

## **DILEMMA OF INTERNATIONAL HUMANITARIAN LAW AMID THE RISKS OF REJECTION AND THE PROCESS OF CODIFICATION**

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### **ABSTRACT**

*War along with its devastating visage has been broken out in different hallmarks since the inception of mankind. As human being prefers peace to war; reservation of rights to violation of rights; enthusiastic people endeavored to curb the recklessness of the warmongers within the framework of rules and regulations. Thus the humanitarian jurisprudence has come into being from conceptual frameworks of different regions and religions, which culminated into the universal codification. But the recent scenario of International humanitarian law, especially after the commencement of unauthorized armed interventions of Afghanistan in 2001 and Iraq in 2003, and the drone attack in different sovereign nations such as Gaza, Syria, Pakistan and Iraq etc in the name of Global War on Terror have recurrently questioned the perfection of the process of codification of this branch of International law and subsequently the prevalent risks of rejection of the same and provoked a great frustration in the edifice of humanitarian jurisprudence.*

**Keywords: International Humanitarian Law, Technology, Conflict, Codification, Warmongers, Ratification.**

### **1. INTRODUCTION**

The five decades since the Second World War have witnessed many conflicts, international and non-international, each of which has added to the sum of human misery and destruction of lives and property. Events such as the armed conflicts in the territory of the former Yugoslavia, between Ethiopia and Eritrea, in Sudan, Rwanda, Bosnia, the Congo, Sri Lanka, Colombia, Syria, and many other places and the events of Afghan, Iraq and recent Gaza and Syria war confront us day after day with the cruelty of war and the suffering, death and destruction it entails. International Humanitarian Law (IHL) whose purpose is to impose limits on the parties to the conflict: limits on how armed conflict is conducted and limits on how combatants behave. But continuous violation of the rules of IHL during armed conflict raises a fundamental question that what is the value of a law which nobody respects? In the recent time this is the real dilemma of IHL that it either cannot step forward to lead a perfect codification on the one hand or cannot avoid the real risks of rejection on the other hand.

### **2. STATEMENT OF PROBLEM**

The recent success of International Humanitarian Law in establishing a sound warfare is not satisfactory. Specially, after the 9/11, total scenario of warfare has taken a different shape. Moreover, a rapid advancement of Technology and politicization of IHL have reminded us about the risk of rejection of IHL in different dimensions. Apart from these, a large number of problems prevailed as a result of improper codification of IHL in the name of cultural universalism and non-cooperation

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of the superpowers. Thus IHL is between Scylla (problem of perfect codification) and Caribides (risk of rejection).

### 3 OBJECTIVE OF THE RESEARCH

IHL is often called the nucleus of human survival during the period of armed conflicts. But this nucleus has been affected due to lack of perfect codification scheme and problem of risk of rejection. Keeping this statement in mind, the objectives of the study are:

- (i) Identifying the causes of the risks of rejection of IHL, and
- (ii) Explaining the reasons for improper codification of this body of rules and providing suggestions thereof.

### 4. METHODOLOGY

The present study is a qualitative legal research. The primary sources like statutes and conventions relating to humanitarian law have been communicated. However, the study is mainly based on the secondary sources like commentary books, articles, research works and reports of ICRC, interviews of different delegates of ICRC, different humanitarian instruments, and other international instruments. Critical thinking about the various relevant issues has been frequently relied upon in the study.

### 5. BACKGROUND OF THE STUDY

The IHL suffers from identity crisis due to its persistent failure to secure a sound warfare during the time of Armed Conflict. Some critics state that IHL is useless in the arena of International law. This research will help the academicians and students of IHL to perceive the challenges of International humanitarian law to be implemented universally and the approaches to be taken to overcome them.

### 6. ANALYSIS AND FINDINGS

#### **6.1. Definition of International Humanitarian Law(IHL)**

In war there are limits: limits on how warfare is conducted and limits on how combatants behave. The set of rules established with this in mind-and endorsed by 194 nations throughout the world-is known as international humanitarian law, of which the Geneva Conventions are the bedrock. Basically, to protect a man against the evils of war and arbitrary treatment is not a new idea. Spring back long before the dawn of history, it has grown steadily more powerful and today has become a tidal wave (Pictet, Jean; Development and principles of IHL). Humanitarian law indicates that branch of law which deals with the protection of humanity in times of most inhumane situations i.e. armed conflicts. IHL is well defined by the International Committee of the Red Cross as International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare.

#### **6.2. The Risks of Rejection of International Humanitarian Law**

##### **6.2.1. Non-Ratification of the Humanitarian Instruments and Presence of Reservation Clause**

In the realm of International law, the connotation “ratification” (Defined in Article 2(B) of Vienna Convention of the Law of Treaties, 1969) is of great importance to bring the law into enforcement. Most of the cases, the parties to the conventions are bound by the Conventions itself when it has been ratified by that very party according to the procedure set out by the concerned Conventions. Otherwise it does not create any binding force upon the parties. The position will be clear with an example: Due to the failure of 4 Geneva Conventions, ICRC took initiative to instrumentalize

the remedial shortcomings of law relating to civil war and national war of independence through Additional Protocols I and II of 1977. Most of the vulnerable areas were located in the continent of Africa and Asia which were colonies of United Kingdom and France. But United Kingdom (Ratified on January 28, 1998 with reservation taken in four times ) and France (Ratified on April 11, 2001 with reservation ) ratified these instruments after the end of the colonial war of independence. The USA has yet to ratify it. This scenario is also available in other aspects. The example of Comprehensive Nuclear Test Ban Treaty, 1996 can be drawn here where Nuclear Powers like USA, China, Pakistan, India, Israel, Iran, and North Korea have not ratified it yet. Thus IHL suffers from the risks of absolute or partial rejection all the time.

Reservation means, “The establishment of a limiting condition or qualification; esp., a nation’s formal declaration, upon signing or ratifying a treaty (Garner, Bryan A. , Black’s Law Dictionary, 8<sup>th</sup> Edition). The admissibility of a reservation is governed by Article 19, paragraph (c) of Vienna Convention of the Law of Treaties, 1969 of which stipulates that any reservation that is not expressly or implicitly prohibited by the Treaty is admissible unless it is incompatible with the object and purpose of the treaty. In the sake of reservation clause, many warring nations including some superpowers are exempting their liabilities in the conflict related matters. It simultaneously deprives the international community of a useful means of gauging the universal application of human treaties.

#### 6.2.2. Politicization of IHL

The politicization of IHL defeats the very purpose of this body of rules. The non-application or selective application of IHL, or the misinterpretation of its rules for domestic or other political purposes are the main concern for the risks of the rejection of humanitarian jurisprudence. The International Committee of the Red Cross (ICRC), for example, held a press conference on 18 February 2004 and expressed its concern over the serious humanitarian and legal problems related to the West Bank barrier and called on Israel “not to plan, construct or maintain this barrier within occupied territory” since the “measures taken by the Israeli authorities linked to the construction of the barrier in occupied territory go far beyond what is permissible for an occupying power under international humanitarian law (ICRC press release, “Israel/Occupied and Autonomous Palestinian Territories: West Bank Barrier causes serious humanitarian and legal problems).” Israel rejected this declaration of ICRC. But practically it is not possible to bring Israel to trial under International Criminal Court (ICC) for the above reason. Because, according to the statute of the ICC, its jurisdiction is limited: in terms of nature of crime (only serious violations of international law as provided by the statute); in time (only crimes committed after 1 July 2002, i.e. it is not retroactive); and in terms of who can be tried (in fact only members). Israel did not sign the Rome Convention, and as such, the ICC has no jurisdiction over it.

It is true that almost 66,081 civilians were died in Iraq war in which USA and UK were involved but because of global politics, it is not practically possible to put Bush and Blair on trial for grave breaches of IHL in the said war.

#### 6.2.3. Unauthorized Direct Interventions by Superpowers

In the name of Global war on Terror, USA and its allies launched unauthorized war on Afghanistan in 2001, on Iraq in 2003 and on Libya in 2011. In the plea of pre-emptive self-defense, USA is operating drone attacks in different countries. The military operation to kill Osama bin Laden in Pakistan in May 2011 and Anwar al-Aulaqi in Yemen in September 2011 raised the constant legality of these unauthorized direct interventions. These types of interventions are creating further fear of rejection in the regime of IHL.

#### 6.2.4. Defiance of IHL by Transnational Armed groups

A Transnational Armed Group can be described as a non-state armed actor which operates beyond the territorial borders of a single state and carries out serious and violent acts intended to cause fear, death, serious bodily injury and property damage to a person, group or general population in order to force a government or international organization to perform or refrain from performing a particular act. One of the fundamental principles of IHL is the principle of distinction under this principle, parties to a conflict shall at all times distinguish between the civilian population and combatants and between military objects and civilian objects. Attacks shall be directed solely against combatants and military objectives. But transnational armed groups are targeting civilian and killing civilians. Spokesman of YPG states that the number of civilians who are killed by Al-Nusra gangs is unknown. They mostly attacked Til Eran, Til Hasil and Ezazê. Even during the Baas regime, nobody was arrested because of their national identities but we see that Islamic State of Iraq, Al-Nusra and FSA kidnap people who are from different ethnic and religious identities. There are still 700 civilians kept by these armed groups. We learned from the documents that we got during the clashes, Azadi Battalion and Freedom Party are also helping the groups attacking the civilians. Thus, transnational armed groups are targeting civilian and killing them without showing any respect to IHL. They have rejected IHL on the ground that they are not under the umbrella of IHL.

#### 6.2.5. Rejection of IHL in the Context of non-International Armed Conflicts

A recent challenge for IHL has been the tendency of States to label as “terrorist” all acts of warfare committed by organized armed groups in the course of armed conflict, in particular non-international armed conflict. Although it is generally agreed that parties to an international armed conflict may, under IHL, lawfully attack each other’s military objectives, States have been much more reluctant to recognize that the same principle applies in non-international armed conflicts. So, States engaged in non-international armed conflicts have, with increasing frequency, labeled any act committed by domestic insurgents an act of “terrorism” even though, under IHL, such an act might not have been unlawful (e.g. attacks against military personnel or installations). For example, the President of the ICRC declared that the violence in Syria has reached the threshold of an armed conflict of a non-international character governed by international humanitarian law. But the government of Syria did not recognize it as non-international armed conflict. That is why, the principles of IHL are not being ensured in this conflict and many civilians are being the victims of attack. Even Chemical weapons are used in this conflict. The same situation is observed in Colombia, where armed conflict between government and insurgents are going on and according to a government report, 220,000 people have died in the conflict between 1958 and 2013, most of them are civilians. But the government of Colombia did not recognize it as non-international armed conflict. That is why, the provisions of IHL are not being applied in this conflict and civilians are being the victims of the conflict.

### **6.3. Reasons for the failure of a Perfect Codification Scheme of IHL**

There are various reasons, as per the findings of experts, for the failure of perfect Codification of IHL which are given below:

#### 6.3.1. Supremacy of Giant warmongers in Law Making Process

The process of codification of IHL is conducted, maintained and influenced by the patronage of the major warmonger states. Thus, the process of codification is at many points at the mercy of them. They try to shape the conventions according to their conveniences. Thus, the humanitarian law suffers from a dilemma in codifying the recent issues of contents due to their recurrent violations of the principles of IHL. So, a recent demand has been posited to change this scheme.

### 6.3.2. Cultural Universalism

The International Humanitarian law is a global phenomenon and it deals with the whole world. It is the result of cultural universalism. As a result there is no possibility of regional humanitarian instruments as contrasted with cultural relativism and human rights law. So, while dealing with a particular matter of humanitarian jurisprudence of a particular area which is of great importance, it cannot be codified due to the principles of cultural universalism. Therefore, the culture of minor parties is often over overlooked. Euro-centered cultural predominance is also responsible in shaping the dilemma of cultural universalism.

### 6.3.3. No effective Regular Review & update System and Universal Supervisory Body

In reality, the laws of war are as old as the war itself and war is as old as life on earth. But the ambit and nature of war have been constantly changing with the current of time and development of science and technology. Therefore, the laws relating to the armed conflicts need regular amendments with the process of review and update. It is reported that the principles ruled out in the Conventions codified after post war period has not been changed. As there is no regular review and update system, the principles of humanitarian jurisprudence often fall out of mark. Thus, it is creating the real dilemma in the process of actual codification of IHL. Basically, an effective organization is very essential in any kind of legal system both for the framing of any law and for the supervision of its effectiveness. Though United Nations has emerged as an institution with a mandate to maintain peace, it has been failed to maintain a sound codification process of humanitarian law. The bulk work in this regard has been contemplated by ICRC, but it is yet to achieve its designation as “Universal Supervisory Body”. Because of its funding, its emblem, and its headquarters the ICRC’s identity is perceived in some circles as mainly Western. As a result, there is no organization to insist any party to take part in the law making process. Rather, it is totally dependent on the whim of the state parties to take part in codification process.

### 6.3.4. Many areas of conflicts are not covered under the Umbrella of IHL

Due to the changing nature of armed conflicts and warfare, newer areas of conflicts are coming into confrontation with the present edifice of IHL. Some areas are very much well debated but beyond the umbrella of International Humanitarian Law. Some of the areas are: asymmetric warfare, internal disturbance and tensions, urban warfare, cluster munitions, cyber war, unlawful combatants, legality of drone attack, unauthorized armed interventions, transnational armed conflicts and disarmament of nuclear weapons are out of the umbrella of International humanitarian law. For the obvious reason, the major warmonger nations, USA and Israel etc., are misusing the spirits of International Humanitarian Law in the name of military necessity or preemptive self-defense creating a total frustration in the international legal environment.

## 6.4. Findings of the Study

- The ambit and nature of war is constantly changing with the development of science and technology.
- The use of universally non-acceptance doctrines like pre-emptive self-defense by the super powers is frustrating the total scheme of humanitarian law.
- The governments of the states are reluctant to apply IHL in the context of non-international armed conflict.
- The provisions of four 1949 GC and protocols of 1977 are not sufficient to combat with the challenges raised by transnational armed conflicts and non-international armed conflicts.
- The problems inherent in the law making process of IHL should be resolved.
- There are some important areas of armed conflict like cyber war, unlawful combatants, drone attacks, unauthorized armed interventions are not covered under the umbrella of IHL.

- The politicization of IHL is a great challenge for IHL which may defeat the very purpose of this body of rules

## 7. CONCLUSION & RECOMMENDATIONS

IHL is the most humane of law and from this viewpoint, it belongs to every place and period and therefore, it is deep rooted in all civilizations, traditions and religions. It is an objective law, containing rules applicable to all elements of society: states, individuals and public and private entity. Its codification has brought it into this universal footing. Although, this codification substantially developed in the Post-War period, it suffers from a congenial weakness from different points. As it is an international concern, if any part of its scheme is breached, it incurs the risk of total frustration among the international community. Then, as the consequence of dilemma in the process of codification and the risks of rejection, IHL has been suffering from identity crisis. Therefore, some useful improvements should produce in some areas of IHL to overcome the drawbacks of the existing IHL especially in the context of transnational armed conflicts and non-international armed conflicts.

Thus, it is a great challenge to The International Humanitarian Law in the 21<sup>st</sup> century to confront the risks of rejection along with the problems inherent in its process of codification with the help of gradually developed institutions and principles under the shade of International Red Cross Movement all over the world irrespective of the types of conflicts i.e. conventional or non-conventional.

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