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Development of International Humanitarian Law

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ABSTRACT

War is a rot to humanity and involves most brutal and arbitrary violence. The international humanitarian law (also called the law of war or law of armed conflicts) is a part of international law and aims to mitigate the human suffering caused by war. International humanitarian law aims to restrain belligerents from wanton cruelty and ruthlessness, and to provide essential protection to those most directly affected by war. In 1991, the General Assembly adopted a resolution to improve the humanitarian relief capacity of the United Nations. Subsequently, the former Secretary-General, Boutros Ghali established the post of Under Secretary-General for' Humanitarian Affairs who headed the Department of Humantarian Affairs (DHA).

KEY WORDS

Humanitarian, United Nations, General Assembly, War, Arbitrary Violence.

INTRODUCTION

The horrifying experiences of the armed conflicts in the Gulf, Somalia and Bosnia remind us of the cruelty of the war and the suffering, death and destruction it causes. War is a rot to humanity and involves most brutal and arbitrary violence. The contemporary international law- in particular the Charter of the United Nations- prohibits not only the use of force but even the threat to use force with the exception of collective measures undertaken by the United Nations or the defensive measures permitted by Article 51 of the Charter. In order to make this prohibition realistic, international law offers to States a great scale of means and measures for the peaceful settlement of disputes with a view to an effective abolition of the recourse to war.

Undoubtedly, armed conflicts cannot always be voided. The question arises; is the behavior of

belligerent parties subject to any limitations? The obvious answer to this questions is that such limits do exist which aim at the mitigation of the most disastrous effects of armed conflicts. Such limits constitute the body or international humanitarian law applicable in armed conflicts.

Conceptualisation

The international humanitarian law (also called the law of war or law of armed conflicts) is a part of international law and aims to mitigate the human suffering caused by war. In short, its aim is to humanise war. The purpose of IHL is not to take, the war victims to heaven but to save them from hell. According to generally accepted definition, the international humanitarian law applicable in armed conflicts means international rules, established by treaties and customs, which are specifically intended to solve humanitarian problems directly arising from international and non-international armed conflicts and which, for humanitarian reasons, limit the right of the parties to a conflict to use the methods and means of warfare of their choice or protect persons or property that are, or may be, affected by the conflict. International humanitarian law aims to restrain belligerents from wanton cruelty and ruthlessness, and to provide essential protection to those most directly affected by war. By reducing and limiting the most brutal and arbitrary violence, international humanitarian law contributes to the objective of the general international law: to maintain and restitute peace among Nations as soon as possible. By keeping the conflict in strict limits, it helps to reconstitute peace. The justifiability of IHL can be challenged on the ground that to mitigate the sufferings of war is tantamount to making the situation of war more acceptable, more endurable. Does the very existence of humanitarian law of armed conflict contribute to perpetuating the phenomenon of war? Will war fought in accordance with humanitarian rules last longer than the one fought without any restraints? Does it follow that all restraints should, therefore, be removed? What ought one to prefer: a longer war or a worse war?

The thesis that IHL may prolong war and therefore ought to be abolished, is untenable and amounts to nullification of the basic purpose of international law which is to maintain international peace and security. The whole mankind cannot be subjected to the terror of unlimited war with maximum cruelty and ruthlessness. Without legal restraints, war may degenerate into, utter barbarism. Moreover, after the termination of such barbaric war, the restoration of peace between the parties that have fought each other with such ruthlessness may become virtually impossible.

The Three Main Trends: The Geneva, The Hague and The New York Trends

The IHL, although of relatively recent origin in its present shape, has a long history behind it. Even in the distant past, military leaders sometimes ordered their troops to spare the lives of captured enemies, treat them well, spare the enemy civilian population, doctors, their assistants and chaplains not to be taken as captives and returned to their side, prisoners of war to be protected and exchanged without ransom and sick and wounded to be card for and not to be regarded as prisoners of war. In the course of time, these and suchlike practices gradually developed into a body of customary rules relating to the conduct of war. However, the scope of these customary rules of warfare remained elusive and uncertain.

The process of codification of the customary rules of warfare started after the middle of the 19th century with the conclusion of multilateral treaties which rendered specificity to the uncertain customary rules of warfare. Two separate treaties were concluded: one at Geneva in 1864 on the fate of wounded soldiers on the battlefield and the other in St. Petersburg in 1868 prohibiting the use of explosive rifle bullets. These modest beginnings led to the emergence of two distinct trends in the law of armed conflict, namely, the Geneva trend which more particularly concerned with the condition of war victims and The Hague trend relating to the conduct of war proper and permissible means and methods of war. Much later in 1960's and 1970's, the United Nations began to take an active interest in the law of armed conflict, mainly from the aspect of implementation of fundamental human rights in the armed conflict. This resulted in the emergence of the third trend, namely, the New York trend. These three trends have finally merged into a single movement.

A. The Geneva Trend

In the middle of the 19th century in 1859, the battle of Solferino exposed the vulnerability of the customary rules of warfare. At that battle about 38,000 were killed or wounded in 15 hours. Customary rules of warfare were put to dust. Field hospitals were shelled. Doctors and stretcher bearers in the field were subjects to fire. Whoever fell into enemy hands, whether wounded or not and regardless of whether he belonged to the fighting forces or to the medical or auxiliary personnel, was taken as prisoner. Often upon the approach of enemy forces, or even when their approach was merely rumoured, the doctors and nurses in the field hospitals fled with ambulances at their disposal. Of the wounded at Solferino, many died from lack of medical care and attention and lack of water and medicaments for the wounded men.[1]

At the battle of Solferino there was present a Swiss citizen, Henry Dunant, amidst thousands of French and Austrian wounded. Dunant was present not as a soldier but as a civilian for purposes unrelated to the war then in progress between Austria and France. Dunant saw the full horrors of the battle. For days, he and a few other volunteers did what they could to treat the wounded and alleviate the sufferings of the dying. Deeply affected by the misery he had witnessed, he retired for a while from active life and wrote his experiences down in a book entitled Un souvenir tie Solferino (A Memory of Solferino) which was published in 1862. In his book, Dunant made two proposals which he regarded as indispensable. The first proposal was that each State should establish in time of peace a relief society to aid the army medical services in time of war. The second proposal was that States should conclude a treaty that would facilitate the work of these relief societies and guarantee a better treatment of the wounded. Dunant, a citizen of Geneva, is generally recognized today as the founder of the Red Cross movement.[2] Thereafter, the International Committee of the Red Cross was established with its seat in Geneva with its membership confined to Swiss nationals.[3] The publication of Dunant was the beginning of the modern humanitarian movement creating law. Henry Dunant, the man of compassion for the wounded in battle provided the first legal base to IHL.

The second proposal of Dunant was implemented in 1864 with the adoption of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. The Convention has three important features. Firstly, in war on land, military hospitals and ambulances would be recognised as same as neutrals.

Secondly, hospital and ambulance personnel would have the benefit of the utrality when on duty. Thirdly, hospitals and ambulances would be distinguished by a uniform flag bearing a red cross on a white ground. In 1899, a treaty was concluded rendering the principles of the treaty of 1864 applicable to the wounded, sick and shipwrecked at sea. 1906 saw the first revision of the treaty of 1864 and in 1907 the treaty of 1899 was adjusted to the revision of 1906.

The First World War, with its long duration and huge numbers of prisoners of war on both sides, brought to light the need for better protection of the prisoners of war. In 1929, the Convention on the Treatment of Prisoners of War was adopted which introduced a categorical ban on reprisals against prisoners of war. In 1929, another Convention was adopted in the form of a much improved treaty on the treatment of the wounded and sick on land taking into account the experiences of the First World War.

The Second World War provided the incentive for yet another major revision and further development of the law of Geneva. The three Conventions in force (one of 1907 and two of 1929) were substituted by new Conventions, giving improved versions of many existing rules and filling lacunae that practice had brought to light. The law of Geneva was enriched by an entirely novel Convention on the protection of civilian persons in time of war. Thus, in 1949, four Geneva Conventions were concluded dealing with the wounded and sick on land; the wounded, sick and shipwrecked at sea; prisoners of war; and protected civilians.

The 1949 Conventions produced an innovation of major importance which merits special mention. The Conventions apply in their entirety to international armed conflicts. However, all the four Conventions contain

a common Article 3 which is applicable in armed conflict not of an international character occurring in the territory of one of the High Contracting Parties. Article 3 contains a list of fundamental rules that the parties are bound to apply as a minimum in the event of non international armed conflicts. The adoption of Article 3 signified a tremendous step forward in that it proved the possibility of laying down rules of international law expressly and exclusively addressing the situation in internal armed conflicts. The four Geneva Conventions of 1949, however, began to show shortcomings during the course of years.

B. The Hague Trend

(a) The Lieber Code: The second jurist who rendered legal base to IHL is a refugee professor Francis Lieber, an international lawyer of German origin, who had migrated to America. In 1863, he prepared a set of instructions, popularly known as the Lieber Code, to be followed by the American Army during American Civil War (1861-1865). The Lieber Code provides detailed rules on the entire range of warfare, from the conduct of war proper and the treatment of the civilian population to the treatment of specified categories of persons such as the prisoners of war, the wounded, doctors, nurses and chaplains. Based on the Lieber Code, President Lincoln issued "Army Order No. 100" entitled Instructions for the Armies of the United States in the Field. Although technically a purely internal document and written to be applied to American Civil War, the Lieber Code has also served as a model and a source of inspiration tar the codification of the laws and customs of war. The Lieber Code has exerted tremendous influence on subsequent developments.

In 1868, at St. Petersburg a remarkable document saw the light of the day with the adoption of a Declaration Renouncing the Use, in time of War, of Explosive Projectiles under 400 Grammes Weight. Although these explosive projectiles were not more effective than ordinary rifle bullets, it caused far graver wounds and thus greatly aggravated the sufferings of the victims. It was thought that the employment of such weapons would be contrary to the laws of humanity. The Declaration, thus makes an endeavour to strike a balance between the necessities of war and the laws of humanity.

(b) De Martens Clause: The third initiative to humanise war was taken by a Russian jurist, Frederic de Martens. He held the chair of international law at the University of Petersburg. He was the catalysing figure at both the Hague Peace Conferences of 1899 and 1907. At the First Peace Conference in 1899, four Conventions were established whereas at the Second Peace Conference in 1907. 13 Conventions were established, Of these, the most important for the development of international humanitarian law was the Hague Convention No. IV of 1907 concerning the laws and customs of war on land. De Martens Clause is expressive of humanitarianism which formed the basis of the Hague Convention No. IV of 1907.[4] It made an attempt to accommodate military requirements to the principle of humanity in war. It finds expression also in the four Geneva Conventions as well as in Article 1(2) of Additional Protocol I which states:

"In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of the public conscience."

In due course of time, De Martens Clause has percolated into the corpus of general intentional law. It balances military necessity against the requirements of humanity.

The First World War demonstrated the inadequacy of the Hague Conventions. The mankind was particularly shocked by the use of poisonous gases during the war. In 1925, a Protocol was adopted for the prohibition of the use in war of asphyxiating, posionous and other gases, and of bacteriological methods of warfare. The Protocol banned not only chemical means of warfare but even the bacteriological means of warfare.

The priciples embodied in the Hague Convention and regulations on land warfare of 1899\1907 had, by the time of the outbreak of the Second World War, been so widely accepted by the States that they

became part of customary international law. This view was endorsed by the International Military Tribunal at Nuremburg in its judgment of the major war criminals.

C. The New York Trend

Initially, The United Nations did not take any interest to further develop international humanitarian law and concentrated on the acceleration of the momentum of the movement for the protection and promotion of human rights in peacetime alone. However, the United Nations was compelled not to lose sight of the issue of individual responsibility for war crimes when the major war criminals were brought to trial shortly after the Second World War. The basis of their prosecution lay in the Charter of the International Military Tribunal. The Charter defined three categories of war-crimes, namely,, crimes against peace, war-crimes, and crimes against humanity. It also stated the principle of individual criminal liability, notably that the official position of the defendants would not be considered as freeing them of responsibility or mitigating punishment. It was also stated that the plea of superior orders would not free a defendant from responsibility but might be considered in the mitigation of punishment if the Tribunal determined that justice so required. In 1946, the United Nations General Assembly reaffirmed these principles as generally valid principles of international law.[5]

The United Nations in the course of time has shifted its focus from human rights in times of peace alone to human rights in times of peace as well as war. The United Nations has found justification for this shift in the Charter of the United Nations whose madate is protection and promotion of human rights without any distinction of peacetime and wartime. The shift in the focus of the United Nations has conferred the status of human rights on international humanitarian law which applies in the event of armed conflicts. In 1968, the General Assembly adopted a resolution entitled Respect for Human Rights in Armed Conflict and invited the Secretary – General to carry out studies in consultation with ICRC in this regard.[6]

In 1974, at Geneva, a Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law in Armed Conflict was convened which resulted in the adoption in 1977 of the two Additional Protocols to the Geneva Conventions of 1949, Protocol I for the protection of victims of international armed conflicts and Protocol II for the protection of victims of internal armed conflicts.

Recently, the International Law Commission has prepared a draft Code of offences against peace and security of mankind. Article 13 of the Code defines war-crimes as serious violations of laws and customs of war. It further clarifies that war means any international or non-international armed conflict defined in Article 2 common to the Geneva Conventions of 1949 and in Article 1, paragraph 4 of Additional Protocol I of 1977. Article 4 of the draft Code proclaims that an offence against peace and security of mankind is a universal offence and therefore every State has the duty to try or extradite any perpetrator of such offence.

CONCLUSION

What baffles international community today is the problem of implementation of international humanitarian law. In armed conflicts, belligerents frequently violate IHL. United Nations, custodians of world peace, has not done better. In Somalia and Bosnia, everyone including the U.N. Peace-keeping Forces have completely forgotten the rules of the game. The ICRC has spoken out forcefully against systematic and serious abuses committed against civilian population in Bosnia, such as summary executions, torture, rape, internment, deportation, harassment of minority groups, hostage-taking, expropriation, threats and intimidation.[7]

In 1991, the General Assembly adopted a resolution to improve the humanitarian relief capacity of the United Nations. Subsequently, the former Secretary-General, Boutros Ghali established the post of Under Secretary-General for' Humanitarian Affairs who headed the Department of Humantarian Affairs (DHA). The post of Under Secretary-General, however, proved to be too low for the purpose of co-ordinating humanitarian relief operations. Ian Eliasson, Under Secretary-General himself remarked:

"Additional measures for respect of humanitarian aid and for protection of relief personnel are now necessary. The blue ensign of the United Nations and the symbols of International Red Cross and the Red Crescent no longer provide sufficient protection."[8]

Eliasson's observation is shocking. Red Cross workers feel compelled during armed conflicts to hire local gunmen to protect their operations. Sometimes even the U.N. Peace-keepers are killed by the bandits. Therefore, the need of the day is to organise security police for the protection of humanitarian operations. The time has come 'when States should consider establishing a separate and distinctive United Nations Humanitarian Police Force.

REFERENCES

1. Draper, G.I.A.D., *The Geneva Conventions of 1949, Recueil des cours,* Vol. I, 1965, p. 64.
2. Draper, G.I.A.D., The Red Crass Conventions (Stevens, London. 1958) p. 233.
3. International Red Cross Handbook (12th Edition, Geneva, 1983) pp. 421-424.
4. Schindler, D. and Toman, J. (Ed.), A Collection of Conventions, Resolutions and other Documents (Henry Dunant Institute, Geneva, 1988) p. 70.
5. General Assembly Resolution No. 95(1).
6. General Assembly Resolution No. 2444 (XXIII), 19 December 1968.
7. ICRC Update on the Aide-Memoire, 3 December 1992
8. Adress, International Neotiation Network. The Carter Centre, centre Atlanta, 17 February 1993.

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