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LIMITATIONS OF INTERNATIONAL HUMANITARIAN LAW- Shourya Mitra¹**I. ABSTRACT**

With the recent emergence of full-scale war between Russia and Ukraine, the discussion with respect to the limitations and adherence to International Humanitarian Law has come up yet again. International Humanitarian Law is not a novel creation by any means, but questions arise with respect to its decrepit nature as warfare technology advances and modern forms of warfare have not been envisaged particularly well by IHL. This paper attempts to elaborate on the scope of IHL and especially highlights some of the contemporary problems in the application of IHL.

II. INTRODUCTION

International Humanitarian Law (Herein referred to as “IHL”) is an aspect of international law that deals with “armed conflict” and is also known as the law of war.² There are four aspects to law of warfare. These include *Jus contra bellum*³ (Law on the prevention of war), *Jus ad bellum* (Laws under which states may use force or resort to war), *Jus in Bello* (the laws of war governing the conduct of the parties whilst the war is ongoing), *Jus post bellum* (laws under which states end their warfare to transition back to peace).⁴

¹Shourya Mitra is an undergraduate law student at Jindal Global Law School

²International Justice Resource Center, *International Humanitarian Law*, <[³ International Committee of the Red Cross, *IHL and other legal regimes – jus ad bellum and jus in bello* <<https://www.icrc.org/en/doc/war-and-law/ihl-other-legal-regimes/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm>>.](https://ijrcenter.org/international-humanitarian-law/#:~:text=International%20humanitarian%20law%20(IHL)%2C,the%20effects%20of%20armed%20conflict.></p></div><div data-bbox=)

⁴ Carsten Stahn et al, *Jus Post Bellum: Mapping the Normative Foundations*, 2014, <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199685899.001.0001/acprof-9780199685899-chapter-8>

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IHL primarily concerns itself with *Jus in bello*, governing the manner of warfare after the war has broken out⁵. The goal of IHL effectively becomes to Humanize warfare and protect those who are *Hors De Combat* (Injured, prisoners of war) and civilians.⁶ The dust settled after World War 2, and it led to the realization that warfare has only caused destruction. This eventually led to the formation of the United Nations. However, the world understands that there is a need of adequate laws of war, as there were certain practices undertaken during wars that were downright abhorrent. These included slaughtering civilians not participating in hostilities including children and women. There were certain other atrocious practices and inhumane acts which included sexual offences against women and children. Today we have various recognized war crimes that can be prosecuted for by the International Criminal Court (“ICC”), indicating the world’s positive approach towards prosecuting the people most responsible for these grave offences under the laws of war.⁷

We can find precursors to modern day IHL rooted in a number of cultures, such as the Mahabharata or the rules of Manu, the Bushido, the bible and even the Koran. All of these contain some or the other forms of IHL embodied inside them.⁸ Historically, Humanity has attempted numerous times to codify certain norms of war because there has never been a war that not been met with regret and exorbitant casualties. The International committee of the red cross was established and took on the behemoth of a task to codify IHL in 1864. This led to the adoption of the initial Geneva convention in 1864. This went through the test of Fire across both the world wars and led to the adoption of the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1949 which is still a law enforced in present day.⁹

III. IHL: Out of touch and loss of respect

⁵ HANS-PETER GASSER, *INTERNATIONAL HUMANITARIAN LAW: AN INTRODUCTION*, International Review of the red cross No. 298, 6, (1994).

⁶ HANS-PETER GASSER, *INTERNATIONAL HUMANITARIAN LAW: AN INTRODUCTION*, International Review of the red cross No. 298, 16, (1994).

⁷ Emily Camins, *Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law*, International Journal of Transitional Justice, 2016, 10, 126–145, 127, (2016).

⁸ HANS-PETER GASSER, *INTERNATIONAL HUMANITARIAN LAW: AN INTRODUCTION*, International Review of the red cross No. 298, 7, (1994).

⁹ HANS-PETER GASSER, *INTERNATIONAL HUMANITARIAN LAW: AN INTRODUCTION*, International Review of the red cross No. 298, 10, (1994).

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The Limitations of IHL are pre-dominantly due to the passage of time, and the means of warfare have changed consequently. Effectively, advancing technology, globalization, and the change in nature of the Armed conflicts occurring in territories are all adding to a system of IHL which really was not prepared such complications considering that the last time we made significant changes to IHL was during the post-WWII era. Further, it is imperative to classify the types of armed conflict in IHL. International Armed conflict (IAC) and a Non-International Armed Conflict (NIAC). Both have fundamental differences. Firstly, an IAC is fought between two states and hence “international”, while a NIAC does not involve two state parties and instead involves non-state actors or organized armed groups. The first problem that arises is with NIACs being more prominent in today’s day and age.¹⁰ The problem is with overall applicability of IHL in the situations of a NIAC, which is lower. This is not to say that there should be more IACs instead of NIACs but the threshold for applicability of IHL in NIACs is low as the applicable IHL is mostly limited to common Article 3 of the four Geneva conventions. Article 3 provides certain minimum applicability of IHL, however that is still lesser relatively¹¹. IHL applicability in a NIAC does not match up to the level of IHL that is applicable in an IAC. The additional Protocols I & 2 apply to IAC’s and NIAC’s respectively while providing more codified protection. This does not impact the delta much either.

Further there is also the issue of the “protracted” nature of violence. There is a certain threshold that an armed conflict needs to meet for it to be considered as a NIAC. This protracted nature of a conflict means that the situations should exceed more than mere “internal disturbances and tensions, such as riots, isolated and sporadic acts violence and acts of similar nature.”¹². This qualification means that if the conflicts do not reach this threshold, IHL is not applicable effectively reducing its applicability and the effectiveness becomes extremely questionable. Additionally, Non-state groups are not the ideal implementers of

¹⁰ International Committee of the Red Cross, *International humanitarian law and the challenges of contemporary armed conflicts*, International Review of the red cross No. 867.719, 741 (2007).

¹¹ Kelley, Morgan, *Challenges to Compliance with International Humanitarian Law in the Context of Contemporary Warfare*, Independent Study Project (ISP) Collection. 1618, 12, (2013).

¹² Kelley, Morgan, *Challenges to Compliance with International Humanitarian Law in the Context of Contemporary Warfare*, Independent Study Project (ISP) Collection. 1618, 13, (2013).

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IHL.¹³ On the contrary they particularly lack any respect for them. Often the non-state actors do not even understand or know about the international norms and IHL.¹⁴

Another issue that has been emerging recently is that states often label acts as “terrorist” acts even during a NIAC. They often conflate the legal regimes of terrorism and a NIAC.¹⁵ The problem that surfaces is the crucial difference that under IHL certain specific attacks are justified between the parties provided these attacks abide by principles of Military objectives, and military advantage. If everything is labelled as a “terrorist” act, then the parties fail to acknowledge that certain acts of warfare may be justified.¹⁶ Effectively, states and even the non-state actors, tend to not recognize the principle of Military objectives under NIAC, which should not be the case. It is imperative to understand that terrorism is a domestic crime while the war-crimes in IHL consists of multitude of crimes that requires in the background a certain level of “protractedness”. Such a mislabeling of the acts of war simply diminishes an armed groups’ incentive to respect IHL.¹⁷ There is also the acts undertaken in the name of “war on terror” that completely violate the principles of IHL. This *war on terror* by the US is often not even considered as legitimate armed conflicts.¹⁸ Even states are displaying a lack of respect for IHL by mis-labelling situations.

Further there is also the problem of advancement in weapons as states resort to use of weapons that may be extremely difficult to control using IHL. Just for instance, nuclear weapons are an example, that when used of which are not likely to adhere to any of the fundamental principles of IHL.¹⁹ The principles include the principle of Humanity, Principle of Distinction, Principle of proportionality and the principle of military necessity. Often the advanced methods of warfare can lead to a complete breach of these principles. Advanced weaponry also leads to the problem of “asymmetric warfare”, wherein there is a significant

¹³ International Committee of the Red Cross, *International humanitarian law and the challenges of contemporary armed conflicts*, International Review of the red cross No. 867.719, 744 (2007).

¹⁴ Kelley, Morgan, *Challenges to Compliance with International Humanitarian Law in the Context of Contemporary Warfare*, Independent Study Project (ISP) Collection. 1618, 18, (2013).

¹⁵ International Committee of the Red Cross, *International humanitarian law and the challenges of contemporary armed conflicts*, International Review of the red cross No. 867.719, 724 (2007).

¹⁶ International Committee of the Red Cross, *International humanitarian law and the challenges of contemporary armed conflicts*, International Review of the red cross No. 867.719, 723-724 (2007).

¹⁷ International Committee of the Red Cross, *International humanitarian law and the challenges of contemporary armed conflicts*, International Review of the red cross No. 867.719, 724 (2007).

¹⁸ International Committee of the Red Cross, *International humanitarian law and the challenges of contemporary armed conflicts*, International Review of the red cross No. 867.719, 724 (2007).

¹⁹ Legality of the Threat or Use of Nuclear Weapons [1996] ICJ 2

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difference in the military capabilities between the parties.²⁰ Due to the difference in the strength, the weaker party often resorts to ways that penetrate the adversary's military strength, and this is one of the fundamental reasons why the principles of Hostilities are also affected. The ICRC lists out certain illustrations of this, such as one of the parties faking a civilian status, or mixing up combatants with civilians, and often use the civilian population to their advantages, such as Human shields, and hostages leading to blatant violation of the core principles of IHL.²¹ The weaker party often also use protected objects such as schools, hospitals, religious/cultural places to execute their attacks. These factors lead to a sharp increase in the civilian casualties that may be caused even incidentally amidst the conflict. Such use of civilians in executing warfare can also lead to the superior party in exercising less restraint in their act of determining "proportionality", or what part of the populous is engaging in hostilities.²² These "new types" of asymmetric conflict also need to be reconsidered for the purposes of IHL and the effectiveness as well as the implementation of the existing rules should be accounted for.²³ A perfect real life example of this would be the conflicts in middle east, namely Afghanistan and Iraq, wherein such immoral practices were resorted to quite often.²⁴

Another severely limiting aspect of IHL is the lack of reparations on an individual level available to the people. The ICJ has previously taken the view that only states can enforce and be the beneficiaries for any claims that are made for violations of IHL and not individuals.²⁵ Therefore post-conflict measures towards individual victims are limited. Consequently, individuals have to depend on the municipal laws that establish means to provide redressal to the victims.²⁶ However, this feels unfair, as IHL concept exists to mostly

²⁰ International Committee of the Red Cross, *International humanitarian law and the challenges of contemporary armed conflicts*, International Review of the red cross No. 867.719, 732 (2007).

²¹ International Committee of the Red Cross, *International humanitarian law and the challenges of contemporary armed conflicts*, International Review of the red cross No. 867.719, 732 (2007).

²² International Committee of the Red Cross, *International humanitarian law and the challenges of contemporary armed conflicts*, International Review of the red cross No. 867.719, 733 (2007).

²³ International Committee of the Red Cross, *International humanitarian law and the challenges of contemporary armed conflicts*, International Review of the red cross No. 867.719, 734 (2007).

²⁴ Kelley, Morgan, *Challenges to Compliance with International Humanitarian Law in the Context of Contemporary Warfare*, Independent Study Project (ISP) Collection. 1618, 22, (2013).

²⁵ Emily Camins, *Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law*, International Journal of Transitional Justice, 2016, 10, 126–145, 130, (2016) ; *Germany v. Italy : Greece Intervening* [2012] , ICJ General List No.143.

²⁶ Emily Camins, *Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law*, International Journal of Transitional Justice, 2016, 10, 126–145, 131, (2016).

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prevent brutal warfare and protect the non-combatants/civilians. Therefore, this form of limitation especially can create problems in a NIAC where the other adversary is not another state, but a non-state actor and reparations may be limited. The ICC, however, does come into the picture here. The ICC has an interesting approach to the level of reparations provided to the victims. The Court prosecutes these non-state actors, primarily individuals most responsible, and takes into consideration the “principle of restorative justice”.²⁷ Restorative justice understands the importance of victim representation, and abides by the meaningful participation of Victims and their right to reparations.²⁸ The ICC is interesting in that way, as it allows victims to be represented by a “Victims Legal Representative” which is quite atypical for a criminal proceeding wherein there are usually only the Prosecution and defense. The ICC along with its Trust fund for victims can help curb this problem of reparations to victims of violation of IHL.²⁹

This brings me to what I believe is the most important issue of IHL, that is the enforcement of punishment against those most responsible for violating IHL. Often the prosecution of the criminals who violate IHL is done via municipal laws³⁰, however the existence of ICC makes it possible to prosecute such individuals using well drafted international laws that have codified the specific war crimes violating IHL. The problem that rests with this however is the unwillingness of states to provide jurisdiction to ICC. As of now most cases at the ICC are from the African Union.³¹ A significant number of countries even in the middle east such as Libya and Iraq, where war crimes are common, are not party to the Rome statute. Even some major superpowers, including the likes of US, Russia, China, India are not a part to the statute. The problem of non-enforcement of IHL is an issue that even the superpowers contribute to.

²⁷ Assembly of States Parties, International Criminal Court, Report of the Court on the Implementation in 2013 of the Revised Strategy in Relation to Victims. ICC-ASP/12/41, 11 October 2013, para. 28 (hereafter: Assembly of States Parties, ICC-ASP/12/41).

²⁸ Claire Garbett, *The International Criminal Court and restorative justice: victims, participation and the processes of justice*, 5 Restorative Justice, 2, 198-220, DOI: 10.1080/20504721.2017.1339953, (2017).

²⁹ Emily Camins, *Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law*, International Journal of Transitional Justice, 2016, 10, 126–145, 141, (2016).

³⁰ HANS-PETER GASSER, *INTERNATIONAL HUMANITARIAN LAW: AN INTRODUCTION*, International Review of the red cross No. 298, 56, (1994).

³¹ The ICC-African Relationship: More Complex Than a Simplistic Dichotomy, Emily Rowe, Edited by Juliette Mennicken and Nina Russell.

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Even when the prosecution of certain people like Qaddafi is made possible through a UNSC reference, the concerned person ends up being killed before ever making it to the ICC.³² Such acts hinder the effective administration of Justice and the reparations that could have been possibly provided to the victims.³³ There are further interferences with the ICC. For example, the American Service-Members' Protection Act (Also known as The Hague Invasion Act) stops the criminal prosecution of American soldiers by the ICC. This hinders the Justice that the ICC could provide in respect to the war crimes taking place. Even Russia backed out of the ICC ever since it annexed Crimea, as the incidents and violations of IHL in Crimea fell under the Jurisdiction of the ICC.³⁴

IV. Conclusion

To conclude, IHL other than facing issues of time and age due to contemporary warfare also seems to be less and less respected by the state and non-state parties alike. Even the violations of IHL, and the consequent prosecution of concerned person and the reparation to victims is hindered due to the way the global powers act. Not “respecting” IHL is not a crime, however, the effective enforcement of them should be a minimum responsibility of the states as some fundamental principles of IHL are *jus cogens* norms which create *Erga omnes* obligations that should bind all states alike.

³²*The Prosecutor v. Saif Al-Islam Gaddafi* [2011] ICC-01/11-01/11

³³ Building Blocks, ‘The Rise and Fall of Responsibility to Protect’ (World 101 ,2019) <[³⁴“Russia Withdraws from International Criminal Court Treaty.” *BBC News*, BBC, 16 Nov. 2016, \[www.bbc.com/news/world-europe-38005282\]\(http://www.bbc.com/news/world-europe-38005282\).](https://world101.cfr.org/how-world-works-and-sometimes-doesnt/building-blocks/rise-and-fall-responsibilityprotect#:~:text=In%202005%2C%20UN%20members%20endorsed,the%20rest%20of%20the%20world.></p></div><div data-bbox=)

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