International Humanitarian Law: Dialectical Feasibility

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Abstract. An effective implementation of international humanitarian law is not only evaluated by the ability to apply its rules and principles when challenged with situations of armed conflict, but it is also depending upon the determination to look back on the actions that made the international humanitarian law. Recent expansions of armed conflict in the world are persistent reminders of the necessity to emphasis on supporting effectiveness of IHL, without ignoring the weaknesses in the current mechanisms for the enactment and dissemination of standards and values of humanitarian law. What is of fundamental importance is that all actors continue to perform their respective tasks under International Humanitarian Law. This is the main concern of States and non-state parties to armed conflicts, and it is also held by the United Nations, International Organizations, ICRC, National Red Cross, NGOs and other actors involved. The International Humanitarian Law is often violated, so it is legitimate to ask, are there not appropriate mechanisms that ensure its implementation. Ii is paradoxical to see the development of humanitarian law when it seems to be more violations over time and in view of the transformations of the Conflicts. The purpose of this document is to examine the feasibility and the philosophy of the International Humanitarian Law in light of its origin. The International Humanitarian Law, which stands by its values against killing and destruction, continues to evolve at principle, concept and application levels.

Keywords: International Humanitarian Law, feasibility, Human Rights.

1 INTRODUCTION

Man knew fighting before he lit up his cave. His knowledge evolved until he discovered the theory of Right as his arbitrary features evolved until he produced nuclear weapons. Our history experienced turbulence between scholars of peace and heroes of war before we needed heroes of peace and scholars of war.

In what resembles the manifestation of civilization, the International Humanitarian Law emerged in its noble context convicted about its motives and questionable feasibility.

The provisions of the Hague Conventions of 1899 and 1907 were intended to be only a first step in the provision of a code prohibiting or limiting the use of certain methods of warfare. International Humanitarian Law is increasingly seen as forming part of the human rights law applicable in the armed conflicts. This evolution began to take shape during the United Nations Conference on Human Rights, held in Tehran in 1968 (Final Act of the International Conference on Human Rights Teheran, 1968). The Conference revealed that the armed conflicts abolish humanity, peace is vital for the full enactment of human rights and war is their denial.

International Humanitarian Law definitely prohibits attacks against non-combatant, and wants states to protect all those who are not directly participating in the hostilities from attack and violence. They also impose rapid and unrestricted access of humanitarian relief to civilians in need. States have to take every effort to prevent violations from taking place, as well as later investigating and prosecuting war crimes.

Despite of that, the International Humanitarian Law is often violated, so it is legitimate to ask, are there not appropriate mechanisms that ensure its implementation? Is it paradoxical to see the development of humanitarian law when it seems to be more violations over time and in view of the transformations of the Conflicts? (Sivakumaran, 2011)

2 CONCEPTUAL EVOLUTION OF INTERNATIONAL HUMANITARIAN LAW

The implementation of the International Humanitarian Law on armed conflicts depends on the context of the legal issues concerned (DAVID, 2002). Certain perspective have to be treated, to track the evolution of the humanitarian law.

2.1 Perspectives of the War

The fundamental concepts of the laws of war have not changed in a radical way and they are always based on the balance between military necessity and humanity (Oppenheim, 1952). Among its main characteristics, International Humanitarian Law incorporates, in its provisions, the actions that are necessary to achieve military ends. To achieve this balance between military necessity and humanity (Schwarzenberger, 1968), it is conceivable to proceed from derogation clauses four conducts: (1) some actions have no value on the military plan and are, therefore, prohibited, like in private wrongdoings committed by soldiers which, far from helping the army to achieve its military goals; (2) if certain acts can have value on the militarily, it has been accepted that humanitarian requirements prevail; (3) certain rules constitute a real compromised, because both military and humanitarian needs are accepted as important for a given action and are, therefore, both limited to some extent; (4) certain provisions allow, in a situation particular, that military exigencies take precedence over normally applicable humanitarian rule.

Restrictions on the conduct of hostilities meet in many cultures and generally find their origins in religious values and the development of military philosophies. These customs relate both to the behavior expected of combatants among themselves and the need to save non-combatants.

It is a fact that war was considered, in the beginning, as a lawful activity, any sovereign government was almost allowed to do war against another sovereign state, the law was therefore based on what was considered necessary to defeat the enemy, while he forbade what was perceived as being the result of unnecessary cruelty (Instructions for the Government of Armies of the United States in the Field, Lieber Code, 24 April 1863, article 67).

2.2 The International Motives

Contrary to National Laws governed by power and its established patterns of democracies and dictatorship, the International Humanitarian Law is underpinned by the international consensus on human commonalities. This international consensus remains a complex situation, without the recognition of Huntington's Clash of Civilizations theory, governed by history factors and political alignments in intense circumstantial events.

The evolvement of the International Humanitarian Law has long been driven by event, as if humankind were using it as a self-defensive mechanism. Hence, its development was driven by fear, example and the rejection of conflicts which makes the non-combatant a target of military operations. This development can be monitored from the Battle of Solferino and the Geneva and Hague Conventions to the Additional Protocols and the establishment of the International Criminal Court.

The environment in which Intrnational Humanitrian Law must be applied is changing extremely. There has been an obvious rise in internal armed conflicts between parties entirely

within a national borders. In these conflicts, civilians are more and more in the line of fire or even intentionally targeted (Moir, 2002).

In difference to international armed conflicts, where states have alleged a mutual interest in establishing rules, internal armed conflicts have often been regarded as a national issue. Many states have been more motivated to look after their own interests than community concerns or humanitarian demands. The latest recognition of the concept of war crimes in internal armed conflicts came as result of the dominance of human security as an international priority, beside, states have become more willing to focus on the security of individual human beings.

The most significant development, in the humanitarian law, is that the recourse to war is no longer constitutes a legal way to resolve a disputes. In general, humanitarian law is currently less perceived as a code of honor intends of the combatants, that as the means of keeping the non-combatants the safer as possible from the horrors of war. The resort to force constitutes, in itself, a violation of the rights of the man.

This was made clear at the Human Rights Conference in Tehran in 1968: "Peace is the first condition for full respect for human rights, and war is the negation of these rights". The same Conference, however, recommended continuing the development of humanitarian law in order to guarantee a better protection to victims of war. This was tantamount to recognizing, therefore, that humanitarian law is an effective mechanism for protection in the event of armed conflict and that such protection remains necessary since, unfortunately, the legal prohibition of resort to force has not, in practice, put an end to armed conflicts.

2.3 Perception of Human Rights

Another important factor was present to direct the international stand; it is the growing globalization of human values upon the consciousness of societies in the form of international framing of Human Rights in the Universal Declaration as well as the International Covenants (The International Humanitarian Law was reflected in customary law and in treaties such as the Hague Conventions of 1899 and 1907, the Geneva Conventions of 1949, and the Additional Protocols thereto of 1977).

The Universal Declaration of the Rights of man of 1948, relates to civil, political, economic and social rights. It's a civilized effort that considers the diverse philosophies concerning the content of human rights. Only when legals and politicians tried to upgrade this Declaration to conventional law that the legal difficulties appeared. The International Covenant to Civil and Political Rights of 1966 demands that all States parties undertake "to respect and guarantee to all individuals within their territory and under their jurisdiction the rights recognized in this Covenant" (Article 2 of the UDHR).

Since the origin of life, being is opposed to being. In all centuries, men have groaned under the sword or the yoke. The pages of man history are stained with blood, when one makes the comparative reading of civilizations, one notices that often the conception of life and of the world rests on the dualism, on the existence of two fundamental elements which confront each other and between which the human being finds himself placed. This dualism of good and evil has its source in the depths of the human psyche. As it was impossible to change the nature of man, we recognized the need to restrain his instinctive reactions and to compel him to accept reasonable solutions.

Operator a major revolution, the community has thus created a social order, from which it has gradually drawn the guidelines for the express in an abstract form, that of moral principles. We have also created the power capable of enforcing these norms, otherwise they would have remained a dead letter. This is the origin of law and public institutions (Porretto, 2006).

But, at the same time, borders had to be placed on power (L. DOSWALD-BECK and S. VITÉ, International Humanitarian Law and Human Rights Law, International Review of the Red

Cross, N. 293, 1993, p.101.). Because if the State has as its supreme goal the blooming of the personality individual, it risks crushing it at the same time. Dominance is blind; it expands until it is stopped. We therefore had to guarantee to man certain fundamental rights, making for all existence acceptable. Thus was born the principle of respect of the human person: respect for his life, his freedom, his finally happiness. This vast and slow evolution, long confined to the domain interior of each State, ends up winning the plane of relations international law, or soon the law would come to grips with war.

It was no longer just a question of sparing the man when he is in conflict with society, because of the established social order, but as well as the enemy himself, when his country enters into the fight with another. Unable to claim from the outset to break the scourge of war, an attempt was made at least to attenuate its useless rigors. Interest reciprocity of the belligerents pushed them to observe, in the conduct hostilities, a certain "rule of the game". These are the origins of the law of war, which forms a very important section of the Public International Law.

3 FEASIBILITY CRITICAL ISSUES IN INTERNATIONAL HUMANITARIAN LAW

This virtuous growth increased the dissemination and implementation of the International Humanitarian Law. Just as the validity of life is entrusted to four: land, air, fire and water, the validity of International Humanitarian Law is entrusted to four: role, sponsor, application and result. These four focal points constitute the dimensions of the 150 years old question which are the number of years of existence of the International Humanitarian Law: is this law which lacks compulsory mechanisms and efficiency really feasible when applied? This question has always limited the spread of International Humanitarian Law around the world (Bangerter, 2011).

3.1 The Perplexed Role

The International Humanitarian Law applicable in conflicts armed corresponds to international rules, established by treaties or by custom, specifically aimed at solving humanitarian problems resulting directly from armed conflicts, international or non-international. For humanitarian reasons, these rules aim to protect people and property that is, or may be, impacted by armed conflict, by framing the methods and means of warfare of the parties to the conflicts. The term "right International Humanitarian Law applicable in armed conflicts" is often presented in the abbreviated form of International Humanitarian Law or simply humanitarian law (Pictet, 1952). Although military forces tend to prefer the expressions “law of armed conflict” or “law of the war", these two expressions must be understood as synonyms of the International Humanitarian Law (The International Committee of the Red Cross (ICRC) has developed a definition of “humanitarian law”. The international community has generally accepted this definition. ICRC, Commentaries on the Additional Protocols of June, 1977, Geneva: ICRC, 1987, XXVII).

The role of the International Humanitarian Law is to protect the non-combatant during armed conflict, not concerned with the causes and consequences of these conflicts, it also seeks to limit its consequences to military objectives. This is its role, and this is its primary concern, because we should understand the difficulty of recognizing a soft law that deals with crises instead of end them and because that carries under its folds the meaning of submission to reality while originally laws are promulgated to control reality.

It is necessary to review the role of this law. The –fictional- right to war is as old as war itself. Already in ancient times there were rules interesting customary laws that could today be considered as humanitarians. Interestingly, the content and purpose of these customary rules

were the same in virtually all civilizations of the world. International Humanitarian Law is an integral part of international public law. Article 38-1/a-d of the Statute of the International Criminal Court defines the sources of the International Humanitarian Law. Considered as authority regarding the sources of international law, the Court must apply: International conventions; International custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; and judicial decisions and the doctrine of the most qualified publicists, as an auxiliary means determining the rules of law. The spontaneous establishment of humanitarian standards, at different times and by different peoples or States that had limited means of communication, is also a phenomenon that is important to highlight. This phenomenon lends credence to the historical argument concerning: the need to establish rules applicable to armed conflicts; and the existence in many civilizations of a feeling that in some circumstances, human beings, friends or enemies, must be protected and respected. Although specialists generally agree that the adoption of the first Geneva Convention in 1864 marks the birth of modern International Humanitarian Law, it is however clearly that the rules included in this Convention were not totally new. In reality, a important part of the first Geneva Convention derived from customary international law already existing. Indeed, there already existed, as early as 1000 BC, rules protecting certain categories of victims during armed conflicts as well as customs relating to the means and methods authorized or prohibited in the context of hostilities.

Arguers got all confused about the feasibility of the International Humanitarian Law between the ambition of preventing and ending armed conflicts and dealing with the consequences of such conflicts on the non-combatants. This confusion is burdening International Humanitarian Law with a task not of its own, and leads us to mere confusion of roles. The role of International Humanitarian Law is not political and the advocates of its application are not parties to the armed conflict and do not have the means or the power to end it. The role of this law is all about the phenomenon of armed conflict

3.2 Sponsor Credibility

For historical considerations, the problem with the International Humanitarian Law sponsor lies in his credibility. The law that has emerged and extended under the ICRC has taken its textual structure and legal frameworks in the political systems of national states. He is the son of Western diplomacy, who was an instrument of colonial expansion in geography vulnerabilities, and an active actor in wars, whose history has plunged it into the duality of the adversary and the judge, which led polemicists to accuse it of not seeking from the promotion of the International Humanitarian Law to end armed conflicts, but rather to reduce the ugliness of war to give it a chance to achieve its political objectives. These accusations are serious and are certainly of relevance, but we must recognize that western diplomacy, which is sponsoring the dissemination and application of International Humanitarian Law, has also been influenced by the peoples' accounts of the two world wars in the twentieth century With the entrenchment of contemporary democracies and the progress of civil societies, which led it to the organization of combat operations and called for accountability for overcoming the laws of war. These diplomatic lobbies, regardless of its motives and seriousness in the application of the International Human Law, elevates the human rights position in the contemporary awareness to the level of international obligation

3.3 Application Knot

The aim of promulgating laws generally is to organize societies and achieve full justice using instruments of power. It is inconceivable to achieve feasibility of the law without implementation mechanisms, as it is also impossible to implement the law without the existence of an authority which activates accountability mechanisms. The impact of the absence of

mechanisms of implementation and accountability goes beyond the inability of the law to achieve its objective to undermining the integrity of the concept of law itself, so how can the International Humanitarian Law be a law if not binding?!

It is not the proper and binding application of the law that grants it its status and merits, it acquires it once it is issued through the mechanism of promulgating laws through national or international institutions reinforced by accountability rule. As for its application it is being carried out through the lever of order. The weakness in the mechanisms of application of the International Humanitarian Law comes from the absence of order and not the absence of law.

However, the imbalance in the application mechanisms of the International Humanitarian Law is a reality that cannot be ignored. In our perspective, there are three reasons for this: The first is the entrenched sovereign national boundaries and the cultural, historical and societal specificities it resembles. The second is the conflicting interests of these specificities where this conflict itself is a cause of war. The third reason is the absence of a transcendent international authority over national authorities to apply the law worldwide.

The system based on the application of the International Humanitarian Law was started from the Nuremberg and Tokyo Courts I what later became known as victor's justice (ICTY, Furundzija case, Judgment, 10 December 1998, 168: *"The Tokyo International Military Tribunal convicted Generals Toyoda and Matsui of command responsibility for violations of the laws or customs of war committed by their soldiers in Nanking, which included widespread rapes and sexual assaults"*). Despite the attractiveness of seeing leaders who took the world to destruction in the cage, the trait of justice seemed far from those trials, according to many scholars. The fact is that the Nuremberg and Tokyo trials were pretty much just in their outcomes, its shortcoming were not convicting criminals who committed war crimes and crimes against humanities, but in the mechanism of access to justice, where the opponent was prosecuting his adversary, and justice cannot tolerate this risk in the absence of its guarantees.

From an emotional perspective, the judge was the victim, and the victim was held accountable her executioner which was a functional flaw in the law enforcement mechanism, which changed the difference between the concepts of justice and revenge. Although this mechanism has evolved to the International Criminal Court, the practical reality points to a recourse in the work of the Court in terms of the accountability for international crimes, where vulnerable states are held accountable and strong states get escape accountability.

Based on the aforementioned, we assert that the main obstacle to the application of International Humanitarian Law lies in the absence of authoritarianism on which national laws are available.

Thanks to a heightened awareness of the importance of humanitarian law for the protection of persons in times of armed conflict, on the one hand, and thanks to the increasing use of the law of human rights in international affairs, on the other hand, these two branches of law are given much greater weight on the international level; organizations, both international and non-international government, are thus brought to use them together regularly to support their action.

The concern is that IHL should not become a way of interfering with national sovereignty, a concern that has increased because so many conflicts are now internal. This concern has been manifested in resistance not only to the development of new principles or rules, but even to modest commitments to promote compliance, such as providing access to monitors or providing information on national IHL activities (Report on US Practice, 1997, Chap. 5.3: "At the CDDH, Yemen, which voted against Article 77 of draft AP I submitted by the ICRC, in its explanation of vote stated that "in the article there is a certain imbalance between International Humanitarian Law and the internal law on which all military discipline is based. That principle is confirmed by the constitutional regulations of all countries and by the principles of international law"). In addition, military powers and states engaged in conflict have sought to preserve a great deal of flexibility in their military practices. Even more problematically, actual

compliance with IHL in many of today's conflicts is abysmal, with massive violations of even the most basic rules being commonplace.

The international community is still far from accepting an authority that goes beyond the principle of national sovereignty. This position has social roots, since the first man discovered the advantage of protection in populations as he clings to it, he expands and develops in the patterns of civilization, but does not emerge from the crucible of the cellular population in which his national identity is unified and overestimates his neurological features. Of course, these communities had to accept the mandate of the National Authority to ensure the maintenance of order and the protection of the community. This seemed to be a vital interest for them, and the idea of submission to an international authority outside these communities did not seem to be the same. It seemed to these communities that allowing their leaders to submit to the implementation mechanisms of the International Humanitarian Law goes beyond limiting war crimes, and that it is a call to them to get out of their protecting crucible and submit to external authority.

In other words, the obstacle to the dissemination of the International Humanitarian Law and the evolvement of its dissemination mechanisms does not stop at the refusal of the National Authorities to be held accountable. However, it goes beyond that to the refusal of the National Communities themselves to be open to an International Community System which refrainment from its foreign national features is not insured. Not to mention the cultural threat it poses to these societies to the separation of geography and national identity if the sovereignty element fails.

Conclusion:

The nature of contemporary armed conflicts continues to deliver challenges for the implementation and respect of the International Humanitarian Law. It is essential to respond to these challenges to guarantee that International Humanitarian Law continues to accomplish its cautious function in situations of armed conflict. While there is common endorsement of the International Humanitarian Law implementation by States, as well as by non-state actors, is often considered insufficient, there is the requirement to understand the legal measures which could contribute to observe of these standards. What should be the answer to the lack of feasibility for International Humanitarian Law in armed conflict? This seems to be the main legal challenge. It is imperative to believe the existing International Humanitarian Law mechanisms, which operate in both international and non-international armed conflicts, in order to identify the legal reasons for their lacking use and whether they are sufficient as such or if it is a of abuse. In this regard, International Humanitarian Law has not ended the tragedies of war, nor has any other law ended any crime. This is an endless process assessed with direction rather than result, in which man resists his wickedness by upholding on values and civilizations defend their harmonious truth, with no distinction made based on religion, sex, race or culture, where geographical maps mean nothing to the rights protected by the International Humanitarian Law, and the non-combatants are not military targets and the civilian objects are protected, where no killer dares to declare his character and continue to deny his crime even if proven he justifies it.

The humanitarian communities evolved their principles through the International Humanitarian Law, and they consider the clash of civilizations to be a vile theory, as it makes a mockery of logic as it attributes the clash to the civilization, although the first is the result of the absence of reason and the second is the result of its presence.

The law, which stands by its values against killing and destruction, continues to evolve at principle, concept and application levels. Taking into consideration all the facts that can be drawn upon to question the feasibility of International Humanitarian Law, it is most likely to find that it stem from the application of law not in its content. Despite the fact that these criticisms are certainly of relevance, the application of the law, for all its imperfections, has

made warlords accused of war crimes and crimes against humanity hide, deny themselves, and even drink poison. If the International Humanitarian Law was criticized for the idealism of its content, we should remember that the idealness which finds who defends it in reality, becomes a reality itself.

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