THE PREJUDICED EVOLUTION OF HUMANITARIAN CONVENTIONS AND POSTCOLONIAL HEGEMONY: DIFFERENT AGGRESSORS, COMMON VICTIM

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ABSTRACT

In this paper, the author seeks to question the contentious past and trace the evolution of international humanitarian law that was mainly cultivated from previous international conventions. This article reveals the dissembler approach of the western bloc in both pre and post-colonial eras to overshadow the aspirations of the third world. In the pre- colonised era, the duplicity of colonial powers went unheard for an elongated period. However, the same was explicit in the post-colonial era due to the greater involvement of the underprivileged world and overt violations of human rights by the so-called civilized world. Ascribed to the Machiavellian tactics of the northern bloc, various articles and provisions of the Geneva convention and additional protocols remain imprecise and ambiguous to date. Consequently, these conventions require critical evaluation as they reflect the extent of western hegemony in the way in which they are approved and negotiated. Therefore, the first part of this paper aims to assess the development of humanitarian laws from a third world standpoint. Whereas, another part of the paper analyses the infamous efforts of another hegemon of the post-cold war era i.e. the USA to subvert the authority of the International Criminal Court to conceal its humanitarian violations. The USA attempted to re-interpret the humanitarian laws in a manner that suited its political agenda. As such, this paper concludes that these humanitarian laws formed dramatically by unconventional means should be re-interpreted by overlooking past differences. In doing so, primacy should be given to ICC, ICJ and other international bodies and tribunals with broader jurisdiction and liberty to operate over national agencies and courts.

I. INTRODUCTION

International humanitarian law is described as the *jus Bello*, which means "the law in waging war".[2] By and large, the history of international humanitarian law can be traced and located in the codes and conventions of warfare that dominated different continents and cultures. These conventions are part of both conventional and customary spheres of law that seek to bind the execution of laws of combat. These regulations began to evolve in the late 19th century and recuperated from debates and discussions in the late 20th century where they gained global compliance. The core repository of humanitarian law comprises the Hague Convention and Geneva Conventions of 1949. The distinction could be made between these

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[2] Rotem Giladi, '*THE JUS AD BELLUM/JUS IN BELLO DISTINCTION AND THE LAW OF OCCUPATION*'[2008]41 Isr. Law Rev.

conventions as customary and conventional regulations of humanitarian law as the Geneva Convention provided authoritative humanitarian principles arising from the treaty obligations whereas, the Hague conferences assured the comprehensive attempt to humanize the war. The international jurists owe the nativity of international humanitarian law to Sir Henry Dunant, who was the founder of the International Committee of Red Cross, as he initiated the tradition of the Geneva chain of conventions.[3] As a result, the movement began to codify and assemble humanitarian laws which ultimately led to the dawn of modern-day International Humanitarian law.

However, state-sponsored violence continued to despoil humanity and ravaged it with its utmost force. This is a generic phenomenon that can be observed in the evolution of any customary law. As far as IHL is concerned, this divide can be traced to the era of colonialism which exposed third world countries to various war threats.[4] The Changing aspect of warfare in terms of technology and nature of conflicts demands impartial engagement with prevalent civil wars and undue gross violation of human rights by militarily advanced countries. This lack of proportion of power among states disputes the validity of these laws and raises questions such as *What are these irregularities? What are the institutions that could be set up to avoid their disregard?* This paper attempts to analyse the advent of these questions and to answer them adequately with proper reasoning.

The dawn of the 21st century proved to be challenging for the reliability of humanitarian laws, especially after the 9/11 confrontation. Its legitimacy came into a big dilemma as it failed to deal with the emerging form of enemies and new circumstances of warfare such as non-international armed conflict or civil war. Further, they try to justify their actions by re-interpreting IHL creating an alternative false reality. The same can be observed from the Macedonia conflict of 1949, Kosovo and Iraq in 2003.[5] The supremacy of the UN Security Council in deciding on humanitarian intervention in internal armed conflicts led to the domestication of these laws at the hands of world hegemons[6]. Additionally, the authority of domestic courts over international tribunals in the evolution of IHL prevented the universal applicability of this branch of law. Of course, the enforceability of IHL is subjected to deliberation and negotiations, however, it is evident that the northern bloc owns sufficient complications over the reliability and degree of acquiescence of these laws which will be covered under this paper. Furthermore, various scholars such as Christine Chinkin and Kate Paradin opined that how the concept of nationality can have a depraved impact on the adjudication of cases involving Gender-based discrimination as it might be influenced by local biases generally based on ethnic and religious differences.[7] Thus, the later part of the paper tries to analyse why reliance on the

[3] Seema Agarwal, '*international humanitarian law: a brief history'* (Indian Institute of legal studies)< INTERNATIONAL HUMANITARIAN LAW: A BRIEF HISTORY (iilsindia.com)>accessed on 21 July 2021.
[4] J.G. Gardam and M.J. Jarvis, *Women, Armed conflict and international law* (2001) at 11.
[5] Mohammed Ayoob, '*Third world perspective on humanitarian intervention and international administration'*(2004) 10(1) The politics of international administration http://www.jstor.org/stable/27800512 .
[6] Vesselin Popovski, '*Un security council: Rethinking Humanitarian intervention and the veto'*(2000) 31 Security dialogue https://www.jstor.org/stable/26296647 .
[7] Kate Paradine and Christine Chinkin, 'Vision and Reality: Democracy and Citizenship of Women in the Dayton Peace Accords' (2001) 26 The Yale Journal of International law 103.

national tribunals could create a puddle of the quandary in interpreting the humanitarian laws owing to the inherent biases.

A large number of these ambiguous and prejudiced regulations demands reforms to a notable extent. Kevin Clements, the foundational director of the National Centre for Peace and Conflict Studies, University of Otago also raised the question of accountability as to who should be held accountable, why, and how.[8] This question indicates uncertainty over the operation of IHL due to the absence of any long-standing authority to secure these regulations. This sense of distrust arose from the existence of problematic doctrines of IHL such as military necessity, proportionality and distinction in armed conflict that stem from the dominance of the northern bloc in Geneva and Hague conventions. Therefore, the main synopsis of this paper is about the paralysis of international institutions and laws for the sake of the affluence of certain authoritative states who yearned for political and economic greatness.

II. THE EVALUATION OF HUMANITARIAN LAWS AND ARRIVAL OF CONTROVERSIES

The contribution of ICRC is inestimable in the formation and evolution of IHL. Going by the definition of ICRC, IHL can be defined as -

> International humanitarian law is part of the body of international law that governs relations between states. It aims to protect persons who are not or are no longer taking part in hostilities, the sick and wounded, prisoners and civilians, and to define the rights and obligations of the parties to a conflict in the conduct of hostilities.[9]

The legal world in the 19th Century, came up with similar definitions to illustrate the dawn of a new branch of law that they were witnessing. Some lawyers continue to differentiate between The Hague part of regulations and the Geneva part of regulations.[10] They expressed that as the Hague convention communicated about the means and integrity of warfare, it should be included in the customary branch of law. However, since the Geneva Convention intensively deals with humanitarian concepts, it should be treated as a conventional branch of law. Nevertheless, another sect of lawyers argued that both parts somewhat contained humanitarian principles and therefore, they intersect each other on frequent occasions. As a result, both of these conventions are sheltered under the wide-ranging umbrella of humanitarian laws whether it is customary or conventional. As Cherif Bassiounni, Professor of Law at DePaul University said "they are so intertwined and so overlapping that they can be said to be two sides of the same coin".[11] Eventually, this particular stance got more acceptance after the Kosovo intervention of 1999 and

[8] Kevin Clements, The challenge of conflict: International law responds(Judith Gardam ed, 13th vol. 2006).
[9] ICRC, *'what is international humanitarian law?'*(ICRC, 31 December 2014) https://www.icrc.org/en/document/what-international-humanitarian-law# accessed 22 July 2021.
[10] Bassiouni, '*the normative framework of international humanitarian law* : o*verlaps, gaps and ambiguities'* (1998) at 200.
[11] Bassiouni, supra note 9 at 200.

International Humanitarian Law emerged as a central branch of international customary law with abundant disagreements ahead.[12]

Primarily, these disagreements owed their existence to the false notion of superiority. The foundation of international Humanitarian law rests on the concept that while western liberal states are civilized, the eastern southern countries embody the characters of regression and savageness. During the 19th and 20th centuries, imperialism absorbed almost the entire continent of Asia and Africa for the triumph of the white man's burden theory. The consequence of this colonisation can be seen lucidly in the formation and evolution of these humanitarian laws. However, when the initial exertion for the formation of IHL took place in the form of the Geneva Convention of 1864,[13], the world was going through excessive forms of exploitation and subjugation in the form of annexation by European powers. This convention was pre-arranged by the western community at a time when concepts such as statehood, democracy and sovereignty were subject to great deliberations and controversies. As a result, only 12 states signed the convention.[14] Not only were the colonized states exploited, but they were also marginalized from such conventions as Turkey was the only non-Christian state that signed the peace treaty of Paris in 1856. However, In the mid 19 Century, the European empires were undergoing a revolution in one form or another. Consequently, the powers were trying to regulate the war as the armies were increasingly bigger in size with the employment of unwilling soldiers in warfare. Therefore, the initial comprehensive effort to regulate the conflict began after the Brussels declaration of 1874, which resulted in the Franco-Prussian war that changed the political scenario of Europe to a notable extent.

(i) The Franco Prussian War: War that Divided the World

In this section of the paper, the author seeks to discover the repercussions of the Franco- Prussian war that eventually led to the expansion of humanitarian laws through the Brussels Conventions of 1874. This war directly moulded the direction of humanitarian laws where the governments themselves were stern and eager for the codification of these laws contrary to their earlier stance where only civilian groups were considered as the protagonist.

The foremost climacteric moment arose when the French troops surrendered before Prussian troops and a new wave of anti-monarchists swept across France.[15] The proletariats of France decided to form their National Defence Government and continue their struggle against the advancing Prussian army. In this tough situation, the French government signed an armistice where they agreed to transfer Alsace and

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[12] Amnesty International, *Federal Republic of Yugoslavia: collateral damage or unlawful killings*? Available at https://www.amnesty.org/en/documents/eur70/018/2000/en/ (6 June 2000).
[13] ICRC, *'The 1864 Geneva convention'* (ICRC, 18 august 2013) https://www.icrc.org/en/doc/resources/documents/treaty/geneva-convention-1864.htm accessed on 22 July 2021.
[14] Yale law school, Laws of War: *Amelioration of the Condition of the Wounded on the Field of Battle* (Red Cross Convention); August 22, 1864 (Yale law school) https://avalon.law.yale.edu/19th_century/geneva04.asp accessed on 22 July 2021.
[15] JOHN MERRIMAN, MASSACRE: *THE LIFE AND DEATH OF THE PARIS COMMUNE OF 1871* 18-38 (2014)

Lorraine.[16] This acknowledgement of chastening peace by the French parliament further ignited the movement known as 'the Commune'.

The decisive phase of the war started when the French government itself sent their regular army to Paris and thus, initiated the horrifying massacre of the 19th century. The French Government exhibited these people as enemies and justified their execution. However, the homicide of these nationalist and virtuous individuals triggered a new discussion in a political world where scholars such as Karl Marx used it as an excuse to initiate the struggle against bourgeois[17]. The short-lived commune has already made a lasting mark on the fluctuating political order of Europe. The atrocities ignited the philosophies of socialism and anarchy which are predominant even today. The feminist drive too was triggered due to the slaughter of commune women[18] that even to one extent denounced the idea of marriage.[19] These muffled voices were now the cause of anxiety in the minds of political authorities who were already shaken by cross-border aggressions. Hobsbawm pointed out the bourgeois apprehension of the proletariat revolution, thus emphasizing their political fear.[20] The ideals of democracy and liberalism became central and the commune slaughter was martyrized and became the figure of worker confrontation on the international stage. Scholars such as Bakunin inspired further insurrections in France thereby ensuring the continuation of sentiments.[21] Feared by such ideas, the capitalist and exploitative regimes of Europe signed the League of three Emperors of 1873.[22] Bismarck conveyed his horrors and apprehensions to his counterparts to infatuate the swiftly mounting movement. This can be apprehended by reviewing the Russian plan of national defence of 1873 which was designed to counter the wave of politically different ideas from European counterparts.[23] Lord Lyons, the British ambassador to France apprehended the communist tendencies which were present in the political atmosphere of England. He was of the view that England was on the verge of destruction in the hands of dissenting nationals.[24]

Thereby, European powers to circumvent these circumstances decided to organise the Brussels convention. This convention was taken as an opportunity to address the encounters that were experienced by governments in this conflict. Therefore, the political establishments of Europe addressed the issue quite seriously and henceforth, refused private entities to partake in the convention.[25] The inspiration behind this non-inclusion was to regulate the war field and prevent any insurrectional group from taking control. The Germans even made it clear that they did not want any non-governmental participation as 'they are

[16] See, the debates in the National Assembly, 17 February 1871 – 1 March 1871.
[17] ALISTAIR HORNE, *THE FALL OF PARIS* (2d ed., 1990)at 430.
[18] ROBERT TOMBS, *THE WAR AGAINST PARIS 1871* (1981) at 132.
[19] Id. At 105.
[20] ERIC HOBSBAWM, *THE AGE OF CAPITAL*: 1848–1875 77-79 (1975) at 167.
[21] BERTRAND TAITHE, *CITIZENSHIP & WARS, FRANCE IN TURMOIL 1870-1871* at 38 (2001).
[22] Hobsbawm s*upra* note 19 at 167.
[23] *See*, JOHN L. H. KEEP, SOLDIERS OF THE TSAR: *ARMY AND SOCIETY IN RUSSIA* 1462 –1874, 276 (1985).
[24] Lord Lyons to Lord Granville, Paris, March 4, 1873, in II LORD LYONS: *A RECORD OF BRITISH DIPLOMACY*, 44.
[25] Brussels Conference Protocols 2, 7.

notorious enemies of the German Reich'. Consequently, it can be concluded that that convention was held to please the apprehensions and fears of European political establishments and to guard the bourgeois interest which was the greatest urgency. The humanitarian garb was used to conceal their actual intentions to prevent further insurgency which could challenge their authority.

(ii) Brussels Convention, 1874

The euro-centric side of IHL suffered countless failed attempts to conceal the irregularities in IHL and such was the case in the Brussels Convention. After the failure of French imperial forces to comply with the Geneva convention of 1864, the destruction of cultural heritages and the mass killings of communards, it was expected that these issues would be addressed by the governments. However, the opportunity was not utilized to elucidate the application of code in a civil war situation, like France. Even the invitees were assured that the conference would not deal with civil war-like situations. After refusing to address this issue, the august gathering of the Brussels convention justified the French position and the acts committed by them during the commune days. Additionally, article 9 of the Russian draft sought to include the irregular combatants within the scope of the Brussels convention however, such a quest proved to be futile.[26] Nevertheless, article 9 of the Brussels convention assigned the rights and duties2 to armies and in some cases to volunteer corps too only if they satisfied the conditions laid down by the convention.[27]Through these conditions, the convention refused to extend the protection to irregular forces such as communards to leave them at the mercy of the enemy. The most advantageous rule of the declaration was to prohibit the launch of firearms and bombardment of open towns. However, it is noteworthy to explain that armies lacked the technology to bombard such towns from a considerable distance. Thus, the only means left to continue the hostility was to march in the town directly which was not even discussed in the declaration. Even the German delegates rejected the proposal of the initial Russian draft wherein it invoked the Rousseau-Portalis doctrine that sought to exclude citizens from the horrors of war. However, this proposal was missing in the final text of the declaration as according to the German delegate, when nations clash and put their resources in wars, it will become difficult to limit the consequences of War. [28] The European powers decided not to sign the agreement considering such principles as 'too humanitarian'.[29] The European motives can be understood by analysing the Brussels Convention in light of the Franco- Prussian war. The western governments sought to secure their base of power by excluding the citizens from the frontline to ensure better control over violence. In the so-called 'Vision of Peace' of these conferences, the principal motive was to shield the interest of the propertied class. The most voiced achievement of these

[26] Compare Tracey Leigh Dowdeswell, *The Brussels Peace Conference of 1874* and the *Modern Laws of Belligerent Qualification*, 54 OSGOODE HALL LAW JOURNAL 805, 831 (2017)
[27] Project of an International Declaration concerning the Laws and Customs of War, Art. 9 (Aug. 27, 1874).
[28] Report sent by German Minister of War Georg von Kameke to Bismarck (July 18, 1874) in preparation for the Brussels conference (Folder R 901/ 28961 No. 46; the German Foreign Office, National Archives in Berlin).
[29] Ibid 17, at 66.

conventions was that the government allowed private associations to treat the wounded and sick soldiers. However, no measures were taken to end the already raging war.

After the mass devastation of WWI and WWII, the international community needed to have well-defined legal treaties for the regulation of warfare. For this purpose, the Geneva conventions of 1949 were formulated that pertains to several matters of warfare. Yet, during its documentation, half of the world was still colonized and therefore, independent participation could not be ensured. Hence, it became significant to analyse the manner that how these conventions prioritized only those issues that were essential to the dominant powers.

(iii) The Four Geneva Conventions, 1949

The Geneva conventions of 1949 constitute the backbone of humanitarian laws of modern times. They seek to protect, treat and incorporate fundamental safeguards for the victims of armed conflict.[30] These conventions directly stem from the principles of the First Geneva Convention of 1864. The previous conventions were now prepared to be replaced by these new Geneva conventions in the backdrop of the destruction in world war 2. The maltreatment and callous torture of the armed fighters in world war led to the recognition of a principle of 'prisoners of war'. These conventions adopted several new principles such as common article 2 which illustrates international conflicts[31] and common article 3, which pertains to non-international armed conflicts and civil war.[32] These principles are enshrined in four Geneva conventions of 1949 that dealt with different aspects of humanitarian regulations.

These four Geneva conventions accomplish the main objective of IHL. No doubt that they can be considered a great success in the field of laws of warfare. They are more appropriate in contemporary times and ensure greater participation of the third world as compared to their predecessors. Despite these constructive characteristics of convention, it still cannot escape the one common characteristic of the earlier convention –the triumph of western political interest over apprehensions of the rest of the world. Hence, this section of the paper aims to critically evaluate the formation of the Geneva convention and the involvement of the global south in this process. This analysis also notes that most developing countries were either colonised or in the process of decolonisation from imperial powers. The initial contention was related to the belligerent occupation of territory. The term 'belligerent occupation' can be defined as the hold of an enemy state over the state territory and its people, without varying the sovereignty of the state and without terminating the administrative and institutional system of such an occupied state.[33] On the

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[30] Red cross, '*Summary of the Geneva Conventions of 1949 and Their Additional Protocols'* (American Red Cross, April. *2011*)https://www.redcross.org/content/dam/redcross/atg/PDF_s/International_Services/International_Humanitarian_Law/IHL_SummaryGenevaConv.pdf . Accessed on 23 July 2021.

[31] Rulac, '*International armed Conflicts*' (Geneva Academy) available at International armed conflict | Rulac accessed on 23rd July.

[32] ICRC, *'ARTICLE 3: CONFLICTS NOT OF AN INTERNATIONAL CHARACTER'* (*I*CRC) https://ihl-databases.icrc.org/ihl/full/GCI-commentaryArt3 accessed on 23 July 2021.

[33] Benvenisti E, '*The Origins of the Concept of Belligerent Occupation'* (2008) 26 Law and History Review 621.

other hand, 'Debellatio' is a situation wherein the state loses its sovereignty and the fortune of the occupied territory lies in the hands of the aggressor.[34] Hence, 'Debellatio' can be considered as the conservative and narrow form of occupying a state. It is worthwhile to note that in the backdrop of WWI and WWII, certain circumstances were predominant in Europe in the 19th century which gave rise to the practice of belligerent occupation. Hence, European powers sought the inclusion of laws that would govern the situation of belligerent occupation.[35] However, there was not even a single provision dealing with debellatio despite its more conservative and coercive nature. Even the colonial situation was not considered to be an occupation. The general excuse that was given behind such discriminative regulation was the lack of sovereignty of these colonial states. As these colonies were not considered as states at that time, they were denied humanitarian protection. Resultantly, it appeared that the situations of debellatio and colonial occupation were excluded to accomplish higher aspirations of European hegemony. It helped the colonizers to regulate large territories and enabled them to exploit the natural resources of colonies for economic advantage. These controversial exclusions and principles justified the contentious articles of previous conventions, such as article 43 of the Hague convention which allowed the belligerent occupant to regulate occupied territories. Article 64 of the fourth Geneva Convention sought to broaden the scope of article 43 of the Hague Convention 1949. This was done by permitting the occupier to bring the necessary changes to regulate the territory by giving the excuse of inevitability.[36]

The delegates of diverse backgrounds were empathetic towards the misery of world war 2. However, they failed to realize that the severity of colonialism was no less than that. At times, due to this rage of tyranny, the struggle between colonies and colonists was more disparaging than any armed conflict. Despite the gravity of this issue, it was not addressed in the Geneva convention thereby ending the optimism of the underdeveloped world. However, the sign of transition appeared with the inclusion of common article 3 which seemed to include civil wars. The background of this argument can be traced to the conference consisting of various governmental professionals who had assembled to discuss the convention for the protection of war victims in 1947.[37] While revising the provisions of the Geneva Convention, the delegates of third world countries argued that these provisions should extend to the situation of colonial civil wars to confer the sovereignty and right to self-determination to colonised territories as these principles were only limited within the borders of colonial powers. Based on this discussion, ICRC presented the initial draft for discussion to all delegates and societies of ICRC at the XVII International Conference of Red Cross in Stockholm in 1948. This draft seemed to be an apparatus to halt the western hegemony as it contained the provisions dealing with civil war.[38] This occasion appeared to change the course of history

[34] Schmitt, Michael N., '*Debellatio*' (October 2009). MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 2009, Available at SSRN: https://ssrn.com/abstract=1610012 Accessed on 24 July 2021.
[35] The regulations related to belligerent occupation was dealt with and attached in the Hague convention (IV) of 1907.
[36] Sassòli, Marco, *'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers'*(2005), Vol. 16, No. 4, pp. 661-694, European Journal of International Law https://ssrn.com/abstract=907198 accessed at 24 July 2002.
[37] Report on the work of the conference of government experts for the study of conventions for the protection of war victims (Geneva, April 14-26, 1947) at 8.
[38] Report on seventeenth International Red Cross Conference (Stockholm, 1948) at 72.

to address concerns of the third world which went unheard for a long time. Unfortunately, this attempt proved to be short-lived as the new and revised draft did not even refer to the term 'colonial conflict' as the text was approved and amended later without any proclamation. Later the report informing about the amendment stated that the words especially cases of civil war, colonial conflicts and wars of religion were deleted.[39] Therefore, this amended draft was presented in the Geneva Convention which did not addressed the issue of colonial conflict as the draft was abruptly amended without any prior notification. The deletion of these words was attributed to the elevated concerns of colonial powers as it might be apprehended that UK, France and fellow colonial powers would never accept this proposal as it would impact their colonial and imperial tendencies. Regrettably, the outcome was quite different from what was earlier anticipated as an absence of any provisions for colonial wars increases the hindrance for justice. This can be substantiated from the assertion of the Soviet delegate, who noted, "civil and colonial wars were often accompanied by violations of international law and were characterized by the cruelty of all kinds. The suffering of the population in the instance of civil and colonial wars was as distressing as that which led Henry Dunant to realize the need for regulating the laws of warfare."[40] This assertion proved to be factual in the instance of the Congo and Yemen civil war. An identical concern was put up by the diplomat of Mexico as well[41]. Therefore, it can be concluded that the exclusion of civil wars from the Geneva convention resulted in the denial of rights of thousands of individuals who lost their lives in civil conflicts.

(iv) The Additional Protocols of 1977

As stated previously, there are some contentious issues and lacunas in the Geneva convention. To counterbalance those omissions, the ICRC resolved to convene another conference in 1974 to restructure the law in the right direction. This conference was widely recognized as approximately 700 delegates of over 174 countries attended the meeting[42]. This conference came to be acknowledged as additional protocols of 1977 that proved to be another breakthrough in the formation of humanitarian laws after the Geneva Convention of 1949. While additional protocol 1 deals with international armed conflict, additional protocol 2 deals with non-international armed conflict.[43]In additional protocol 1, novel principles such as the principle of proportionality, military necessity and the definition of guerrilla warfare were materialized

[39] Draft revised for the protection of war victims by International Committee Of Red Cross, XVIIth INTERNATIONAL RED CROSS CONFERENCE (Stockholm, August 1948) at pages 9 and 226.
[40] Final Record of the Diplomatic Conference of Geneva of 1949 Vol.ll, Section B (Examination of all the articles by Joint Committee, Coordination Committee and Drafting Committee) at page 14.
[41] *Ibid*, at 12.
[42] Claude Pilloud, *'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949'*(1987) ICRC at xxxiii.
[43] PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Entered into force 7 December 1978), 1125 UNTS 3 (International Armed Conflict).
Also see, PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTION OF 12 AUGUST 1949 (Adopted on 8 June 1977, Entered into force 7 December 1977), 1125 UNTS 609 (Non-international Armed conflict).

which are subjected to contentions. However, factors such as equal participation from the southern block and evolving jurisprudence of human rights ensured the equal and free representation of the Global south.[44]

The initial strife started over the question of liberation movements or colonial conflicts which was disputed in the Geneva convention too. The same question was deliberated in additional protocol 1.[45] Again, the third world saw this as an opportunity to further their motive to include colonial conflicts in the domain of international armed conflict. After the unforeseen result of the Geneva convention, numerous legal experts considered colonial conflicts as an internal dispute and it was cemented as an obvious conclusion. However, the third world was firm on its stance. As a result, the eastern Europe bloc consisting of countries such as Tanzania and Algeria conferred their proposal to include these conflicts within the domain of IHL.[46] Western states countered such a proposal by refusing to differentiate between just and unjust war and argued that it would corroborate the dangerous nature of war.[47] Ultimately, after a few more deliberations, the long-standing dispute was resolved and the proposal was accepted.[48] It was apprehended that the western bloc will be aggravated by such acceptance. Fortunately, this was not the case.[49] This was because the effect of the proposal was limited to much fewer places as the decolonisation process was already completed by the 1950s. This acceptance was seen as the victory for the eastern bloc after years of deliberations and discussions which led to the surge of optimism in the third world. However, certain other contentious issues led to the confrontation between the two blocs and thereby led to conflict.

a. Guerrilla Warfare

After its first crucial breakthrough, the Additional Protocol 1 of the Geneva Convention entered its next stage. The next contention was associated with the recurrent usage of guerrilla warfare. The history of this irregular warfare can be drawn from the Apalachee resistance to Spanish forces.[50] The delegates of western states, particularly Mr Longva of Norway claimed that such frequent usage of guerrilla tactics was not anticipated and it demands regulation.[51] The Northern block sought to regulate these tactics as it yielded favourable results for revolutionaries in colonial regimes. The west was trying its best to constrain its usage to avoid further fatalities of its imperial forces. To frame firmer regulations, the west argued that laws should be formed to address the changing facets of warfare as guerrilla tactics were not covered under the

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[44] See Amanda Alexander, *'A Short History of International Humanitarian Law'* (2015) 26 European Journal of International Law 124.
[45] International Committee of the Red Cross*, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff, 1987) xxxi.
[46] Michael Bothe, Karl Josef Partsch and Waldemar A Solf,*' New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*' (Martinus Nijhoff, 1982) 41.
[47] John F DePue, '*The Amended First Article to the First Draft Protocol Additional to the Geneva Conventions of 1949 — Its Impact upon Humanitarian Constraints Governing Armed Conflict'* (1977) 75 Military Law Review 71, 97.
[48] *Supra note*, 40
[49] Charles Lysaght, '*The Attitude of Western Countries'* in Antonio Cassese (ed), The New Humanitarian Law of Armed Conflict (Editoriale Scientifica, 1979) 350, 354.
[50] Gubernia, '*Guerrilla Warfare'*(Marxist.org)< https://www.marxists.org/glossary/terms/g/u.htm> accessed 26 July 2021.
[51] Keith Suter, *An International Law of Guerrilla Warfare* (Pinter, 1984) 1.

law.[52] However, the Western Delegates were silent on the earlier regulations that applied to irregular combat. These regulations were formed in the Hague convention of 1907 and were even applied by the Germans in ww1 and ww2 and by the US in Vietnam.[53] The reason for this silence was to frame much stricter laws as colonial warfare and revolutionary struggles were breeding grounds for guerrilla tactics. On the other hand, the southern bloc viewed such tactics as entirely fair and justified. They also demanded new laws and regulations as according to them, the old laws were incapable of protecting combatants engaged in guerrilla combat.[54] Despite the same plea, both the northern and southern blocs differed on the rationale behind such demand. Therefore, nearly all the delegates were looking forward to negotiating on framing a new set of regulations concerning guerrilla warfare.

As far as the drafting of new regulations is concerned, there were conflicting opinions on both sides. For the third world, the objective was to achieve relaxation on restrictions and assistance to colonial regimes.[55] However, the western bloc saw it as an opportunity to provide incentives to guerrilla fighters to persuade them to follow the law.[56] To achieve their objective, Europeans proposed three conditions to be followed. These conditions consist of 'organized armed struggle 'meaning that they should operate under a responsible command, to distinguish themselves from civilians and to follow the law.[57] The eastern bloc opposed these conditions of organized headship and asserted that following the law will eventually accomplish the western objective to withhold the protection.[58] North Vietnam even argued that the principle of distinction will provide impetus to western forces to attack guerrilla fighters easily.[59] Therefore, the southern bloc chose to stay firm on their stand without any compromise. To facilitate the convention, ICRC was able to present the draft in the fourth session after two years.[60] The draft comprises two preceding conditions however, these were not necessary for the insurgents to be classified as 'prisoner of war ' except in case of military engagement and military deployment. The fascinating part is the lack of any mutual conscience over the term 'military deployment' and it is the reason for the acceptance of this draft as article 44. The very ambiguity of this article becomes the reason for ending this confrontation.[61] It was perceived more as a compromise rather than mutual acceptance.[62] Even those who are in support of this draft accepted the ambiguity of this article and were concerned about the reduced protection of

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[52] James E Bond, *'Protection of Non-Combatants in Guerrilla Wars'* (1971) 12 *William and Mary Law Review* 787, 789–90 < https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2757&context=wmlr> accessed 26 July.
[53] Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Quadrangle Books, 1970) 136.
[54] *Official Records of the Diplomatic Conference,* vol 14, 366. Mr Todoric (Yugoslavia) speaking.
[55] *Ibid,* 342 *Mr Belousov* (Ukraine delegate) speaking.
[56] George H Aldrich, '*New Life for the Laws of War*' (1981) 75 American Journal of International Law 764, 770.
[57] 'Draft Protocol Additional to the Geneva Conventions of August 12, 1949' in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: Geneva* (1974–1977) (Federal Political Department Berne, 1981) vol 1, 13 ('Official Records of the Diplomatic Conference (FPDB)').
[58] *Ibid*, Algeria at 522.
[59] *Ibid,* at 466.
[60] *Official Records of the Diplomatic Conference,* Vol. 15, 155 (Egyptian representative).
[61] George H Aldrich, *'Guerrilla Combatants and Prisoner of War Status'* (1981) 31 American University Law Review 871, 878–9.
[62] Nigeria described it as a '*victory for reason and justice*': *Official Records of the Diplomatic Conference* (FPDB), above n 60, vol.15 at 180.

civilians.[63]The two strong narratives put forth by both the coalitions could prove to be fatal for the supervision of future warfare. Here, the position of both these blocs was subjected to much criticism. The ambiguous nature of the article endangers the life of many civilians and thus, increases the scope of unjustness. This so-called humanitarian provision has the authority to obscure the civilian status of any individual, consequently making him/her exposed to possible injustice. This was the result of an ideological clash amid two conflicting coalitions at work. On one hand, the idea of sophisticated warfare and military aesthetic of the western side prevails, whereas, on the other hand, the deep-rooted recollections of colonial regimes and imperialism subjugated the eastern thought. Both sentiments were strong enough to be negated and hence, a negotiation was realized as the only route to end the confrontation.

b. Reprisal

The next contention which surfaced was on the issue of reprisal. The principle of reprisal is contained in paragraph 6 of article 51 of additional protocol 1, which prohibits retaliation against civilians.[64] Some countries were willing to accept this provision contentedly as previous customary law permitted reprisal in certain circumstances and it was being observed as a positive transition from previous laws.[65] Except for France, who argued that this provision would not leave any room for the country with an annihilated population to retaliate, this provision was accepted by the convention without many deliberations.[66]

However, the disagreement was about to commence after the question of reprisal against civilian objects. Many heated debates and discussions were centred around reprisal against objects. Even ICRC apprehended that this provision will entice opposition therefore, it was initially proposed on the committee level where it was approved.[67] After that, it was faced with much opposition and hostility when it was later proposed on an international platform. The developed coalition consisting of Australia, the US, Germany and UK specified that this rule is impracticable to its core and hazardous as it removes the deterrence which will encourage the adversary to commit crimes.[68] Australia even chose to abstain from voting and remained firm on its stance. The Australian delegate asserted that reprisal against the object will do nothing in furthering the objective of IHL.[69] This rule is based on the issue of precautions and instructions of military commanders that itself became the contentious innovation of additional protocol 1 and drew elongated discussions as its implementation is more or less depends on the will of the commander of that force. Finally, a conclusion was reached by adding the ambiguous term 'all feasible precautions' which even

[63] *Ibid*, vol.15 170(*Greece*), 171(*Netherlands*),174(*Sweden*),162(*Mexico*) and 163*(Austria*).
[64] *Ibid*, at 265.
[65] *Ibid*, at 312.
[66] *Official records of Diplomatic Conference* vol.6 at 164.
[67] *Supra note* 49*,* at 323.
[68] Stanislaw E Nahlik*, 'Belligerent Reprisals as Seen in the Light of the Diplomatic Conference on Humanitarian Law,* Geneva 1974–1977' (1978), Law and contemporary times at 59.
[69] See LC Green, '*The Geneva Humanitarian Law Conference 1975'* (1975) 13 Canadian Yearbook of International Law 295, 302. Also see*, Official Records of the diplomatic Conference* vol.6 at 176.

amplified the hindrance of idiosyncrasy.[70] Similar ambiguity was shaped in the case of the term 'military deployment'. The consequence was also proved to be identical as despite modifying provisions, the countries were still in a dilemma. These predicaments just increased the apprehensions instead of resolving the clashes and encouraging resolutions. These conflicts invited many questions that needed to be answered with rational thought: *Why was the western world justifying the mass killings of civilians in the name of proportionality? How can they try to escape their accountabilities of torturing civilians in colonial territories and why does the third world seem to settle on ambiguous terms and their vague connotations for the sake of satisfying their self-conceit?* The answer is that both these blocs appeared to attain their notion of humanitarian philosophies based on their past experiences and prejudices. The northern bloc was looking to accomplish their former hegemony of military influence and power aesthetics. Contrarily, the eastern bloc sought to avenge those oppressions and tyrannies by opposing the western dominating novel laws even at the cost of ambiguous and vague regulations. This eastern oriented sentiment amplified after world wars and spread during the Vietnamese and Algerian conflicts. These vague laws are subject to indistinctness till date which creates ambiguity over various issues such as the definition of Guerrilla Warfare and the nature of non-international armed conflicts. The only solution perceptible is to frame these laws once again by neglecting the former position and prejudice with a rational and humanitarian frame of mind. However, at the same time, it should also be stated that the obligation of reform is higher on the northern bloc owing to the previous oppression and injustice they had inflicted on the third world. Therefore, the present insecurities of the third world are justified as they have suffered subjugation from similar countries who dominated the procedure of framing these humanitarian laws. Even in current times, the northern bloc seeks to surge this subjugation by asserting their dominance over the International Criminal Court which is a statute based authority to penalize war crimes and human rights abuses. The determination behind such domination is to conceal their atrocities and grave violations of IHL to defend their armed forces and political stalwarts from the jurisdiction of ICC. They used the benefit of being in the hegemonic position to negotiate the downfall of ICC especially by coercing the states to accept their conditions. These unrealistic demands and their fraudulent use by Northern hegemons to dilute the liberty of ICC will be dealt in the next part of the paper.

III. INTERNATIONAL CRIMINAL COURT: A POLITICAL MANIKIN

The international criminal court, set up by the Rome statute of 2002, delivers the means for implementing the International Humanitarian Law in addition to punishing the criminals of mass atrocities.[71] However, even after 2002, the world experienced the Iraq invasion, Guantanamo detention by the US, the assassination of Saddam Hussain and an upsurge in terrorism.

The American attempt to marginalize ICC is subject to great discussions in the international community. The US sought to protect its army and nationals from prosecution by negotiating bilateral immunity

[70] *Supra note* 49 at 372.
[71] ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 90, *entered into force* July 1, 2002, available at rs-eng.pdf (ICC-cpi.int).

agreements with various countries. These agreements dilute the legal power of ICC and deliver immunity to the citizens of the US.[72] Furthermore, authoritative countries tried to overshadow the power of ICC by giving effect to the legislation that sought to confer the power of prosecuting criminals to domestic courts. For instance, countries such as Belgium[73], Australia and the UK have passed legislation to prosecute criminals irrespective of their nationality and place of crime committed.[74]. On similar lines, Spain's High court opted for a firm stand against the universality of tribunals and laws.[75] It empowers the higher judiciary of Spain to prosecute the accused if another state with greater jurisdiction fails to act on the issue. Hence, it can be concluded that state-driven penalization of criminals in domestic tribunals drove the ICC to a secondary position. An imperative instance of the primary role of the state to prosecute international criminals according to their prejudice can be noted in the Pinochet case where the house of lords acknowledged the view that sovereign immunity should be given to representatives for their acts done in an official capacity.[76] These constraints were specifically put up by the countries of the security council who enjoy special control over the working of international courts by the virtue of their permanent membership.

Therefore, it is crucial to look at the political context that will assist us in determining the extent of independence of ICC from the influence of the security council. After its inauguration in 2003, the court managed to get representation from all of the continents. However, the weak foundation of ICC became evident just after one week when the NATO coalition was resolute to invade Iraq with fierceness. Here, the proponents of Hedley's Bull theory rightly concluded that the society of common rules and regulations will cease to exist as the US with its influence decided to invade Iraq without any consideration for ICC and UN.[77] The indication of ICC infancy in front of the security council can be asserted by the statement of ICC's first president Justice Phillippe Kirsch where he said 'by prophets of doom and gloom of the demise of the ICC before it is even born strike me as a little premature'.[78]A lot of unsolicited attention was given to the court after its creation. This can be recognized by reading the resolutions 1422 and 1487 of the security council.[79] These resolutions sought to deliver immunity to United Nations peacekeeping personnel from countries that were non-signatories of the Rome convention. The US intended to intimidate the

[72] Silal Khan, '*Status of the US Bilateral Immunity Agreements under the Rome Statute"* [2020] CILJ.
[73] Stefaan Smis and Kim Van der Borght, '*Belgian Law concerning The Punishment of Grave Breaches of International Humanitarian Law: A Contested Law with Uncontested Objectives"* [2003] (8) 18 ASIL <https://www.asil.org/insights/volume/8/issue/18/belgian-law-concerning-punishment-grave-breaches-international> Accessed at 28 July.
[74]See, G Triggs, "*Implementation of the Rome Statute for the ICC: a quiet revolution in Australian Law*" (2003) 25 *Sydney Law Review*, 507-34.
[75] Herve Ascensio, '*Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in Guatemalan Generals'* (2003) 1 Journal of International Criminal Justice 690.
[76] *Reg. v. Bow Street Magistrate, Ex p. Pinochet*, [2000] 1 AC 61 (HL).
[77] Tim Dunne, *'Society and Hierarchy in International Relations'*, (2003) 17 (3) International Relations 316.
[78] Philippe Kirsch, *'Keynote Address'*, (1999) 32 Cornell International Law Journal 437, 442.
[79] UN Security Council Resolution 1422 adopted by the Security Council at its 4572nd meeting, on 12 July 2002, UN Doc S/Res/1422 (2002) ('Resolution 1422'); *UN Security Council Resolution 1487* adopted by the Security Council at its 4772nd meeting, on 12 June 2003, UN Doc S/Res/1487 (2003) ('Resolution 1487').

council to refuse the renewal of all United states peacekeeping missions by using veto power.[80] Despite the robust opposition from the international community, the security council approved resolution 1422, which instructed that ICC must not commence any trial of such military assignments that were authorized by the UN for peacekeeping purposes.[81] This resolution was renewed for another 12 months in 2003[82] which again met with strong criticism from lawyers and members of civil societies, including Phillipe Kirsch, who was about to become the president of ICC.[83] The same criticism can be sensed in UN Secretary-General Kofi Annan's statement where he asserted that its renewal, if routine, will diminish the authority of the court and UN peacekeeping authorities.[84] The United States again in June 2004, tried to renew the resolution but fortunately, was not able to do so. Due to the dread of its notorious activities, the US wants to escape from the jurisdiction of ICC especially after its war on terror in 2003 which led to several cases of human rights and humanitarian law violations.

Owing to their erroneous interpretations of humanitarian codes for their advantage, the international community is now undergoing the consequences of the re-interpretation of humanitarian principles by powerful states and their national tribunals. They carved out exceptions and technicalities that best resemble their agenda. The implication of ambiguity over the principles of prisoners of war and proportionality still exist. Due to the USA's unsubstantiated claim that IHL is not pertinent in the case of Afghanistan and al-Qaeda, the international community is still perplexed on the applicability of common article 3 of Geneva conventions and additional protocol II. Therefore, the next section of the paper will deal with the legal 'Black Hole' that has been created in International Humanitarian Law and how the national tribunals have contributed to it. This contribution highlights the evidentiary hurdles and problem of biases that could influence trials in domestic courts and consequently, discourage the dispatchment of justice.

IV. THE INEFFECTIVE IMPLEMENTATION OF BYGONE IHL

In terms of the evolution and implementation of its substantive principles, IHL is quite comprehensive as compared to its other counterparts in international law. However, this comprehensive nature of IHL is a shortcoming in its effective implementation as the principles and tenets of the subject are quite vague in nature. As can be grasped from the previous section of the paper, these principles are the result of the political urgency to accomplish personal objectives. The reason for such defilement is that the current implementation mechanism is politically motivated based on personal interest. These complications owed

[80] Neha Jain, " *A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court*" [2005] 16 (2) EJIL < CHI16(2).book(chi116.fm) (ejil.org)> accessed on 28 July.
[81] UN Security Council*, Security Council resolution 1422* (2002) [on United Nations peacekeeping], 12 July 2002, S/RES/1422 (2002)
[82] UN Security Council, *Security Council resolution 1487* (2003) [on the United Nations peacekeeping], 12 June 2003, S/RES/1487 (2003).
[83] Philippe Kirsch, John T Holmes and Mora Johnson, *'International Tribunals and Courts'* in David M Malone (Ed), *The UN Security Council: from the Cold War to the 21st Century* (Rienner, Boulder, 2004) 289-90.
[84] 'States Send Clear Message that ICC Exemption will not be Automatic', CICC, International Criminal Court Monitor, issue 25, September 2003, 4.

their existence to a lack of collaboration, mutual assistance and dearth of political will of concerned states. One such complication is the over-classification of armed struggle. The recent technological innovations, the emergence of non-state actors and third-party interposition are such complications that act as hindrances in the applicability of IHL as they cannot be fitted in the watertight definition. Even though the Geneva convention of 1949 does not describe the word 'armed conflict', it is divided into two divisions- (a) international armed conflict and (b) non-international armed conflict. However, Professor Pictet defines the expression of armed conflict as "Any difference arising between states and leading to the intervention of members of armed forces is international armed conflict".[85] He further adds that the intensity and time frame of the conflict does not hold any significance.[86] This assertion was relevant for decades however, now the position has been changed and it has been expected that a convinced level of intensity should exist to be qualified as an armed conflict.[87] The reason for such change is the emergence of low intensity and swift wars that are prevalent today. Apart from these wars, the evolution of proxy war and terrorism has not been dealt efficiently in humanitarian law. This has been suggested to contain the intermittent interstate activities such as ceasefire violations and border incursions. However, till date, these offences are not classified in any of the two prearranged categories. Even the recent act of surgical strike by Indian armed forces which resulted in some casualties cannot be classified due to the short time frame of the strike.[88] The Indian side argued that since they attacked terrorists on Pakistani soil, they cannot be held accountable for violating the territorial integrity of Pakistan as they had acted in self-defence.[89] Pakistan denied the happening of such surgical strikes from Indian forces and held them unsubstantiated.[90] However, even if that strike was actually done then in that case too, India cannot be held accountable as the act of surgical strike has not been dealt under humanitarian laws, not as of now to say the least. Thus, it can be determined that IHL till now, does not have any provisions to deal with such inter-state conflicts and they do not qualify as international armed conflicts.

Another such complication concerning the implementation of IHL is correlated with non-international armed conflict that is primarily governed by Common Article 3 of the Geneva convention and additional protocol II. The same problem persists as the common article 3 gives a very broad outlook of the expression 'Non-International armed conflict'. The careful reading of the article suggests that the armed conflict should be of non-international nature in the territory of high-contracting parties of the dispute. Despite this, no

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[85] See, *Jean Pictet, Commentary on the Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field* (Geneva: ICRC, 1952), 32.
[86] *Ibid.*
[87] ICRC*, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Report of 31st International Conference of the Red Cross and Red Crescent* (Geneva, Switzerland, 28 November-1 December 2011) accessed on 20 July 2021. International Humanitarian Law and the challenges of contemporary armed conflicts (rulac.org).
[88] "*4 hours, choppers and 38 kills: How India avenged the Uri attack*," The Economic Times, India, 27 August 2016, accessed on 20 July 2021. India's Surgical Strike: 4 hours, choppers and 38 kills: How India avenged the Uri attack (indiatimes.com).
[89] *Ibid.*
[90] Pakistan's Prime Minister Nawaz Sharif Condemns India's Strike along LoC, accessed May 20 JULY 2021. https://indianexpress.com › India.

remedy has been recommended as to what laws will administer the conflict if that non-state actor is not present within a sole territory. In contemporary times, it is quite usual that non-state actors such as terrorist organisations usually administer their activities in neighbouring territory. In this case, the hostility between Indian and Pakistani authorities over terrorist organisations such as Jaish-e-Mohammad and Israeli-Hezbollah war becomes imperative in understanding the serious nature of the armed conflict of that kind. Similarly, the Bush administration utilized the lack of well-defined law that could govern the dispute of this nature. The US after the declaration of its war on terror made no vibrant statement concerning the legal nature of war. The US administration denied the applicability of the Geneva convention as Al-Qaeda is neither an international body nor does it exist in the identical territory of the USA. Such American re-interpretation of IHL eventually stripped off the alleged terrorist from their rights granted to them under numerous international conferences. An identical step was taken by Turkey when it refused to acknowledge the applicability of the Geneva convention and the domestic legislation was imposed on PKK activists.[91] Consequently, it can be stated that the thresholds enshrined in Geneva conventions and additional protocols are not conducive to determining the form of armed conflict. The vague and non-determined nature has attracted disparagement from various scholars and thinkers. Hans Peter voiced his displeasure as he asserted that the thresholds given for the application are quite intricate and are thus insufficient[92]. Even scholars and academicians are alienated concerning the US positioning. One school represented by Bianchi and Naqvi emphasized that US intrusion in Afghanistan should be incorporated within the definition of international armed conflict[93]. Another school represented by Lubell asserted the contrary idea that al-Qaeda should not be considered as a state.[94] Hence, irrespective of the different stances of scholars, one can effortlessly conclude that such broader definitions do not even directly deal with the terrorist aggressions.

These are many such subjects that are yet to be addressed by the international community. As earlier asserted and established, these loopholes are the result of the precedence given to the individual objectives rather than humanitarian objectives. Even to date, global civil societies are trying hard to mobilize the governments and armed forces to produce a legally binding document that should be authoritative in its approach. The hegemonic control and influence are gradually diminishing due to the ground-breaking development of other nations which has led to the upsurge of a multipolar world. These projects and earlier notions should be defied especially from the nations that are undergoing the fear of asymmetrical warfare. The histories of these prejudiced evolutions are waiting to be transformed and rehabilitated by the contemporary generation. As a measure, the international community collectively should shape the new

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[91] Marco Sassoli, "*The Implementation of International Humanitarian Law: Current and Inherent Challenges*," Yearbook of International Humanitarian Law 10 (2007): 45–73.
[92] Hans-Peter Gasser, "*International Humanitarian Law: an Introduction," in Humanity for All: The International Red Cross and Red Crescent Movemen*t, ed. H. Haug (Berne: Paul Haupt Publishers 1993), 71.
[93] Andrea Bianchi and Yasir Naqvi, *International Humanitarian Law and Terrorism* (Oxford: Oxford University Press, 2011), 60–61.
[94] Noam Lubell, "*The War (?) against Al-Qaeda*," in International law and Classifications of Conflicts, ed. E. Wilmshurts (Oxford: Oxford University Press, 2012), 431.

treaties that may be more commanding and practical in approach dealing with contemporary emerging issues.

V. COSMOPOLITANISM AND NATIONAL JURISDICTION OF COURTS: SHORTCOMINGS IN REGIONAL LEGISLATIVE FRAMEWORK

In this contemporary era, along with the evolving nature of conflicts, the redressal and procedural means of providing justice are correspondingly evolving too. Now, the national courts too realised their significance and are consistently giving effect to the international principles universally. This is most ubiquitous in nations that have adopted translational jurisdiction like Britain. The apex courts of countries often incorporate the universal principles in national laws where the constitution of that country provides recognition to international laws.

This novel contemporary redressal system has reconciled the international law mechanism. A municipal court that adopts the international principles in its pronouncements is not merely a national organ. The same conclusion has been stated by Professor Ian Brownlie wherein he asserted that such courts exercise international jurisdiction.[95] This point was also made by the supreme court of Canada where the court acknowledged that national courts of numerous countries are playing the role of international courts.[96] However, while analysing the local functioning, one could analyse that the adjudication of dispute could be problematic when the political climate would be antagonistic to the witnesses where the accused is influential like in *the Tadic* case. Likewise, there are many hurdles in the successful operation of national tribunals. The infrastructure of the country could be damaged and ruined. In most of the cases where the international cases are tried in national tribunals, the political intrusion and biases can prevail especially when there is a multiplicity of regional or cultural groups like in South Sudan. In these circumstances where the international tribunals sought to change the condition through their verdicts then things might not work in the way they wanted to be. These verdicts and judgements might be subjected to the utmost criticism and can be considered politically influenced. Besides, analysing the procedural loopholes in the working of the national tribunal may cause the delay in delivering justice, thus would destroy the motive of the entire judicial system.

The overview of the factual conditioning of the court can be understood by analysing the quality of evidence gathering in national tribunals. The more pertinent example, in this case, is the Blaskic case. In 1993, Bosnian armed forces massacred thousands of Muslims in that area to get rid of them from central Bosnia. Consequently, Tihomir Blaskic, the commander of the army was indicted based on command responsibility[97]and was held liable for 45 years of imprisonment[98]. However, he presented arguments in his

[95] Cf I Brownlie, *Principles of Public International Law* (5th ed, Clarendon, 1998), 584, 708.
[96] See G V La Forest, '*The Expanding Role of the Supreme Court of Canada in International Law Issues'* (1996) 34 Canadian Year Book 89 at 100.
[97] *Prosecutor v Blaskic,* Case No IT-95-14-I, Second Amended Indictment (25 April 1997).
[98] *Prosecutor v Blaskic,* Case No IT-95-14-T, Judgement (3 March 2000).

defence wherein, the massacre was committed by the military police of the Bosnian army which directly is responsible to the government officials. He alleged that president Tudjman and other government leaders should be held accountable and not him. Accordingly, his lawyers and their legal team repetitively tried to contact the government officials to get their access to archives of the Croatian government. However, their request was denied by the officials frequently. These kinds of examples show the risk that might be involved in the trial in national tribunals. In this regard, the case of Milan Vujin can be considered too. He was affiliated with the Tadic team where he tried to influence the witnesses so the culpability of Bosnian leaders could not be proved.[99] Therefore, it can be apprehended that it is nearly imprudent to believe that national courts could convict such national leaders for their acts where they govern the whole political and executive structure of the nation.

There are still countless examples that can be drawn presenting the disappointing work done by states to implement international law in domestic legislation. Exclusively, it has been observed that the under-developed countries generally did not have a decent infrastructure that could assist the procedural implementation of universal laws. However, in the case of developed countries, they did not show the required will that is desirable for the encouragement of international laws. This is so because they conferred less importance to these laws as compared to their 'National criminal law'. For instance, a trial of US Lieutenant Calley for My Lai Massacre during the Vietnamese war is observed as a complete failure of the national judicial mechanism, specifically when the president granted him pardon.[100] Similarly, when the French committers of 'Rainbow Warrior' bombings in Auckland Harbour were given minimum sentences. These examples demonstrate that the countries were reluctant to persecute those perpetrators who were serving the interest of their homeland. In addition to personal interest, biases and political subjectivity too play the role in the corrupt implementation of laws.

Therefore, this paper asserts that states are generally disinclined in taking a revolutionary step concerning the persecution of international war criminals. This reluctancy is generally observed when the offending state has a sound economy and is militarily stronger. Because of trade and military considerations, states generally choose to turn a blind eye to the humanitarian violation in the territory of the offending state. Unfortunately, these strategic, political and military considerations are not to be changed soon as the states are not willing to interfere in the internal matters of other states which is affecting the implementation of international law.

VI. CONCLUSION

This paper sought to highlight the aspects and consequences of two different eras of ascendancy that led to the development of these humanitarian principles that administer warfare to date. Europe predominantly

[99] *Prosecutor v Tadic*, Case No IT-95-1-A, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin (31 January 2000).
[100] See, Geoffrey Robertson, *Crimes Against Humanity – The Struggle for Global Justice* (Penguin Press, 1999) p 167.

took pride in the creation of these laws that was primarily started in 1864 with the inventiveness of Henry Dunant.[101] It faces challenges and variations in terms of new moralities that were added at times quite frequently. European scholars such as Professor Verzijl drew the formation of IHL from European consensus and frame of mind.[102] Correspondingly, Geoffrey Best, a historian, stipulated in his study that one could find these humanitarian principles alone in western history and philosophy. However, what they failed to appreciate is that the procedure of the development of these laws in the mid-18th and 19th centuries was subjugated by Europe. It does not mean that these principles were solely found in western and Christian philosophy. It is quite ironic that the law that claimed to safeguard human dignity was confined to a particular continent and regarded as a product of western thought. Instead of promoting the universalism of IHL, western philosophers and historians took pride in affirming it as their contribution. Such misguided prerogatives can lead to the universal embargo of these principles as the third world may regard it as a remnant of imperialism. In addition, the study of Lawrence Keeley unveiled the western notion of 'primitivity' of non-European wars as equated with the so-called military aesthetics and regulated war of the west. He stressed that western wars were not conducted by legal and humanitarian principles prevalent at that time.[103] Even the so-called primitive wars of the east were less detrimental.[104] Therefore, the imperial tendencies to exclude the other coalition on the supposition of un-civilized and primitive is extremely contentious.

Also, the centralisation of IHL and execution of the western model of humanitarianism forced the 'other' groups to act under their system which ultimately led to the violation of IHL. Hence, the attention of these global contestants should be the elevation of universal culture of compliance through treaties, conventions and legislation which should deal with every circumstance. This can be achieved by the removal of political constraints from ICC and discouraging the current inclination of states to prosecute the criminals in national courts despite the international nature of the crime committed by them. However, regardless of which jurisdiction will prevail in near future, it should be the responsibility of states that they should pursue the enforcement of law legitimately that should be free of any notion of any personal prejudice. Indeed, the desirable model should be the model of universal jurisdiction with an expanded base laid on the principles of impartiality and transparency.

Besides, the international community could also consider the establishment of the world's people court that could be adjudicated by the intellectuals and eminent persons from NGOs and other international bodies. This idea was initially recognized by Bertrand Russell wherein, he established the said tribunal in Paris to hear the allegations of war crimes committed by various states in the Vietnam war.[105] The tribunal had no

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[101] *Supra note 3*.
[102]See, Verzijl JHW, "*Western Influence on the Foundations of International Law*" in International Law in Historical Perspective (1968), 435-6.
[103] Lawrence K., *Wars before civilization: The myth of Peaceful Savage* (1st edn, Oxford University Press, 1996).
[104] *Ibid*
[105] B. Russell, *Speech at the first meeting of members of the War Crimes Tribunal,* (1969) vol 3, p 216.

state or any formal assistance nor did it have any authority to compel the accused to present before the court. This move of Russell inspired the Algiers declaration on the rights of people. This declaration recognized the primacy of people where they could utter their grief and violence inflicted on them. As a result, the declaration instituted permanent people's tribunals which investigated various international war issues such as the Soviet invasion of Afghanistan. Therefore, the world could resort to such people's tribunals and could deliver them with adequate international backing. These tribunals will encourage those unheard voices which were suppressed in the past and would ensure greater accountability. Even if the accused states refused to accept responsibility, the other states would hesitate to take the side of such a state as the victims will have a stage where they could themselves individually more systematically and coherently. This structure will further encourage the new domain of international law where the individuals would no longer need their respective states to represent themselves on the international platform.

Additionally, the international community should also endeavour to find new approaches to ensure the implementation of humanitarian law, especially by non-state armed actors. The means of execution is the nomination of a protecting power to look after the interest and welfare of nationals involved in a conflict. The same responsibility was taken by countries such as Sweden and Switzerland during the second world war. Such appointed countries should ensure compliance with humanitarian principles and should act as a channel of communication between adversaries. On the same line, protocol 1 also laid down the concept of an international fact-finding commission that usually enquires about grave breaches of human rights.[106]

The leading obstacle in the non-implementation of IHL particularly in the case of non-international armed conflict is that most of the humanitarian treaties addressed states and not insurgent bodies. Therefore, to ensure accountability, the international community should look towards customary international and human rights laws which can safeguard the interest of the whole community. On the lines of the Sierra Leone special court, the ad-hoc tribunals could be set up to prosecute the war criminals. Therefore, the alternative of setting up the treaty-based sui-generis courts could be considered that could act on the lines of ICTY and ICTR. In the case of an unsuccessful country that has been devastated by the civil war horrors or in a country where the international community could sense the dawn of civil war, then such country could be inserted in the trusteeship council of the United Nations in the administration of the security council for effective administration.

Finally, what this contribution seeks to establish is that the bygone humanitarian principles which formed as a result of colonial oppression are futile in contemporary times. The gaps, loopholes and ambiguity have to be addressed by the international community to ensure effective applicability. Once again, new treaty obligations should be framed while confirming the appropriate representation from all spheres of the world. Besides, international institutions should be allowed to adjudicate matters freely without any coercion and intimidation from the authoritative states. With the dawn of new powers and influential states, the

[106] See articles 50,51 and 130 of the four Geneva conventions respectively.

international community could secure them more accountable and transparent redressal forums without any undue influence. Now it is high time that the world should forget the previous biases, wrong notions as well as false pride and should take a long stride to admire the principles of human dignity while recognizing the basic civil liberties of individuals irrespective of their nationality and status.