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The History, Nature and Development of International Humanitarian Law: A Review

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ABSTRACT

This paper explores the history, nature and development of international humanitarian law: a review. Doctrinal research methodology was used. International Humanitarian Law (IHL) earlier known as the laws of war is applied in the armed conflict to protect those who don't take part in the hostilities or no longer taking part in the hostility M.S Isian (2018) opined, that the rules of conflict or fight although, first documented in 1863 after the war of Solferino, it was slightly existed and practiced from the beginning of human being. The earliest societies, the Papua, the Sumerians, Babylon, Persians, the Greek, and the Roman, in all societies had some rules of fighting and these rules were strictly followed by people. Every religion namely, Christian, Islamic, Hindu and Buddhist contains a handful of provisions on the law of armed conflict (LOAC). The scattered provisions of (LOAC) have been accumulated in the documents, the lieber code in 1863 and the first Geneva Convention 1864. Later on many Conventions, Protocols, Declarations on Armed conflicts (AC) have been adopted in various times depending on the nature of conflict and protection of the victims. Four Geneva Conventions in 1949, it's three Additional protocols (APs) in 1977 and 2005 and the permanent International criminal court in 1998 have given a great success to the development of International Humanitarian Law.

INTRODUCTION

According to M.N Shaw (2008) in his book titled International Law: he explained the development of IHL in the following terms: the Law in this area developed from the middle of the nineteenth century. In 1864, as a result of the pioneering work of Henry Dunant who had been appalled by the brutality of the battle of Solferino five years earlier, the Geneva Convention for the Amelioration of the condition of the wounded in Armies in the field was adopted. This brief instrument was revised in 1906. In 1868 the Declaration of St. Petersburg prohibited the use of small explosive or incendiary projectiles. The laws of war were codified at the Hague conference of 1899 and 1907.

A series of conventions were adopted at these conferences concerning land and naval warfare, which still form the basis of the existing rules. It was emphasized that belligerents remained subject to the law of nations and the use of force against undefended village and towns was forbidden.

It defined those entitled to belligerent status and dealt with the measures to be taken as regards occupied territory. There were also provisions concerning the rights and duties of neutral states and persons and in case of war, and an emphatic prohibition on the employment of arms, projectiles or material calculated to cause unnecessary suffering: However, there were inadequate means to implement and enforce such rules with the result that much appeared to depend on reciprocal behavior, public opinion and the exigencies of moral. A number of conventions in the inter-war period dealt with rules concerning the wounded and sick in armies in the field and prisoners of war. Such agreements were replaced by the four Geneva 'Red Cross' conventions of 1949 which dealt respectively with the amelioration of the condition of the wounded and sick in armed forces in the field, the amelioration of the condition of wounded, sick and shipwrecked members of the armed force at sea, the treatment of prisoners of war and the protection of civilian persons in time of war.

Fourth convention was an innovation and a significant attempt to protect civilians who, as a result of armed hostilities or occupation, were in the power of a state of which they were not nationals. The foundation of the Geneva Convention system is the principle that persons not actively engaged in warfare should be treated humanely. A number of practices ranging from the taking of hostages to

torture, illegal executions and reprisal against person protected by the conventions are prohibited, while a series of provisions relate to more detailed points, such as the standard of care of prisoners of war and the prohibition of deportations and indiscriminate destruction of property in occupied territory.

In 1977, two additional protocols to the 1949 conventions were adopted. These built upon and developed the earlier convention. While many provisions may be seen as reflecting customary law, others do not and thus cannot constitute obligations upon states that are not parties to either or both of the protocols.

Protocol III was adopted in 2005 and introduced a third emblem to the two previously recognized ones (the Red Cross and the Red crescent) in the form of a red diamond within which either a Red cross or Red crescent, or another emblem which has been in effective use by a high contracting party and was the subject of a communication to the other high contracting parties and the international committee of the Red Cross through the depositary prior to the adoption of this protocol, may be inserted. This allows in particular for the use of the Israeli Red Magen David (Shield of David) symbol.

The international court of justice has noted that the law of the Hague dealing primarily with inter-state rules governing the use of force or the laws and customs of war as they were traditionally termed and the law of Geneva, concerning the protection of persons from the effects of armed conflicts, have become so closely interrelated that they are considered to have gradually formed one single complex system, known as International Humanitarian Law.

CONCEPTUAL CLARIFICATION

V.Y Dhupdale opined that International Humanitarian Law (IHL) applicable in armed conflicts means international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems that arise directly from international or non-international armed conflict. For humanitarian reasons, these rules protect persons and property that are or may be, affected by conflict by limiting conflicting parties' right to choose their methods and means of warfare.

For this author, the expression international Humanitarian law applicable in armed conflict is often abbreviated IHL or HL, while the expression

laws of armed conflict (LOAC) or Laws of war are synonymous with IHL Law Corner (2020) viewed international Humanitarian law, as part of the body of International law that governs relations between states. It aimed to protect persons who are not or are no longer taking part in hostilities, the sick and wounded, prisoners and civilians and to define the rights and obligations of the parties to a conflict in the conduct of hostilities. Corner viewed IHL to be the current understanding of the laws concerning the conduct of warfare.

Alexander (2015), opined the term international humanitarian law refers to the current understanding of the *jus in bello* the laws concerning the conduct of warfare.

Wikipedia, explaining International Humanitarian Laws is referred to as the laws of armed conflict, is the law that regulates the conduct of war (*jus in bello*). It is a branch of International Law that seeks to limit the effects of armed conflict by protecting persons who are not participating in hostilities and by restricting and regulating the means and method of warfare, available to combatants. IHL is inspired by considerations of humanity and the mitigation of human suffering. It comprises a set rules, which is established by treaty or custom and that seeks to protect persons and property/objects that are or may be affected by armed conflict, and it limits the rights of parties to a conflict to use methods and means of warfare of their choice.

Umuzurike (1993) defined humanitarian law as derived from the basic principle that the individual is entitled to certain minimum rights whether in peace or in war. He is entitled to protection, security and respect; if wounded or captured, he is entitled to care and human treatment; if dead, his body is entitled to decent treatment. Humanitarian Law aims at limiting human suffering in situations of armed conflicts while at the same time preventing atrocities, Humanitarian Law, therefore, is one side of a coin; the other is human right law. The one operates in situations of war or armed conflict; the other operates in peace time.

Agu Gab Agu (2021) viewed International Humanitarian Law to comprises a set of rules, established by treaty or custom, that seeks to protect persons and property that are (or may be) affected by armed conflict and limits the rights of parties to a conflict to use methods and means of warfare of their choice. Includes the Geneva conventions and

the Hague conventions, as well as subsequent treaties, case law, and customary international law. These body of laws define 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 non-combatants. It is designed to balance humanitarian concerns and military necessity, and subjects warfare to the rule of law by limiting its destructive effect and mitigating human suffering.

Ama-Oji (2005) in her article opined that, the entire body of IHL is intended, in times of armed conflict, to restrict the use of violence to the lowest level compatible with military imperatives proportionate use of force and a prohibition on indiscriminate attacks); in addition, it stipulates that respect for the dignity of the individual, even an enemy must be preserved in the circumstances. She further stated that, the Nuremberg Tribunal and the Tokyo trial are the major instances of criminal prosecution of offenders against fundamental norms of IHL.

EXPLANATORY FRAMEWORK: HISTORY, NATURE AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

According to U.O Umuzurike (1993), he opined that: The idea of the rights of man dates back to the most ancient time in human history. The most prominent instruments for their achievement include the Magna Carta 1215, the Bill of Rights 1688, the French Declaration of the Rights of Man and Citizen (Declaration de Droit de l'homme et Citoyen) 1789 and the American Bill of Rights 1791. The rights of an alien, of a head of state of an ambassador have long been recognized in International Law; as well as the responsibilities of a pirate and, late, a slave trader. Primitive societies recognized the rights of their kinsmen and of a foreigner who had taken refuge with them. These rights, in peacetime, have greatly expanded with the express inclusion of fundamental human rights in the Charter of the United Nations. These were elaborated in the Universal Declaration of Human Rights 1948 and further still in the International Covenants on Human Rights 1966 (the latter came into force in 1976). By far, the clearest internationalization of these rights is to be found in the European Convention of Human Rights which reaffirms profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand, by an effective political democracy and on the other, by a common

understanding and observance of the human rights upon which they depend". The American Convention on Human Rights and the African Charter on Human and people's Rights have similar characteristics.

Humanitarian Law in its present form can be traced back to the efforts of concerned individuals in different parts of the world during the 19th Century. The Russian Pirogov raised the issue of protecting the wounded and the sick in battlefields as a matter of International Law during the Crimean War 1853-56. He embodied the idea in his Course OF Military Surgery 1862.

Jean-Jacques Rousseau, in his famous Social Contract, replaced the old distinction between just and unjust war with one between combatants and non-combatants. The Englishwoman Florence Nightingale, during the war of Spanish Succession and Clara Barton, during the American Civil War, displayed courage in their humanitarian help to the wounded in battle.

As succinctly stated by Agu Gab. Agu (2021) p.67 He stated that, as far back as 1874, at the Brussels conference, the International community started holding meetings, and making efforts, not only to prevent wars, but protect war victims. There was also the Hague peace conference of 1899 and 1907 which provided for provision of hospital ship and care for wounded soldiers, the paris Declaration of 1856, the German conference of 1864, when sought to protect wounded soldier in the field, st. petersburg Declaration of 1868 which sought to prevent the use of explosive in wars, the Geneva convention of 1925 which prohibited the use of poisonous gas in war, the Geneva convention of 1929 which sought to protect prisoners of war and the London Treaty of Naval

Armament of 1930 and 1936 on sub-marine warfare all these were attempts made before and after the first world war which all could neither prevent the second world war, nor fully protect the inhuman treatment meted out to war victims. After the Second World War, there was the Geneva Convention of 1949 which gave rise to four conventions and three subsequent protocols

EARLY HISTORICAL TIME

The history of International Humanitarian Law is not a new one. The laws of war are as old as war itself and war is as old as life on earth. The earliest societies, like Papua, Sumerians, Babylon, Persians,

Greek and the Romans had some rules of fighting which were strictly followed by people. Even the modern naturalists have identified that some rules are being practiced by animals also during the time of their combat. For example, when the deer fights with other types of deer or two wolves or dogs fight, the one who knows that he is losing, he gives up the fighting or some time offers surrender by exposing his throat to the victor, who as a result abstains to bite him. Even every religion contains a handful of provisions on the law of armed conflict (LOAC).

The aforesaid discussion shows the efforts to regulate warfare existed to a greater or lesser extent from the very ancient period. Those initiatives were not sufficient to regulate the conduct of parties during warfare until these rules had been documented in any instrument. The first initiative was taken, following the proposal of Henry Dunant in his book "A Memory of Solferino" in 1864. Dunant in the book "A Memory of Solferino" described his experiences what he witnessed in the battle of solferino (a terrible conflict between French and Austrian force, took place in northern Italy 1859) and simultaneously in his book he made two proposal firstly, "each state should established in time of peace a relief society to aid the army medical services in time of war" and secondly, "state should conclude a treaty that would facilitate the activities of these relief societies and guarantee a better treatment of the wounded". In next year the International Committee for the Relief of Military Wounded was established with its permanent seat in Geneva. The great success of the committee was that, within a very short time. It succeeded to persuade the Swiss government to convene an international conference.

Prior to this, an attempt was taken in 1863 to gather laws and customs of war by Francis Lieber in his valuable document "The Lieber Code" promulgated as General Orders No. 100 by President Lincoln. The Code (1863) provide detailed rules on the entire range of warfare. While the Swiss Government convened the conference in August 1864 and adopted the "Geneva Convention for the Amelioration of the condition of the Wounded in Armies in the Field in 1864". These documents accumulated the scattered provisions of LOAC.

ESTABLISHMENT OF INTERNATIONAL COMMITTEE OF THE RED CROSS

The Geneva Convention led to the establishment of the International Red Cross. On 22 August 1864 twelve nations signed the first Geneva Convention, agreeing to guarantee neutrality to medical personnel, to expedite supplies for their use, and to adopt a special identifying emblem (which since 1870s has been the Red Cross on a white background).

Alongside the Geneva Convention, the Hague Convention was created by the state in order to govern the wars. The Hague Convention are various international treaties that emerged from the Hague peace conferences in 1899 and 1907. The two conventions established a model for multilateral meetings to create international laws and subsequently influence the information of the League of Nations in 1919. After several years of these developments, World War II took place. It was the most horrified war that continued for six years. ICRC's role involved, bringing it into direct and continuous contact with the realities of war. It constantly urged governments to expand the reach of the law, which gradually came to cover warfare at sea, prisoners of war and civilians. The Swiss Government called for a conference and adopted four Geneva Convention, 1949 (four protocols).

- I. On Wounded and sick in the field, ie
The Geneva convention for the Amelioration of the condition of the wounded and sick in Armed force in the field (the first convention)
- II. On Wounded, sick and shipwrecked at sea, ie
The Geneva convention for Amelioration of the condition of the wounded, sick and shipwreck members of Armed force at sea (the second convention)
- III. On prisoners of war, ie
The Geneva convention Relative to Treatment of prisoners of war (the third Convention)
- IV. On civilians (in the hands of enemy),ie
The Geneva convention Relative to the protection of civilian persons in time of war (the fourth convention)

These re-wrote the existing conventions and added a fourth, for the protection of civilians who found themselves under enemy control. In 1974, the Swiss

Government organized Diplomatic Conference with the aim to protect civilians which had been neglected before the fourth GC of 1949. This conference adopted Additional protocols to 1949 GCs. Protocol I is applicable for international armed conflicts while protocol II is applicable to non-international armed conflicts. These two protocols contributed tremendously to the development of IHL.

The 1977 Additional Protocols (APs), relating to the protection of victims in both international and internal conflict, not only incorporated aspects of both the Law of The Hague and the Law of Geneva, but also important human rights provisions. However, the APs lacked the provisions regarding conventional weapons which have been fulfilled by, later on, Conventions on Conventional Weapons in 1980 and its five protocols.

At the beginning of the 1990s, the statues of the Additional protocol I was uncertain and, as a result, so was the appropriateness of 'international Humanitarian law' as the description of a *ius in bello* that was dominated by military imperatives. Yet, by the end of the decade, this uncertainty had been replaced by the acceptance of Additional protocol I as customary law and a general embrace of the humanitarian values of international humanitarian law. This change took place as quickly and unequivocally as the original emergence of the term 'international humanitarian law'.

BASIC PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW (IHL)

At a general level, IHL tries to find a balance between the two fundamental principles that are the principle of humanity on the one hand and the principle of military necessity on the other hand. However, there are seven fundamental principles that are not directly derived from the treaty but are essential of IHL.

- i. Person hors de combat (who have been put out of action) are entitled to respect for their lives and physical and moral integrity.
- ii. It is forbidden to kill who surrenders or who is hors de combat.
- iii. The wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transport and medical supplies.

- iv. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions.
- v. Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed.
- vi. Parties to a conflict and members of their armed forces have a prohibited choice of methods and means of warfare. For eg: the use of chemicals.
- vii. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property

CONCLUSION AND RECOMMENDATIONS

International Humanitarian Law was quite unknown to the general public but now it has become a popular branch of International Law which has been accepted by all countries of the world and many countries following the obligations of Geneva Conventions (GCs). The International Humanitarian Law (IHL) previously known as Laws of War (LOW) was limitedly in practice among the developing nations. The International Humanitarian Law (IHL) is very strongly found in many religious books especially in the Holy Bible, Quran and others which significantly contributed towards the development of International Humanitarian Law (IHL).

Again the documentation of International Humanitarian Law (IHL) started from the adopting of the GC of 1864. Since then many conventions, regulations and declarations on the laws of AC have been adopted and enacted. Both locally and internationally till 1948. But the most significant documents of International Humanitarian Law (IHL) were adopted in 1949 and 1977 by adopting GCs and its APs respectively. The APs lacked the provisions regarding conventional weapons which have been fulfilled by, later on, conventions on conventional weapons in 1980 and its five protocols. The Rome Statutes of the Permanent International Criminal Court in 1998 for trial of the International Humanitarian Law violators has added to a great contribution in the development of International Humanitarian Law (IHL).

International conventions, protocols, statutes and declarations on the LOW are in force in recent age, they have not been signed and ratified by all states of the world. This study recommend all states of the

globe to sign and ratify the international instruments of IHL and make necessary domestic laws inserting the provisions of Geneva and other laws of war existing in the world to become beneficiary of International Humanitarian Law.

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