ascends to celestial levels of glorious human future"*

## EVOLUTION OF HUMAN RIGHTS

The concept of human rights, being a modern concept arose in Europe in the 17th and 18th centuries during the struggle of people against feudal despotism. It was the English philosopher John Locke who first propounded the theory of natural rights which the citizens would claim even against the king. These rights were first declared as Legal rights by French National Assembly in the 'Declaration of Rights of Man' in the year 1789 during French Revolution. Subsequently, these rights were incorporated in the 'Bill of Rights' in the US Constitution in 1971 and they have been included by many countries in their constitution.

The human rights in international arena trace back to the Magna Carta (1215 AD), the Petition of Rights (1627 AD) and the Bill of Rights (1688 AD) in the U.K. It was the golden rays of sun enlightening the world of 19th century to human being to know about human rights they possessed. Worth of human personality began to be realized.

The resultant of human rights movement was experienced after the Second World War. During the war whole humanity was shocked due to heinous crimes committed against men and human rights perished. The history witnessed silently tyranny and complete lawlessness of Nazi Leaders of Germany. President *Franklin D Roosevelt* on January 6, 1941 reflected in the proclamation of 4 freedoms namely-

1. Freedom of Speech;
2. Freedom of Religion;
3. Freedom of want, and

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[1] Ram Deo Chauhan v. Bani Kant Das, AIR 2011 SC 615

4. Freedom from fear.

He said *"Freedom is the supremacy of human rights everywhere; our support goes to those who struggle to gain and maintain those rights*".[2]

The growth and evolution of human rights and international law had achieved a remarkable progress since 1945. On 24th October, 1945 the world at large witnessed establishment of United Nations Organization which on the 10th December, 1948 adopted the Universal Declaration of Human Rights. This was the first positive manifestation of internationalization of human rights values. Soon, thereafter followed the European Convention of Human Rights signed in November, 1950 and brought into force in 1953. This convention created bodies such as The European Commission and European Courts of Human Rights established in 1959. In the same year, the United Nations General Assembly proclaimed the Declaration of Rights of Child. The year 1966 witnessed adoption of International Covenant of Economic, Social and Cultural Rights; International Covenant on Civil and Political Right; Optional Protocol on International Covenant on Civil and Political Rights, and International Covenant on the Elimination of All Forms of Racial Discrimination. In the year 1979, Covenant on all forms of Discrimination against Women was adopted. In 1986, The United National General Assembly proclaimed the declaration against women. In the same year, United Nations General Assembly proclaimed the Declaration on the Right to Development.

Human Rights ensure that the victims are-

1. To be free from intimidation
2. To be informed about availability of international and legal assistance
3. To get back stolen or other personal property which is no longer needed as evidence; and
4. A speedy investigation and trial of the case.

What was said by ***Alexander Hamilton***, the great constitutional expert and political philosopher, way back in 1775, is poignant still today having a clear perception of what human rights are. He said, *"The sacred rights of mankind are not to be rummaged for, among old parchment, or musty records. They are written as with a sun beam in the whole volume of human nature, by the hand of the divinity itself and can never be erased or obscured by mortal power"*[3]

[2] http://www1.umn.edu/humanrts/education/FDR4freedoms.html accessed at 19.10.2014 at 10:47 AM
[3] R.P Kataria *"Commentary on Human Rights*" First Edition, Orient Publishing Company, 2011, page 37

## INDIAN CONTEXT

The Indian context perceives an individual, society and world at large as an organic whole which is implicit in the doctrine of "**Vasudhaiva Kutumbakam**". The Buddhist doctrine of non-violence in deed and thought says it is a humanitarian doctrine par excellence. Jainism too contained such doctrines. According to the **Gita**, *"he who has no ill will to any being, who is friendly and compassionate, who is free from egoism and self sense and who is even-minded in pain and pleasure and patient is dear to God*." [4] It also says that divinity in humans is represented by the virtues of non-violence, truth, freedom from anger, etc.

### Ancient Hindu Law of Human Rights

Scholars who have spent long time in lucubration on the Hindu "Dharmasastras" and the "Arthasastras" and other legal treatises of the past have discovered a system which regulates the duties of Kings, judges, subjects and judicial as well as legal procedures. The central concept is Dharrna, the functional focus of which is social order. Human rights gain meaning only when there is an independent judiciary to enforce rights. Dharmasastras provides for the same.

The independence of the judiciary was one of the outstanding features of the Hindu judicial system. Even during the days of Hindu monarchy, the administration of justice always remained separate from the executive. The case of ***Ananthapindika v. Jeta*** [5]reported in the vinaya-pitaka, is a shining illustration of this principle. According to it, a Prince and a private citizen submitted their cases before the law court and the court decided against the Prince. The Prince accepted the decision as a matter of course and as binding on him. Law in Hindu jurisprudence was above the sovereign. It was the "Dharma." Certain laws were regarded as above all human authority. Such, for instance, were the natural laws, which no Parliament, however supreme, could abolish

There are many references in the Vedas, which throw light on the existence of human rights in ancient lndia. The Vedas proclaim liberty of body (Tan), dwelling house (Skridhi), and life (Jibase). In 1367 B.C. Bahmani and Vijayanayar Kings are stated to have entered into an agreement for the humane treatment of prisoners of war.

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[4] http://shodhganga.inflibnet.ac.in/bitstream/10603/9617/12/12_chapter%202.pdf accessed on 19.10.2014 at 10:59 AM

[5] P.B. Mukherji, *"The Hindu Judicial System - The Cultural Heritage of India*", Vol.ll,, Tagore Law lectures (Calcutta: Eastern Law House. 1999), pp 434-435

Kautilya's Arthasastra asserts that in the happiness of the subject's lies the happiness of the King, and what is beneficial to the subjects is his own benefit. Kautilya didn't agree of this theory of royal absolutism and subordinated the King also to the law. Similarly, Shantiparva prescribes that a king may be punished if he does not follow the path of the Dharma. Emperor Ashoka protected and secured the most precious of human rights, particularly the right to equality, fraternity, liberty and happiness.

**Human Rights in the Islamic Era**

The Muslim invasion of India created a new situation wherein the Muslim rulers followed a policy of discrimination against the Hindus. So the significance of Muslim rule in lndia was counter- productive to harmony, justice and equality. There was one law for the Muslims (the faithful) and another for the Hindus (the Kafirs or the infidels) With the Mughal rulers, especially with Akbar new era began in the Mughal history of India in the field of human rights as a result of his policy of 'Universal Reconciliation and Tolerance.'

**Human Rights in British lndia**

The modern version of human rights jurisprudence may be said to have taken birth in lndia in the British rule. Resistance to foreign rule led to demand for freedom and giving the basic socio political rights of citizens. Indian were often discriminated by the British rulers. The impression created in the Indian minds was that their sacred inalienable human rights and vital interests had been ignored, denied, and trampled upon for the English rulers.

***Motilal Nehru Committee*** -In 1925 the Indian National Congress finalized the draft of Common Wealth of India adopting a 'Declaration of Rights'. The Madras Session of the Congress held in the year 1927 - demanded incorporation of a 'Declaration of Fundamental Rights' in any future constitutional framework. A committee under Motilal Nehru was appointed by the National Congress to study the fundamental rights. The Simon Commission, appointed by the British Government in 1927, however, totally rejected the demands voiced by the Nehru Committee reports.

***Constituent Assembly and Human Rights***-The Indian Constitution was framed by the Constituent Assembly of India, which met for the first time on December 9, 1946. The Constitution of India gave primary importance to human rights. To quote ***Guha, "The demand for a declaration of fundamental rights arose from four factors."***

1. Lack of civil liberty in India during the British rule;
2. Deplorable social conditions, particularly affecting the untouchables and women;
3. Existence of different religious, linguistic, and ethnic groups encouraged and exploited by the Britishers, and
4. Exploitation of the tenants by the landlords.

The Constituent Assembly incorporated in the Constitution of India the substance of the right; proclaimed and adopted by the General Assembly in the Universal Declaration of Human Rights. Further on l0th December 1948, when the Constitution of India was in the making, the General Assembly proclaimed and adopted the Universal Declaration of Human Rights.

Many of the rights enveloped in The Universal Declaration of Human Rights were incorporated in the Indian Constitution in The Chapter on Fundamental Rights.

## HUMAN RIGHTS AND INTERNATIONAL DECLARATION

**Universal Declaration of Human Rights**- Preamble of the act states and the General Assembly proclaims- Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people, Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law, Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms, Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge.

The declaration entails the following provisions[6]-

ART 1-. Everyone is born free and has dignity because they are human.

[6] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx accessed on 19.10.2014 at 11:33 AM

ART 2-. Everyone has equal rights regardless of differences between people such as gender, religion, language, wealth or political opinion.

ART 3- Everyone has the right to life and the right to live in freedom and safety.

ART 4- No one shall be held in slavery.

ART 5- Everyone has the right not to be hurt, tortured or treated cruelly.

ART 6- Everyone has the right to be treated as a person under the law everywhere.

ART 7. The law is the same for everyone and should protect everyone equally.

ART 8. Everyone has the right to ask for legal help when their basic rights are not respected.

ART 9. No one should be arrested or expelled from their country without good reason.

ART 10. Everyone has the right to a fair trial, if accused of a crime

ART 11. Everyone has the right to be presumed innocent until proven guilty, accused of a crime.

ART 12. Everyone has the right to privacy.

ART 13. Everyone has the right to travel within and outside their own country.

ART 14. Everyone has the right to seek asylum in another country.

ART 15. Everyone has the right to a nationality.

ART 16. Everyone has the right to marry and have a family.

ART 17. Everyone has the right to own property.

ART 18. Everyone has the right to free thoughts, conscience and religion including the right to practice their religion privately or in public.

ART 19. Everyone has the right to say what they think and to share information with others.

ART 20. Everyone has the right to meet with others publicly and privately and to freely form and join peaceful associations. There are other provisions in this Charter as well.

**International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights** - The ICESCR is a multilateral treaty adopted by the UN General Assembly on December 16, 1966. The International Covenant on Civil and Political Rights was also adopted on December 16, 1966 but came into force on March 23, 1976.

Broadly the 2 charters divide the rights into 3 headings:

1. **Rights of the Nations**- both the covenants essentially recognize the rights of Self-Determination and rights to own, trade and dispose of property freely and not to be deprived of the essential subsistence

2. **Civil and Political Rights**- The rights pertaining to right to life, integrity, liberty and security of human person; the right with respect to administration of justice; the right to freedom of religion or brief and to form opinion and expression, freedom of movement; the right to assembly and association; and the right to political participation.

3. **Economic, Social and Cultural Rights**- The right to work, trade union freedoms; the right to adequate standard of living, including food, lodging and clothing; the right to health care; the right to education and the right to take part in cultural life. The covenants also forbid torture and inhuman treatment, slavery, arbitrary arrest and detention in debtor's prisons. The ICCPR forbids exploitation of children, and requires that all nations cooperate to terminate world hunger. They forbid propaganda's advocating either war or hatred based on race, religion, nationality or language.

The charters and covenants form the basic link in the recognition of human rights internationally and were later incorporated in the Indian Constitution. In ***Keshavananda Bharati v. State of kerala***[7], the Supreme Court observed, "The Universal Declaration of Human Rights may not be a legally binding instrument but it shows how India understood the nature of human rights at the time the Constitution was adopted."

## HUMAN RIGHTS AND STATUTORY AND JUDICIAL ASPECT

The National Human Rights Commission of India is an autonomous public body which was constituted on October 12 1993 under the Protection of Human Rights Ordinance of 28 September 1993. It is a statutory organ which was given its statutory status by the Protection of Human Rights

[7] AIR 1973 SC 1461

Act, 1993. Human rights are the rights of individuals relating to their life, liberty, equality and dignity. The term would apply to individual rights of parties even against State arising under contract. [8]

**Constitution of the National Human Rights Commission-** The Constitution of the Commission dealt with in Chapter II of the Act. Section 3 of the Act says: "the Central government shall constitute a body to be known to the National Human Rights Commission to exercise the powers conferred upon, and to perform the functions assigned to it, under this Act.[9]

The Commission shall consist of

a. A Chairperson who has been a Chief Justice of the Supreme Court;
b. One Member who is, or has been a judge of the Supreme Court;
c. One Member who is, or has been the Chief Justice of the High Court;
d. Two members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights.

3. The Chairpersons of the National Commission for Minorities, the National Commission for the Scheduled Castes and Scheduled Tribes and the National Commission for Women shall be deemed to be Members of the Commission for the discharge of functions specified in clauses (b) to (j) of section 12.

4. There shall be a Secretary-General who shall be the Chief Executive Officer of the Commission and shall exercise such powers and discharge such functions of the Commission as it may delegate to him.

5. The headquarters of the Commission shall be Delhi and the Commission may, with the previous approval of the Central Government, establish offices at other places in India.

## POWERS AND FUNCTIONS OF THE COMMISSION

Wide powers and functions have been given to the Commission under Section 12 of the Act. The Commission shall, perform any of the following functions namely-

[8] Maharashta Housing and Area Development Authority v. Maharashtra State Human Rights Commission, AIR 2010 Bom 2014
[9] The Protection of Human Rights Act, 1993 section 3.

1. Inquire on its own initiative (suo motto) or on a petition presented to it by a victim or any person on his behalf, into complaint of-
   a. Violation of human rights or abetment; or
   b. Negligence in the prevention of such violation, by a public servant.
2. Intervene in proceedings involving any allegation of violation of human rights pending before a court
3. Visit, under intimation to the State Government, any jail which is under the control of the State Government, where the persons are detained for the purposes of treatment, reformation or protection to study the living condition of the inmates and make recommendations;
4. review the safeguards for the time being in force for the protection of human rights and recommend for their effective implementation;
5. review the factors, including acts of terrorism that inhibit the enjoyment of human rights;
6. study treaties and other international instruments on human rights and make recommendations for their effective implementation;
7. undertake and promote research in the field of human rights;
8. spread human rights literacy among various sections of society;
9. encourage the efforts of non - Governmental organizations and institutions working in the field of human rights;
10. other functions as it may consider necessary for the promotion of human rights.

## MAJOR INITIATIVES OF THE COMMISSION

The commission has taken initiatives in guarantying civil liberties which includes Terrorist and Disruptive Activities Act, Prevention of Terrorism Bill, 2000, etc. It set up many Human Rights Cells in the State and City Police Headquarters for protection of Human Rights. It took serious steps to check custodial deaths, torture and rape of women. It took up various discussions and conferences on review of Refugee Laws in the country. It took up studies for police and prison reforms. It took steps for elimination of Bonded Labour and Child Labour. It gave serious thought to issues of Right to Food, Maternal Anemia and Public Health. Rights of women, vulnerable, scheduled caste and scheduled tribes have been given a status of major Human Rights issue.[10]

[10] http://www.nhrc.nic.in/

## ILLUSTRATIVE CASES

### *National Human Rights Commission vs. State of Arunachal Pradesh*

The Commission under Article 32 of the Indian Constitution has filed a writ petition as a public interest petition before the Supreme Court of India[11]. The Commission filed this petition mainly for the enforcement of fundamental rights of about 65,000 Chakma\ Hajong tribals under Article 21 of the Constitution.[12] In this case a large number of refugees from erstwhile East Pakistan were displaced in 1964 due to Kaptain Hydel Project. These displaced Chakmas had taken shelter in North-Eastern States of India, namely, in Assam and Tripura. There were two main issues involved in this case; (1) conferring of citizenship; (2) fear of persecution by certain sections of the citizens of Arunachal Pradesh. Largely to these two issues NHRC was approached by two different NGOs. The Commission contended before the Court that the Commission found serving of quit notices by All Arunachal Pradesh Students Union (AAPSU) to Chakmas and their attempted enforcement appeared to be supported by the officers of Arunachal Pradesh. The State government deliberately delayed the disposal of the matter by not furnishing the required response to NHRC and in fact assisted in the enforcement of eviction of the Chakmas from the State through its agencies. The Court after hearing the argument directed the government of Arunachal Pradesh to ensure the life and personal liberty of each and every Chakma residing within the State.

### Punjab Mass Cremation Order[13]

Two writ petitions [14]were filed before the Supreme Court of India containing serious allegations about large-scale cremations resorted to by the Punjab Police of persons allegedly killed in what were called encounters. The main concern of the Writ Petitions was that there were extra-judicial executions and hasty and secret cremations rendering the State liable for action. These petitions were largely relied on a press note of 16th January 1995 by the Human Rights Wing of the Shiromani Akali Dal under the caption "Disappeared" "cremation ground". The note alleged that the Punjab Police had cremated a large number of human bodies after labeling them as unidentified. The Supreme Court after examining the report submitted to the Court by Central Bureau of Investigation (CBI), relating to cremation of

[11] *National Human Rights Commission of India* v. *State of Arunachal Pradesh*, AIR 1996 SC 1235
[12] Article 21 of the Indian Constitution provides, "No one shall be deprived of his life or personal liberty except according to procedure established by law"
[13] AIR 1999 SC 340
[14] Writ Petition (Crl.) No. 497\95, *Paramjit Kaur v. State of Punjab* and others and Writ Petition (Crl.) No. 447\95, *Committee for Information and Initiative on Punjab v. State of Punjab*.

dead bodies observed that report indicates 585 dead bodies were fully identified, 274 partially identified and 1238 unidentified. The report discloses flagrant violation of human rights on a large scale.[15] On 12 December 1996 the Court requested the Commission to have the matter examined in accordance with law and determine all the issues related with the case. The Commission granted in some cases compensation amounting of Rupees Two Lakh Fifty thousand (Rs. 2,50,000/-) to the next of kin of the 89 deceased persons.

Thus, Human rights are basic, inherent, immutable and inalienable right to which a person is entitled simply by virtue of being born as a human. Constitution and Legislations of civilized country recognize them since they are so quintessentially part of every human being. In a democratic society, all state institutions whether police department, legislature, executive and judiciary must protect human rights. Constitution and Legislations of civilized country recognize them since they are so quintessentially part of every human being. No state can deprive an individual of their basic and natural rights without due process of law.

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[15] http://indiankanoon.org/doc/1538237/ accessed as on 19.10.2014

# HUMAN RIGHTS DURING ARMED CONFLICTS

*Dhruv Sharma**

## INTRODUCTION

International humanitarian law ("IHL") was first conceived in '*A Memory of Solferino'* by the founder of the Red Cross, Henry Dunant. However the regime of IHL has subsequently been understood as a field constraining military behaviour during armed conflicts (or the hunting season).[1] Consequently, the discourse on IHL has become perpetrator centric (regulating the conduct of armed groups) while ignoring the protective measures enshrined within the law. In reality IHL ensures protection of minimal human rights, such as the right to life and human dignity, even during armed conflicts wherein otherwise monsters would be made of men.

This paper focuses on this oft forgotten goal of IHL and attempts to elaborate on the role of IHL in protection of human rights. The paper also discusses the ostensible conflict this role of IHL creates with another regime protecting human rights, i.e. International Human Rights Law ("IHRL").

The paper proceeds as follows. Part I introduces the concept. Part II establishes the objectives of IHL and elaborates upon its role for protection of human rights. Part III then analyses the ostensible conflict between IHL and IHRL in light of their similar goals and attempts to resolve this conflict by viewing the two laws through the lens of complementarity. Part IV then illustrates and tries to resolve the hard cases wherein no seemingly simple solution exists as to the complementary application of rules. Part V concludes the previously advanced arguments.

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[1] Christian Tomuschat, *Human Rights and International Humanitarian Law*, 21 EUR. J. INT'L L. 15, 16 (2010).

## PROTECTING HUMAN RIGHTS DURING ARMED CONFLICTS

### Inclusion of Human Rights Norms

International humanitarian law upon its codification through the Hague Convention resulted in limiting the means and methods of conducting war,[2] despite its original aim of aid the victims of war, such as, prisoners of war as well as civilians. IHL thus while initially starting out as a victim centric model subsequently came down to regulating armed conflicts.

This approach to IHL was sought to be altered through a more 'humanized' approach to the law[3] through the four Geneva Conventions entered into force after the Second World War and the protocols additional to it. The Geneva Conventions, unlike the Hague Conventions, were concerned more to the victims of the war rather than being limited to proscribing the means and methods of warfare.[4] IHL was thus finally codified as a regime with dual goals; *firstly* regulating the means and methods of warfare and *secondly* creating a regime that ensure protection of human right norms.

While the first goal of IHL is well defined and highly scrutinised,[5] the second goal is often lost in implementation.

At the very outset IHL has been codified in a way that ensures guarantee of minimum human rights. For instance the principle of distinction ensures that civilians cannot be target of armed attacks and enemy armed forces must at all times distinguish between military targets and civilian populations.[6] While admittedly IHL does provide for derogation from such obligation in case of clear military advantage, the same is an exception and not the norm. In fact the law imposes duty to respect, care and provide aid to the victims of armed conflicts and any attempt on the lives of these persons is strictly prohibited.[7]

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2 Richard Fruchterman, *Enforcement: The Difference between the Laws of War and the Geneva Conventions*, 13 GA. J. INT'L & COMP. L. 303, 304, (1983).
3 *See Generally* Theodor Meron, *Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000).
4 Jjoyce Gutteridge, *The Geneva Conventions Of 1949*, 26 BRIT. Y.B. INT'L L. 294, 325 (1949).
5 *See Generally* Antonio Cassese, *On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2 (1998); Jozef Goldblat, *The Laws of Armed Conflict: An Overview of the Restrictions and Limitations on the Methods and Means of Warfare*, 13 SECUR. DIALOGUE 127, (1982).
6 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 48, 8 June 1977, 1125 UNTS 3.
7 Louise Doswald-Beck, *International Humanitarian Law: A Means Of Protecting Human Rights In Time Of Armed Conflict,* 1 AFR. J. INT'L & COMP. L. 595, 601 (1989).

Additionally the protection of human rights under IHL is evident from the protection of certain peremptory human right norms. Peremptory human right norms implies that there exist certain human rights that cannot be suspended or derogated from even in the name of military necessity during an armed conflict. The biggest example of such peremptory norm is the protection afforded to prisoners of war. Armed forces are absolutely prohibited from arbitrarily depriving prisoners of war from their right to life, from inhumanely treating prisoners of war or conducting torture.[8] It is arguably the provisions against torture within IHL that effectively make torture an effective *jus cogens* norm by not only prohibiting it but also allowing for a remedy against all groups.

Similarly interned civilians and soldiers cannot be discriminated upon based on their race, colour, sex, language, religion, national or social origin, wealth, birth or other status and are guaranteed fair trial.[9] In fact the prisoners of war, wounded or sick soldiers found on land or sea and soldiers otherwise incapable of fighting are accorded protection from all kinds of arbitrary behaviour by the enemy authorities.[10]

The prohibition on the use of certain weapons – such as biological, toxic, poisonous weapons – also demonstrates that the principle of humanity contains certain values that cannot be derogated from even in the name of military necessity.[11] For this reason the use of chemical weapons in Syria is a clear violation of international humanitarian law regardless of whether it was dictated by military necessity.[12]

Finally, the peremptory nature of such rights is further confirmed by the fact that these rights are actionable not only inter-state but also intra-state.[13] Through the recognition of internal armed conflicts by Common Article 3 of the Geneva Conventions and Additional Protocol II the rights exercisable by individuals are granted not only against states but also against belligerent groups

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[8] Geneva Convention (III) relative to the Treatment of Prisoners of War, Article 3(1), 12 August 1949, 75 UNTS 135.
[9] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 75, 8 June 1977, 1125 UNTS 3.
[10] Louise Doswald-Beck, *International Humanitarian Law: A Means Of Protecting Human Rights In Time Of Armed Conflict*, 1 AFR. J. INT'L & COMP. L. 595, 601 (1989).
[11] *Id.*
[12] *See Generally* Jillian Blake, Aqsa Mahmud, *A Legal 'Red Line'?: Syria and the Use of Chemical Weapons in Civil Conflict*, 61 UCLA L. REV. DISC. 244 (2013).
[13] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Art. 1, 8 June 1977; Cordula Droege; *The Interplay Between International Humanitarian Law And International Human Rights Law In Situations Of Armed Conflict*, 40 ISR. L. REV. 310, 342 (2007)

recognised are being party to the conflict.[14] Quite specifically, as has been argued earlier, this characterisation of norms under IHL means that crimes such as torture can be punished regardless of the perpetrator. Thus the *jus cogens* character of torture is better exercised under the regime of IHL wherein unlike IHRL[15] the perpetrator of the crime can be a non-state armed group as well.[16]

These protections accorded under the international humanitarian law through the Geneva Conventions and the protocols additional to it must not viewed as merely regulating means and methods of warfare but also as guaranteeing rights.

However it must be understood that international humanitarian law ensures only minimum guarantees. With the increased humanization of IHL norms combined with universal commitment to human rights, the values imbibed within human rights law are slowly integrating with IHL. This integration creates two diametrically opposite possibilities: creation of conflict within IHL and IHRL norms or heightened commitment to and realisation of human right norms.

## IHL v. IHRL?

### Conflict in Regimes

The inclusion of human right norms within IHL may be seen to create a conflict between two regimes of law – IHL and IHRL. Both regimes share the ideal of ensuring protection of human dignity and consequently many of their guarantees overlap.[17]

At a very preliminary level, IHL applies only during the situation of an armed conflict and occupation while IHRL is not dependant on situational prerequisites.[18] This characterisation of IHRL can result in situations wherein identical norms are (differently) protected under the two regimes.

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[14] *Id.*

[15] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, 1465 U.N.T.S. 85.

[16] Cordula Droege; *The Interplay Between International Humanitarian Law And International Human Rights Law In Situations Of Armed Conflict*, 40 ISR. L. REV. 310, 342 (2007); Prosecutor v. Kunarac and Others, Case Nos. IT-96-23 & IT-96-23/1, Trial Chamber, ¶ 491 (Feb. 22, 2001).

[17] *See Generally* Louise Doswald-Beck, *International Humanitarian Law: A Means Of Protecting Human Rights In Time Of Armed Conflict*, 1 AFR. J. INT'L & COMP. L. 595, 601 (1989).

[18] Oona Hathaway et al, *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883, 1888-90 (2012).

For instance in the case of an armed conflict IHL applies, however, at the same time human rights law owing to its universal character and independence from situations can also be applicable. In fact the Human Rights Committee has also clarified the same stating that 'the ICCPR applies in situations of armed conflict to which the rules of IHL are applicable.'[19] A conflict may thus be created in the regime of IHL and IHRL if the norms within one regime oppose the provisions within another. This conflict can lead to heightened reliance on the norms within one regime or in an enhanced commitment to human rights through mutual deference by the regimes.

The question that might be asked then is: which rule of norm protection must be applied to guarantee a human right, for instance right to life, during an armed conflict?

## RESOLVING THE CONFLICT IN REGIMES

The above question has several conflicting solutions such as the application of the rule of displacement, and complementarity.

### Rule of Displacement

The rule of displacement states that only the situation is paramount for the determination of the applicable law. If the situation is that of an armed conflict then IHL applies, or else human rights law is applicable.[20] The principle implies that upon the fulfilment of the criteria required for an armed conflict IHL displaces human rights law.[21]

The principle is most clearly illustrated in the defence of the global war on terror by the United States of America. The USA maintains that it is in an on-going armed conflict with terrorist organisations and therefore the rules of international humanitarian law are applicable to its conduct.[22]

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[19] Human Rights Comm., General Comment No. 29: States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.l/Add.11 (Aug. 31, 2001).
[20] Oona Hathaway et al, *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883, 1895 (2012).
[21] *Id.*
[22] John B. Bellinger, III U.S. Dep't of State, Opening Remarks at U.S. Meeting with U.N. Committee Against Torture (May 5, 2006), available at http://www.state.gov/g/drl/rls/68557.htm.

The principle of displacement can also be understood as the principle of *lex specialis* wherein specific law on a situation replaces general treaty law.[23] Proponents of displacement rule state that IHL is the *lex specialis* in an armed conflict and thus it trumps IHRL.[24] They rely on the use of the term by the International Court of Justice in the Nuclear Weapons Advisory[25] wherein it stated that arbitrary deprivation of life under the ICCPR must be interpreted in light of the *lex specialis*, i.e. international humanitarian law.[26]

However this interpretation of the Advisory Opinion completely ignores the Courts acknowledgment of the continuity of human rights during armed conflicts.[27] It is for this reason that there has been a consistent dilution of the Advisory Opinion as is evident from the Wall Advisory[28] and the Armed Activities case.[29]

Furthermore the rule of *lex specialis* is in itself quite ambiguous.[30] Principally a specific norms overrides a general norm, however, there exist no guidelines for determining the specific norm.[31] From the standpoint of an armed conflict IHL may be argued to be the *lex specialis*, however, from the standpoint of human rights IHRL may become the *lex specialis*.

The rule is thus plagued by definitional and substantive difficulties. Hence the principle seems unacceptable especially in light of the universalization of human rights and the increasing fuzzing boundaries between international humanitarian and human rights norms.[32]

**Rule of Complementarity**

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[23] Oona Hathaway et al, *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883, 1895 (2012).
[24] *Id.*
[25] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ 246, ¶ 25 (8 July).
[26] *Id.,* ¶25.
[27] *Id.*
[28] Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ 4, ¶ 106 (9 July).
[29] Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda), 2005 ICJ Rep 116, ¶ 216 (19 December).
[30] Marko Milanovic, *A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law*, 14 J. CONFLICT & SEC. L. 459, 473-74, (2009).
[31] Nancie Prud'homme, *Lex Specialis: Oversimplifying A More Complex And Multifaceted Relationship?*, 40 ISR. L. REV. 356, 382, (2007).
[32] Oona Hathaway et al, *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883, 1897 (2012).

The rule of complementarity states that the regimes of IHL and IHRL pursue a common ideal, the protection of human dignity, and therefore the rules of each regime must be interpreted in light of the other.[33] The complementarity rule focuses on "coordinated interpretation" of identical norms within the two regimes.[34]

Interpretation through coordination is based on the rule of contextual interpretation which requires a treaty to be interpreted in light of other applicable rules of international law.[35] Thus the rule states that where both IHL and IHRL are applicable the guarantees provided for under IHRL must be read in context with and in limitation to the rights under IHL.[36] Proponents of this interpretation also rely upon the Nuclear weapons advisory wherein the Court held that the rights under ICCPR must be in conjunction with the norms under IHL.[37]

This interpretation of the Advisory opinion is further strengthened by the Courts own reliance on it in the Wall Advisory and in the Armed Activities Case.[38] In the Wall Advisory the Court while still considering IHL as *lex specialis* accepted the application of both regimes during armed conflict. In the Armed Activities case the Court went a step further and dropped the usage of the term *lex specialis* and applied both IHRL and IHL for resolving the dispute and holding Uganda responsible for human rights violation in the Democratic Republic of Congo.[39] Thus the International Court of Justice has consistently applied both IHL and IHRL in cases of occupation and armed conflicts.[40]

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[33] Human Rights Comm., General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (26 May 2004).
[34] Oona Hathaway et al, *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883, 1897 (2012).
[35] Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331.
[36] Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ 4, ¶ 106 (9 July); Oona Hathaway et al, *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883, 1895 (2012).
[37] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ 246, ¶ 25 (8 July); Christian Tomuschat, *Human Rights and International Humanitarian Law*, 21 EUR. J. INT'L L. 15, 17-8 (2010).
[38] Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ 4, ¶ 106 (9 July); Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 19 Dec. 2005, 45 ILM (2006) 271, 317.
[39] Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda), 2005 ICJ Rep 116, ¶ 216 (19 December).
[40] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ 246, ¶ 25 (8 July); Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ 4, ¶ 106 (9 July); Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda), 2005 ICJ Rep 116, ¶ 216 (19 December).

The practice of the ICJ is not isolated and human rights bodies have consistently viewed the norms under IHL and IHRL to be mutually enforcing.[41] The International Committee of the Red Cross has previously advocated a complementary enforcement of the norms within the regimes stating that the regimes are distinct but complementary.[42] Similarly as previously iterated the human rights committee has also maintained that human rights norms under IHL and IHRL are not mutually exclusive but complementary.[43] Finally international jurisprudence has also viewed the regimes as mutually enforcing with several courts across jurisdictions acknowledging the combined application of the regimes in situations of occupation and armed conflicts.[44]

The complementary rule appears to be a better model for not only resolving the conflict that may arise between IHL and IHRL but also furthering the ideal shared by the regimes, i.e. a higher commitment to and realisation of human right norms. Mutual interpretation of the rights guaranteed under the two regimes achieves twofold benefits. *Firstly* the norms within IHL are interpreted in keeping with broader human right standards. This creates a possibility for the evolution and observation of higher standards of human rights even during armed conflicts. For instance previously the right to life was only seen vis-à-vis military necessity. This implied in theory that even arbitrary deprivation of life was acceptable as long as a direct and concrete military advantage ensued from such deprivation. However with the inclusion of human rights law deprivation of life must necessarily not be arbitrary. The inclusion of this requirement of non-arbitrariness introduces a higher burden on armed groups. Previously the loss of life had to be proportional to the military advantage, however, now the military advantage must be weighed vis-à-vis the rule against **arbitrary** loss of life. While it is conceded that the term arbitrary may be decided in accordance with IHL, even then it arguably leads to a higher respect for the most fundamental human right. *Secondly*, the application of human rights law during armed conflicts allows for introduction of human right norms which are yet not present in IHL but are provided for under IHRL. A prime example of such

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[41] Tehran Conference, General Resolution XXIII, 'Respect for Human Rights in Armed Conflicts' UN doc A/Conf.32/41 (13 May 1968).

[42] https://www.icrc.org/eng/war-and-law/ihl-other-legal-regmies/ihl-human-rights/overview-ihl-and-human-rights.htm, accessed on 20 December 2014.

[43] Human Rights Comm., General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (26 May 2004).

[44] Coard v. United States, Inter-Am. C. H.R., Rep. No. 109/99, ¶39 (Sept. 29, 1999); Serrano-Cruz Sisters v El Salvador, Preliminary Objections, 23 November 2004, Inter-Am Ct HR Series C, No 118, ¶112; Prosecutor v. Kunarac and Others, Case Nos. IT-96-23T, Trial Chamber, ¶ 467 (Feb. 22, 2001).

incorporation can be seen from the application of the Convention against Racial Discrimination[45] to the armed conflict between Russia and Georgia.[46]

Thus the complementarity model is more suited in cases of a conflict between IHL and IHRL norms.

## OSTENSIBLE AREAS OF UNRESOLVABLE NORM CONFLICTS

Despite complimenting the interpretation of the other regime, IHL and IHRL do come into conflict in limited situations. These situations are the result of differential norm protection under the two regimes. Authors have frequently argued these potentially unresolvable conflicts to be a bane in the mutual implementation of IHL and IHRL.[47] The current section outlines the potentially unresolvable conflicts and tries to resolve the unresolvable through the application of the complementarity model as discussed above.

### Right to Life

Under ICCPR any arbitrary deprivation of life is prohibited,[48] while in IHL combatants may be targeted and killed on the fulfilment of necessity requirement. Authors argue that this carte blanche of targeting combatants and killing them creates a conflict between IHL and IHRL obligations.[49] The dispute was unequivocally answered to in the Nuclear Weapons Advisory where the Court held that arbitrary deprivation must be understood in terms of the IHL norms.[50] While the application of the ICCPR during armed conflicts is recognized, its interpretation must be done in light of the provisions under IHL to effectively read them together.

Thus the targeting of combatants being permissible under IHL does not amount to arbitrary deprivation of life and therefore there does not raise any conflict between IHL and IHRL norms.

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[45] International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.
[46] Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, 2008 I.C.J. Reports, ¶112 (15 October).
[47] Marko Milanovic, *A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law*, 14 J. CONFLICT & SEC. L. 459, 477-81 (2009); Fiona E. Nairn, *The relationship between International Humanitarian Law and International Human Rights Law: Parallel Application or Norm Conflict?*, 10-12 March 14, 2012, http://ssrn.com/abstract=2021839.
[48] International Covenant on Civil and Political Rights, Art. 1, Dec. 16, 1966, 999 U.N.T.S. 171.
[49] Marko Milanovic, *A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law*, 14 J. CONFLICT & SEC. L. 459, 477-81 (2009).
[50] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ 246, ¶ 25 (8 July).

**Occupation**

In a situation where one state occupies the territory of another the norms under IHL become applicable. The Hague Regulations and the Fourth Geneva Convention require the penal laws of the occupied state to remain applicable in such situations.[51] In contrast norms under IHRL require the occupying state to fulfil its human rights obligations in territories[52] under its effective control.[53] The potential conflict may be raised when a state has human rights obligations under IHRL to refrain from the application of certain penal measures (Capital Punishment, Torture) and under IHL to respect the laws of the occupied state. For instance a state that has ratified the ICCPR occupies the territory of a state that is not party to the ICCPR. In this situation the occupier state may have an obligation, say, not to subject anyone to torture or inhuman treatment whereas the non-party state may have laws that arguably allow for torture (Stoning under Iranian Penal Law[54]).[55] In that situation IHRL would require the occupier state to prohibit the conferment of such punishment, while IHL would require the laws of the occupied state to be made applicable and thus to allow for stoning.

Authors have previously argued for policy decisions to be taken in such situations.[56] The argument tend to favour policy decisions because IHRL has an absolute prohibition on torture and IHL only allows for derogation from the application of local laws if they threaten the security of occupying state or are threaten the application of the Geneva Conventions.[57] However a more careful reading of the law leads to a resolution of the dispute. The exception to the IHL norm includes a threat to the application of the Geneva Convention. In the case of penal provisions allowing for stoning it

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[51] 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, Art. 43, 18 October 1907 36 Stat. 2277, 1 Bevans 631; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 64, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[52] International Covenant on Civil and Political Rights, Art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 1, Sept. 3, 1953, 213 U.N.T.S. 222.

[53] Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Confl ict, Parallelism, or Convergence?*, 19 EUR. J. INT'L L. 161, 164 (2008).

[54] Islamic Penal Code of Iran, Art. 83, 102 (1991).

[55] Marko Milanovic, *A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law,* 14 J. CONFLICT & SEC. L. 459, 477-81 (2009).

[56] Marko Milanovic, *A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law*, 14 J. CONFLICT & SEC. L. 459, 477-81 (2009); Fiona E. Nairn, *The relationship between International Humanitarian Law and International Human Rights Law: Parallel Application or Norm Conflict?*, 10-12 March 14, 2012, http://ssrn.com/abstract=2021839, accessed on 20 December 2014.

[57] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 64, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

can be argued that stoning amounting to torture or in the very least inhuman treatment are against the Geneva conventions and therefore hamper the application of the Convention. Alternatively the exceptions to the convention implicitly include another exception, i.e. disallowing derogation from peremptory norms. Torture being a peremptory norm cannot be allowed in order to respect the local laws of occupied state and therefore the conflict is resolved through the exceptions provided for under the Geneva Convention. Therefore the two regimes can be read in conjunction with one another.

Additionally the stated problem is not so much of a conflict between two regimes of law as much as it is of conflicting understanding of human rights in different jurisdictions. While laws in one state would (rightly) consider stoning as an act of torture, laws in another state may not. The universalization of human rights is the best response to conflicts of this nature which exist due to differential understanding of human rights.

Thus the seemingly unresolvable conflicts between the two regimes can be resolved through a thorough application of the complementary mechanism so as to ensure a greater commitment to human rights while not derogating from the law.

## CONCLUSION

The aim of this paper was twofold: Firstly, to present the humanist goals of IHL and elaborate upon this oft forgotten aim of the regime, secondly to conceptualise the conflict between IHL and IHRL through the application of the complementarity model.

Since its very inception IHL was created as a regime of law that ensured minimal protection of human rights even during war. The subsequent development of IHL led to a heightened focus on the methods of conducting armed conflicts rather than enhancing focus on protection of human rights. The position while being partially resolved through the Geneva Conventions and the additional protocols still exists due to concentration of jurisprudence on the regulatory aspect of IHL thereby overlooking the protectionist nature of the regime. IHL provides for norms that ensure protection of peremptory rights of persons, such as protection from being subjected to torture or inhuman treatment. Similarly the prohibition on indiscriminate or disproportionate killing or

protection of civilians under the principle of distinction ensures that armed conflicts do not surpass the principles of humanity that traverse boundaries binding the world community together.

The aforementioned goal of IHL pits it into an apparent conflict with another human rights oriented regime of law, IHRL. With similar goals IHL and IHRL come into conflict in situations of armed conflict wherein both regimes of law are applicable. The conflict can be resolved through the application of the rule of *lex specialis* according to which IHL being the specific law governing armed conflicts displaces IHRL. However owing to conceptual ambiguity in the rule of *lex specialis* along with the universalization of human rights the principle fails to be practically meaningful. Alternatively the complementarity model can be followed which allows for mutual interpretation of the two regimes thereby reading IHRL and IHL not in place of each other but with each other. The complementarity principle has been gaining momentum in international jurisprudence as well owing to its higher commitment towards human rights.

However several authors argue that there exist certain conflicts between IHL and IHRL which cannot be resolved. The norm conflicts as presented by authors and detailed in the paper can in fact be resolved through the complementarity regime by reading the specific provisions under one regime alongside the provisions present in the other regime. Thus the complementarity model can be used to resolve the potential conflicts between the regime of IHL and IHRL.

Armed conflicts are currently an unfortunate reality of the world order. The least international law can do to reduce the harms posed by them is to increase the protection of human rights. The same can be achieved through the hopeful application of IHRL norms during armed conflicts. However a better model for protection is through the complementary use of IHL and IHRL norms as the specific protections envisaged under IHL along with detailed remedial mechanisms provide for a better realisation of human right norms.

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# VALUING MOTHERHOOD
# A CASE FOR LEGALIZING MARKET IN BABIES

*Smriti Chandrashekar*

## INTRODUCTION

"Both of us [Sunita and her husband] worked all day to earn Rs.10,000 - Rs.15,000 per month and lived hand-to-mouth. We did not have enough to provide good education to our two children. Here, they offered me Rs.2.5 lakh in return for bearing a child and to take care of all my expenses till delivery. I could have never made this much money in such a short span of time. I have borne [delivery] pain for my children…. now I can bear it again for their better future," said Sunita, one of the dozen surrogate mothers at Gurgaon's first surrogacy home being run by Vansh Health Care in India.[1]

The problems of the infertility spread globally have necessitated a growth in the Assisted Reproductive Technologies [hereinafter *ART]*. The concept of surrogacy or commissioned adoption comes handy to people with infertility issues where typically, a surrogate mother bears and delivers a child for another person or couple as the case maybe. A gestational surrogacy is a slight break away from the traditional concept of surrogacy wherein the genetic mother donates her egg, which is fertilized through in vitro fertilization and the embryo is implanted in the uterus of the surrogate mother who has agreed to carry and deliver the baby. In a traditional surrogacy, however, the surrogate mother is also the biological parent due to the fact that she agrees to be inseminated with the sperms of the intending father artificially, thence making her the egg donor also.

The driving force motivating mothers to engage in surrogacy commercial or not can range from monetary incentives to altruism. While some countries like Australia, Canada, Belgium, Netherlands and New Zealand have confined themselves to legalizing only altruistic surrogacy, the other countries

[1] Ashok Kumar, *Surrogacy on the Rise in North India,* The Hindu (Nov. 3, 2013) http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/surrogacy-on-the-rise-in-north-india/article5308900.ece?ref=relatedNews

like India, Ukraine, Russia, Israel have moved forward to recognize surrogacy in its commercial form. There are also many countries like Pakistan, Italy, Iceland and Finland, which consider surrogacy be it commercial or otherwise to be illegal. Many states in the United States of America like California, State of Massachusetts recognize surrogacy while others like Michigan prohibit all forms of surrogacy.

The role of developing economies like India in the commercial surrogacy sphere is increasing by the day, mainly because the potential cost involved in entering into surrogacy contracts is relatively low in India especially when compared to the costs prevalent in the United States and United Kingdom. The usual fee for a surrogate contract is around $25,000 to $30,000 in India, which is believed to be 1/3rd of the cost involved for a surrogate contract in developed economies like the United States of America.[2] Thus people from across the world visit India making it a hotspot for surrogacy arrangements because commercial surrogacy is legal in India.[3]

While more and more foreigners enter India in order to enter into surrogacy contracts with Indian surrogates transforming surrogacy into a lucrative business industry, the social activists find the present regulations governing the rights of surrogates and children born out of such contracts, to be insufficient. The activists fear the potential scope for human trafficking involved in commercial surrogacy and hence urge for it to be regulated through an adequately protective legal framework like organ donation. This debate has finally led to formulation of the *Assisted Reproductive Technology (Regulation) Bill and Rules 2008*, a full-fledged law proposing to regulate surrogacy in all its forms and protect rights of both surrogate mothers and children, which is pending consideration by the Parliament of India.

In the interim, sociologists, philosophers, political scientists and legal scholars amongst others continue the debate concerning moral and ethical aspects of commercial surrogacy and market in babies.

Although a surrogacy arrangement at the outset seems beneficial to all the parties involved therein, commercialization of such arrangements invites the dangers of exploitation especially due to lack of

[2] Report No. 228, Law Commission of India, Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy 1, 11 (Aug. 5, 2009), http://lawcommissionofindia.nic.in/reports/report228.pdf

[3] Baby Manji Yamada vs. Union of India and Anr. A.I.R. 2009 SC 84- wherein Supreme Court of India recognized a case of gestational surrogacy; See also, National Guidelines for Accreditation, Supervision & Regulation of Assisted Reproductive Technology (ART) Clinics in India, http://icmr.nic.in/art/art_clinics.htm

regulation in the industry. Thus such a beneficial arrangement calls for effective regulation through a carefully crafted framework of law sensitive to the ethical nuances but accounting for pragmatic concerns to protect the rights of the surrogate mother, intended parents and most importantly the child born out of such an arrangement.

Going forward, many countries (India, UK) seek to break out of operating in the legal vacuum and deliberate on the enactment of a codified law that seeks to regulate surrogacy and protect the rights of children and mothers involved in such arrangements. This deliberation necessitates the analysis of a deeper question what if anything is wrong with the intervention of market and applicability of commercial norms to the arrangements involving relinquishment and acquisition of parental rights that lead to transfer of offspring.

## MARKET IN BABIES: ANALYSIS OF ETHICAL AND MORAL OBJECTIONS

At the outset, it seems like the general collective conscience is against application of market language and norms to human beings and relationships between human beings. Thus to associate words like 'acquisition', 'purchase', 'sale' with human beings and relationships, skirmishes the collective conscience.

Although the present world witnesses a strong breakaway from the traditional definition of many relationships and bonds, the public policy remains fundamentally opposed to baby a system involving transfer of babies for a economic consideration.[4] Scholars examining this opposition attribute it to more than one reason.

### Analogous to Slavery

The fundamental opposition to a market in babies comes from treating it as being analogous to a system to slavery.[5] The concept of commercial surrogacy often termed as "baby selling"[6] is thus characterized as a form of human trafficking. It can be contended that transfer of babies between two

[4] Elizabeth M. Landes and Richard A. Posner, *The Economics of Baby Shortage,* 7 The Journal of Legal Studies 323, 324 (1978).
[5] Keith Schneider, *Mothers Urge Ban on Surrogacy as form of 'Slavery',* New York Times, (Sept. 1, 1987) http://www.nytimes.com/1987/09/01/us/mothers-urge-ban-on-surrogacy-as-form-of-slavery.html ; *See also* Suzanne Moore, *The case of baby Gammy shows surrogacy for the repulsive trade it is,* The Guardian, (Aug. 4, 2014) http://www.theguardian.com/commentisfree/2014/aug/04/baby-gammy-thailand-surrogacy-repulsive-trade-pattaramon-chanbua
[6] Richard A. Posner, *The Regulation of the Market in Adoptions,* 67 B.U.L. Rev. 59, 70 (1978); *See also* Schuck, *Some Reflections on the Baby M Case,* 76 GEO. L.J. 1793, 1794 (1988)

parties for an exchange of monetary or economic consideration would tantamount to assigning property rights in babies like in cases of slavery, which is not only immoral but objectionable to public policy.[7]

The arguments that analogize surrogacy to that of slavery lose sight of the fact that the intending father in case of traditional surrogacy and both the parents in case of gestational surrogacy, are the natural parents of the child. Thus there is a biological link between the parents or parent who intend to raise the child as the case may be, and the child. Whereas in cases of slavery the child or the person is given away to a total unrelated person or a stranger who may not really intend to raise the child. The involvement of parents who share a biological connection with the child than just being able to pay for the child makes a huge difference. Although it erroneous to presume the strength of the bond based on the genetic connection, thus undermining the strength of social relationships, an arrangement where the natural father or sometimes even both mother and father are also the social parents, is a benign arrangement difficult to doubt.

Here, it also becomes important to emphasize on the extent of control wrapped within the concept of slavery, which is absent in case of surrogacy.[8] The beneficial value in a slavery arrangement is limited to whims and fancies of the buyer and seller and the arrangement thus disregards the interests of the victim subjected to such slavery.[9] However, a surrogacy arrangement more often than not is believed to fulfill all the requirements of a normative economic concept that is 'Pareto Superiority' which implies a transaction that makes at least one person better off and no one worse, to ultimately promote social welfare and is hence efficient.[10] People wanting to harness family bonds while experiencing the joy and pleasures of parenthood enter into a surrogacy contract and it is unlikely that such arrangements diminish the babies' welfare by more than they increase the welfare of contracting parties. While it may be argued that not all surrogate contracts are aimed at child's welfare and thus have hidden ulterior motives, it thus becomes necessary to ponder over the question about the extent to which baby selling should be regulated.[11] This also sets up the case to seek intervention of law to regulate commercial surrogacy to condemn practices that are far from promoting the welfare of child

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[7] *Id.*

8 Allen, Anita L., *Surrogacy, Slavery, and the Ownership of Life*, 13, Faculty Scholarship Paper 805, 139, 142 (1990) *http://scholarship.law.upenn.edu/faculty_scholarship/805*

[9] Elizabeth Anderson, *Is Women's Labor a Commodity?,* 19, Philosophy and Public Affairs 71, 72, No. 1 (Winter,1990) http://www.jstor.org/stable/2265363

[10] Posner, *supra* note 7 at 60.

[11] *Id.* at 72.

born therein. It is needless to say that legalizing market in babies would not preclude the application of laws prohibiting child abuse to such transaction and the same would continue to apply with equal force. Further the law can also mandate thorough screening of the intending parents, which is now only done for the surrogate mother to further amplify the best interest of the child. However, in disputes involving custody of the child, the same can once again be left open to the law to decide equitably once again in the best interest of the child.

The idea of surrogacy being analogous to slavery also stems from the element of ownership involved in both the arrangements where children are considered as objects, capable of being owned akin to property in goods, which runs contrary to the perception of traditional parent child relationship.

The intending parties in a surrogacy arrangement are most likely childless couples or persons wishing to experience the invaluable joy that comes along with parenthood unlike slavery that entails elements of coercion, and is not aimed to benefit the victim.

Failure to recognize the distinction between the two concepts may result in perpetuating the grave injustices caused by misdemeanors like mass abortions and illegitimacy especially where transfer of children albeit altruistically is viewed as a violation of law.[12]

**Commodification of Children**

A market in babies is alleged to objectify children as commodities capable of being bought and sold in the market.[13] Such commodification, it is argued leads to degrading human dignity that occurs when human being is subjected to barter. This particularly stems from the popular Kantian philosophy that people cannot be treated as mere means only but are ends in themselves. To treat children as mere use objects by the contracting parties undermines the norms of parental love insofar as it treats them as commodities.[14] Some regard such commodification as corrupting the values of human dignity and integrity that are intrinsic to humans.

An arrangement, involving sale of babies does not violate the nuances of the Kantian ideologies, as it does not take away the intrinsic value in babies merely by valuing them. Kant's 'Humanity Formula' prohibits treating human beings worthy of respect as if they were worthy merely of use. It is important

[12] *Id.* at 70-71.
[13] Anderson, *supra* note 10 at 77.
[14] *Id.*

to note that this philosophy does not eliminate use of human beings as a means to an end completely. What Kant seeks to eliminate is to treat human beings *merely* of use and not an end in themselves.[15] This applies with great force to a slavery arrangement where the interests of the slave is completely ignored as against in a surrogacy or baby selling arrangement where the intended parents have the best interests of the child in mind that is provide loving homes for the offspring. Thus is a surrogacy arrangement or baby selling contract the child is not *merely* considered as an object of use. Further, it is most likely that people resort to such arrangement mainly because of the high reverence for the intrinsic value that they perceive in a child.

Further if we were to accept Kantian 'means and ends' argument as those who condemn surrogacy interpret it, then any service rendered using performance of human skill would stand to degrade intrinsic value of human beings. The consultancy firms which value human intelligence by rendering services like business modeling must be considered to damage the intrinsic value of human beings as they are used as a means to an end and not just an end.

The Kantian emphasis on respecting humans is not just limited to human beings but extends to *humanity* in the human beings that he says has to be treated as an end in itself. This humanity scholars say, entails self-directed rational behavior, to pursue one's own ends and any other allied abilities aimed at one's welfare.[16] "The difference between a horse and a taxi driver is not that we may use one but not the other as a means of transportation. Unlike a horse, the taxi driver's Humanity must at the same time be treated as an end in itself" Professor Robert Johnson writes, if the tax driver "has freely exercised his rational capacities in pursuing his line of work, we make permissible use of these capacities as a means when we behave in a way that he could, when exercising his rational capacities, consent to — for instance, by paying an agreed on price."[17]

It is argued that by engaging in the transfer of children by sale, all the contracting parties express attitudes towards children, which tend to undermine the norms of parental love.[18] On the contrary in reality, the intending parents as well as the surrogate mother seek to amplify the norms of parental

[15] Johnson, Robert, *Kant's Moral Philosophy*, The Stanford Encyclopedia of Philosophy (Summer 2014 Edition), Edward N. Zalta (ed.), http://plato.stanford.edu/archives/sum2014/entries/kant-moral/
[16] *Id.*
[17] *Id.*
[18] Anderson, *supra* note 10 at 77.

love by not giving up on their infertile conditions to engage in cultivating the bond of families and relish the joy of parenthood through surrogate contracts.

While scholars accept the failure of parents to fulfill their parental obligations in cases of adoption,[19] it makes no sense to relegate practices of commercial surrogacy and baby selling where intending parents come forward to indulge in upbringing of a child while nurturing a family.

The surrogacy or baby selling arrangements that are considered to be morally reprehensible for commodification of babies and thence degrading their intrinsic value are not accurate inasmuch as in reality such arrangements are initiated with high regard to the personhood that is wrapped within a child and are far from viewing children as mere "use-objects". Further the commodification argument is also not backed by empirical evidence and is mostly criticized for being a theoretical concept far from reality.[20]

**Conception of Personhood**

Some claim that a market in babies would affect the child's self-conception and thus harms personhood.[21] This contention fails to recognize the uniqueness of each market sphere and a market in babies like other market segments would have its own unique rules. Each market segment has it's own rules like a market in human resource services is unique and different from that of a market in art. FWhile Professor Radin analogizes with the BMW Car example, Professor Martha Ertman, says "From an ethical standpoint, parents have the duty to help the child develop a healthy sense of self, become an independent adult, and learn how to be a good citizen. While a car owner is obliged to maintain insurance and refrain from using the car to sell illegal drugs, that owner is also free to destroy the car, or run into the ground through lack of maintenance. Parents are obviously not free to do the same."[22]

While it is important to refrain from language and arrangements that treat children like chattel, it is not fair to assume apprehension of danger to personhood of children merely due to existence of a market in babies. If it were true that market corrupts personhood, then wage labor has to be

[19] *Id.* at 79.
[20] Michael Shapiro, Minority Report to the California Legislature, Joint Legislative Committee, *Commercial and Non-Commercial Surrogate Parenting*, M32.
[21] Margaret Jane Radin, *What if Anything is wrong with Baby Selling?* 26, Pacific Law Journal 135, 144-145 (1995)
[22] Ertman, Martha M., *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification.* Vol. 82, No. 1, North Carolina Law Review, 2003 http://ssrn.com/abstract=774968

considered akin to slavery when it is the opposite. The parenthood market is essentially built on the rights and obligations contained in there.[23] The presence or absence of market thus does not affect the personhood or conception of the child crucially.[24]

**Commodification of Women's Labor and Women's Body**

Commercial surrogacy, it is said, attempts to transform the work of bringing forth children that is women's labor into a commodity. The baby selling or commercial surrogacy is regarded as a practice that makes women's reproductive abilities available for sale is regarded as morally reprehensible as it is alleged to reinforce the traditional perception about women as the breeder class and reinforces the gender inequality of women as a group.[25] Some philosophers once again resort to Kantian ideology that some activities are close to our personhood and to commercialize such activities constitutes the person as less than an end or even worse, less than a person.[26]

It is at this point relevant to reiterate the aforesaid taxi driver illustration by Professor Johnson[27] to elucidate Kantian maxim about respecting not just human beings but the *humanity* in human beings. Thus once a surrogate mother has freely exercised her rational capacity in entering into surrogacy contract, it is not immoral or reprehensible to make use of this capacity as a means when the intending parents pay an agreed price for such a contract.

The opponents of surrogate practices would doubt the fact about surrogate mother freely exercising her rational capacities inasmuch as they would argue that surrogacy arrangements are mainly targeted at poor and vulnerable group of women who are coerced into such arrangements through monetary incentives that baby markets offer. However, if a woman decides to contract herself to delivering a baby for another person albeit due to economic duress, to stop her from doing so seems patronizing and hence objectionable. Many people resort to well paying jobs even if means that the job exploits their health to the maximum and such jobs I doubt are regarded as morally reprehensible.

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[23] *Id.*
[24] *Id.*
[25] Janice G. Raymond, *Reproductive Gifts and Gift Giving: The Altruistic Woman,* Vol. 20, No. 6, The Hastings Centre Report 7, 11 (Nov-Dec, 1990) http://www.jstor.org/stable/3563416
[26] Sara Ann Ketchum, *Selling Babies and Selling Bodies*, *Hypatia*, Vol. 4, No. 3, Ethics & Reproduction 116, 120 (Autumn, 1989) http://www.jstor.org/stable/3809829
[27] Johnson, supra note 16

Further, activities like modeling, gymnastics, wrestling, dance performances, involve use of woman's bodies, the same are less likely to be objected for commodification of human body. It is unlikely that someone would refer to a fashion model as a 'beauty thing' and condemn the industry for objectifying human body that has an inherent attachment of immeasurable intrinsic value to it that places it above the vicissitudes of the market.

Surrogacy contracts are only interested in services rendered by the surrogate mother with the use of her body and are not interested to 'purchase' or 'trade in' any rights over surrogate mother's body. There is no reason to perceive the monetary consideration to women in surrogacy arrangements as payments that constitute *rental* of her body.[28] Professor Heidi Malm, elucidates this proposition well as she says "the woman is being paid for *her* to use *her* body in a way that benefits him (the intending father paying her)—she is being compensated for her services. But this does not treat her body as an object of commerce—as something that can be bought sold or rented—any more than does my paying a surgeon to perform an operation, a cabby to drive a car or a model to pose for a drawing. My payments to the surgeon do not give me a right to her arm, make her an object of my domain, nor deny that there is a person there."[29]

Thus a surrogacy contract that expects the woman to use her reproductive ability does not involve any surrender of the woman's rights to the intending parents thereby giving them exclusive dominion over her body and herself. However, it becomes necessary to regulate surrogate arrangements through the force of law to ensure limit the intending parents from interfering the surrogate's lifestyle and prohibit forceful decisions on the surrogate against her will.

**Exploitation of the Surrogate Mother**

Those against the concept of baby selling contend that the contracts are highly exploitative in nature inasmuch as they lead to rich and upper middle class with financial advantages exploiting the unfortunate and under privileged poor and vulnerable groups of women by luring them with monetary incentives to enter into 'renting out their wombs'. They also contend that poorly informed and uneducated class resorts to these arrangements in order to gain some financial advantage therefrom.

[28] Heidi Malm, *Paid Surrogacy: Arguments and Responses,* Vol. 3, No. 2, Public Affairs Quarterly 57, 60 (Apr. 1989) http://www.jstor.org/stable/40435711
[29] *Id.*

Malm, has a four point comprehensive rebuttal to this contention, which is as follows[30]-

a. Surrogacy arrangements are not merely targeted at poor women inasmuch as statistics evidence that an average surrogate mother is white, with two years of collegiate education, married young and has all the children, she and her husband want.
b. The exploitative nature of monetary incentives is applicable to all forms of vocations and every instance of rendering of service. It is not in the best interests of poor when in the guise of protecting them from evil of exploitation, one deprives them of an opportunity to get away from poverty.
c. The economic duress element has gained great emphasis in surrogate arrangements mainly because the practice in general is considered to be distasteful and is viewed with a disdain and hence the opponents consider that if not for the economic coercion, there would not be anyone who would agree to engage in such a practice. However, this is not backed by empirical evidence and also, many women involve themselves in the practice with altruistic motives to gift a couple what they could never have on their own- a family.[31]
d. If the intention is to protect those who view the practice as degrading, yet have no choice but to indulge in it, given the economic incentives, then the aim has to be to regulate the same by restricting the participation through putting forth eligibility conditions as to who can enter into such arrangements.

Thus if a practice not necessarily surrogacy is proven to be exploitative, the solution is not necessarily to abolish or prohibit the practice altogether but to regulate the exploitative nature of such a practice effectively.

**Case for Legalizing Market in Babies**

It is important that surrogacy and baby selling arrangements be analyzed from a consequentialist and utilitarian perspective. This is mainly because the moral and ethical objections to surrogate practices are necessarily deontological to say that it undermines the notions of personhood while disturbing societal structure and criticize those who approach the practice from a utilitarian perspective.

[30] *Id.* at 61.
[31] Lorraine Ali and Raine Kelley, *The Curious Lives of Surrogates,* Newsweek (Mar. 29, 2008, 10:55 am) http://www.newsweek.com/curious-lives-surrogates-84469

As Professor Cass Sunstein says, "It is possible that when people disapprove of trading money for lives, they are generalizing from a set of moral principles that are usually sound and even important but that work poorly in some cases."[32]

The school of thought that morally objects to surrogate and baby selling practices has lost sight of the plight of many single, infertile and gay people who may have been yearning to experience the family bonds. As the world fights for equal rights and protection of gay, lesbian and transgender people and hence legalize same sex marriage, it is significant to not deprive them of families and parenting in its truest form and surrogacy a practice, which in essence enables the gift of family to many people, cannot be regarded as lacking moral legitimacy.

Further consider the case of holocaust survivor, who wants to continue this progeny and is unable to, an arrangement like commercial surrogacy would come to his rescue. This applies to almost all minorities who are deprived of many rights by virtue of being a minority. The arrangements like surrogacy would help them in building families thereby entitling them to many protective legal rights through legislative process.[33]

Market mechanisms, it is said present a moral vision while prioritizing liberty and innovation than tradition or biological mandates.[34] While some reprehend surrogate practices for being exploitative in nature and for being coercive, it is important to recognize the autonomy, individual choice and liberty of the woman concerned in the arrangement. Here it may be pertinent to recall, Millian idea of individuality and liberty, which furthers individuality as being good and furthers the promotion of social institutions that contribute to that individuality. So, it is said that according to John Stuart Mill liberty, liberty is the right to do as one wants free from the interference of others, so long as what one wants does no harm to others. Although merely offending the moral sensitivities of others does not count as harm. Especially since others often confuse feelings of repugnance with feelings of moral disapprobation.[35] This makes it clear that as long as the surrogate mother while exercising her individual liberty is not harming anyone, the practice cannot be considered morally reprehensible.

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[32] Cass R. Sunstein, *Valuing Life-Humanizing the Regulatory State,* The University of Chicago Press 145-146, (2014)
[33] Ertman, Martha M., *The Upside of Baby Markets,* Baby Markets- Money and the New Politics of Creating Families- Edited by Michele Bratcher Goodwin, Cambridge University Press 23, (2010)
[34] *Id.*
[35] Wilson, Fred, *John Stuart Mill,* The Stanford Encyclopedia of Philosophy (Spring 2014 Edition), Edward N. Zalta (ed.), http://plato.stanford.edu/archives/spr2014/entries/mill/

Those who oppose the market in babies would not fail to acknowledge the various benefits of commercial markets albeit in other spheres. A market in babies can also be made to prove advantageous allowing norms of law and culture to this market to ensure maximization of benefits and minimization of perils.[36]

It is thus about time that those who are against the practices of commercial surrogacy or baby selling, admit that there already exists a 'legal market' in babies[37] and also acknowledge that the chances of fraud and corruption in a 'black market' trading in babies is greater than those in a lawful market.[38] The law if not abolish fraudulent markets can at least positively incentivize and protect the vulnerable section from the perils of an existing black market.[39]

Thus the baby markets more than any other sphere seek the intervention of law, today. Thus laws should take over and fill in the grey areas guaranteeing protection to interests of mothers and also children who are considered the representative future.

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[36] Ertman, Martha M., supra note 32 at 25.
[37] Posner, supra note 6, at 72.
[38] Posner, supra note 4 at 338.
[39] Ertman, Martha M., supra note 32 at 26.

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