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THE SCOPE OF MODERN MEANS AND METHODS OF WARFARE UNDER INTERNATIONAL HUMANITARIAN LAW

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By: Akshara Ajit Kurup

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ABSTRACT

With advancements in technology in the 21st century that have changed the manner in which armed conflicts have been carried out, it is necessary to review the essence of the principles of International Humanitarian law that regulate the permissible means and methods of warfare and how the modern scope of such means and methods of warfare have added new complexities in the determination of key aspects like armed conflict, the intensity of force used, whether there exists a deliberate belligerent intent etc, which then acts as a block on the application of International Humanitarian law itself, which disproportionately affects the protection of civilians and civilian objects i.e the most vulnerably affected in any armed conflict.

RESEARCH QUESTIONS

1. What are the fundamental principles that regulate means and methods of warfare under International Humanitarian Law?
2. What are the challenges regarding means and methods of warfare that are caused due to the advancements in various related factors of armed conflict, peculiar to the 21st century?

RESEARCH METHODOLOGY

This paper is primarily explanatory in nature, with the outlining of the principals involved for the subject matter and its application in the present context. The paper shall also employ a doctrinal approach of research as it has focused on international legal provisions and commentaries for interpretation of scope. The paper has used secondary sources such as commentaries, handbooks, research papers, articles etc.

CHAPTER 1: INTRODUCTION

It is a well-established fact that International Humanitarian Law (IHL) is that branch of public international law that seeks to regulate the conduct of armed conflicts and limit the damage caused as a consequence of that conflict. Modern IHL has developed an extensive body of rules regulating the development, possession and usage of certain weapons i.e. means of warfare and prohibiting or restricting the ways in which such weapons can be used or hostilities can be conducted i.e. methods of warfare.

The codified branch of IHL consists of the 1899 to 1907 Hague Regulations and 1949 Geneva Conventions, where it is the former that regulate or prohibit the means and methods of warfare under IHL. The 1977 Additional Protocols (hereafter “AP I”) to the 1949 Geneva Conventions provide a more detailed account on the principles of protection as applicable both during international and non-international armed conflicts. Along with these instruments, specific legal instruments such as treaties and conventions that restrict or prohibit means and methods of warfare along with customary international law constitute the broad regulation that seek to limit the harmful consequences that are felt especially by uninvolved parties such as civilians.

The extraordinary predisposition of humans to develop new weapons has often shown itself in parallel with efforts to limit or regulate their use.¹ Thus, in the 21st century, with changing technology and advancements in knowledge of various related fields, it is seen that new forms of weapons and means exist, but it how well they have been regulated or conform to principles of IHL is something that will be seen in the coming chapters.

CHAPTER 2: PRINCIPLES FOR THE REGULATION OF MEANS AND METHODS OF WARFARE

The main provisions that definitively lay out the limitations are on means of warfare with respect to Art 22 of the Hague Regulations² which state that the rights of belligerents to adopt the means of injuring the enemy are not unlimited and on methods of warfare under Article 35(1) of the Additional Protocol 1, which restricts the right of the Parties to the conflict to choose the methods of warfare. These limitations follow the two basic principles that now form part of customary international law.

The first principle is the prohibition of the use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering, and this is outlined in various treaties, showcased all the way from the early instrument of the St. Petersburg Declaration in 1868³. The principle it highlighted, for the banning of rifle shells that exploded on impact, was

¹ Isabelle Daoust, Robin Coupland and Rikke Ishoey, *New wars, New weapons? The Obligation of States to Assess the Legality of Means and Methods of Warfare*, (84), Int'l Rev. Red Cross, 345, (June 2002)

² Article 22, Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907

³ St. Petersburg Declaration, Vol. II, Ch. 20, Para 1

that it was prohibited to employ means and or methods of warfare that will cause or prolong the unnecessary suffering⁴, as it would be contrary to the laws of humanity.

The main issue is that there is a need to strike a balance between the principle of military necessity, and the expected injury or suffering inflicted on a person and whether that will constitute excessive injury or suffering i.e. that which is not proportionate to the military advantage that is sought by the Party inflicting injury, therefore violating the rules of IHL.⁵ This is why when the suffering has no nexus with a military objective or has no military purpose, it will not get the protection of military necessity as justification.

The interpretation of the terms “superfluous” or “unnecessary suffering”, are therefore essential in expanding the scope of the principle. This is seen with it initially related to “arms rendering death inevitable” in the St. Petersburg Declaration, with later interpretations of even “inevitability of serious permanent disability” being regarded as a relevant factor, which was later used for the prohibition of blinding laser weapons⁶ and of antipersonnel landmines⁷.

In the Advisory Opinion on Legality of the Threat or Use of Nuclear Weapon⁸, the ICJ, it considered that inflicting superfluous injury or unnecessary suffer means to cause combatants greater harm that that unavoidable to achieve military objectives. It stated that “States do not have unlimited freedom of choice of means in the weapons they use . . . this is to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law”. Thus, with respect to this principle, it is not the degree to which suffering is inflicted but that it exceeds the harm that is unavoidable or necessary to achieve a military objective i.e. military necessity.⁹

⁴ Fleck, Deiter, The Handbook of Humanitarian Law of Armed Conflicts, Oxford University Press, 1995

⁵ Rule 70, ICRC Handbook on Customary International Law

⁶ Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention Prohibiting certain Conventional Weapons), Geneva, 1995

⁷ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, (Ottawa Convention), Oslo, 1997

⁸ ICJ GL No 95, [1996] ICJ Rep 226, ICGJ 205 (1996)

⁹ Gloria Gaggioli, Nils Melzer, Methods of Warfare, (2017),
https://www.researchgate.net/publication/339883371_Methods_of_Warfare;

With the scope of this principle, various weapons and methods have been interpreted to cause superfluous injury or unnecessary suffering such as asphyxiating, poisonous or other gases, and of bacteriological methods of warfare¹⁰ where it is prohibits practices such as poisoning the food and water supplies, smearing poison of projectiles, bayonets and other penetrating weapons etc¹¹, Booby-traps and other remote- or timer-controlled devices ¹², landmines such as anti-personnel mines¹³, incendiary weapons¹⁴, cluster munitions¹⁵, etc.

The second principle that limits armed conflict is the prohibition of weapons that are indiscriminate in nature. These are i.e. those means of warfare that cannot be directed at a military objective or whose effects cannot be limited as required by international humanitarian law. It is heavily based on the principle of distinction where the use of weapons will depend on the ability to distinguish between civilian and military objectives. Article 51(4)(b) of AP1 prohibits weapons which cannot be directed at a specific military objective and Article 51(4)(c) prohibits those weapons whose effects can't be limited to the extent required by the Protocol. The principle of proportionality plays a major role here, because it, in theory, prohibits directing attacks against civilians or civilian objects that would be excessive to the necessity and that the collateral damage could outweigh any military advantage, thus considered a clear violation of IHL. Some clear prohibited attacks would be using weapons of mass destruction such as biological and chemical weapons, bombardment limited to military objectives only¹⁶ etc.

Thus, it can be seen that there is a multiplicity of conventions and legal instruments that prohibit the means and methods of warfare that go against the tenets of IHL. But it is not a static concept,

¹⁰ United Nations, Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, 17 June 1925

¹¹ Nils Melzer, *International Humanitarian Law; A Comprehensive Introduction*, ICRC, 112, August 2016

¹² Amended Protocol II to the Convention on Certain Conventional Weapons

¹³ United Nations, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 18 September 1997

¹⁴ Article 1(1), Protocol III to the Convention on Certain Conventional Weapons

¹⁵ Convention on Cluster Munitions, 30 May 2008

¹⁶ Article 48, 52(2), 52(3), 57; Additional Protocol I

and States are constantly in search of more advanced techniques and this raises the issue pertaining to the 21st century period of warfare.

CHAPTER 3: MODERN SCOPE OF MEANS AND METHODS OF WARFARE.

There exists an obligation on States to determine whether the employment of any new weapon, means or methods or warfare would violate the Protocol or any rule of international law applicable to that State¹⁷. Thus, it addresses the issue of new developments in weapons and usage of those during armed conflict. But the key word “employment” must be given its due weightage, as it makes the Article only regulate the actual use and not the possession of such weapons within the States. Although States do have legal reviews being conducted to make sure that new weapons or usage do not violate any element of IHL, it does not address the possession of it itself as a threat; both to conflicting parties and civilians, and only the actual usage of it. This can lead to many States building up arsenal of weapons using this justification of matters of self-defence, as mentioned in Article 2 of the UN Charter.

As the lines between civilians and combatants are getting blurred, and multiple parties are getting involved indirectly in the armed conflict, especially in Non-international armed conflicts, as is most evident in ongoing conflict zones such as Syria and Yemen, the strict regulation of IHL becomes more difficult. These new means of combat complicate the characterization of armed conflict, not in themselves but because they enable to multiply actions of low intensity against or within a State. Therefore, to know whether IHL applies to the situation is not a problem of rule but of interpretation of them qualifying the threshold test, which is higher for NIACs.¹⁸

With the advancements in the pervasive reach of the Internet and digitisation, a new and concerning issue in IHL is that of robotisation aided with Artificial intelligence. It has reduced the various issues that conflicting parties face on ground during the traditional armed conflicts, with distance between the combatants practically nullified with hackability and accuracy of information provided by AI, as well as the damage to individuals; be it combatants or civilians. It relates to a plethora of issues such resource-exploration and unitisation competition,

¹⁷ Article 36; Additional Protocol I

¹⁸ E. Pomes, *Technological Innovations and International Humanitarian Law: Challenges and Tensions*, 46, Polish Political Science Yearbook, 209, (2018)

transformation in current political dynamics in the international space, big data mining, privatisation of warfare where there are no longer traditional reasons for conflict between States or States and Non- State actors; rather there are multiple parties that have shared issues or concerns, surveillance and privacy issues that directly impact civilians, determination of involvement of parties becoming more difficult, thus tracing actions back to the responsible party to hold them accountable for any violations of IHL that may occur etc.

The examination of new weapons mentioned under Article 36 would not be sufficient in the context of these issues due to two reasons. The first is that this determination is left to States themselves and the manner in which such examination must be conducted is not explicitly mentioned. The second reason that the principles, although part of customary international law and binding on parties whether they are parties to the legal instruments or not, are open to interpretation. There is no prohibition that stops States from interpreting such new developments as part of “self-defence” or “military necessity”, because the terms in which suffering or injury is a consequence itself will not fall under the traditional scope of the principles.

Although the Advisory Opinion of the ICJ in the Threat against Nuclear Weapons case had indicated that merely because the means or methods of warfare are not expressly prohibited, will not make it automatically legal or justified, it is to be seen that the military tactics and knowledge, nature of combatants, intelligence capacities and manner of conducting armed conflicts have been transformed.

The costs of war in terms of blood, overt battlefield confrontations and leaders’ “call to arms” may well not be the spectre of future wars, certainly not in their initial stages.¹⁹

Hybrid Warfare is also another presentation of widening scope of armed conflict, as it encompasses a wide range of integrated military and non-military means of State power and clandestine actions available to a hybrid actor, with the scope of tools and techniques having advanced due to advancements in I.T.²⁰ Thus, the aspect of distinction of military objectives and civilian objects is made practicably impossible, such as the power of social media to control

¹⁹ Dr Randolph Kent, *The Future of Warfare: Are We Ready?* 97(900), IRRC, 1341-1378, (2015), https://international-review.icrc.org/sites/default/files/irc_97_900-18.pdf

²⁰Abdyraeva, Cholpon, *The Use of Cyberspace in the Context of Hybrid Warfare.: Means, Challenges and Trends*, OIIP - Austrian Institute for International Affairs, 13-15, (2020), www.jstor.org/stable/resrep25102.6.

the narrative of the armed conflict, possibility of large-scale cyber-attacks on civilians, possibility of grey zone attacks etc.

CONCLUSION

Application of the rules of IHL is seen to be complicated in terms of the scope of interpretation that will be efficient in addressing these new issues related to armed conflict. There are obvious loopholes in the present system that allow for new means and methods of warfare to be in possession of or employed by parties to armed conflict. It is pertinent to note that rules of IHL alone will, therefore, not be sufficient to address the issue if they are not updated to accommodate the changing factors of the 21st century. It is necessary to move beyond specific treaties and conventions that ban certain means and methods of warfare in order for IHL to keep up with changing trends and as a consequence, to offer better protection to those most affected by armed conflicts all over the world.