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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

EFFECTIVENESS OF INTERNATIONAL HUMANITARIAN LAW IN COMBATING WAR CRIMES AND CRIMES AGAINST HUMANITY

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ABSTRACT

Wars have been a part of the civilization since time immemorial. It brings with itself mass destruction and all sorts of inhuman activities in the form of war crimes and crimes against humanity. War being inevitable, the international community devise various conventions related to rights and duties of the parties to the conflict from time to time. The branch of law under which these conventions are studied is known as International Humanitarian Law. The term 'International Humanitarian Law' is of recent origin. It owes its emergence to Henry Dunant and Guillaume-Henri Dufour. It was used for the first time in 1965 in Resolution XXVIII of the XXII International Red Cross Conference held in Vienna. Earlier, it was known as Law of War. According to the report of the OHCHR Investigation on Sri Lanka, international humanitarian law is responsible for the regulation of the conduct of the parties to an armed conflict by extending protection to those who do not participate or those who cease to participate in hostilities and by the regulation of the means and methods of warfare, pursuing the aim to restrict the use of armed force to the necessary amount for the achievement of the aim of the conflict which can be only to weaken the military potential of the opposite party; irrespective of the causes fought for. The major part of the framework includes the two Hague Conferences of 1899 and 1907, the four Geneva Conventions of 1949 and its three additional protocols of 1977, 1977 and 2005 respectively. International Humanitarian Law has always played a crucial role in punishing war criminals. As far as the contemporary era is concerned, war crimes are being committed in both the Russia-Ukraine War and the Israel-Hamas War. International Humanitarian Law, like any other branch of International Law, is a weak law. Despite the imposition of sanctions by the international community, there is no effect on the status of the wars, Russia being a great power and Israel a great military power. The measure of effectiveness of International Humanitarian Law in combating war crimes and crimes against humanity in these wars is a huge question awaiting their end.

KEYWORDS

War crimes, Crimes against humanity, International Humanitarian Law, Hague Conventions, Geneva Conventions 1949

EFFECTIVENESS OF INTERNATIONAL HUMANITARIAN LAW IN COMBATING WAR CRIMES AND CRIMES AGAINST HUMANITY

War. On hearing the term 'War' one is immediately reminded of the death and destruction caused by war and the bereavement it causes, taking a heavy toll of both life and property. With war, war crimes and crimes against humanity knock furiously at the door of the international community, which has the responsibility of combating them. That is why they devise and revise rules and regulations related to war, from time to time, for the parties in conflict to follow. These consist of general norms of humanity. Basically, they carve out the pattern of behaviour of the parties in conflict towards each other. The branch of Public International Law under which these conventions are studied is known as International Humanitarian Law.

ORIGIN AND EMERGENCE OF INTERNATIONAL HUMANITARIAN LAW

The term International Humanitarian Law is of recent origin. Earlier, it was known as Law of War. It developed into a different branch of International Law when need was felt to eliminate inhuman conditions and revive humanity during conflicts. It establishes what can and cannot be done by parties to the conflict. It seeks to minimize human suffering and protect civilians and combatants who have ceased to take part in hostilities.

The origin of Humanitarian Law can be traced back to the ancient times since the concept of war is in existence. There are some basic norms followed during armed conflicts – not using certain types of ultra destructive weapons, not harming the unarmed, treating everyone humanly and respecting the dead bodies – to name a few. All these principles are followed since Ramayana and Mahabharata Wars and even before that. These principles also find a witty place in Manu Smriti and Rig Veda. Besides Ancient India, they also find place in the Greek Mythology where the Goddess Athena, the

protectress, used to fight civilized wars with discipline in contrast to the bloodthirsty Ares.¹ Islam and Christianity also provide for humanitarian principles during war.

In 1762, Jean-Jacques Rousseau first attempted to pen down the then-existing humanitarian principles through his social contract theory. He contended that the wounded or the prisoners of war should not be further attacked in any form; neither physically nor mentally.²

FORMAL BEGINNING OF INTERNATIONAL HUMANITARIAN LAW

International Humanitarian Law, owes its formal beginning, as a unique term, to Henry Dunant, a Swiss Businessman, and Guillaume-Henri Dufour, a Swiss Army Officer and Engineer. Battle of Solferino was what moved Henry Dunant to take a greater step towards the upliftment of humanity during armed conflicts. The battle was fought between French and Sardinians as allies and Austrians. More than 6,000 soldiers were dead and more than 40,000 were wounded before dawn. A few of them somehow gathered strength and approached Henry Dunant and his neighbours for help. This incident shook Henry's conscience as the situation had become so intense due to lack of medical help and transportation on the battlefield. Therefore, he founded The International Committee of The Red Cross in 1863, with a red cross over a white base as its symbol, to ensure protection and assistance to the victims of armed conflict and strife.³ The term 'International Humanitarian Law' was used for the first time in 1965 in Resolution XXVIII of the XXII International Red Cross Conference at Vienna.⁴ According to the report of the OHCHR Investigation on Sri Lanka, international humanitarian law is responsible for the regulation of the conduct of the parties to an armed conflict by extending protection to those who do not participate or those who cease to participate in hostilities and by the regulation of the means and methods of warfare, pursuing the aim to restrict the use of armed force to the necessary amount for the achievement of the aim of the conflict which can be only to weaken the military potential of the opposite party; irrespective of the causes fought for.⁵

¹ Dr. Rakesh Kumar Singh and Bhanu Pratap, Textbook on Public International Law 251 (LexisNexis, Ghaziabad, 1st edn., 2016, Reprint, 2020)

² Origin and Development of IHL: History and Philosophy, available at: <https://ebooks.inflibnet.ac.in/hrdp08/chapter/origin-and-development-of-ihl-history-and-philosophy/> (Visited on March 28, 2024)

³ History of the ICRC, available at: <https://www.icrc.org/en/document/history-icrc> (Visited on March 28, 2024)

⁴ Dr. H.O. Agarwal, Human Rights 233 (Central Law Publications, Allahabad, 14th edn., 2013)

⁵ V K Ahuja, Public International Law 264 (Lexis Nexis, Noida, 1st edn., 2016)

WAR CRIMES AND CRIMES AGAINST HUMANITY

Following are the three categories of crimes punishable under International Law:⁶

1. Crimes Against Peace: The crimes against peace are:-

- a) planning, preparation, initiation or waging of a war
 - i. of aggression, or
 - ii. violating any international treaty, agreement or assurance; OR
- b) participation in a common plan or conspiracy for the accomplishment of any of these.

2. War Crimes: War crimes are the violations of the laws or customs of war. The list not being exhaustive, these include the following:-

- a) murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in the occupied territory,
- b) murder or ill-treatment of prisoners of war or persons on the seas,
- c) killing of hostages,
- d) plunder of public or private property,
- e) wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

3. Crimes Against Humanity: Crimes against humanity consist of the following:

- a) murder, extermination, enslavement, deportation and any other inhumane activity against civilians, before or during the war, or

persecutions on political, racial or religious basis in execution of or in connection with any crime within the jurisdiction of the Tribunal; irrespective of whether it violated the domestic law of the country where it was perpetrated.

DEFINITIONS OF WAR CRIMES

Following are some important definitions of war crimes as given by different jurists:

- **Prof. Schwarzenberger:** He defined war crimes as those acts which strike at the very roots of international society.⁷ This is the widest possible definition of war crimes.

⁶ Charter of the International Military Tribunal, 1945, Art. 6

⁷ Dr. S.K. Kapoor, International Law and Human Rights 777 (Central Law Agency, Prayagraj, 22nd edn., 2021)

- **Prof. Oppenheim:** He too gave a wider definition of war crimes. According to him, war crimes are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders.⁸
- **Prof. Hans Kelsen:** Prof. Kelsen defined war crimes as the violations of the laws and customs of war.⁹

HAGUE CONVENTIONS

These were two conventions held in 1899 and 1907, respectively, held at The Hague, The Netherlands, for the pacific settlement of international disputes.

1899 CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

The 1899 Hague Convention was the first concrete step towards the codification of International Humanitarian Law. It was mustered at the initiative of Czar Nicholas II. It incorporated the four basic principles of Law of War –

1. **The Principle of Humanity:** The principle of humanity is the Grundnorm of International Humanitarian Law.¹⁰ It is the leading principle around which the other three elements rotate. The principle forbids the infliction of suffering, injury or destruction not necessary for achieving the legitimate purpose of conflict.¹¹
2. **The Principle of Military Necessity:** The principle of military necessity states that a party to an armed conflict may use only those means and measures which are necessary to accomplish legitimate military objectives. Also, such means and methods must not be prohibited by International Humanitarian Law.
3. **The Principle of Proportionality:** The principle of proportionality is the weighing scale of military necessity.¹² It seeks to make a balance between humanity and military necessity. It states that the amount of harm inflicted should be proportional to the infliction required.

⁸ Ibid., 778

⁹ Supra note 7

¹⁰ Supra note 1, p. 245

¹¹ What is IHL?, available at: <https://www.icrc.org> (Visited on March 31, 2024)

¹² Supra note 1, p. 248

- 4. The Principle of Distinction:** The principle of distinction is the core of International Humanitarian Law.¹³ According to this principle all the parties to an armed conflict must necessarily distinguish between combatants and non-combatants.

1907 CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

The Second Hague Convention was initially proposed by U.S. President Roosevelt, but officially convened by Czar Nicholas II. It introduced two supplementary principles to the principle of humanity:¹⁴

1. Belligerents do not have any right to adopt unlimited means of injuring the enemy.
2. Belligerents are prohibited to use arms, projectiles or material calculated to cause unnecessary sufferings.

GENEVA CONVENTIONS, 1949

GENEVA CONVENTION ON THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, 1949

Known as the First Geneva Convention, this convention provided for the wounded and sick members of the armed forces on the battlefield. It provides the wounded and sick with the following rights:

1. Persons not taking an active part in hostilities, members of armed forces who have laid their arms and placed hors de combat by sickness, wounds, detention or any other cause, shall be treated humanely under all circumstances without any distinction.¹⁵
2. Violence to life and person, mutilation, cruel treatment and torture, taking of hostages, outrages upon personal dignity and passing of sentences without previous judgement pronounced by regularly constituted court is prohibited.¹⁶
3. They must not be wilfully left without medical assistance and care and in conditions exposing them to contagion or infection.¹⁷

¹³ Supra note 1, p. 249

¹⁴ Supra note 4, p. 236

¹⁵ First Geneva Convention, Art. 3(1)

¹⁶ Ibid., Art. 3(1)

¹⁷ Ibid., Art. 12

4. The parties to the conflict may conclude local arrangements for the passage of medical and religious personnel to besieged or encircled areas.¹⁸
5. Fixed establishments and mobile medical units must be respected and protected at all times and never be attacked. On falling into the hands of an adverse party, there shall be no change or pause in their duties unless necessary care is ensured by the capturing power.¹⁹
6. Everything related to medical care shall only be used for medical purposes and must not be destroyed.²⁰
7. Their transport shall be respected and protected as that of a mobile medical unit.²¹
8. The Red Cross and Red Crescent must not be used improperly. They must be respected at all times and displayed by medical and religious personnel on medical units and transport.²²

GENEVA CONVENTION FOR THE AMELIORATION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF THE ARMED FORCES AT SEA, 1949

The Second Geneva Convention provides for the wounded, sick and shipwrecked members of the armed forces at sea. It confers upon them the following rights:

1. Right to be treated humanely without distinction on the basis of race, colour, religion or faith, sex, birth or wealth.²³
2. Right to life, dignity and fair trial and right against cruel, humiliating and degrading treatment and torture.²⁴
3. Right to adequate care and right against pillage and ill-treatment.²⁵
4. Shipwrecked persons possess the right against capture and attack and the right to be respected and protected.²⁶

GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, 1949

The Third Geneva Convention is dedicated to the prisoners of war. A prisoner of war is either a

¹⁸ Ibid., Art. 15(3)

¹⁹ Ibid., Art. 19(1)

²⁰ Ibid., Art. 33

²¹ Ibid., Art. 35

²² Ibid., Art. 38-44

²³ Second Geneva Convention, Art. 3(1)

²⁴ Ibid., Art. 1

²⁵ Ibid., Art. 18

²⁶ Ibid., Art. 51

combatant who has fallen into the hands of the enemy, or a specific non-combatant who has been granted the status by International Humanitarian Law.²⁷

In accordance with the Third Geneva Convention, the prisoners of war and civilian internees are infested with the following rights:

1. Their camps must not be located in areas particularly exposed to the dangers of war, neither they should be used to render any point or area immune from military operations.²⁸
2. They must be detained in hygienic and healthy premises. In case this is not possible, they shall be shifted to a more favourable climate as soon as possible.²⁹
3. They should be held in different quarters, and if possible, in separate detention facilities.³⁰
4. Their diet must be properly monitored and they should be provided with sufficient quantity, quality and variety of food daily for the maintenance of their health and nutritional balance in their body.³¹
5. They must be treated humanely and protected from violence, intimidation, insult and public curiosity.³²
6. They should not be tortured physically or mentally and no coercive force should be used against them to secure any information from them.³³
7. While undergoing punishment, a female prisoner of war may not be treated more severely compared to male or female members of the detaining power for a similar offence.³⁴

GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIMES OF WAR, 1949

The Fourth Geneva Convention convene the rights of civilian persons. These are as follows:

1. Safety or neutralized zones may be established by the parties to the conflict to shield the civilian population from the effects of war.³⁵
2. Special protection must be granted to women with respect to their honour, particularly against rape, enforced prostitution or any indecent assault.³⁶

²⁷ Prisoners of War, available at: <http://casebook.icrc.org> (Visited on March 31, 2024)

²⁸ Third Geneva Convention, Art. 23

²⁹ Ibid., Art. 22

³⁰ Ibid., Art. 97

³¹ Ibid., Art. 26

³² Ibid., Art. 13-14

³³ Ibid., Art. 17

³⁴ Ibid., Art. 88

³⁵ Fourth Geneva Convention, Art. 14

³⁶ Ibid., Art. 27

3. Protected persons should not be physically or morally coerced to reveal information.³⁷
4. Reprisals against protected persons, pillage, collective penalties, intimidation, terrorism and taking of hostages is prohibited.³⁸
5. A National Information Bureau must be established by the parties to the conflict. The Bureau shall be accountable for handling all information regarding prisoners of war and protected persons.³⁹
6. The Central Information Agency shall be responsible for collection and transmission of all the information provided by the National Information Bureau.⁴⁰
7. All persons must be able to exchange strictly personal news with their families.⁴¹
8. Protected persons are entitled to protection of their family rights.⁴²
9. In case of occupation, the occupying powers must identify and register the true parentage of all children.⁴³

ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS

ADDITIONAL PROTOCOL I TO THE GENEVA CONVENTIONS, 1977

The Additional Protocol I to the Geneva Conventions created new protections for civilians and the environment during international armed conflicts and solidified existing principles of Customary International Law. It prohibits the following:

1. Means and methods of warfare intended or expected to cause widespread, long-term or severe damage to the natural environment prejudicing the health or survival of the population.⁴⁴
2. Attacks against civilian objects.⁴⁵
3. Starvation of civilians as a method of warfare.⁴⁶
4. Objects indispensable to the survival of civilians to be the objects of reprisals.⁴⁷

³⁷ Ibid., Art. 31

³⁸ Ibid., Art. 33,34

³⁹ Ibid., Art. 136-141

⁴⁰ Ibid., Art. 140

⁴¹ Ibid., Art. 25

⁴² Ibid., Art. 27

⁴³ Ibid., Art. 50

⁴⁴ Additional Protocol I, 1977, Art. 35(3), 55(1)

⁴⁵ Ibid., Art. 52(1)

⁴⁶ Ibid., Art. 54(1)

⁴⁷ Ibid., Art. 54(4)

5. From blocking the passage of any relief consignment, equipment or personnel, even if it is intended for the civilians of the adverse party.⁴⁸
6. Acts or threats of violence with the primary purpose to spread terror among the civilians.⁴⁹
7. Using the presence or movements of civilians to shield military objectives from attacks.⁵⁰

ADDITIONAL PROTOCOL II TO THE GENEVA CONVENTIONS, 1977

The Additional Protocol II is common to all the four Geneva Conventions 1949. Its focal point is non international armed conflicts. It protects the person and honour of all those persons who do not take part or have ceased to take part in hostilities during a non-international armed conflict, irrespective of restriction of their liberty.⁵¹ Relief societies are allowed to offer their services in non-international armed conflicts.⁵²

The Additional Protocol II prohibits the following with respect to non-international armed conflicts:

1. Violence to the life, health and physical or mental well-being of persons, particularly, murder and cruel treatment.⁵³
2. Attacking civilians and acts of violence to spread terror among civilians.⁵⁴
3. Starvation of civilians as a means of warfare.⁵⁵
4. Attacks at works or installations that are likely to cause the release of dangerous forces and severe losses among the civilians.⁵⁶
5. Forced displacement of civilians either within the country or across a border. This is allowed in case of security of civilians.⁵⁷

ADDITIONAL PROTOCOL III TO THE GENEVA CONVENTIONS, 2005

The significance of the Third Additional Protocol lies in the fact that the member states of the Geneva Conventions adopted the red crystal as an additional distinctive emblem for national relief. It has an equal status as that of the red cross and the red crescent. All three have the same meaning and common purpose to imply that the people, buildings and vehicles with the symbols are protected under the

⁴⁸ Ibid., Art. 70 (2)

⁴⁹ Ibid., Art. 51(2)

⁵⁰ Ibid., Art. 51(7)

⁵¹ Additional Protocol II, 1997, Art. 4(1)

⁵² Ibid., Art. 18(1)

⁵³ Ibid., Art. 4(2)

⁵⁴ Ibid., Art. 13

⁵⁵ Ibid., Art. 14

⁵⁶ Ibid., Art. 15

⁵⁷ Ibid., Art. 17

1949 Geneva Conventions and should not be attacked.

SOME IMPORTANT WAR CRIME JUDGEMENTS

International Humanitarian Law has always played a crucial role in punishing war criminals.

THE SCUTTLED U-BOATS CASE (1940) 1 LAW REPORTS OF TRIALS OF CRIMINALS 55

An instructor of the U-Boats ordered their scuttling after they were surrendered to the allied nations on May 4, 1945. As a result, they were scuttled. The accused was arrested and prosecuted for violating the laws of war.

NEUREMBERG TRIAL – THE INTERNATIONAL MILITARY TRIBUNAL, NEUREMBERG (1946)

The Neuremberg Tribunal was established for the trial of the war criminals of Germany. It acquitted three accused and awarded death sentence, transportation for life and long term imprisonment to ten, three and four accused, respectively.

The tribunal laid down the following principles:

1. Abstract entities cannot commit crimes against International Law. They are committed by men and International Law can be enforced only by punishing such men.
2. Being the head of a State or a responsible government official does not relieve a person from the responsibility of a crime under International Law.
3. If a person acted pursuant to the orders of government or superior in committing a crime under International Law, despite having a moral choice, he is not relieved of the responsibility.
4. A pre-existing law is not required to declare an act as a crime and punish it.
5. Waging of aggressive war is the highest international crime with planning and preparation as its two essential ingredients.

TOKYO TRIAL – THE TOKYO TRIBUNAL, TOKYO (1946)

The Tokyo Tribunal was established for the trial of the war criminals of Japan. It awarded death sentences to persons guilty of conducting and organising war and imprisonment to other accused of war crimes.

PELEUS TRIAL – BRITISH MILITARY COURT, HAMBURG (1945)

Peleus, a Greek ship, was sunk by the German U-Boat. While trying to save their lives through life boats, the thirty five crew members were fired at due to which twenty two of them lost their lives. The accused were held guilty and duly punished.

The Court held that prohibition to fire on unarmed enemies is a fundamental usage of war and that there is no duty to observe orders which are not lawful.

ADOLF EICHMANN v. ATTORNEY-GENERAL OF THE GOVERNMENT OF ISRAEL, SUPREME COURT OF ISRAEL, (1962) 136 I.L.R. 277

Eichmann was accused of committing Nazi atrocities upon the Jews. He was awarded death sentence by the Supreme Court of Israel.

The Court propounded the principle of universal jurisdiction in respect of war crimes and genocide which states that every State has the power to try and punish those who participate in the preparation in commission of crimes of universal character.

MAI LAI TRIAL – MAI LAI COURTS MARTIAL, VIETNAM (1970)

Lt. William Calley of America killed the whole unarmed, civilian population of Mai Lai village of Vietnam during the Vietnam War. He was held guilty and awarded life imprisonment through Court Martial.

CHERNIGOV TRIAL – DISTRICT COURT OF CHERNIGOV, UKRAINE (1986)

Grigory Shurub was accused of siding with Germany in 1943 and slaughter of thousands of Ukrainians. The Court awarded him death sentence.

MILOSEVIC WAR CRIMES TRIAL – INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA, HAGUE (1993)

The former Yugoslavian President, Slobodan Milosevic was accused for murders, deportations, persecutions and violations of the 1949 Geneva Conventions during his rule on ethnic Albanians in Kosovo in 1988-89. He was awarded life imprisonment as punishment.

CONCLUSION

The international community has left no tables unturned in its efforts to combat war crimes and crimes against humanity. It is also an individual level responsibility. The international community has devised and acted upon various conventions and conducted the trials of accused on their basis, thereby, punishing the guilty. It takes war crimes and crimes against humanity as a serious threat to international peace. As far as the contemporary era is concerned, war crimes are being committed in

both the Russia-Ukraine War and the Israel-Hamas War. International Humanitarian Law, like any other branch of International Law, is a weak law. Despite the imposition of sanctions by the international community, there is no effect on the status of the wars and war crimes and crimes against humanity being committed, Russia being a great power and Israel a great military power. The measure of effectiveness of International Humanitarian Law in combating war crimes and crimes against humanity in these wars is a huge question awaiting their end.

