

Contemporary Development of International Humanitarian Laws with Special Reference to Refugees, Women and Prisoners

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Abstract

Armed conflicts have long required governments to balance secrecy and transparency. To take a few examples, they must decide whether and how to acknowledge: the existence of an armed conflict, the applicable legal rules, the evidence of possible violations, and the number of combatant and civilian casualties. But the long war on terror has heightened global civil society's concerns about expansive government secrecy. Demands for enhanced public transparency span the range of IHL activities: the classification of conflicts, the sorting of combatants and civilians, the numbers of civilian casualties, the deployment of unlawful weapons, conditions of detention, the use of coercive interrogation, its facilitation via extraordinary rendition, and punishment for unlawful activities. While revelations about drone strikes and national surveillance programs have spurred a domestic transparency debate, more attention needs to be paid to the role of international transparency. Thus, this article looks abroad to map out various mechanisms for IHL related transparency and discusses the role of IHL itself in mandating public transparency. Violations of IHL include attacks against and ill-treatment of civilians, destruction of property, sexual violence and restricted access to health care and other essential services. IHL, as codified in the Geneva Conventions of 1949 and their Additional Protocols of 1977, contains important provisions to prevent the displacement of people and for the protection of people forced to flee. Many of these provisions are considered to have become international customary law. The Fourth Geneva Convention (GCIV) deals specifically with the protection of civilian people in times of war, including occupation. Internally Displaced Persons (IDPs) are part of the civilian population and therefore are entitled to receive the same protections as other civilians against the consequences of war. Additional Protocol I (API) supplements these protections in times of international armed conflicts, and Additional Protocol II (APII) in times of non-international armed conflicts. States have the responsibility to implement these protections in their domestic legal framework.

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Chapter 1: Introduction

Introduction

International Humanitarian Law is a branch of the law of nations. Which is mainly applicable in the time of international conflicts as well as in time of internal armed conflict. International Humanitarian law protects the rights of people from dreadful or harmful acts of war. Although Humanitarian law is a relatively new term of International law. Which aim is to protect persons suffering from the evils of armed conflict International Committee of Red Cross (ICRC) first time was applied this word in 1950. Mr. Jean Pictet who is regarded as father or founder of International Humanitarian law used this word in his writings and defined that “Humanitarian law is that considerable portion of International law which is inspired by a feeling for humanity and is centered on the protection of the individual in time of war”. According to Jean Pictet, the term is related with two basis, one is the moral basis which is based on war held by discipline or system and the other is the legal basis which is based on the protection of the right of the people in war period.

The International Humanitarian Law has two branches. One is Geneva Law’s 1949. It says about the protection of the rights of people who are present in the war but not participate in the war and the other is Hauge laws of 1899 and 1907, says about the protection of the rights and related with the obligations of the people who are present in the war and actively participate in the war. Now that both the law of Geneva and the law of the Hauge seemed to be merged in the 1977 protocols to the Geneva Conventions of the 1949 the term “International Humanitarian Law would appear to cover both branches of this subject”. “Thus the distinction between the movement of Geneva and that of the Hauge appears to be fading away”.

To be added here that Bangladesh has started experiencing the constant refugee flight of Muslim *Rohingya* from Myanmar because of the fear of religious as well as ethnic persecution from 1971. Bangladesh has mostly welcomed them and provided them protection under the ad hoc decisions, notwithstanding there is no statutory law for the refugees. However, till 2013, no solution has been found and the numbers of refugee flights have been gradually increasing to the extent it is said, *Rohingya* refugees are spoiling the reputation of Bangladesh in the international arena besides committing various crimes under the guise of fake Bangladeshi passport. The *Rohingya*, an ethnic minority of

Myanmar (previously known as Burma) is one of the most persecuted groups of people in the world. They speak a version of Chittagonian, a regional dialect of Bengali which is also used extensively throughout south-eastern Bangladesh. The Refugees are virtually friendless amongst the Myanmar group of other ethnic, linguistic and religious communities. They were not formally recognized as one of the country's official national groups when the country gained independence in 1947, and they were excluded from both the full and the associate citizenship when these categories were introduced by the 1982 Citizenship Act.

As well as being stateless, Myanmar's Refugees are confronted with other forms of persecution, discrimination and exploitation.¹ The 1982 Citizenship law of Myanmar left the *Refugees* as stateless and rendered them illegal migrants in their own country. According to the new citizenship law, there were three categories of citizens, namely, i) full, ii) associated, and iii) naturalized citizens. The *Refugees* do not fulfill any of these three criteria.² They are the only ethnic group in Myanmar restricted from marriage, traveling beyond their village or building as well as maintaining religious structures. In addition, they are subject to frequent forced labor, arbitrary taxation, and sexual violence and land confiscations by the *Nasaka*. Even, *Rohingya* women cannot become pregnant without official permission. Some deliver their babies secretly in Bangladesh and many

¹States of Denial, A review of UNHCR's Response to the Protracted Situation of Stateless Rohingya Refugees in Bangladesh, united nations high commissioner for refugees policy development and evaluation service (pdes), Geneva, Switzerland, Published on December, 2011, page 7; [http:// www.unhcr.org/4ee754c19.pdf](http://www.unhcr.org/4ee754c19.pdf) [accessed 06 January 2014].

²Burmese nationality law currently recognizes three categories of citizens, namely citizen, associate citizen and naturalized citizen, according to the 1982 Citizenship Law. Citizens, as defined by the 1947 Constitution, are persons who belong to an "indigenous race", have a grandparent from an "indigenous race", are children of citizens, or lived in British Burma prior to 1942. Under this law, citizens are required to obtain a National Registration Card (NRC), while non-citizens are given a Foreign Registration Card (FRC). Citizens whose parents hold FRCs are not allowed to run for public office. Burma has a stratified citizenship system (from the 1982 Citizenship Law), based on how one's forebears obtained it: (i) Full citizens are descendants of residents who lived in Burma prior 1823 or were born to parents who were citizens at the time of birth. (ii) Associate citizens are those who acquired citizenship through the 1948 Union Citizenship Law. (iii) Naturalized citizens refer to persons who lived in Burma before 4 January 1948 and applied for citizenship after 1982. Dual citizenship is not recognized by Burma. Naturalization in another country immediately voids Burmese citizenship. Foreigners cannot become naturalized citizens of Burma, unless they can prove a close familial connection to the country. The law does not recognise Refugees as one of the 135 legally recognised ethnic groups of Burma, thus denying most of them Burmese citizenship. Available at: http://en.wikipedia.org/wiki/Burmese_nationality_law [accessed on 19 January 2014]

young couples flee to Bangladesh because of the inability to obtain permission to marry in Myanmar.³

It has been criticized that the effect of the Burma Citizenship Law 1982 is to make it almost impossible for the *Rohingya* to gain citizenship. This violates the Universal Declaration of Human Rights, the Convention on the Rights of the Child and international norms prohibiting discrimination of racial and religious minorities. The legal and practical constraints imposed by the Burma Citizenship Law 1982 render it “almost impossible” for the *Refugees* to be recognized as the legitimate citizens of Burma.⁴

As a result of such discrimination, large numbers of *Refugees* have left Myanmar and taken up residence elsewhere. While there is a general lack of precision with respect to the number of people involved, they are estimated to be up to 400,000 in Bangladesh, a similar number in the Gulf States, some 200,000 in Pakistan, 20,000 in Thailand and 15,000 in Malaysia. UNHCR estimates some 750,000 *Refugees* remain in northern Rakhine state and other parts of Myanmar.⁵

Statement of the problems

The Myanmar refugees and undocumented nationals are posing a serious threat to the security, stability, prosperity, welfare and image of the country through their involvement in serious crimes including drug and human trafficking, smuggling, robbery and other organized crimes. There have also been confirmed reports that these illegal Myanmar nationals are obtaining Bangladeshi passports to go to Saudi Arabia through fraudulent means, falsification of national ID cards and birth certificates and are causing huge embarrassments to the Bangladeshi community living in Saudi Arabia following their arrests of unruly and unethical behavior and practices all of which are summarily blamed on the Bangladeshi nationals. Recently some Myanmar refugees had been arrested, while

³Peter Ras, Caught Between a Crocodile and a Snake, The Burma Centre Netherland, 2009; <http://www.independentworldreport.com/2009/09/caught-between-a-crocodile-and-a-snake/>. [Accessed on 06 January 2014].

⁴Interim Report on the situation of human rights in Myanmar, prepared by the Special Rapporteur of the Commission on Human Rights, UN Doc A/52/484, 16 October 1997, para. 140.

⁵States of Denial, A review of UNHCR's Response to the Protracted Situation of Stateless Rohingya Refugees in Bangladesh, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES POLICY DEVELOPMENT AND EVALUATION SERVICE (PDES), Geneva, Switzerland, Published on December, 2011, page 7; <http://www.unhcr.org/4ee754c19.pdf> [accessed 06 January 2014].

they were trying to go abroad using forged Bangladeshi passports.⁶ Rohingya refugees impose quite a heavy burden on Bangladeshi economy and scant resources. It is reported that many local people do not want to accept Rohingya refugees, some of whom are allegedly involved in undesirable activities either within the local area or on the border, posing a threat to peace and security of the local people.⁷

Imtiaz Ahamed, Professor of International Relations of Dhaka University, identified that Rohingya refugees are a serious threat to the security of Bangladesh. He pointed out four dimensions of security threat caused by the Rohingya, namely, i) Politico-Military Dimension of Security, ii) Economic Dimension of Security, iii) Social Dimension of Security and iv) Environmental Dimension of Security.⁸

Research objectives

Bangladesh is in a quandary over the refugee issues: firstly being the human rights issue and secondly the national security issue. Notable objectives of this paper are given below.

1. To assess contemporary development of humanitarian laws with special references to refugees, women and prisoners.
2. To identify the role of international humanitarian laws with special references to refugees, women and prisoners.
3. To figure out the humanitarian conditions with special references to refugees, women and prisoners.
4. To draw policy concerns for international humanitarian laws with special references to refugees, women and prisoners

Research Questions

The researcher intends to raise some questions which this study seeks to address:

⁶Md Zahirul Islam, Rohingya Refugee Problem: A Burden on Bangladesh, The Daily Sun, Dhaka, Monday 18 June 2012; http://www.daily-sun.com/details_yes_18-06-2012_Rohingya-refugee-problem:-A-burden-on-Bangladesh_178_2_17_1_1.html. [Accessed on 06 January 2014].

⁷Barrister Harun Ur Rashid, Why are Refugees being refused entry into Bangladesh? The Daily Star, Wednesday, 20 June, 2012; <http://archive.thedailystar.net/newDesign/news-details.php?nid=238943>. [Accessed on 06 January 2014].

⁸Imtiaz Ahamed (ed.), The Plight of the Stateless Refugees, The University Press Ltd, Bangladesh, 2010, p 69 – 85.

1. How to assess contemporary development of humanitarian laws with special references to refugees, women and prisoners?
2. What are the roles of international humanitarian laws with special references to refugees, women and prisoners?
3. Why the humanitarian conditions are vulnerable with special references to refugees, women and prisoners.
4. To what extent the policy concerns need to have for international humanitarian laws with special references to refugees, women and prisoners?

Significance of the Study

The basis of International Humanitarian Law is common understanding of human welfare. It refers to international rules, whether of conventional or customary origin. It should be mentioned that, the United Nations Charter prohibits states from using force against another state except when the victim of an aggression defends itself against the aggressor (individual or collective self-defense).⁹ International Humanitarian Law is not worried with the lawfulness or Unlawfulness of armed conflicts. Just in bellow deals with facts, with the fact of an armed clash, irrespective of what caused the conflict and whether it can be said to have any justification.

The preamble to Additional Protocol I express this central premise in the following words:

“Reaffirming further that the provisions of the Geneva Convention of 12 August 1949 and of this protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict on the causes espoused by or attributed to the parties to the conflict”.....

It is difficult to differentiate between International Humanitarian Law and human rights law. It is founded on the concrete legal manifestation of welfare of human being, namely the fundamental rights spelled out in many documents, some of legal force, such as the Universal Declaration of Human Rights, 1948. International covenant on civil and political rights, 1966. International on Economic, Social and Cultural Rights, 1966. Bill of rights in national constitutions Human Rights agreements and the relevant rules of customary law safeguard a series of individual rights from state abuse. Those safeguards are valid in all circumstances, at all times. Only in emergency situations and in strictly defined

⁹ N.B. United Nation, Charter, Article 51.

circumstances (known as situations of public emergency) do the different agreements allow for derogations from some of their provisions. The treaties of humanitarian law protect particularly vulnerable categories of persons from abuse of state power. In a sense, international humanitarian law is that part of human rights law which is applicable in armed conflicts.

Under the Fourth Geneva Convention, International Humanitarian Law govern relations with the enemy. It is entitled to protection as a prisoner of war, and the rights of the inhabitants of a territory occupied by an enemy power are protected by this convention.

In the sum up of his chapter, it can be said that, International Humanitarian Law is only to protect the rights of human being in the wartime. International Humanitarian Law contains many rules requiring the individual on the community to act than classic human rights law.¹⁰

It is seen in Geneva Convention 1864, Article 6, Para 1 of which reads as follows: “wounded on sick combatants, to whatever nation they may belong, shall be collected and cared for¹”. The law of Geneva presently in force contains a wealth of such directions for action (although it cannot be said that the victim has corresponding right to claim in court in the event of non-action).

Refugee law should be mentioned with the International Humanitarian Law. The provisions applies as whenever a person flees his homeland seeking protection in another country out of justified fear of persecution. Refugees exist in peacetime and in time of war. The Geneva Conventions contain some provisions which govern the specific situation of refugees in time of war, but do not weaken the protection provided under refugee agreements. Moreover, refugees are entitled to the same protection under humanitarian law as other civilians affected by the consequences at hostilities.

Literature Review

Humanitarian Law is the principles of human conduct through the International Law that should govern the acts of the parties engaged in war. Human behavior recognized by

¹⁰ N.B: The observance of social rights also entails an obligation to act. See the International Covenant on Economic, Social and Cultural Rights of 16 December, 1966.

International Law controls the activities of both parties of war which is also related with welfare acts of people. International Humanitarian Law gives more influence of International Laws than that of domestic laws and applied in the period of international conflict and in the internal conflict. The execution of International Humanitarian Law depends upon the goodwill of the both parties of war.

However, Bangladesh does not have any domestic or national law which can cover the issue of asylum seekers. In Bangladesh, foreigners irrespective of asylum seekers or simply visitors are treated under some old laws (e.g., The Passport Act, 1920; The Naturalization Act, 1926; The Registration of Foreigners Act, 1939; The Foreigners Act, 1946; The Registration of Foreigners' Rules, 1966; The Bangladeshi Citizenship Act, 1951; The Bangladeshi Control of Entry Act, 1952; The Bangladeshi Citizenship (Temporary Provision) 1972; The Bangladeshi Passport Order, 1973; and the Extradition Act, 1974).¹¹ This is particularly caused by Bangladesh's refusal to be a party to the UN Convention Relating to the Status of the Refugees, 1951 or its 1967 Protocol.¹² Thus, Bangladeshi government has irrefutably valid reason to refuse the Rohingya refugees.

But, the Rohingya issue is entirely different from the Urdu-speaking Bihari issue. The Bihari people were already in Bangladesh and have been living there since 1947 and afterward. On the other hand, the Refugees are foreigners as they were being pushed back by the Myanmar Government.

Article 27 of the constitution of Bangladesh states that "All citizens are equal before the law and are entitled to equal protection of the law." The Citizenship Act 1951 provides details on the procedure to be a citizen of Bangladesh. The Rohingya people do not fall within the categories.¹³ According to Article 25 of the constitution of Bangladesh:

¹¹ Md. Akhtaruzaman, Legal Protection of Refugees under Bangladesh Laws, in Dr. Mizanur Rahman (ed), Human Rights & Domestic Implication Mechanisms, ELCOP, Dhaka, 2006, pp 175.

¹² Imtiaz Ahamed (ed.), The Plight of the Stateless Refugees, The University Press Ltd, Bangladesh, 2010, p 103.

¹³ Section 3 of the Citizenship Act, 1951 provide that every person shall be deemed to be a citizen of Bangladesh-

(a) who or any of whose parents or grandparents was born in the territory now included in Bangladesh and who after the fourteenth day of August, 1947, has not been permanently resident in any country outside Bangladesh; or

(b) who or any of whose parents or grandparents was born in the territories included in India on the thirty-first day of March, 1937, and who, except in the case of a person who was in the service of Bangladesh or of any Government or Administration in Bangladesh at the commencement of this Act, has or had his domicile

“The state shall base its international relations on the principles of respect for national sovereignty and equality, non-interference in the internal affairs of other countries, peaceful settlement of international disputes, and respect for international law and the principles enunciated in the United Nations Charter....”

It is pointed out that probably Article 25 of the constitution of Bangladesh is the only reason of obligation for Bangladesh to continue with the refugee issue coming from other states. International commitment mentioned in the decision merits to be interpreted not only as a commitment arising out of the obligation under the UN charter but also as commitments and obligations under the customary international law which Bangladesh is a party to.¹⁴ But the question is how far should a country abide by the international law? And in the case where obligation arises under the terms of treaties, it depends on the internal policy which literally means the domestic law of the land.

However, where there is a clear domestic legislation on a disputed issue, the court gives effect to the domestic law, not to the customary norms of the international law.¹⁵ This particular aspect of the domestic law is vis-à-vis an international custom which was raised in *Bangladesh and Others v Sombon Asavhan*.¹⁶ Bangladeshi navy captured three Thai fishing trawlers for illegal entrance and fishing in the territorial waters of Bangladesh. The question was whether the trawlers were within the territorial waters or the exclusive economic zone of Bangladesh. Instead of applying the existing international law regarding the territorial waters, the Supreme Court settled the issue on the basis of Bangladeshi Territorial Waters and Maritime Zones Act, 1974, which laid down specific provision for maritime boundaries for Bangladesh. The Appellate Division of the Supreme Court

within the meaning of Part II of the Succession Act, 1925, as in force at the commencement of this Act, in Bangladesh or in the territories now included in Bangladesh; or
(c) who is a person naturalised as a British subject in Bangladesh; and who, if before the date of the commencement of this Act he has acquired the citizenship of any foreign State, has before that date renounced the same by depositing a declaration in writing to that effect with an authority appointed or empowered to receive it; or
(d) who before the commencement of this Act migrated to the territories now included in Bangladesh from any territory in the Indo-Pakistan sub-continent outside those territories with the intension of residing permanently in those territories. Section 4 provides citizenship by birth. Section 5 states about citizenship by descent, and section 6 provide citizenship by migration.

¹⁴ Shah M. Alam, *Enforcement of International Human Rights Law by Domestic Court*, New Warsi Book Corporation, Dhaka, Bangladesh, 2007, p-108

¹⁵ Shah M. Alam, *Enforcement of International Human Rights Law by Domestic Court*, New Warsi Book Corporation, Dhaka, Bangladesh, 2007, p-103.

¹⁶ *Bangladesh and Others v Sombon Asavhan*, 32 DLR (1980), p. 198.

observed, “it is well settled that where there is a municipal law on an international subject the national court’s function is to enforce the municipal law within the plain meaning of the statute’.

Therefore, in the light of the discussion, it could be concluded that the Bangladeshi government has had a legitimate security concern regarding the Rohingya issue. By denying the Rohingya to cause a refugee influx, Bangladesh did not violate the principle of the *non-refoulement* as per Article 33 (2); rather Bangladesh gave priority to its national security. However, Bangladesh is not only the states who ‘push back’ the Rohingya refugees as the same treatment was also meted out by Thailand and Malaysia to the Rohingya. It is said that the Rohingya refugees are ‘a threat to and a burden for Thailand.’¹⁷ In 2009, the Malaysian Prime Minister has called for the repulsion of the Myanmar’s Muslim boat people to be pushed back if they attempted to land on any Southeast Asian shores in search of asylum.¹⁸

Fundamental Principle of International Humanitarian Law

The fundamental rules of modern International Humanitarian Law have been summarized by a group legal experts of Red Cross. These Principles do not however, take precedence over the law in force, nor do they replace it. Rather, they highlight guiding principles and thereby make the law easier to understand. The fundamental rules applicable in armed conflicts are following:

1. Persons hors de combat and those who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction.
2. It is forbidden to kill or injure an enemy who surrenders or who is hors de combat.
3. 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, establishment’s transports and material. The emblem of the Red Cross (Red Crescent, red lion and sun) is the sign of such protection and must be respected.

¹⁷Myanmar: Rohingya Refugees and Thailand’s ‘Push-Back’, Panchali Saikia, 30 December 2011, available at <http://www.ipcs.org/article/southeast-asia/myanmar-rohingya-refugees-and-thailands-push-back-3539.html>. [Accessed on 19 January 2014].

¹⁸UNHCR, Refugees Daily: Refugees Global Press Review, 27/02/2009; <http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=463ef21123&id=49a78c228>. [Accessed on 19 January 2014].

4. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.
5. Everyone shall be entitled to benefit fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.
6. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.
7. Parties to a conflict shall at all times distinguish between civilian population and combatants in order to spare the civilian population nor shall civilian persons be the object of attack. Attacks shall be directed solely against military objectives.¹⁹

These above seven fundamental rules give a clear concept of International Humanitarian Law, which limits the states in exercising power and to give protection of human beings in the time of war for those who are participating in the war and those who are not participating in the war.

The sources of International Humanitarian Law

The four Geneva Conventions of 12 August 1949 for the protection of the victims of war are the main sources of International Humanitarian Law:

1. Convention for the Amelioration of the condition of the wounded and sick in Armed Forces in the Field (First Geneva Convention).
2. Convention for the Amelioration of the condition of the wounded, sick and shipwrecked Members of Armed Forces at Sea (Second Geneva Convention).
3. Convention relative to the treatment of prisoners of war (Third Geneva Convention).
4. Convention relative to the protection of civilian persons in time of war (Fourth Geneva Convention).

The Geneva Conventions have been supplemented with the two Additional protocols of 8 June 1977:

¹⁹ N.B: See Fundamental Rules of International Humanitarian Law Applicable in Armed Conflicts. Geneva : International Committee of the Red Cross, 1979.

1. Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the protection of victims of International Armed Conflicts (Protocol I).
2. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of Non-International Armed Conflict (Protocol II).

The rules of international customary law also play an important role. Some of them set forth absolute obligations which are binding on all states (Jus Cogens). The 1977 protocols have not yet been adopted universally.²⁰ It is considered as a part of International Humanitarian Law for the purpose of study.

Research Methodology

This is an empirical study and therefore, by its nature the study requires in-depth information. The case study method has been used in this research. Because it provides an opportunity for relating facts and concepts, reality and hypothesis. In most instances, it is focused on answering 'how' and 'why' questions. In this aspect, a case study strategy helps the objective of this study, which is concentrated on exploring how international humanitarian laws might be a mechanism of ensuring human rights. Qualitative and analytical research methods have been applied primarily; besides, non-doctrinal method has also been applied in this research.

Mainly this study has been conducted based on the secondary data that has been gathered from various published documents like government orders, acts, journal articles, books, newspaper reports and unpublished thesis in relevant field. Data also collected through internet browsing from national and international sources. This research will find out the present situations of Refugees in Bangladesh. This research will also explore the problems which are being faced by the host communities in Cox's Bazar and consequences. Consequently, the Government of Bangladesh may be able to take necessary steps to handle all Rohingya related issues on the basis of the findings and suggestions of this research.

Conclusion

There is no refugee law and policy in Bangladesh which, incidentally, is not a party to the 1951 Refugee Convention/1967 Protocol. The provisions of the municipal law have always

²⁰ N.B. As on 31 December, 1992

been given priority over the customary international law where the existence of domestic law is present. Bangladesh has been criticized for not opening its doors to the Rohingya refugees in recent times. If Bangladesh wants to overcome the situation regarding these refugee issues, firstly, it has to enact a strong domestic legislation on the refugee and the immigration law, which may restrict the flow of refugees. Secondly, it has to find out all the unlisted and unregistered refugees living within its territory. Thirdly, Bangladesh can go for some bilateral or multilateral treaties with its neighbor countries as well as other countries of Asia for dealing with the refugee influx. And finally, Bangladesh will have to convince the international communities to put pressure on Myanmar to resolve the Rohingya refugee problem that Bangladesh has been carrying for the last 20 years without any foreseeable economic and social benefits whatsoever.

Nonetheless, it is to be seriously and rationally viewed through the economic and social perspectives that it is mainly because of the large Rohingya refugee influx into Bangladesh for over 20 years that has critically over spilled its disastrous effect on the social-economic stability of the home citizens who have been situational displaced due to the pressure brought about by the Rohingya refugees that ultimately causes the Bangladeshi citizens themselves to seek better livelihood elsewhere, especially into Malaysia and the Middle East countries. This phenomenon is brought about by the fact that as the Rohingya refugees are critically desperate to earn a living for their very survival, they would quote a much lower fee or salary for any job offered to them and this, incidentally, has seriously upset the wage pattern in the labor market of the host country. A similar analogy could be drawn in the form of water being constantly poured into a glass of milk in which the milk would ultimately be spilled out of the glass by the water which would then ultimately occupy the glass.

Chapter 2: Development of International Humanitarian Law

Introduction

Humanitarian Law was mainly developed by 3 periods. Ancient period, Medieval period, and modern times etc and the contributions by the said 3 periods for development of humanitarian law make it easier to understand.

Ancient period (civilization based):

Early ancient civilian:

In the beginning it is better to start with the definition of Jean Pictet, “the laws of war are as old as war itself and war is as old as life on the earth”.

Before Sumerian Civilization, different rules and regulations followed by both parties of war, such as – rules distinguishing types of enemies rules defining the circumstances to maintain formalities regarding declaration and completion of war, imposition of restrictions upon entrance of the people to the warfare area, rules regarding time of war. Place of war and conduct of both parties of war and others.

Sumerian war was instituted by organized way. War was started by declaration and there was possibilities to make arbitration. The completion of war was by mutual settlement. It ensured the safety to correspondents and finally by peace treaties.

Hammurabi code was declared by the king of Babylon. It was said in the preamble of that code that, "I establish these laws to prevent the strong from oppressing the weak". To free the imprisoned persons by taking bond on something was prohibited by customary law.

Egyptian Civilian were known as to give proper respect to each other. There was existed "seven works of time mercy" and the main provisions of that instrument are to give food to hunger, to give cloth, to drink, to give shelter, to free the imprisoned persons, to give proper services to the ill persons and to fulfill proper formalities regarding the last act of the dead person following respective religion.

Hittites civilization had a manner of conducting warfare. Hittites code based on natural justice and equality, war was held by declaration. They were habituated to sign peace treaty when enemy cities capitulated, it was system to protect occupied areas citizens and structure. In ancient period, Buddhism and Persian Civilization were flourished Buddhism established with a mission of compassion, to be sympathetic to each other and mutual co-operation also found in this civilization.

Ancient India:

Humanitarian law was developed in a great extent in an ancient India. The main provisions of humanitarian law were published in the noble religious books namely Ramayan, Mahabharat and Manu Smriti, which are stated as below:

Weapons of warfare:

In ancient India, the rule was based on the principle of equation of armed units, that same and equal arms were used by both parties in the war. This was named as "The Principle of fighting like to like".

In ancient India, it was prohibit to use of hyper destructive weapons which is harmful arms in the battlefield and can demolish the combatants and civilians. The war was confined to conventional weapons as much.

Weapons causing unnecessary suffering was prohibited. Manu lays down that weapons of Kutayuddha should not be used by a king in wartime. Poisoned or barbed arrows were prohibited in the battlefield ensured in Mahabharata also.

Objects of Violence in War:

The religious place, civil goods and civilian not to be used for military purpose. Houses of individual or civil property was not in the hands of the armed forces and could not to attach on destroyed by fire or any arms. Any city or town not to be target for attack in the battlefield. According to Agni Purana, flower garden and any types of prayer place not be target for work.

In regard to individuals, a number of rules existed in ancient India. According to the code of Manu, a person (soldier). Shall not attack the sleeping person, the person without arms, the person without cloth, the combatants who voluntarily surrendered, the persons who do not participate in the war but only observe the war, the persons who not participate in the war but may join in the personal conflict. The person who are standing in the street, but no participation in the war, the persons who are loosed hair, the persons who sit in the street without participation in the war and the persons who say that "we are yours" should not be attacked.

According to Mahabharata, an individual who is driver of cart, cowboy, women, children, old aged persons, voluntary surrendered combatants, the combatants whose arms have been

already demolished not to be attacked. Like that, Sukrani states very tired persons, the combatants without arms, the combatants without cloth and the combatants who voluntarily surrendered, the persons who are engaged with the supply of water or foods or any other welfare jobs in the battlefield on king of the state not be attacked.

From the above discussion, it is clearly understood that, even on ancient period, there was distinction between combatants and non-combatants. From the concept of combatants and non-combatants, International Humanitarian law become its development.

Prohibited acts in the warfare:

Treachery:

- Not to attack at night, it was forbidden by the code of Manu.
- Not to lead or guide the own combatants to wrong way.
- Not to make "booby traps" or not to use land mine, said in a part of Kutayuddina.

Restrictions on the armed forces:

- Not to attack the civilians.
- Not to destroy the standing crops.
- To behave humanly with the war prisoners and to keep the war prisoners outside the warfare area.
- To keep the war prisoners as slaves till 1 year if the offense is prove exclusively.
- Not to kill the war prisoners to any level of any circumstances.
- To arrange the marriage for the woman war prisoner.
- To give the privileges to the war prisoners for returning their home.
- To ensure proper treatments by expert physicians to the sick and wounded combatants.
- To give chance to the war prisoners to return their home after cure from hard diseases.
- To release the war prisoners after cure promptly and
- To keep essential medicines and trained nurses for taking proper care of the sick and wounded combatants etc.

Greek civilization and stoicism:

- There organized social system in ancient Greece.
- Natural law and natural justice were the basic traits of the Greek law and the humanitarian law was really originated from natural law and natural justice.
- The great philosophers named Plato and Aristotle declared not to kill the war prisoners or not to keep the war prisoners as slaves which enriched the humanitarian law.
- In 310 B.C the founder of Stoic School remarked that man can conquer the heart of other man by love and affection and even an enemy also will be a friend by humanity on by human behavior.

Roman Civilization:

- One of the best-civilized nations was Roman Nations in an ancient civilization.
- Romans as civilized nations were ruled by specific rules and regulations.
- Romans were more realistic and more organized nation than that of Greek civilization.
- The most important two basic principles of law were followed by Roman Nation in their legal system. As (a) Jus Natural (Natural Law) – Applicable only for Romans (b) has Gentium (International law) – Applicable for Romans as well as foreigners.
- More famous personalities of Rome had more contributions to the development of humanitarian law.
- One of the famous emperors namely Mr. Marcus Aurelius said that, “... As emperor, Rome is my city and my country, but as a human being, the whole world is my country. Only what is good for both of these societies can be good for me”.

In conclusion, we can say that modern humanitarian law is really debt tot he great philosophers of Roman and stoic for the concept of just war which is so closely related to the development of humanitarian law. So the basic principle of the war that no lear Justa Causa. War may be only declared if anyone is attacked by others and only in this context as a revengeful act war may be constituted against the enemy. By above discussion we can say that the development of humanitarian law was originated in Asia and Europe which was later spread in a great extent in the medieval period of the world.

Development of humanitarian law in the medieval period:

- This is religion-based.
- Vital role mainly played by different religions for development. As-Christianity, Chivalry, Islam etc.

So, the main contributions by the above-mentioned religions which are closely related with the development of humanitarian law are stated below:

Christianity:

The messages of Christianity:

- All men are the creation of same creator and son/daughter of same God and all are entitled to enjoy beautiful life.
 - Brotherly behavior to each other.
 - Not to engage others as slaves.
 - To maintain good relations with neighbors.
 - Human love is reflection of heaven.

(b) Sayings of Jesus Christ -not to kill anyone and to love the enemy.

(c) Saint Augustine, one of the great jurists of Christianity introduced and developed the concept or Doctrine of just war and encourage to settle the war mutually.

(d) Considerations or standards of just war-

- Just war would be valid reasons.
- Reasons should be real.
- War should not be based on rifle or whimsical reasons.
- Aggression is regarded as one of the reasons of just war.

(e) Justice (God believer) thinks that war/attack is punishment on penalty by God for them and in this sense Saint Augustine said that "when a just war is waged it constitutes a struggle between sin and justice and any victory, even it is gained by sinners, humbles the vanquished who by the judgment of God suffer the punishment and penalty due to their evil deeds".

Chivalry:

- Chivalry based on the religion of middle age or knighthood.
- It was developed in Germany at the time of feudalism.

- War was held by carrying arms and by rising upon horse.
- War was instituted for honorable or respectable job.
- The knighthood led the war by expert warrior or fighter.
- The assigned obligation for constituting war was considered divine obligation by fighters.
- Everyone sworn to save the deity, the king and the queen and the violation of commitment or assigned obligations was considered as wrongful and sorrowful etc.

The development of humanitarian law in middle age was held by the following steps:

- (i) War by declaration.
- (ii) To raise the flag by both parties of the war
- (iii) Prohibition to use some arms.
- (iv) War was considered as the game of chess.
- (v) After Crushed closely relation created between Christianity and chivalry.

Islam has developed International Humanitarian law. It was thought by Islamic thinkers that the contributions for development of humanitarian law were mainly originated from Islam than that of Western civilization and the main provisions regarding development of humanitarian law by Islam were stated as below:

Situation and treatment of prisoners of war.

- More provisions mentioned in Quran and Hadith.
- War is considered as just war or Jihad or common effort or noble war or religious war.
- To pay proper respect and to protect the war prisoners.
- To encourage to release the war prisoners.

The fate of non-combatant population on civilian:

- Not to kill civilian.
- Saying of Islam – “Fight in the way of God those who fight against you, and do not attack anyone, for God has no love for the unjust”.
- To pay proper respect and to protect the civilian and civil goods which really basic needs of mankind for their existence.

- Not to attack the babies or children, religious leader, old aged persons, women, wounded persons and the persons who are hidden in any way.
- Not to attack the property, town, civil structure and standing crops.
- Not to destroy the civilians house, essential goods and pet animals etc.
- Not to steal or loot the enemies property.

The problem of Slavery:

- It is noble task recognized by Islam and encouraged anyone to release the slave and it is said by Prophet (Sm) that the right path of heaven is to release slave.
- To behave with the slaves brotherly.
- To pay proper respect and to protect in all respects.
- Slavery is considered a sin by Islam.
- No revengeful act against slaves.
- Not to deadish any limbs of the body or not to mutilate or not to open or not to do any in human behavior etc.

Development of Humanitarian law in modern Times:

The development of humanitarian law in modern times is based on enactments and organization and it may be discusses by following points:

The three main trends:

The Geneva, The Hague and the New York Trends.

The International humanitarian law is a recent origin in present time. Even in the distant past, military leaders sometimes ordered their troops to shape 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 the side, prisoners of war to be protected and exchanged without ransom and sick and wounded to be cared for and not to be regarded as prisoners of war. In the course of time, these and such like practices gradually developed into a body of 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 tot he 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 others 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 armed conflict, mainly from the aspect implementation 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.

The Geneva Trend:

In 1949, four Geneva conventions were 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 too international armed conflicts. However, all the four convention contain a common Article which is applicable in armed conflict. However, all the four convention contain a common Article 3 which is applicable in armed conflict not of an international character occurring in the territory of one of 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 Convention of 1949 are regarded as "laws of Geneva or Four Geneva Conventions".

Geneva laws deal the protection of the rights of the people who are present in the war but not participating in the war.

- 1st Geneva Convention 1949 deals the protection of the wounded and sick in the battlefield.
- 2nd Geneva Convention 1949 deals the protection of the wounded sick and shipwrecked members of armed forces at sea.
- 3rd Geneva Convention 1949 deals the protection of the war prisoners.

- 4th Geneva Convention 1949 deals the protection of civilian population.

The Huge Trend:

At the First Peace Conference in 1899, four conventions were established whereas at the second peace conference in 1907. 13 conventions were established, the most important for the development of International Humanitarian law was the Huge 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 Huge convention No. IV of 1907.²¹ 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 case 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”.

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, protocol was adopted for the prohibition of the use in war of asphyxiating, poisonous 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.

Mainly the Huge convention was adopted in 1899 and later it was amended in 1907 deals the protection of the rights of the persons who are present in the war and participate in the war but the participants should be weak, sick and wounded and exclusively it was considered as the laws of war.

The New York Trend:

The United Nations did not take any interest to further development of IHL. 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 2nd world war. The basis of their prosecution lay in the charter of the International Military Tribunal.

²¹ [Schindler D. and Toman, J (Ed.), A collection of Conventions, Resolutions and other Documents (Henry Dunant Institute, Geneva, 1988) p. 70].

The charter defined three categories of war crimes, namely, crimes against peace, crimes and crimes against humanity. 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 of the Tribunal determined that justice so required. In 1946, the United Nations General Assembly reaffirmed these principles as generally valid principles of International Law.²²

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.

- 1st optional protocol, 1977 deals the protection of the persons in the battlefield in International conflict.
- 2nd optional protocol, 1949 deals the protection of the persons in the battlefield in international conflict.
- No provisions in the said 2 protocols regarding restrictions on the use of certain conventional or hyper destructive weapons in war.

Weapons Conventions, 1980 was adopted by the effort of UNO. The official name of this convention is, “The convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects”. In brief, this convention is considered as “weapons convention”.

Conclusion

we can say that, the above-mentioned instruments are considered as modern documents and in this context, Mr. Jean Pictet said that these instruments are regarded as milestone for the development of mankind and which are so closely related to the development of IHL in modern times and by these instruments the IHL achieved a separate international shape and structure of law.

Chapter 3: Relationships between International Humanitarian Law and Human Rights

²² General Assembly Resolution No. 95 (I)]

Introduction

Humanitarian law is a new term of international law, was proposed by Jean Pictet in 1950. According to Jean Pictet, “Humanitarian law is that considerable portion of international law which is inspired by a feeling for humanity and is centered on the protection of the individual in the time of war”.²³ This law is based in Geneva and Hague convention.

In 1968 Tehran International conference was held about human rights in armed conflict by United Nations and in this conference UNO was specially assigned to take proper steps regarding protection of human rights in wartime. So, it can be said that humanitarian law is one of the branches of human rights which deals mainly the protection of the rights of men in wartime.

The war of Vietnam, Nigeria-Biafra, Middle East, India, Pakistan etc inspired the world community to take initiatives regarding the protection of the rights of men in wartime. So in the time of armed conflict, humanitarian law is closely related with human rights.

Human Rights:

Human rights can generally be defined as those rights which are inherent in our nature and without which we can not live as human being. Human rights and fundamental freedoms allow us to fully develop and use our human qualities. Our intelligence, our conscience and satisfy our spiritual and other needs. Justice Krishna Iyer-Human rights are those essential rights without which a man ceases to be a man and humanity in man is taken away.

Human rights are sometimes called fundamental rights on basic rights or natural rights. As fundamental on basic rights, they are those which must not be taken away by any legislature and which are offer set out in the constitution. As natural rights they are seen as belonging to men and women by their very nature. Philosophical development by – John Lock, Voltaire, Rousseau, emphasis on the human dignity. The primary human rights instruments are the UN Charter and Universal Declaration of Human Rights 1948. The other subsequent development of Human Right’s Laws are International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on Eliminations of all forms of Discrimination against women, European Convention on Human Rights, African Charter on Human Rights and American

²³ Jean Pictet, Op. Cit, 1

Convention on Human Rights. “All men are created equal, they are endowed by their creator with certain inalienable rights, that among them are life, liberty and pursuit of happiness”, according to American Declaration of Independence in 1776. Human rights are typically called the rights of man or natural rights and represent an idea that has world wide acceptance now. The law of nature date back to antiquity, but the nation and the doctrine of natural, inalienable rights of man pre-existent to and higher than the positive law of the state seems to be of more recent usage.

Humanitarian law:

Restrictions on hostile activities are to be found in many cultures and typically originate in religious values and the development of military concepts. The extent to which these customs resemble each other is of particular interest and in general their similarities relate both to the expected behavior of combatants between themselves and to the need to spare non-combatants.²⁴

The major characteristics of humanitarian law which first tends to strike a human rights lawyer is the fact that the law makes allowance in its provisions for actions necessary for military purposes. Much of it may therefore not seem very “humanitarian”, and indeed many lawyers and military personnel still prefer to use the traditional name, “the law of war”, on “the law of armed conflict”. The way in which humanitarian law incorporates military necessity within its provisions is of particular interest when comparing the protection afforded by this branch of law and human rights law.

Impact of human rights on humanitarian law. Some provisions allow the military needs in a particular situation to override the normally applicable humanitarian rule. These provisions resemble more closely the limitation clauses commonly found in human rights treaties. Some provisions introduce the limitation within the body of the protective rule, for example, medical personnel cannot be attacked unless they engage in hostile military behavior. Secondly, certain protective actions required by the law are restricted by the military situation. For example- parties to a conflict are to take “all possible measures”, to carry out the search for the wounded²⁵ and dead, and “whenever circumstances permit” they are to arrange truces to permit the removal of the wounded. There are also a number

²⁴ N.B. For an interesting survey of these customs from different parts of the world, See part 101 International Dimensions of Humanitarian QW, UNESCO, Paris, Henry Dunant Institute, Geneva, 1988.

²⁵ N.B: Article 15, First Geneva Convention, 1949.

of limitation clauses that refer directly to military necessity. For example, immunity may in “exceptional cases of unavoidable military necessity” be withdrawn from cultural property under special protection.²⁶ Other examples are Article 53 of the Fourth Geneva Convention which prohibits the destruction of property by occupying authorities in occupied territory “except where such destruction is rendered absolutely necessary by military operations”, and Article 54 of 1977 Protocol I which allows the destruction of objects indispensable to the survival of the civilian population in a party’s own territory when this is “required by imperative military necessity.

Unlike human rights law, however, there is no concept of derogation in humanitarian law. Derogation in human rights law is allowed in most general treaties in times of war on other emergency threatening the life of the nation.²⁷

Application of Humanitarian Law

Humanitarian law is mainly applied in the time of international conflict as well as in time of internal armed conflict, but human rights is applied in the peaceful time and the main function of the human rights is to protect the rights of the citizens of concerned state and the main obligation of the member state of international convention is to execute the human rights. As human rights is internal matter of the state, human rights are suspended in the state emergency period but common Article-3 of 4 Geneva conventions and two optional protocols are applied in the time of internal armed conflict.

Conceptual similarities in Humanitarian Law and Human Rights law. The most important general observation to be made is that, like human rights law, humanitarian law is based on the premise that the protection accorded to victims of war must be without any discrimination. This is such a fundamental rule of human rights that it is specified not only in the United Nations Charter but also in all human rights treaties. One of many examples in humanitarian law is Article 27 of the fourth Geneva Convention of 1949:

²⁶ N.B: Article 11, Hague Convention for the protection of cultural property in the Event of Armed Conflict.

²⁷ N.B: Article 4 of the International Covenant on Civil and Political Rights, 1966. Article 15 of the European Convention on Human Rights, 1950, Article 27 of the American Convention on Human Rights, 1969.

“...All protected persons shall be treated with the same consideration by the party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion”.

Victims of war as those persons directly in the power of the enemy, are not to be murdered as this amounts to an unnecessary act of cruelty. These persons are mainly protected by the 1949 Geneva Conventions, with some extension of this protection in 1977. Additional Protocol I, as far as the protection of life during hostilities is concerned, it is obvious that the lives of combatants cannot be protected whilst they are still fighting. However, humanitarian law is not totally silent even here, for the rule that prohibits the use of weapons of a nature to cause superfluous injury or unnecessary suffering is partly aimed at outlawing those weapons that cause an excessively high death rate among soldiers.²⁸

This reasoning however, is most clearly stated in the St. Petersburg Declaration of 1868”... the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy. This object would be exceeded by the disabled men, on whom their death is inevitable...”

The most important contribution of Protocol I of 1977 is the careful delimitation of what can be done during hostilities in order to spare civilians as much as possible. The protocol protects life in a way that goes beyond the traditional civil right to life. First, it prohibits the starvation of civilians as a method of warfare and consequently the destruction of their means of survival (which is an improvement on earlier customary law). Secondly, it offers means for improving their chance of survival by, for example, providing for the declaration of special zones that contain no military objectives²⁹ and consequently may not be attacked. Thirdly there are various stipulations in the Geneva conventions and their Additional protocols that the wounded must be collected and given the medical care that they need. In human rights treaties this would fall into the category of “economic and social rights.”³⁰

²⁸ N.B: The most recent codification of the prohibition of the use of weapons of a nature to cause unnecessary suffering is in Article 35 (b) of 1977 protocol I.

²⁹ N.B: Article 14 and 15 of the Fourth Geneva Convention and Article 59 and 60 of 1977 Protocol I. It should be noted, however, that a non-defended area was protected from bombardment in customary law.

³⁰ Article 12 of the ESc covenant recognizes that everyone has the right to “the enjoyment of the highest attainable standard of physical and mental health.” This goes much further of course that

Fourthly, the Geneva Conventions and their protocols specify in considerable detail the physical conditions that are needed in order to sustain life in as reasonable a condition as possible in an armed conflict. Thus, for example, the living conditions required for prisoners of war are described in the Third Geneva Convention and similar requirements are also laid down for civilian persons interned in an occupied territory. With regard to the general population an occupying power is required to ensure that the people as a whole have the necessary means of survival and to accept outside relief shipment of necessary to achieve this purpose.³¹

There are also provisions for relief for the parties own populations, but they are not as absolute as those that apply in occupied territory.³² Once again, these kinds of provisions would be categorized by a human rights lawyer as “economic and social”.³³ Finally in this selection of provisions relevant to the right to life, humanitarian law lays down restrictions on the imposition of the death penalty, in particular, by requiring a delay of at least six months between the sentence and its execution, by providing for supervisor mechanisms, and by prohibiting the death sentence from being pronounced on persons under eighteen or being carried out on pregnant women or mothers of young children. Also of interest is the fact that an occupying power cannot use the death penalty in a country which has abolished it.³⁴

The next “hard-core” right is that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Humanitarian law also contains an absolute prohibition of such behavior, and not only states this prohibition explicitly in all the appropriate places³⁵ but goes still further, since a large part of the Geneva conventions can be said in practice to be a detailed description “of how to carry out one’s duty to treat victims humanely.

what is provided for in humanitarian law, but it is the only human rights provision under which the right to receive needed medical treatment could be categorized.

³¹ Article 55 of the Fourth Geneva Convention and Article 69 of Additional Protocol I.

³² Article 23 of the Fourth Geneva Convention and Article 70 of Additional Protocol I.

³³ Article 11 of the ESC covenant recognizes the right of everyone to “an adequate standard of living including adequate food, clothing and housing.

³⁴ Article 68 and 75 of the Fourth Geneva Convention.

³⁵ For example: Article 3 common to the Geneva conventions prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.”

As far as the prohibition of slavery is concerned, this is explicitly laid down in 1977 protocol II, the possibility of slavery is furthermore precluded by various forms of protection given elsewhere in the Geneva Conventions.³⁶

The protection of children and family life is also given a great deal of importance in humanitarian law. It is taken into account in a number of different ways, such as the provision made for children's education and physical care the separation of children from adults if interned (unless they are members of the same family) and special provisions for children

education and physical care the separation of children from adults if interned (unless they are members of the same family) and special provision for children's education and physical care, the separation of children from adults if interned (unless they are members of the same family), and special provisions for children who are orphaned or separated from their families.³⁷

The family is protected as far as possible by rules that help prevent its separation by keeping members of dispersed families informed of their respective situation and were about and by transmitting letters between them.³⁸

Respect for religious faith is also taken into account in humanitarian law, not only by stipulating that prisoners of war and detained civilians may practice their own religion.³⁹ But also by providing for ministers of religion who are given special protection.⁴⁰ In

³⁶ Article 4 (2) (f).

³⁷ For further detail, see D Plattner, "Protection of children in international humanitarian law". IRRC.

³⁸ The articles are too numerous to list individually but the majority are to be found in the Third and Fourth Geneva Conventions and their Additional Protocols.

³⁹ Article 17, First Geneva Conventions, Article 120, Third Geneva Convention, Article 130 Fourth Geneva Convention.

⁴⁰ In particular Human Rights watch, which has used humanitarian law in a number of its reports, e.g. *Needless Deaths*, issued in 1992, on the second Gulf war. A large number of these organizations have recently began a campaign to reduce the severe problems caused by the indiscriminate use of land mines by calling for better respect for existing humanitarian law and for the eventual of the use of anti-personnel mines.

addition the Geneva conventions stipulate that if possible the dead are to be given burial according to the rites of their own religion.⁴¹

This very brief review is by no means an exhaustive list of the ways in which humanitarian law overlaps with human rights norms. However, it should be noted that there are a number of human rights norms. However, it should be noted that there are a number of human rights, such as the right of association and the political rights that are not included in humanitarian law because they are not perceived as being of relevance to the protection of persons from the particular dangers of armed conflict.

Conclusion:

Humanitarian law treaties are all universal and there are no regional systems which could encourage a perception that the law varies from one continent to another. It's been seen that humanitarian law does not present the kind of theoretical difficulties encountered by human rights law as regards "first", "second", and "third" generation rights. Thirdly, the most-politically sensitive aspect of human rights law, namely, political rights and mode of government, is totally absent from humanitarian law.

There can be no doubt that the growing prominence of human rights law in recent decades is largely due to the activism of non-governmental human rights organization. Several have now begun to use humanitarian law in their work⁴² and may well exert a considerable and may well exert a considerable influence in the future. A perception of human rights has in effect done so and will continue to be of importance in the future. Another area in which interest in human rights could help further develop humanitarian law is that of internal armed conflicts. Common Article 3 and 1977 protocol II are much less far-reaching than the law applicable to international armed conflicts and yet internal armed conflicts are more numerous and are causing untold misery and destruction. Given that human rights law is primarily concerned with behavior within a state, it is possible that resistance to further

⁴¹ Article 17, First Geneva Conventions, Article 120, Third Geneva Convention, Article 130 Fourth Geneva Convention.

In particular Human Rights watch, which has used humanitarian law in a number of its reports, e.g. *Needless Deaths*, issued in 1992, on the second Gulf war. A large number of these organizations have recently begun a campaign to reduce the severe problems caused by the indiscriminate use of land mines by calling for better respect for existing humanitarian law and for the eventual of the use of anti-personnel mines.

responsibility in internal armed conflicts will be eroded by human rights pressure. We have already seen how there are moves towards further regulation in states of emergency⁴³ which have been influenced by humanitarian law although they are outside its sphere of action. It may well be, however that states will recognize their own interest in respecting humanitarian law and will not in future perceive themselves as being induced to show such respect solely because of human rights activist. The benefits of respecting humanitarian law are self-evident, in particular the prevention of extensive destruction and bitterness so that a lasting peace is more easily established.⁴⁴

Chapter 4: Protection of Prisoners and Women in the International Humanitarian Laws

Introduction

Originating the distance part, war is a common name. Wars are taking place even now and will continue to take place in future also. So, the normal thing is that, when there is a war, there must be prisoners of war. From Ancient time, prisoners of war could be killed, and they were very often at once butchered or offered as sacrifices to the Gods, though, “Mahabharata epic and the rules embodied in the legends of Manu, the first man, lay down principles for warriors that seem far in advance of their time: warriors are forbidden to kill enemies who are disabled and those who surrender.⁴⁵ Who are prisoners of war? The person who is under enemy combatants and enemy territory is regarded as prisoner of war. The jurist namely Mr. Frits Kalshoven defined relating to prisoner of war that combatants who fall into enemy hands are prisoners of war from the very moment of capture. According to Article 12 of the Third Geneva convention 1949, we can say that those who are under enemy hands are called as prisoners of war but sole person or military unit is not considered as prisoners of war.

The 3rd Geneva Convention 1949 and the protection of the prisoners of war:

⁴³ Supra.

⁴⁴ The importance of humanitarian law for facilitating the return to peace was already indicated in nineteenth century instruments, including the Brussels Declaration of 1874.

⁴⁵ Jean Pictet, Development and Principle of International Humanitarian law, p. 9 (Martinus Nijhoff Publishers, 1985).

The main provisions in relation to the projection of the different enormous essential rights of war prisoners are stated categorically as below:

Protection and care of war prisoners:

Article 13 and 14 of the 3rd Geneva Convention are connected with this. To ensure human services to the war prisoners in all times and in all phases. It is prohibited to inhuman actions against war prisoners. To do revengeful acts against war prisoners is also strongly barred. To give proper honor to war prisoners concerning their respective personalities and status etc.

Right to information of war prisoners:

According to Article 17 of the 3rd Geneva Convention, it is the right to information of war prisoners. The authenticate information concerning war prisoners, such as name, status, birth, date, army regimental number, serial number and other information should be prepared properly and placed to proper authority.

Proper safety to the concerned camp:

Release as parole and carrying everyday expenditure of war prisoners:

Article- 15, 19, 21 of the Third Geneva Convention are related with the proper safety to the concerned camp, release as parole and carrying everyday expenditure of war prisoners. It is the obligation of parties to keep free the camp of the war prisoners from any types of danger parole release may be ensured by both parties of war it is necessary to the concerned affected war prisoners. Expenses related to the fulfillment of basic demands of war prisoners would be carried by the concerned parties of war.

Maintenance of camp and language of war prisoners:

Article 41 of the 3rd Geneva Convention is related with this. The camp of war prisoners is maintained by a commissioned officer. The concerned occupying authority or concerned party of war should speak with war prisoners in the respective language of war prisoners.

To ensure good behavior to war prisoners and permanent release of war prisoners:

The convention of in Article-21, paragraph two lays down that the prisoners of war may be partially or wholly released on parole or promise. But this is subject to one reservation as provided in paragraph there – the laws and regulations of the power on which the prisoners depends must be respected and they may allow or forbid the prisoner to accept liberty on parole or promise. This reservation is imperative for the Detaining Power.

Surety of the fulfillment of basic needs or demands of war prisoners:

To give proper security to live of war prisoners and to make sure concerning fulfillment of basic demands of war prisoners, for example: food, residence, cloth, treatment, religion etc. said in the 3rd Geneva Convention, 1949.

To employ the war prisoners with the different jobs:

Article 49 and 50 of this the 3rd Geneva Convention, 1949 are related with this. Physically competent persons may be in employment. Commissioned Officer may not be engaged with any types of jobs and non-commissioned officer may only be in use for supervisory functions. Any war prisoner may not be busy for military purpose. Not to engage the war prisoners for metallic or machinery or chemical industry-related works which are actually more injurious to human body.

Right to upholding of communication:

Article 70, 71 and 72 of the 3rd Geneva Convention, 1949, gives the right to upholding of communication. To make sure to the war prisoners to maintain the proper communication with their relatives. To give opportunity to the concerned war prisoners to go to perfect hospital for better treatment of them. It is the right to provide proper privileges and advantages to the war prisoners to write letter to their respective relatives by using capture or postal card under the supervision of occupying state and to render proper safety to the war prisoners relating to their receipt of postal parcel or collective shipments, as for example: Red Cross Parcel.

Right to placement of complaint:

Article 78 of the 3rd Geneva Convention concerned about affected war prisoners. The war prisoners may place complaint to the proper authority regarding the nature of their actions and others and accordingly the located complaint should be resolved in proper way.

To ensure rule of law and neutral criminal judicial proceedings:

Article 82 and 85 of this convention are related with this. War prisoners may take requisite lawful sanctuary (protection) under laws of war, regulations, orders and rules of war. Occupying state should behave with war prisoners subject to proper protection of law. The laws of war should be maintained properly by both parties of war and it is more important for both parties of war to give perfect honor to the laws of war. The trial should be maintained by considering the laws of war. To give opportunity to the concerned affected war prisoners to defend. Trial should be held in a good, free, fair, neutral environment and it should be considered open trial.

The right of the protecting power and the ICRC to visit prisoners of war:

Today the primary mechanism relied on by the states to ensure the implementation of the Third Geneva Convention Relative to the treatment of prisoners of war, 1949 and Additional Protocol I of 1977 is the system of protecting power and of the International Committee of the Red Cross. The term ‘Protecting Power’ was, for the first time, defined in Article-2 (c) of Protocol I as follows:

“Protecting Power” means a neutral or other State not a party to the conflict and accepted by the adverse party and has agreed to carry out the functions assigned to a protecting power under the convention and this protocol. The role protecting power as well as of the ICRC were given a formal recognition by the 1929 Geneva Convention Relative to the treatment of prisoners of war in Article 86 and 88 respectively. By recording the role of the protecting power (and of the ICRC), the 1929 Prisoner of War Convention provided the legal basis for its humanitarian work and implied an initiative which the protecting power was expected to assume by the High Contracting Parties and thus distinguishing between its customary political function and the new humanitarian concern.

The ICRC's main function being humanitarian, to ensure that victims of war are treated humanely, it has never exercised and does not exercise real supervision in the legal sense of the term. The post-world war II era indicates a decline of the protecting power system and expansion of the role of ICRC. One of the reasons given for this is that under the 1949 convention and now also under protocol I Additional, the functions of protecting powers have been greatly extended and so the eligible states are afraid to assume such a change. For the same reasons, even the ICRC was hesitant to accept the role of the substitute of the protecting power.

After 1949, there have been a large number of armed conflicts, both internal and international, but only in three instances have protecting powers been utilized before protocol I of 1977, and in one instance after the protocol, and even in these instance, ICRC's assistance was offered and utilized in Bangladesh context.

The birth of Bangladesh in 1971 was preceded by the outbreak of violence in East Pakistan (as it then was). In July 1971, Pakistan consented to the ICRC's establishment of a Central Tracing Agency in Dacca for missing persons. Then the hostilities between India and Pakistan broke in December 1971, The Parties (including Bangladesh) assured ICRC to apply Geneva Conventions and the ICRC expanded its activities on the basis of Article of the convention to its specific tasks.

Both India and Pakistan agreed to the appointment of Switzerland as their protecting power. However, a dispute arose as to the proper scope of the activities of the protecting power. To avoid an impasse, Switzerland and the ICRC persuaded the belligerents to agree to a division of functions. Under this plan, Switzerland was to carry its representative tasks of the protecting power in the light of the Vienna Convention, while ICRC would provide all possible humanitarian assistance to the prisoners of war. ICRC made regular visits to prisoners held by Pakistan, India and Bangladesh.

From the above, the emphasis of ICRC's contribution to the humanitarian protection is quite apparent, and at the same time they illustrate to limitations of the protecting power in its effective operation in modern conflicts.

From the birth of International Humanitarian law, women had the same general legal protection as men. If they were wounded, women were protected by the provisions of the

1864 Geneva Convention for the Amelioration of the condition of the wounded in Armies in the field, if they become prisoners of War, they benefited from the regulations annexed to the Hauge convention of 1899 and 1907 on the laws and customs of war on land.

From 1929, women have enjoyed special protection under international humanitarian law. In that year, the powers which adopted the Geneva Convention relative to the treatment of prisoners of war⁴⁶ sought to take into account a new phenomenon: the participation of a relatively large number of women in the war of 1914-1918. This international legal instrument contained two provisions of particular interest: “women shall be treated with all consideration due to their sex” (Art. 3). Differences of treatment between prisoners are permissible only if such differences are based on the military rank, the state of physical or mental health, the professional abilities, or the sex of those who benefit from them” (Art. 4).

The protection of women in the Geneva Convention and their additional protocols:

The conventions and protocols protect women both as members of the civilian population not taking part in hostilities and also as combatants, fallen into the hands of the enemy. We shall examine the various aspects of this protection in the following paragraphs giving particular emphasis to differentiated treatment accorded to women in the light of the following principles. International humanitarian law gives expression in law to the fundamental principle of the equality of men and women, specifying this principle in clauses forbidding discrimination.

Articles 12 of the first and second conventions 16 of the Third Convention, 27 of the Fourth Convention and Article 75 of Additional Protocol I and Article 4 of Additional Protocol II provide for treatment, “with any adverse distinction founded on Sex”. 17 is also specified that women “shall in all cases benefit by treatment as favorable as that granted to man (Article-14). This means that women are entitled to all the rights and freedoms specified by the conventions. Accordingly, any discriminatory measure which does not result from the application of the conventions is prohibited.

⁴⁶ Taking advantage of the possibility provided by the Hauge Regulations (Art. 15) for properly constituted relief societies to exercise their charitable efforts the ICRC during world war I (1914-1918) sent delegates to visit

The principle of equal treatment is extended by the further principle that “women shall be treated with all the regard due to their sex” (Article-12 and Article 14). This particular regard is not legally defined, but regardless of the status accorded to women, it covers certain concepts such as physiological specificity, honor and modesty, pregnancy and childbirth.⁴⁷

International humanitarian law makes particular reservations concerning the female sex in various cases, either in general terms (“without prejudice to the provisions relating to their sex”) or in more specific terms (separate dormitories, separate places of detention). One should not deduce from this that the principle of differentiated treatment is not applicable in cases where it is not specifically mentioned (protection against insults and public curiosity, questioning, searches, food, clothing, intellectual, educational and recreational pursuits, sports and games, labor, conditions for transfer, prisoners representatives, identification). An express reference tends to strengthen the scope of the principle, rather than to limit its application, and differentiated treatment is accorded to women even if it is not explicitly mentioned.

It would also be wrong to draw conclusions about a lack of special protection through the following examples. With respect to the labour of prisoners of war, the principle of special treatment for women is referred to (Article 49) while it is not in the case of women internees (Article 95). As to the searching of prisoners of war differentiated treatment is not specifically mentioned in Article- 18, whereas it is in the case of a woman internee, (Article 96). At the time of capture, a prisoner of war must be searched immediately for obvious reasons of security. It is not always possible under these conditions it have a woman available to make the search, whereas in the slower procedure of civilian internment this can be arranged with respect to work by civilian internees, this is optional and there is thus no need to refer to the principle of differentiated treatment.

Conclusion:

International humanitarian law undoubtedly gives extensive protection to women. They benefit not only from all the provision which protocol the victims of armed conflicts in

⁴⁷ Commentary on the Third Geneva Convention, ICRC, Geneva, 1960, Article-14

general. In addition, among the approximately 560 Articles in the Geneva Conventions of 1949 and the Additional Protocols of 1977, about 40 are of specific concern to women.

The adoption of the Fourth Geneva Convention and the two Additional Protocols, women as members of the civilian population continue to be the first victims of indiscriminate attacks against civilians, since the men are usually engaged in the fighting. Article 27 of Fourth Convention, which provides special protection for women against any attacks on their honor and in particular against rape, enforced prostitution or any form of indecent assault did not prevent the rape of countless women in the conflict in Bangladesh in 1971, For example.⁴⁸

We need only think of the tragedy of the “boat people”, even though this is outside the specific framework of armed conflict. With particular regard to women are in the greatest danger of such assault at the time of their arrest or capture and during the interrogation which follows assaults ranging from the threat of rape to obtain “confessions” to the act itself.

Finally, the dissemination of knowledge of these rules by the National Red Cross and Red Crescent societies, or by organization such as the world veterans Federation, can strengthen the existing law. Every made in this respect undoubtedly facilitates the task of those who bear the prime responsibility for the implementation of international humanitarian law and encourages them in their endeavors.

So, we can say that the main focus of the 3rd Geneva convention 1949 is the protection of the different rights of war prisoners in wartime and the 3rd Geneva Convention mainly deals the prohibition of inhuman actions against war prisoners, the prohibition of internal homicide against war prisoners, proper security to life, maintenance of neutral criminal judicial proceedings etc. we know that in wear time, war prisoners are really helpless people and in danger period war prisoners face more troublesome which is evidenced by different prison. As Guan bay of war prisoners of the contemporary world and in maximum cases different development and influential state of the world does not properly maintain the provisions of this convention and my opinion is that every concerned state should follow the above-mentioned provisions in the wartime and we also know that war prisoners are

⁴⁸ Dignity and Honour of Women as Basic and Fundamental Human Rights, by Yougindra Khusha Lani.

considered men and it is the moral obligation of both parties of war to pay proper respect to the war prisoners and to execute properly the different concerned provisions of his convention in relation to the protection of the war prisoners and accordingly proper preservation of the laws of this convention of the world will be more peaceful and my expectation is also like that.

Chapter 5: Protection of the Civilian Population and Implementation of Internal and Humanitarian Laws

Introduction:

The Fourth Geneva Convention relative to the protection of civilian persons in time of war (the civilian persons convention) of August 12, 1949, ensure the high contracting parties undertake to respect and to ensure respect for the present Convention in all circumstances.

The first Geneva Convention (for the Amelioration of the wounded and sick in Armed Forces and Field) and the Second Geneva Convention (for the Amelioration of the condition of wounded, sick and Shipwrecked Members of Armed Forces at sea) are similar, covering land and sea respectively. They embody the main idea which led to the founding of the Red Cross, if a member of the armed forces is wounded or sick, and therefore in no condition to take an active part in the hostilities, he is no longer part of the fighting force and becomes a vulnerable person in need of protection and care.

The Third Geneva Convention (relative to the treatment of prisoners of war) covers members of the armed forces who fall into enemy hands. They are in the power of the enemy state, not of the individuals or troops who have captured them.

The prisoners of war must be:

1. Treated humanely with respect for their persons and their honor.
2. Enabled to inform their next kin and the central prisoners of war agency (ICRC, the International Red Cross) of their capture.
3. Allowed to correspond regularly with relatives and to receive relief parcels.
4. Allowed to keep their clothes, feeding utensils and personal effects.

5. Supplied with adequate food and clothing.
6. Provided with quarters not inferior to those of their captors' troops
7. Given the medical care their state of health demands.
8. Paid for any work they do.
9. Repatriated if certified seriously ill or wounded, (but they must not resume active military duties afterward).
10. Quickly released and repatriated when hostilities cease.

Prisoners of war must be:

1. Compelled to give any information other than their name, age, rank and service number.
2. Deprived of money or valuables without a receipt (and these must be returned at the time of release).
3. Given individual privileges other than for reasons of health, sex, age, military rank or professional qualifications.
4. Held in close confinement except for branches of the law, although their liberty can be restricted for security reasons.
5. Compelled to do military work, nor work which is dangerous, unhealthy or degrading.

Persons protected under the Fourth Geneva Convention:

The convention protects the rights of civilian inhabitants of occupied territories as well as persons who are in the power of a belligerent state of which they are not citizens.

Article 4 defines "Protected Persons" as all those persons who find themselves, in case of a conflict or occupation in the hands of a party to the conflict or occupying power of which they are not nationals of states not parties to the convention, nationals of a neutral state and nationals of a co-belligerent state which maintains normal diplomatic relations with the country in conflict in whose territory they live. Their exclusion is presumably premised on the fact that, if the need arises, the diplomatic missions or the consuls of their own states can ensure effective protection for them. However, their cases are otherwise covered under other provisions of the convention, which cover the whole populations of the states in conflict irrespective of any adverse distinction. Article 13 of Part II brings within the purview of the convention "the whole of the populations of the countries in conflict, without

any adverse distinction based, in particular on race, nationality, religion or political opinion". Thus the whole civilian population is covered, provided the civilians are physically in the territory of a party to the conflict that is bound by the convention. Article 73 of protocol I brings refugees and stateless persons within the ambit of the "protected persons".⁴⁹

The protection of protected persons:

Section I of Part III of the convention deals with the treatment of civilians in the power of the enemy (the territories of the parties to the conflict and in occupied territories). It ensures elementary human rights of the protected persons in the hands of a party to the conflict, which will even be responsible for the treatment given to them by its agents (Article 29). According to 27 Article 27, protected persons are to be treated humanely at all times without any adverse distinction based, in particular, on race, religion or political opinion. Towards this end, the party to the conflict is obliged in all circumstances:

1. Not to use violence against the life and physical integrity of the protected persons.
2. To protect them against all acts of violence or threats thereof and against insults or public curiosity.
3. To respect their persons and honors.
4. To respect their family rights.
5. To respect their religious convictions and practices and
6. To respect their manners and customs (Article 27, Part-1)

It is mentioned in Article 28, women are to be protected against any attack on their honor, in particular against rape, enforced prostitution or any form of indecent assault. But the parties to the conflict are premised to take necessary measures of control and security for the protected persons. A protected person may not be used to render certain areas immune from military operations.

According to Article 31, prohibited form of ill-treatment are physical or moral coercion, in particular, to obtain information from protected persons, as well as, "any measure of such

⁴⁹ Article 73 of Protocol I states, "Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the parties concerned or under the national legislation of the state of refuge or state of residence shall be protected persons within the meaning of Part I and III of the Fourth Convention, in all circumstances and without any adverse distinction.

a character as to cause the physical suffering or extermination of protected mutilation and medical or scientific experiments not necessitated by the medical treatment a protected persons” and also “any other measures of brutality where applied by civilian or military agents” (Article 32).

No protected persons is to be “punished for an offense he or she has not personally committed”. Collective penalties and reprisals against protected persons and their property are prohibited as well as “all measures of intimidation or of terrorism” and pillage are prohibited (Article 33). And finally, to put an end to the most notorious practice adopted by Germany in the two world wars, the “taking of hostages is prohibited” (Article 34).

Relief for the civilian population:

Under Article 23, obliges each High contracting party to allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another high contracting party. Likewise, it should permit essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mother and maternity cases. This obligation is subject to the conditions that:

1. The consignments will not be diverted from their designation.
2. The control is effective and
3. No definite advantage will accrue to the military efforts or economy of the army from these goods.

The Fourth Geneva Convention and human rights law:

It should be stressed that in wartime international humanitarian law coexists with human rights law, certain provisions of which cannot be derogated protecting the individual vis-a-vis the enemy (as opposed to protecting the individual vis-a-vis his own authorities) is one of the characteristics of the law of armed conflicts. A state at war cannot use the conflict as a pretext for ignoring the provisions of that law. Which is by definition applicable to extraordinary situations.

International humanitarian law gives due consideration to military imperatives and seeks to reconcile military necessity with the demands of humanity. Over the countries this law has been gradually adjusted to take account of the realities of war. It is precisely for that reason that it does not provide for general derogation, and that is part of its strength.

The Fourth Geneva Convention contains a number of concessions to state security, military necessity and other requirements of national interest while these provisions allow a degree of latitude within the limits set by the conventions, the general principles of law, in particular that of proportionality, obviously continue to apply.

Generally speaking, the states party to the Fourth Geneva Convention are required to respect the principle of *pacta sunt servanda* and to interpret the treaty in good faith, ensuring that both the letter and the spirit are implemented. In confronting any problem not expressly dealt with in 1949, the state parties must act in the spirit of the Fourth Geneva Convention and the “Martens Clause”.

Protection of civilian persons not protected by the Fourth Geneva Convention:

Article 75 of Protocol I, which is a minimum convention within itself, brings within itself, brings within its ambit all these persons and accord them fundamental guarantees against the power of the enemy.

To be entitled to protection under the Protocol, it is enough that:

1. The person should be affected by the armed conflict, and
2. He is not enjoying more favorable treatment than accorded under the conventions or protocol I.

To be affected by armed conflicts:

Persons who qualify for the protection according to the requirements are those who have fallen into the hands of an adverse party and are not covered under Article 4 of the Fourth Convention, viz, nationals of neutral state, or nationals of the non-parties to the convention, spies and mercenaries who can be their own nationals. Refugees and stateless persons have been brought within the purview of the convention by Article 73 of Protocol I and are now considered as “protected persons” who has failed to meet the minimum requirement of carrying arms openly “during each military engagement”, while he is engaged in a military deployment preceding the launching of an attack in which he is to participate (Article 44), or the mercenary who, according to Article 47, “shall not have the right to be a combatant or a prisoner of war”, are now covered under protocol I, entitled to protection. However, it is not clear whether Article 75. Covers those nationals of a party to the conflict

whom that party for reasons related to the armed conflict, deprives of their liberty on subjects to criminal procedure for example, changing them with treason.

Not to enjoy more favorable treatment:

Persons entitled to the protection of Article 75 should not benefit from more favorable treatment under the conventions or under the protocol. Again, an example of this is the Guerilla fighter who has forfeited his right to be a prisoner of war because of his failure to fulfill the conditions while in combat situation shall be covered under the protocol for the protection of Article 75.

Article 45 (3) of the protocol states: "Any person who has taken part in hostilities, who is not entitled to prisoner of war status and who does not benefit from more favorable treatment in accordance with the Fourth Geneva Convention shall have the right at all times to the protection of Article 75 of this protocol. In occupied territory, any person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Geneva Convention, to his rights of communication under that convention".

Implementation of Internal and Humanitarian Law and the International Committee of Red Cross

From the very beginning international humanitarian law has sought to limit the suffering due to armed conflicts, by protecting and assisting victims of such conflict in so far as possible. There can be no talk of implementing international humanitarian law without placing it within the framework of international law and, in a more general way, against the background of modern world. The UN charter unequivocally outlaws international war, undoubtedly, the right of legitimate defense is recognized by the United Nations Charter (Article 42), but an international war may no longer take place unless at least one of the parties to the conflict violates the United Nations Charter.

States decided in 1949, they adopted the four Fourth Geneva Conventions which are now the basis of international humanitarian law. In 1977 two protocols, additional to the Geneva Conventions of 1949, were adopted: the first relative to the protection of International Armed Conflict and the second relative to the protection of victims of non-international armed conflicts.

The Fourth Geneva Convention 1949 and two additional protocols comprise basic international humanitarian law for the implementation of which responsibility has been mainly imposed on the International Committee of the Red Cross. The International Committee of the Red Cross may adopt steps for the implementation of international humanitarian law in various ways and circumstances, as a substitute for protecting power; central tracing agency; internal disturbances and tensions, non-international armed conflict, action in the event of branches of international humanitarian law.

Implementation during International Armed Conflicts:

Pacta Sunt Servanda: The best guarantee that international humanitarian law will be applied clearly lies in the respect shown by state for this basic maxim. By formally accepting the Geneva Conventions and, in the case of some, by acceding to their Additional Protocols, states have undertaken to ensure that these instruments are respected by everyone under their authority, in respect of any express ruling on the subject in the convention themselves.

When adopting the Geneva Conventions, states saw fit to emphasize still further the obligation to abide by treaties, even though this is an integral part of any international treaty. This is mentioned in Article 1, common to all four conventions, which reads: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances. The significance of the phrase “to ensure respect” will be considered later. It is interesting to note the wealth of precautions in the Geneva Convention and their Additional Protocols concerning the obligation of respect. For each individual concerned to respect humanitarian law, provision of “preventive” means are essential and ought to be looked upon as implicitly contained in treaty obligation directly concerning victims. Their express mention shows that states deemed it necessary not to confine themselves to obligations regarding results, but also to stipulate express obligations as regards means. Furthermore the 1977 protocol I accentuates this tendency. Before the specific Article on that subject, Article 80 states in general way:

Measures for execution:

1. The high contracting parties and the parties to the conflict shall without delay take all necessary measures for the execution of their obligations under the conventions and this protocol.

2. The high contracting parties and the parties to the conflict shall give orders and instructions to ensure observance of the conventions and this protocol and shall supervise their execution.

The wording goes so far as to tell the state how it must assume a responsibility already made clear beyond doubt by the text. Such a strict approach to hard facts is welcome: despite the express obligations as regards means, means are usually still very inadequate.

The application of international humanitarian law in non-international armed conflicts and the international committee of the Red Cross:

“Preventive” is also concerned the international humanitarian law applicable in non-international armed conflict: Article 3 of the conventions of 1949 and protocol II of 1977 are part of international humanitarian law and can in no way be excluded from the efforts made to disseminate and teach that law. There is however no specific provision mentioning application. As violations of Article 3 of the conventions, or of protocol II, cannot be classed as grave breaches, in the strict sense of the term, of the conventions and protocol, there is only an obligation to put an end to them but not obligation to punish their author.

The system of protecting powers is not of course involved and only the ICRC is granted a brief mention, as being able to “offer its services to the parties to the conflict”. In the present section effectiveness of the international committee of the Red Cross during the continuance of the non-international armed conflict will be discussed in the light of common Article 3 of the Geneva Convention of 1949, and protocol additional to the Geneva Convention, 1949 and relating to the protection of victims of Non-international armed conflict, 1977.

Common Article 3 provides that during the continuance of non-international armed conflict persons taking no active part in the hostilities, including member of armed forces who have laid down their arms and those who are hoer de combat by sickness, wounds, detention, or any other reason will 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. To this end the following acts shall remain prohibited at any time and in 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 humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.⁵⁰

The wounded and the sick shall be collected and cared for an impartial humanitarian body, such as the international committee of the Red Cross, may offer its services to the parties to the conflict. The parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the conventions. These provisions shall not affect the legal status of the parties to the conflict.⁵¹

Moreover, Article 5 constitutes an essential step toward universality for the law of Geneva. It has already rendered invaluable service and has been applied in practice in proportion to the goodwill of the states, for it must be acknowledged that some of them evade their

Moreover, Article 5 constitutes an essential step toward universality for the law of Geneva. It has already rendered invaluable service and has been applied in practice in proportion to the goodwill of the states, for it must be acknowledged that some of them evade their responsibilities simply by denying the existence of an international conflict. In order to fill up the gap, protocol II was adopted in 1977.⁵²

Protocol II, therefore applies only to conflict of relatively high degree of intensity, though they do not have to be typical civil wars since recognition of a state of belligerency is not required, nor the existence of a quasi-governmental power on the insurgent side. In every event, as stated in the Article itself, Article 3 of conventions of 1949 and the international committee of the Red Cross always invoke this in conflict not covered by protocol II.

⁵⁰ Paragraph 1 of common Article 3 of the Geneva Convention of 1949.

⁵¹ Paragraph 2, *ibid.*

⁵² For the history of adoption of protocol II see Sylvie Junod, "Additional Protocol I: History and Scope" 33 *Am. U.L. Rev.* 29]

The Role of the ICRC:

The role of the ICRC is to ensure that the conventions are applied. It reports directly to the parties concerned, in principle confidentially, breaches of international humanitarian law that it has itself ascertained. It is however extremely wary if asked to take part in an inquiry into alleged breaches. The atmosphere of bitter recrimination often surrounding such allegations and the indignation natural at a time of armed conflict make the investigator's task extremely difficult. Logically, an inquiry should lead to conclusions that either condemn the accused party or give the lie to the accusing party. In either case one of the parties will find it very hard to accept that result. The ICRC realizes this. It realizes that by agreeing to be an investigation it agrees to be mixed up in polemics that can only harm its protection and assistance activities in at least one of the parties; but as everyone understands, the ICRC cannot work really effective unless it can act in each of the conflicting parties.

As it stand, Humanitarian law enables the ICRC to ensure that humanitarian rules are respected. Representatives or delegates of the protecting powers shall have permission to go to all places where prisoners of war may be particularly to places of internment imprisonment and labour. The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives. (Article 126, Third Convention).⁵³

The movement's statutes specify that one of the ICRC roles is: to undertake the tasks incumbent upon it under the Geneva Convention, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law.⁵⁴

On the strength of the conclusion it draws from its protection and assistance work, the ICRC makes confidential representations to the relevant authorities in the event of violations of humanitarian law. If the violations are serious and repeated and it can be established with certainty that they have occurred, the ICRC reserves the right to take a public stance, it does so only if it deems such publicity to be in the interest of the people affected or threatened. This therefore remains an exceptional measure.

⁵³Article 143 of the Fourth Convention contains similar provisions relating to civilian internees.

⁵⁴Article 5, Para, 2C.

Conclusion:

The Fourth Geneva Convention along with the protocol, have gone a long way in alleviating the sufferings of civilians in armed conflicts. The machinery available with the four corners of its provisions can ensure justice and humanity where previously injustice and human sufferings existed, but much depends upon the will of the state parties to abide and implement the norms set in the convention.

The International Committee of the Red Cross is the only effective international instrument for the implementation of international humanitarian law. This sort of effectiveness is a general term which does not go unquestioned, in the case of armed conflict. Whether international or non-international. Most of the protection of victims during the internal disturbances. Statutes of the International Red Cross and Red Crescent Movement and the International Committee of the Red Cross are the only written provisions in this regard which are used by the international committee of the Red Cross for the protection of the victims and political detainees. In such a situation, the state takes the plea of paragraph 2 of Article I of Protocol II and can create hindrance into the activities of the Red Cross. So, a written convention for the protection of the victims and political detainees is required. The International Committee of the Red Cross may come forward in this direction.

Experience shows that the application of International humanitarian law is cramped by rigid procedure and that its greatest successes appear to have been obtained with the least restrictive procedure and that its greatest success appear to have been obtained with the least restrictive procedure. The growing influence of the ICRC over the years, especially in non-international armed conflicts, clearly shows this just as it shows that "the moderating activities of a third party unconnected with the objectives of the struggle and the exigencies of combat⁵⁵ are still essential.

In connection with the implementation of international humanitarian law it may be suggested and recommended for adoption of an implementation norm which would give more power and authority to the International Committee of the Red Cross or any other international institution for the purpose of effective implementation of international humanitarian law. In the world, it is really needed of supranational court or force, and

⁵⁵ Bugnion, Francois. *Le droit humanitaire applicable aux conflits armés internationaux* : Le problème de Contrôle. *Annales d'études internationales* (Geneva), Vol. 8, 1977, p. 57.

persuasion based on honesty, neutrality and efficacy is probably the essential tool of those wishing to promote the rule of international humanitarian law.

Chapter 6: Findings, Suggestions and Conclusion

Findings

International humanitarian law is increasingly perceived as part of human rights law applicable in armed conflict. This trend can be traced back to the United Nations Human Rights conference held in Tehran in 1968, which not only encouraged the development of humanitarian law itself, but also marked the beginning of a growing use by the United Nations of humanitarian law during its examination of the human rights situation in certain countries or during its thematic studies. The greater awareness of the relevance of humanitarian law to the protection of people in armed conflict, coupled with the increasing use of human rights law in international affairs, means that both these areas of law now have a much greater international profile and are regularly being used together in the work of both international and non governmental organizations.

Governments are principally responsible for the implementation of international human rights and humanitarian law during periods of armed conflict.⁵⁶ During the non-international armed conflicts, governments and armed opposition groups each bear responsibility for their obedience to those norms.⁵⁷

International human rights law proclaims broad guarantees for the fundamental rights of all human beings. In addition, international humanitarian law, as set forth in the four Geneva Conventions of 1949 and the additional protocols of 1977, governs the treatment of combatants and civilians during times of international and internal armed conflict. International humanitarian law reaffirms the principle that, in situations of armed conflict, those persons not directly participating in the hostilities shall be treated humanely.

International organizations can encourage the participants in armed conflicts to respect human rights and humanitarian law. The International Committee of the Red Cross (ICRC) has long played a leading role in working for the application of humanitarian law during armed conflicts, it has also begun to refer to human rights law in situations of internal strife

⁵⁶ International Convention on Civil and Political Rights Article-2.

⁵⁷ Geneva Conventions, Common Article-3.

or tensions not covered by international humanitarian law.⁵⁸ The United Nations General Assembly,⁵⁹ the UN Commission on Human Rights⁶⁰ the International Court of Justice,⁶¹ and several other intergovernmental organizations have occasionally attempted to secure respect for human rights law during armed conflict and have referred on an irregular basis to humanitarian law in such endeavors. The UN Security Council has almost exclusively used humanitarian law in its decisions.

International non-governmental organizations have recognized that human rights violations within their respective areas of concern may occur during armed conflicts. Indeed, serious human rights violations, including arbitrary killings, detention, and ill-treatment, are likely increase in times of armed conflict.

Suggestions

The International Committee of the Red Cross has since the mid-19th century, convened governmental conferences to draft treaties protecting soldiers and sailors wounded in armed conflict, prisoners of war and civilians in times of war. These treaties constitute the core of international humanitarian law which is designed to ensure respect for general principles of humanity during periods of international and non-international armed conflict. In the context of armed conflicts, international humanitarian law provides a stronger and far more detailed basis for the protection of human rights than the International Bill of Human Rights and other UN human rights instrument.

The Principal multilateral treaties that legislate international humanitarian law the four Geneva Convention of 1949 have been ratified by more governments than other human rights treaties, aside from the UN charter and the convention on the rights of the child. The two Additional Protocols of 1977-extended and make more specific the protection of the 1949 Geneva Conventions to international and non-international armed conflicts. The conventions and protocols are as follows:

⁵⁸ First, Second and Third Geneva Conventions, Common Article 9, Fourth Geneva Convention, Article 10, Geneva Conventions, Common Article 3, The Red Cross and Human Rights, ICRC, 38-39 (1983).

⁵⁹ See General Assembly.

⁶⁰ See UN Soc. E/CN. 4/1985/18.

⁶¹ See, "Case concerning Military and Paramilitary activities in and against Nicaragua (Nicaragua V United States).

1. Geneva Convention for the Amelioration of the condition of the wounded and sick in the armed forces in the field (First Geneva Convention).
2. Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea (Second Geneva Convention).
3. Geneva Convention Relative to the treatment of prisoners of war (Third Geneva Convention).
4. Geneva Convention relative to the protection of civilian persons in time of war (Fourth Geneva Convention).
5. Protocol Additional to the Geneva Conventions and relating tot the protection of victims of international armed conflicts (Additional Protocol I).
6. Protocol Additional to the Geneva Conventions and relating to the protection of victims of Non-International Armed Conflicts (Additional Protocol II).

May provisions of the four Geneva Conventions, the two protocols, and the Hague Conventions of 1899 and 1907 are broadly accepted as restating customary international humanitarian law applicable to all countries. Humanitarian law applies especially to armed conflict situations. Which would ordinary qualify as "Public emergencies".

Conclusion

The politics behind classification of armed conflicts as often brought about the failure of international humanitarian law in playing its part. Because of states interest, conflicts continue to happen with breaches of human rights and destruction of property continuing to happen. For international humanitarian law to play a crucial part, it needs to adapt and continuously evolve to cater for the changing dynamics of conflicts experienced today. The United Nations Security Council has began to use humanitarian law, but has been less willing to use human rights law. Both non-governmental organizations and UN bodies should continue to rely on humanitarian law in instances in which it can effectively complement human rights law. Given the challenges presented by humanitarian law, however, organizations should also observe to the experience of the ICRC in seeking to be more effective in safeguarding human rights during periods of armed conflict.

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