

A Study On Efficacy of International Humanitarian Law: Historical and Existing Perspectives.

Aamir Yousuf Wagay & Aamir yousuf wagay

¹Assistant Professor law, DME Law School Noida 62 Delhi.

²Assistant Professor DME Law School Noida.

INTRODUCTION

International Humanitarian Law is a branch of law of nations or international law. That law governs relations between members of the international community, namely states. International law is supranational and its fundamental rules are binding on all states. Their goals are to maintain peace, to protect human being in a just order, and to promote social progress in order and to promote social progress in freedom.

International Humanitarian Law is also called the law of armed conflict and previously known as the law of war. International humanitarian law seeks to mitigate the effects of war, first in that it limits the choice of means and methods of conducting military operations and secondly in that it obliges the belligerent to spare persons who do not or no longer participate in hostile actions.

The expression 'International Humanitarian Law' applicable in armed conflict means international rules established and developed by customs and treaties, which are specifically intended to solve humanitarian problems directly arising from international or

non-international armed conflict to use the methods and means of warfare of their choice or protected persons and property that are, or may be affected by conflict”²

International Humanitarian Law (IHL), often referred to as the laws of war, the laws and customs of war or the law of armed conflict, is the legal corpus "comprised of the Geneva Conventions and the Hague Conventions, as well as subsequent treaties, case law, and customary international law." It defines the conduct and responsibilities of belligerent nations, neutral nations and individuals engaged in warfare, in relation to each other and to protected persons, usually meaning civilians.

International Humanitarian Law can be defined as “the human rights component of the law of war”³ in other words, it is the branch of human rights law which applies in international

1.Hans Peter Gasser, *Introduction to International Humanitarian Law*, pp.1

2. *Commentary on the Additional Protocol of 8 June, 1977 to the Geneva Convention of 12 August, 1949*, p.27

3 .T. Buergenthal & H. Maier, *Public International Law*, (1985), p.140.

armed conflict and in certain circumstances it applies even to international armed conflicts. The international humanitarian law is much older than international human right law.

Humanitarian law is that considerable portion of international law which is inspired by the feeling for humanity and is centered on the protection of the individual in time of war. The term 'humanitarian law' combines two ideas of different natures, one legal and the other moral, and more specifically, of humanitarian concern⁴.

International Humanitarian Law and U.N. Charter

War is forbidden. The Charter of the United Nations states clearly that the threat or use of force against other States is unlawful⁵. Since 1945, war has no longer been an acceptable way to settle differences between States. So why talk about international rules dealing with armed conflicts (or war) and their effects, if the Charter has banned recourse to force in international relations? There are four answers of a legal nature to that question.

First, the Charter has not completely outlawed the use of force. Indeed, States retain the right to defend themselves, individually or collectively, against attacks on their

independence or their territory, in response to a (legal or illegal) use of force. Second, the Charter's prohibition of the use of force does not encompass internal armed conflicts (or civil wars). Third, Chapter VII⁶ of the Charter allows member States the use of force in collective action to maintain or restore international peace and security. Fourth, wars do in fact occur, as we all know, despite their being outlawed by the Charter of the United Nations. Armed conflicts short of war are a sad reality in our contemporary world.

The Soul and Spirit of Humanitarian Law

The soul searching of humanitarian law has been made by Henry Dunant in his book⁷. Of course, almost during the same time, Francis Lieber also pleaded for a similar course of action.

4 .P.K. Goel, Bullentin on IHL & Refugee Law, vol.1, no.2, July- Dec, 1996. p.194.

5. Article 2(4), 2 (7), 39,41, 51 of U.N. Charter.

6 . UN charter ,1945

7 . 'A Memory of Solferino' 1862.

Dunant deep concern originated out of the awe of the modern war and its lingering impact on the maimed, deserted and distressed people, some who fought as victims of war, not knowing what their fault was. He listened to the demand of the soul of humanism and was deeply ‘shocked by the absence of any form of help for the wounded and dying’.

A deeply shocked as Dunant was at the time; he came out with two positive codes of actions. Firstly, he advocated for (i) an ‘international agreement on the neutralization of medical personnel in the field’ and (ii) the creation of a ‘service organization for the assistance of war wounded’. The first led to the Geneva Convention and the second led to the establishment of the international committee of the Red Cross.

International Committee of the Red Cross, 1863

A committee was formed—which included Dunant and an early iteration of the Red Cross—in Geneva to explore ways to implement Dunant’s ideas. In October 1863, delegates from 16 countries along with military medical personnel traveled to Geneva to discuss the terms of a wartime humanitarian agreement. This meeting and its resultant treaty signed by 12 nations became known as the First Geneva

Convention. Despite playing an important role in the progression of what became the International Committee of the Red Cross, continuing his work as champion for the battle-wounded and prisoners of war and winning the first Nobel Peace Prize, Dunant lived and died in near poverty. Article 9 of the Convention specified the Red Cross has the right to assist the wounded and sick and provide humanitarian aid. Article 12 stipulated the wounded and sick must not be murdered, tortured, exterminated or exposed to biological experiments.

CUSTOMARY INTERNATIONAL LAW

Customary laws play an important part in the evolution of IHL. These laws are based on general and consistent practice carried out by the nations which give the sense of legal obligation. IHL acknowledges *jus cogens* norms which also known as *peremptory norms*. They are such principles of International Law which are so fundamental that no nation may ignore them or act in contrary.

PURPOSE OF IHL

The purpose of creating IHL was to limit the use of violence in armed conflict by: Sparing those who either do not or no longer participate in hostilities. Regulating the means and methods of warfare .War means outburst of primitive raw violence when nations do not settle their disputes or disagreement through peaceful discussion, they use weapon to speak as an alternate option. War causes inevitable sufferings to people and damage to objects. The United Nations Charter has also expressed views and dealt with the circumstances under which states are allowed to use force. IHL is concerned with fate of those who are not taking part in war.

It is to be noted that the aim of IHL is not to prevent conflicts or wars between the countries. The purpose of IHL is to limit the human suffering which is caused by war. It mainly aims and intends to make rules on the ways in which war can be waged. It restricts the use of means in warfare and ensures proportionality. In other words, the purpose of IHL is to preserve a measure of humanity even during conflicts.

APPLICATION OF IHL

IHL is applied in two situations i.e. one in International Armed Conflict and another in Non-International Armed Conflicts.⁸

International Armed Conflicts : Humanitarian law intends principally for the parties to conflicts and protects other individuals who doesn't take part in conflicts, which includes-**Non-International Armed Conflicts** : In this situation, humanitarian law destines for the purpose of armed forces, either regular or irregular, which takes part in conflicts and involves in the protection of every person or category of individual who do not actively take part in activities of conflict and hostilities any more. A few such examples include: Sick or wounded fighter

People who are prevented from having their freedom because of armed struggle Civilian people

LEADING INSTITUTIONS

8 . Iyer V.R. Krishna, “ humanitarian law- a halting history of global evolution”. ICRC, Regional Delegation, New Delhi, 1999.

ICRC which stands for International Committee of Red Cross is the body of International Law which is devoted in developments, implementation and promotion of International Humanitarian Law. ICRC is the protector and guardian of IHL. ICRC acknowledges parties to the conflict of their duties they are morally and legally bound to do. This organization makes sure that application of law is done effectively and therefore respected. They also make representations that are confidential to the related authorities in the event of violation of humanitarian law. When the violations are serious, the ICRC retains the right to speak for the public and stand for them. It does so only if it deems it to be in the interest of the people affected.

History of Conventions

A. Hague Conventions of 1899 and 1907

One of the purposes for which the First Hague Peace Conference of 1899 was convened was "the revision of the declaration concerning the laws and customs of war elaborated in 1874 by the Conference of Brussels, and not yet ratified" (Russian circular note of 30 December 1898). The Conference of 1899 succeeded in adopting a Convention on land warfare to which Regulations are annexed. The Convention and the Regulations were revised at

the Second International Peace Conference in 1907. The two versions of the Convention and the Regulations differ only slightly from each other.

Seventeen of the States which ratified the 1899 Convention did not ratify the 1907 version (Argentina, Bulgaria, Chile, Columbia, Ecuador, Greece, Italy, Korea, Montenegro, Paraguay, Persia, Peru, Serbia, Spain, Turkey, Uruguay, Venezuela). These States or their successor States remain formally bound by the 1899 Convention in their relations with the other parties thereto. As between the parties to the 1907 Convention, this Convention has replaced the 1899 Convention (see Article 4 of the 1907 Convention).

In 1946 the Nuremberg International Military Tribunal stated with regard to the Hague Convention on land warfare of 1907, though first proposed by U.S. President Theodore Roosevelt, was officially convened by Nicholas II. This conference sat from June 15 to Oct. 18,

1907, and was attended by the representatives of 44 states. Again the proposal for the limitation of armaments was not accepted. The conference did, however, adopt several conventions relating to such matters as the employment of force for the recovery of contract debts; the rights and duties of neutral powers and persons in war on land and sea; the laying of automatic submarine contact mines; the status of enemy merchant ships; bombardment by naval forces in wartime; and the establishment of an international prize court. Although the conference scheduled for 1915 failed to meet because of the outbreak of World War I, the conference idea strongly influenced the creation of the more highly organized League of Nations after the war

"The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing International Law at the time of their adoption but by 1939 these rules were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war".

B. The Geneva Convention

The Geneva Convention was a series of international diplomatic meetings that produced a number of agreements, in particular the Humanitarian Law of Armed Conflicts, a group of international laws for the humane treatment of wounded or captured military personnel, medical personnel and non-military civilians during war

or armed conflicts. The agreements originated in 1864 and were significantly updated in 1949 after World War II.

1. The Geneva Convention 1906 & 1929

In 1906, the Swiss government arranged a conference of 35 states to review and update improvements to the First Geneva Convention. The amendments extended protections for those wounded or captured in battle as well as volunteer agencies and medical personnel tasked with treating, transporting and removing the wounded and killed. It also made the repatriation of captured belligerents a recommendation instead of mandatory. The 1906 Convention replaced the First Geneva Convention of 1864.

After World War I, it was clear the 1906 Convention and The Hague Convention of 1907 didn't go far enough. In 1929, updates were made to further the civilized treatment of prisoners of war.

9. AJIL, Vol. 41, 1947, pp. 248-249

The new updates stated all prisoners must be treated with compassion and live in humane conditions. It also laid out rules for the daily lives of prisoners and established the International Red Cross as the main neutral organization responsible for collecting and transmitting data about prisoners of war and the wounded or killed.

2. Geneva Conventions of 1949

Germany signed the Convention of 1929, however, that didn't prevent them from carrying out horrific acts on and off the battlefield and within their military prison camps and civilian concentration camps during World War II. As a result, the Geneva Conventions were expanded in 1949 to protect non-combatant civilians.

According to the American Red Cross, the new articles also added provisions to protect:

- i) Medical personnel, facilities and equipment
- ii) Wounded and sick civilians accompanying military forces military chaplains
- iii) Civilians who take up arms to fight invading forces

The Geneva Conventions of 1949 also laid out rules for protecting wounded, sick or shipwrecked armed forces at sea or on hospital ships as well as medical workers and civilians accompanying or treating military personnel. Some highlights of these rules are: hospital ships cannot be used for any military purpose nor captured or attacked captured religious leaders must be returned immediately all sides must

attempt to rescue any shipwrecked personnel, even those from another side of the conflict Male and female prisoners of war received expanded protections in the Convention of 1949 such as:

- i) they must not be tortured or mistreated
- ii) they're only required to give their name, rank, birth date and serial number when captured
- iii) they must receive suitable housing and adequate amounts of food
- iv) they must not be discriminated against for any reason
- v) they have the right to correspond with family and receive care packages
- vi) the Red Cross has the right to visit them and examine their living conditions

Articles were also put in place to protect wounded, sick and pregnant civilians as well as mothers and children. It also stated civilians may not be collectively deported or made to work

on behalf of an occupying force without pay. All civilians should receive adequate medical care and be allowed to go about their daily lives as much as possible.

3. Additional protocol to the Geneva Convention 1977.

Protocols I and II are international treaties that supplement the Geneva Conventions of 1949. They significantly improve the legal protection covering civilians and the wounded, and - for the first time - lay down detailed humanitarian rules that apply in civil wars. In 1977, Protocols I and II were added to the Conventions of 1949. Protocol I increased protections for civilians, military workers and journalists during international armed conflicts. It also banned the use of “weapons that cause superfluous injury or unnecessary suffering,” or cause “widespread, long-term and severe damage to the natural environment.”

According to the Red Cross, Protocol II was established because most victims of armed conflicts since the 1949 Convention were victims of vicious civil wars. The Protocol stated all people not taking up arms be treated humanely and there should never be an order by anyone in command for “no survivors.”

In addition, children should be well cared for and educated, and the following is prohibited: taking hostages ,terrorism ,pillage ,slavery, group punishment ,humiliating or degrading treatment In 2005, a Protocol was created to recognize the symbol of the red crystal—in addition to the red cross, the red crescent and the red shield of David—as universal emblems of identification and protection in armed conflicts.

i) Why were the Additional Protocols I and II to the Geneva Conventions adopted?

They were adopted by States to make international humanitarian law more complete and more universal, and to adapt it better to modern conflicts. The Geneva Conventions of 1949 afforded major improvements in the legal protection of victims of conflict. However, they apply essentially to international conflicts – wars between states. Only Article 3, common to all four Conventions, refers to internal conflicts; its adoption was itself a great step forward but the rules contained in the Article are mainly of a general nature.

In addition, most of the countries that became independent after 1945 “inherited” the Geneva Conventions from the former colonial powers – the adoption of the Protocols was also an occasion for them to contribute to developing the law.

ii) Why two Protocols?

Protocol I deals with international armed conflicts, Protocol II with non-international ones, a term that includes civil wars. It was necessary to differentiate between the two situations, as States were not prepared to grant the same degree of legal protection in both cases. In 2005 a third protocol additional to the Geneva Conventions was adopted, establishing a new emblem, the red crystal, which is equal in status to the red cross and red crescent.

iii) What are the additional Protocols?

In today's wars, civilians suffer the most. Understanding this, governments from around the world adopted new rules of international law in 1977 to improve the protection that civilians are entitled to in wartime. Known as Protocols I and II additional to the Geneva Conventions, these rules placed limits on the way wars may be fought. They were especially created to deal with the changing

nature of armed conflict and advances in weapons technology.

The duty to distinguish between civilians and combatants is a key feature of the Additional Protocols. They say that all sides of an armed conflict must draw this distinction and that no one may target civilians. The warring parties must also distinguish between civilian objects, such as homes and places of worship, and military targets.

iv) Why are they important?

In wartime, civilians suffer the most. Families are separated. Homes are destroyed. Food and water is scarce. Schools close. People are wounded or killed. Lives are shattered. Additional Protocols I and II say that civilians must be spared the worst effects of conflict. They represent a milestone in the long history of efforts by the ICRC and the international community to secure greater protection

Additional Protocol I lays down rules on the how wars may be fought. Combatants must take all feasible precautions in choosing weapons and methods of warfare in order to avoid incidental loss of life, injury to civilians and damage to civilian objects. Additional Protocol II was the first-ever international treaty devoted exclusively to protecting people affected by non-international armed conflicts, or civil wars.

The Additional Protocols also: grant protection to all medical personnel, units and means of transport so that civilians can receive medical care during wartime require the warring parties to search for missing persons from the opposing side strengthen the obligation to provide civilians with food, water and other essentials

v) How do they protect people?

The Additional Protocols include rules especially designed to protect both civilians and combatants. They stipulate that: combatants must not pose as civilians indiscriminate attacks are not allowed acts of

vii) Are combatants protected too?

violence - or threats to commit them - whose primary purpose is to spread terror are prohibited objects indispensable to the survival of communities must not be destroyed

vi) Who is protected by them?

Those who are not, or no longer, taking part in an armed conflict must be protected, respected and treated humanely. The Additional Protocols say that: All wounded and sick people, both civilian and military, must be collected and cared for, without discrimination. Women and children must be respected and protected from any form of indecent assault. Children and adolescents must be protected from the effects of war. They must not be allowed to take part in hostilities.

Members of families separated by conflict should be reunited and they should be able to exchange personal messages. They also have the right to be informed of what has happened to missing relatives.

Combatants also are entitled to protection. The Additional Protocols say that: Suffering inflicted on an opponent must not go beyond what is necessary to achieve a legitimate military objective. Combatants no longer capable of fighting may not be attacked. In an international conflict, captured combatants must be presumed to be prisoners of war, and are therefore entitled to protection under the Geneva Conventions. Prisoners of war who cannot be cared for must be set free

viii) When do they apply?

The Additional Protocols are relevant for all current armed conflicts. Additional Protocol I concerns international armed conflicts, that is, those involving at least two countries. Additional Protocol II is the first international treaty that applies solely to civil wars and sets restrictions on the use of force in those conflicts. In 2005 a third protocol additional to the Geneva Conventions was adopted, establishing a new emblem, the red crystal, which is equal in status to the red cross and red crescent.

ix) Where do they apply?

Every country has ratified the Geneva Conventions, making them universally embraced. It is important to ensure that the Protocols attain the same universality as that achieved by the Geneva Conventions.

EFFECT ON INDIA'S LAW

India has certain obligations under some International Convention and treaty at an international level. The 'Universal Declaration of Human Rights' (UDHR) declares that "all human being are born free and equal in dignity and rights. They are endowed with the reason and conscience. They should act towards one another in a spirit of brotherhood." But later, the Indian Government passed the Geneva Convention Act, 1960 under Article 253 of the Indian Constitution. It prescribed punishment for the breach of convention 1949. Misuse of Red Cross and other protected emblem are also prohibited under this law.

At present two major problems are being combated by India i.e. 'militants' and 'extremists' which refer to group operating in Jammu & Kashmir to a large extent and group in

the Naxal affected area respectively. Despite various human right treaties and signatory, India has failed to protect the Human Rights of Jammu & Kashmir people.

According to Indian perspective of the International Humanitarian Law, it has not participated in the Additional Protocols of 1977. Therefore, India would not allow ICRC any access to detainees, but it allowed ICRC access to terrorism affected areas . International Criminal Court (ICC) is allowed to take action or measure only when a judicial system of India is not in existence or when it is not able to deal with crimes of particular nature which are covered by the statute.

The Constitution of India amply gives expression to the basic principles of IHL. They find significant place in the Article 14, Art. 20, Art. 22, 23(1), Art. 34, Art. 51 (c), Art. 253. Entry 13 & 14 of list I of seventh schedule. Section 475(1) of the Criminal Procedure Code, Army Act of 1950, The Air-Force Act of 1950 and The Navy Act of 1957, also touches the provision of study.

BIBLIOGRAPHY

A. PRIMARY SOURCES

CONVENTIONS

1. International Committee of the Red Cross ,1863
1. The Hague Conventions of 1899 and 1907
2. The Geneva Conventions 1864 and 1949
3. United Nation Charter 1945.
4. Convention on the Prevention and Punishment of Genocide 1948.
5. Universal Declaration of Human Rights 1948.
6. Protocol I (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts. As of 12 January 2007 it had been ratified by 167 countries.
7. Protocol II (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. As of 12 January 2007 it had been ratified by 163 countries.
8. Protocol III (2005): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem. As of June 2007 it had been ratified by seventeen countries and signed but not yet ratified by an additional 68

B. SECONDARY SOURCES

BOOKS

1. Akhurst, Michael ,A Modem Introduction To International Law (George Allen And Unwin Ltd., London) Justice At Nuremberg, (Chicago,1945)

2. Baxi, Upendra , The Future Of Human Rights, 1st Edition 2002.
3. Dr. Agarwal H.O , International Law and Human Rights, 10th Edition,2003
4. Justice Iyer, V.R Krishna , Human Right and the Law, 1st Edition, Vedpal, 1984

ARTICLES

1. Manohar, Sujata V., “ an Indian perception of international humanitarian law and refugees law” ISIL Yearbook of International Humanitarian and Refugee Law, vol. D (2002).
2. Dixit, R.K., “ special protection of women during armed conflicts under Geneva Conventions Regime”, vol. II (2002).
3. Kadam, Umesh, “implementation of international humanitarian law; problems and prospects”, vol. H (2002).
4. Iyer V.R. Krishna, “ humanitarian law- a halting history of global evolution”. ICRC, Regional Delegation, New Delhi, 1999.
5. Saxena, J.N., “protection of prisoner of war”, ICRC, Regional Delegation, New Delhi, 1999.
6. Balachandran, M.K., “national measure for the implementation of international humanitarian law- the Geneva Conventions Act 1960; A Study” ICRC, Regional Delegation, New Delhi, 1999.
7. Iyer V.R. Krishna, “roots and growth of IHL in India” Bullentin on IHL & Refugee law, vol.1, no.1, Jan-June, 1996.
8. Bakshi, P.M, “ the humanitarian approach in the Indian constitution” report on seminar on

international humanitarian law, vigyan bhavan, new delhi.

WEB SITES

1. <http://www.icrc.org> - international committee of red cross
2. http://www.ihlresearch.org/portal/ihli/portal_home.php ,international humanitarian law research site.
3. <http://www.unm.edu/humanrts/intree/auoy.htm> - university of Minnesota international humanitarian law.
4. http://www.yale.edu/lawweb/avalon/law_of_war.htm - university of yale avion project laws of war.
5. <http://www.yale.edu/lawweb/avalon/imt/imt.htm> - Nuremberg war crimes trial
6. <http://ourworld.compuserve.com/homepages/aspals.htm> - military law site.