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Evaluating the Application of International Humanitarian Law to the Protection of Civilians During Armed Wars

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ABSTRACT

Violations have occurred and continue to occur in different forms across the world. International Humanitarian Law (IHL) seeks to regulate and mitigate armed conflicts. IHL is embodied in the Geneva Convention and Additional Protocol to protect the non-combatants and minimize the human suffering. This paper evaluates the application of IHL and the increasing need for humanitarian law in warfare, urban combat, international as well as non-international conflict. It highlights legal obligation of states to protect civilians at time of need. The study shows how the approach of IHL is different in International and Non-International armed conflict, and case laws that shows the domestication of the IHL into their nation's laws.

Furthermore, the paper discusses the main principles of the framework of the IHL's foundation. Also, it shows the challenges and problem in the effectiveness in implementation of IHL by highlights the shortcomings of the IHL implementation at times of war like in Yugoslavia, Ukraine and currently in Israel. This research aims to identify the areas for improvement and contribute to ongoing efforts to enhance civilian protection in armed conflict. Reenforcing importance of IHL and addressing its shortcomings and how more effective methods can be adopted for the protection of the humanitarian rights is the pivot of this study.

KEYWORDS

Human Rights, International Humanitarian Law, Civilians, Armed Conflict, Non-Combatants

1. INTRODUCTION

**“Peace can only last where human rights are respected,
where the people are fed, and where individuals and nations
are free”**

- Dalai Lama

From the olden times wars and conflicts are a part of our society and civilians are affected the most in this process the concept of prisoners of war was not given any thought, they were eventually killed, held captivated or held for some crime they did not commit. The bloodshed and destruction is inevitable in a war. Gradually people realised that there was a need for the protection off the civilians of the state as no matter who wins or loses in a war the effect of such destruction can be long-lasting. What is meant by the long-lasting effect is that the people face scarcity of food, water, and shelter, war crimes are everywhere and there is a long-lasting psychological effect, and the economy is already destroyed hence the recovery is very unlikely. So, to protect the civilians and to limit the effect of the war on them International Humanitarian Law were introduced.

International Humanitarian Law, often referred to as the law of war or the law of armed conflict is a body of legal norms and principles designed to limit the effects of armed conflict on people and property. The primary goal is to protect individuals who are not participating in hostility and to minimize unnecessary suffering and destruction. It sets rules to limit the effect of armed conflict on civilians and non-combatants. At the time of war the hospitals schools, civilians and aid workers are protected under IHL. And if any violation takes place, it is considered a war crime and therefore can be tried at both the national and international levels. If global human rights are not being protected, then the

whole peace and security preservation model will collapse straightaway. There is an obligation on the state and armed forces that at times of war the human rights of the civilians of the state are upheld. And in the current scenario of Israel – Palestine all nations are looking at the gruesome acts of military forces on civilians, these war crimes have a long term traumatizing effect on everyone. They are being provide with the necessities but the devastating effect on people and especially children will be prolonged. This paper analyse the effectiveness of the International Humanitarian law for the protection of civilians during the time of the war and analysing current scenario in reference to the Israel and Palestine conflict and also what changes can be brought up for the protection of the human rights of individuals who are the victims of interplay of power between the states.

2. WHAT IS HUMANITARIAN LAW?

Humanitarian law is very crucial for regulating the war conduct and protecting the civilians who are not involved in the conflict. All people whatever their position are, are a part of the humanitarian law. The violation of this law is not a new concept as it has been. Going on for a long period of time. the violations have occurred and the only thing that has changed is how the acts of war crime has increased and how cruel and non-sensitive war makes a man.

This is the reason why IHL was designed to limit the effects of armed conflict for humanitarian reasons. Its primary aim is to protect individuals who are not participating in the war and they are merely the sufferers from this act of political distress.

3. WHAT IS ARMED CONFLICT?

It is a largely debated question that what is an armed conflict and what constitutes armed conflict? Well currently there is no definition provide in the international law . the Geneva Convention and The Additional Protocols which are the foundation of the IHL does not provide any definition of armed conflict. The Geneva Convention only refers that there are two kinds of armed conflicts and they are International Armed Conflict and Non-International Armed Conflict. Therefore still we do not have any proper definition for armed conflict but it continue to evolve as new forms of warfare emerges.

4. WHO ARE COMBATANT AND PROTECTED PERSONS?

Article 43 para 2 of Protocol I ¹ states who are combatants and also cites one exception to the status of Combatants i.e. a medical personnel and chaplains do not have a status of a combatant. The combatants are allowed to use force and held personally responsible for their acts.

A combatant can become a protected person while having its combatant status. Under the Geneva Convention and Additional-Protocol a right to special protection is given and they are called “protected person”. A combatant is a protected person in hands of the enemy as well.

5. WHO ARE CIVILIANS?

The main motive of the formation of the International Humanitarian Law is for the protection of the civilians. The very much reason for the birth of this law was the after effect of war on the civilians. It refers to the effort and measures taken for the protection of non- combatants – people who are not involved in the hostilities at the time of conflict , crisis, or disaster . To

¹ Additional Protocol I Geneva Convention of 12th August 1949,article 43(2).

mitigate suffering caused by the war and by reducing the brutal acts and arbitrary violence on the civilians the IHL was made.

Civilians are the persons who are not the member of the armed forces. The civilian population comprises of all the persons who are civilians.² However now it is very difficult of distinguish a civilian from the combatant.

The Geneva Conventions of 12th August 1949 for the protection of war victims. These treaties, which are universally accepted, protect the wounded, the sick, the shipwrecked, prisoners of war and civilians who find themselves in enemy hands. They also protect medical duties, medical personnel, medical units and facilities, and the means of medical transport. However, the conventions leave gaps in important areas, such as the conduct of combatants and protection of civilians from the effects of hostilities.³

6. INTERNATIONAL HUMANITARIAN LAW: BACKGROUND

From the ancient times conflicts and wars are part of the society and the people who are not even participating in such conflicts are the ones who suffer the most. In 1785 the first International treaty was signed between Prussia and United States to protect the prisoners of the war . Later during American Civil war, President Lincoln adopted Lieber code for the protection of the same.

The modern interpretation of the International Humanitarian Law comes from The Battle Of Solferino in 1859, basically the after

² International Committee of Red Cross, Customary International Humanitarian law (2005) Rule 5 < <https://www.icrc.org/en/publication/0907-customary-international-humanitarian-law>> Accessed 22nd September 2024.

³ A.P.V. Rogers, Law on The Battlefield (Manchester University Press,1996)144-145.

effect made Jean Henri Durant a Swiss businessman and humanitarian activist realise the need for such laws as to reduce the horrific suffering of people. He began to run the campaign which lead to the creation of first Geneva Convention and establishment of the International Committee for Red Cross.

The International Humanitarian law is a conjunction of two main-areas and they are:

1. Henry Dunant's Law of Geneva

The law was first established in 1863, this paid close attention to people who were unwilling to participate in the war and those who were hors de combat. The Geneva law developed between 1864 and 1949 and after the World War II we see many Geneva conventions

- The Geneva Convention for amelioration of Condition of Wounded and Sick in armed forces in the field (Adopted 1864, revised 1906, 1929 and 1949)
- The Geneva Convention for amelioration of Condition of Wounded and Sick and Shipwreck member of armed forces at sea (adopted 1906, revised 1949)
- The Geneva Convention relative to treatment of prisoners of war (adopted 1929, replaced 1949)
- The Geneva Convention relative to protection of civilian's persons in the time of war (adopted in 1949).

2. Francis Lieber's Law of Hague

The Hague Convention was developed between 1899 and 1907. It is a body of law that provided the definition and scope for the term combatants and means and methods of warfare.

The US President in 1862 Abraham Lincoln asked Francis Lieber a Columbia University Professor to form rules for means of conduct to

be used by the army in American Civil war. He then wrote "Instructions for the government of Armies of the United States in the Field", it is known as liber code. Later the code was promulgated as General Order No. 100 by the President in 1863. the code had a very important role in the development of IHL.

Many Hague peace conventions took place and which resulted in the evolution of the International Humanitarian law.

With the adoption of Additional Protocols to the 1949 Geneva Conventions, the separation between the terms 'law of Geneva' and 'law of the Hague' has ended.

Before the adoption of these Additional Protocols there was the concept of Martens Clause this term came out of the work of a Russian delegate Fredrick de Martens, a professor of international law. Martens Clause was popular since in early development of IHL there were many gaps in the legal codification of the rules, due to each universal nature of the humanitarian law. So, there were no codification of the rules in IHL, the Martens Clause required belligerents to act in a way which is consistent with the International law, despite the fact that there might not be any existent rules regarding any matter in IHL. It is not possible to have a complete codification of such rules and in the developing world the means and methods of warfare also continue to develop. The Martens Clause is a dynamic concepts and it leaves the doors open for regulation of future protocols to be added.

The Martens Clause has formed a part of the laws of armed conflict since its first appearance in the preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land:

"Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience." ⁴

Its essence is still present in 1949 Geneva convention Art 1 (2) of Additional Protocol 1

“In cases not covered by this protocol or by any other international agreements, civilians and combatants remains under the protection and authority of the principles of the international law derived from the established customs, from the principles of humanity and from the dictates of public conscience”.

7. INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICT

In mid-20th century the International Humanitarian Law was thriving. The difference between an International and Non-International conflict is of border of states. War between two or more states are considered as International Conflict, and conflicts inside the territory of one state is known as Non-International Armed Conflict.

The need to differentiate between the two is that it is important to determine to what extent the International Humanitarian law is applicable in the case of International and Non-International Armed Conflict. Before the insertion of the Common Article 3 of

⁴ Rupert Ticehurst, 'The Martens Clause and Laws of Armed Conflict' (1997) 317 International Review of Red Cross 125.

the Geneva Convention in 1949 the International Humanitarian Law was only applicable in the international armed conflicts only.

Non-International conflicts can also be called a civil war or internal conflict. There can be many reasons for such conflict but the main reason for the establishment of IHL in NON-international armed conflict was to protect human rights of the civilians from the dictators or who are in power. Many states denied any international interference as they considered it as internal matters of state, this was a backdrop of the humanitarian law but Article 3 of Geneva convention is considered to revolutionary.

In *Nicaragua v. United States of America*, the International Court of Justice accepted this article as a customary rule which made the provision vested in this article as binding whether they were party or not.⁵ In Tadic jurisdiction decision the International Criminal Tribunal for former Yugoslavia held that: “In the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 as well as customary international law, the Appeals Chamber concludes that, under Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict. Thus, to the extent that Appellant's challenge to jurisdiction under Article 3 is based on the nature of the underlying conflict, the motion must be denied.”⁶

U C Jha in his book “International Humanitarian Law (The Laws of War)” viewed “Article 3 common to the four Geneva Conventions of 1949 (CA 3) provides:

⁵ *Nicaragua v. United States of America* (Merits)(1986)ICJ Rep 14.

⁶ *The Prosecutor v. Tadić* (case no IT-94-1-A)(International Criminal Tribunal for the former Yugoslavia, Appeals Chamber Judgment, 15 July 1999)

Conflicts not of an international character:

In the armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

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.

The following acts are and shall remain prohibited at any time and 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 humiliation and degrading treatment.*
- d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regular constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”*

“The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the ICRC, may offer its

services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict”⁷

In 1977 there was a revision of Geneva convention in which Additional Protocol I and II were adopted. the Additional Protocol I deals with the International Armed Conflict and Additional Protocol II deals with the Non-International Armed Conflict. Article 1 of the Additional Protocols II defines it as:

“armed conflicts which are not covered by Article 1 of the Additional Protocol I (international armed conflicts) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”⁸

8. PRINCIPLES OF HUMANITARIAN LAW

The principles of IHL are designed to ensure that even in midst of conflict humanitarian considerations are respect and suffering can be minimized. The Geneva Convention and Additional Protocols are the primary legal instruments which are codified keeping in mind these foundational principles and can be broadly

⁷ U.C Jha, 'International Humanitarian Law, The Laws of War (Vij Books India Pvt Ltd 2013)

⁸ Additional Protocol II to the Geneva Conventions, Article 1(1977).

categorised into following concepts:

- 1) Principle of Distinction.
- 2) Principle of proportionality.
- 3) Principle of Humanity.
- 4) Principle of Necessity.
- 5) Principle of Fairness and Non-Discrimination.
- 6) Principle of Humane Treatment.
- 7) Principle of Accountability.
- 8) Principle of Distinction in means and methods of Warfare.

9) APPLICATION AND EFFECTIVENESS

1) The Yugoslav Wars in 1990s

This war was a stark example of the hindrances that come in the way of application of IHL. Despite the framework, violations do occur which highlights the drawbacks about the effectiveness of IHL. here are some key points regarding IHL in context of these conflicts:

- **War and Crime Atrocities:** Throughout the war , numerous violations occurred , including ethnic cleansing, mass killing, sexual violence, and targeting of civilians. These crimes led to international outrage .
- **Protection of Civilians:** During the war many civilians were deliberately targeted. IHL emphasis on the protection of non-combatants which lead to discussion about the effectiveness of the IHL and the responsibility it is taking regard to civilians protection in an armed conflict.
- **International Criminal Tribunal for the Former Yugoslavia (ICTY):** This tribunal was established in 1993 by the United Nations, and was given the task to prosecute serious violations of IHL. It played a crucial role in

addressing war crimes, also convicted high-ranking officials for their roles in conflict.

- **Ethnic Cleansing:** The term “ethnic Cleansing” is widely used during any conflict; it was used in event like Srebrenica Massacre in 1995 which prompted debates about legal framework related to crimes against humanity.
- **Accountability and Reconciliation:** The aftereffects of wars are the worst part of any war, as they highlight the challenges of accountability for war crimes and need for a mechanism to promote reconciliation after war happens.

Yugoslavia War showed the necessity and challenges of enforcing IHL in complex conflicts. The war highlighted the need for humanitarian laws strict enforcement to protect civilians in future crisis.

2) The Ukraine and Russia Conflict

The ongoing conflict in Ukraine has raised concerns regarding the violations of IHL. Following are some key issues:

- **Aiming Civilians:** Both sides have been attacking the civilian populations indirectly in the war , and no one is taking the responsibility for the suffering , these actions are completely prohibited under IHL.
- **Using Prohibited Weapons:** Reports of using cluster munitions and other indiscriminate weapons have turned up many times , which states the complete violations of IHL regulations.
- **Handling Prisoners of War:** There have been allegations of mistreatment and summary executions, and many inhuman acts which is an upright contravention of the Geneva Convention.

- **Cultural Heritage Ruin:** IHL seeks to protect the cultural heritage during an armed conflict. But the constant attacks on such sites shows the failed effectiveness of the provisions of IHL.
- **Displacement:** Whenever war happens, displacement of people occurs. This raised concerns about the treatment of refugees and internally displaced people and how they were being treated. Which mostly resulted in war crimes.

Efforts by International bodies like investigations by International Criminal Court (ICC), aim to hold accountable those responsible for such violations. But still there are some drawbacks of IHL which needs more alterations and effectiveness in operation.

3) Israel-Palestine Conflict

The Israel-Palestine conflict raises complex issues in relation to the IHL. As there have been continuous violations of the provisions of IHL it raises a very big concern. The key issues include:

- **Targeting Civilians:** both the sides have raised concerns about protecting the civilians. Military operations and attack by the armed groups has continued by threatening civilians which the IHL prohibits. Civilians in both Palestine and Israel has faced significant violence.
- **Accountability and war crimes:** War crimes like murder, sexual assault, rape and other life-threatening form of torture allegations by the Palestine detainees have come up many times.
- **Blockade and Seigs:** The blockades of Gaza has been criticized for severely limiting access to essential goods like water, food, clothes etc. the humanitarian aid has also been denied , which is a complete violation of humanitarian law.

- **Destruction of Infrastructure:** Bombing the infrastructure such as schools, hospitals and the civilians have been deprived of shelter above their head can be viewed as IHL violation.
- **Settlement and Disproportionate use of Force:** Israel expansion settlement in West Bank is considered to be Violative of Fourth Geneva Convention, which prohibits transferring civilians' population into occupied territories. And the military responses by Israel are not proportionate to any threat. The advisory opinion that was given by the International Court of Justice recently regarding Israel's continuous presence in occupied Palestinian territories as unlawful and their refusal shows the challenges inherited in ensuring compliance with international law.

International organizations, including the United Nations, have reputedly called for accountability and adherence to IHL in the region, but to find a solution is still challenging. Efforts to address these issues through legal frameworks and international diplomacy still continue, reflecting need for peace and justice in the region.

10) CONCLUSION AND SUGGESTIONS

Every now and then, we find the word "war" in newspapers, news, posts on the internet. However, nothing is getting done to prevent such atrocities. Improving the effectiveness of International Humanitarian Law is a must for protecting human rights of individuals, as at the time of any armed conflict every individual's life matters.

Firstly, there is a need for promoting awareness and training for the military personnels on the IHL principles for better compliance. Humanitarian Workers and legal professionals must

have the understanding of what values these principles hold , increasing public awareness can put pressure on the government and the military to comply. Also, the humanitarian access can operate freely in conflict zones for helping civilians.

Secondly, by encouraging the states to incorporate IHL into domestic law and providing mechanism for enforcement. By promoting the accountability by the states to investigate violations and hold perpetrators accountable and also states must take initiatives to engage armed groups in non-state actors about IHL compliance for adherence to law.

Thirdly, International corporation is very much important and also by strengthening the mechanisms like the capacity of the International Court and tribunals like the International Criminal Court to investigate the violations and also its decisions must be of binding nature for it to call it as a law its strict compliance must be followed.

By broadening the horizon of the IHL not only at times of war but for other upcoming challenges as world is changing and there may be many bumps on the way. Global community can work for more stricter and effective approach for protection of the civilians, as without civilians there may be no state. Human rights are the basic rights of people, and they must be protected for the nations to thrive. By committing to uphold humanitarian rights not only serves to protect people but also reinforces moral and peacekeeping aspect of the war. Disagreements always happens but what matters most is that how those disagreements are resolved with more humane way possible.