

Why Respect International Humanitarian Law? Between Legality and Morality

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Abstract

The focus of this paper is an attempt to advance reasons for obeying international law with a view to ascertaining whether obeying international humanitarian law is a matter of legality or a morality. It is on this problematic premise that this paper critiqued the arguments for or/and against international law and advanced to interrogate whether or not the prominence of the emergence of international humanitarian law and its attendant substance on humanity has countered the morality question against international law generally. In order to achieve this aim, the paper uses qualitative data from the secondary sources and argues that previous studies counteracted international law on morality grounds without considering if the humanitarian law has influenced the international system in any measure in contemporary international system. It is within this gap in international law literatures that this paper seeks to interrogate, why respecting international humanitarian law, and whether the obligation is legal and a moral duty. It is thus reveal that the changing notion of sovereignty in international law is covering more spheres of law even at the domestic level, especially the human rights. And it is uncertain if the changing notion has advanced a paradigm to dismiss the naturalists' permissive view about international law. The paper concludes that the increasing global interdependence is unavoidable and compliance with international law becomes necessary both in national and international interest. It is observable that non-compliance with a decision of the International Criminal Court does not make the international humanitarian law (international law) a moral duty or/and not law. Disobedient to court order is not peculiar only to international law. As such, international humanitarian law as an aspect of public international law has made compliance with international law a great deal of benefits to the country due to it benefits to humanity. This informs the basis of the argument in this paper. It recommends that the United Nation System should continue to strategize to promote obedience to international law among nations.

Keywords: International law, Humanitarian law, Morality, Legality

Introduction

International humanitarian law is an aspect of public international law that regulates crimes against humanity. The evolution and development of the international humanitarian law is a complex one. The complexity perhaps is shrouded in the prolonged stages of its development. Its principle and spirit are products of the founding treaties and protocols. The principle of international humanitarian law is premised on certain treaties. One of such treaties is the treaty on the protection of victims of war and the Convention for the amelioration of the condition of the wounded and sick in armed forces in the field is another one. This treaty protects wounded and sick combatants, the personnel attending to them, the buildings in which they are sheltered and the equipment used for their benefit. The Convention extends protection to shipwrecked combatants and regulates the conditions under which they can be assisted. The treaty also regulates the use of the Red Cross and Red Crescent emblem (ICRC, 1949).

There is also a Convention relative to the treatment of prisoners of war. The thrust of this Convention protects members of the armed forces that have been taken as prisoner (ICRC,1949). This Convention sets forth the rules governing their treatment and established the rights and obligations of the detaining power. The Convention relating to the protection of civilian persons in time of war is another legal instrument of international humanitarian law(ICRC,1949). This Convention establishes the rules governing the protection of the civilian population, in particular the treatment of civilians in occupied territory, those deprived of their liberty, and occupation in general. There is a Protocol additional to the Geneva Conventions, and relating to the protection of victims of international armed conflicts. This Protocol broadens the protection extended to civilians and limits the means and methods of warfare. To this end, the 1949 Geneva Conventions which is the ground legal framework for the current international humanitarian law regime is a product of four Conventions. These are:(i) first Convention: wounded and sick armed forces in the field; (ii) second Convention: wounded, sick and shipwrecked members of armed forces at sea; (iii) Third Convention: prisoners of war and (v) fourth Convention: civilians.

In spite of the complex and challenging nature in the evolution of the international humanitarian law, the naturalists are by no means exonerated from the morality question attributed generally to international law. The doubt about international law is not only scholarly interesting but dominating in international relations literature. Why should anyone have any respect whatsoever for international law? This question forms the basis for the arguments for or/and against international law. The taint on international law is the patriarchal one. Consider what Catharine MacKinnon (1989) said about even the best of law: 'In the liberal State, the rule of law, neutral, abstract, elevated, pervasive both institutionalizes the power of men over women and institutionalizes power in its male form'. It is even more true of international law than of the law that demands compliance within States that it reflects the male point of view. International law is a product of war, statecraft, diplomacy, and relations

between States, which have been dominated by men and not women to a large extent, than have the internal governance and regulation of states. Held (2000, pp.173-194) holds that: then there is the taint of the relative power imbalances between existing States. States have come about as a result of war, imperialism, and the strong imposing their will on the weak, not social contracts. International law, even more than law within States, reflects what the powerful want. Within States, powerful interests structure law to their own advantage but democratic forces often temper the sway of the powerful and influence the way law evolves. At the international level, small and weak States have no comparable leverage. Wherever they have an equal vote, as in the General Assembly of the United Nations, their puny influence is often dismissed by powerful States.

The argument by the positivists that all States are equal by virtue of international law is discarded by Held's (2000) submission. Many scholars on the left-hand side of the divide had seen international law as a tool serving neo-colonial interests in interference. To Chomsky (2005), in the international law community and international law professionals, most have to construct complex arguments to justify crimes of aggression. Their job, basically, is to serve as defense counsels for state power. Even Nagel (2005) argues that, the most important task for political theory today is to find 'workable ideas' about justice in the domain of global or international institutions. Nagel and many other liberals undermine any realistic hope for international law, accepting the Hobbesian idea that there can be no justice or law until there is sovereignty with a monopoly of force (Held, 2000). Their arguments can be a disparaging of international norms as the arguments of conservatives. Nagel argues, for instance, that justice is only applicable within sovereign states where decisions are enforced, and in the global system cooperation is possible but precarious. International law, on this view, consists of little more than quasi-contractual agreements that some sovereign states may, or may not, choose to enter into. Even within the domain of legal thought, there is a lack of support for international law.

As Goldsmith and Levinson (2009, p.1) wrote, 'international law has long been viewed with suspicion in Anglo-American legal thought. Compared to the paradigm of domestic law, the international legal system seems different and deficient'. From the foregoing arguments, Held and other scholars believed that there is the serious problem of compliance with international law. Apparently, for a law to even be law, it requires compliance. Compliance is achieved within States by enforcement and by the willingness of citizens to accept law even when enforcement is weak. Nothing comparable can be said on the international scene; where enforcement is uncertain and often arbitrary and where powerful States flout international law almost at will. While the liberal thinking continues to advance this permissive position about the legality, enforcement and enforceability of international law generally, it is uncertain whether the emergence of the international humanitarian law has changed the narrative. The humanitarian law has influenced the international system in no small measure in contemporary international system. Yet, scholarly works that interrogate its legality and morality nexus is

rather scanty. It is within gaps in international law literatures that this paper seeks to interrogate why respecting international humanitarian law? And whether the obligation is a legal and moral duty?

The Development of International Humanitarian Law

The 1977 Protocols additional to the Geneva Conventions is essential to the development of international humanitarian law. It gave birth to three Protocols and member-states that ratified them. These are the Protocols and the number of States that ratified them. The Protocol I: is international armed conflicts (150 States), Protocol II is non-international armed conflicts (144 states) and the third Protocol is declaration under article 90 of Protocol I (53 States) (ICRC,1983). By this Protocol the use of certain conventional weapons deemed to be injurious were outlawed. This controversy traivailed until the 10th of October 1980 when the Geneva Convention established the framework for the Protocols prohibiting the use of certain weapons.

There is protocol on prohibitions or restrictions on the use of mines, booby-traps and other devices, and incorporated into the Geneva Convention of 10th October 1980, amended on 13 May 1996. In a previous study, Echikonye (2019) only x-rayed the development of the international humanitarian law purely on a historical perspective without interrogating whether the legal regime prohibits the use of mines, booby-traps and other devices against the civilian population and restricts their use against military targets. The amended Protocol further extends the prohibition of those devices and extends its scope to internal conflicts. Protocol on prohibitions or restrictions on the use of incendiary weapons had its entrenchment in the Geneva Convention of 10th October 1980.

The issue is the protocol that prohibits the use of incendiary weapons against civilians and civilian objects and restricts their use against military targets. The contending angle is that the Protocol focuses only on blinding laser weapons. The Protocol prohibits the use of laser weapons that are specifically designed to cause permanent blindness. Convention on the prohibition of the development, production, stockpiling and use of chemical weapons, and on their destruction further clarified the contentious areas. There is another Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and their destruction which is step ahead of the preceding Convention.

There is also a protocol for the protection of cultural property in the event of armed conflict (ICRC,1991). The Hague, 14 May 1954 provides for the prevention of the export of cultural property from occupied territory, and for the safeguarding and return of such property. The Hague, 26 March 1999 became the Second Protocol for the protection of cultural property in the event of armed conflict. It enhances the protection of cultural property, strengthens the repression of violations and applies also to internal conflicts.

There is also Convention on the prohibition of military or any other hostile use of environmental modification techniques. The Convention prohibits the military or any other hostile use, as a weapon of war, of environmental or geophysical modification techniques having widespread, lasting or severe effects. There is the treaty on international jurisdiction on Statute of the International Criminal Court of Rome, 17 July 1998. It established a permanent international criminal court with jurisdiction for the crime of genocide, war crimes, and crimes against humanity and for the crime of aggression once it has been defined. The history and development of the international law is both challenging and complex before the final establishment of the International Criminal Court.

Respect for International Humanitarian Law: Sensible Political Choice or Legal Duty?

The International Criminal Court (ICC) is the international judicial organ that adjudicates cases on international humanitarian law. The International Criminal Court has the following Jurisdiction

(i) War crimes

Under Article 8 of the Rome Statute, the ICC has jurisdiction in respect of war crimes. These include most of the serious violations of international humanitarian law mentioned in the 1949 Geneva Conventions and their 1977 Additional Protocols, whether committed during international or non-international armed conflicts. A number of offences are specifically identified as war crimes in the Statute, including: rape, sexual slavery, enforced prostitution forced pregnancy or other forms of sexual violence; and using children under the age of fifteen years to participate actively in hostilities. Certain other serious violations of international humanitarian law, such as unjustifiable delay in the repatriation of prisoners and indiscriminate attacks affecting the civilian population or civilian objects, which are defined as grave breaches in the 1949 Geneva Conventions and their 1977 Additional Protocol I, are not specifically referred to in the Statute. There are only a few provisions concerning certain weapons whose use is prohibited under various existing treaties, and these do not apply with respect to non-international armed conflicts.

(ii) Genocide

The ICC has jurisdiction over the crime of genocide under Article 6 of the Statute which reiterates the terms used in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. This crime is defined in the Statute as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group

(ii) Crimes against humanity

The ICC also has jurisdiction over crimes against humanity. Under Article 7 of the Statute, these crimes comprise any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population: murder, extermination; enslavement; deportation or forcible transfer of the population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character internationally causing great suffering, or serious injury to body or to mental or physical health. (iv) Aggression

As stated in Article 5(2) of the Statute, the ICC will have jurisdiction over the crime of aggression once a provision defining this crime and setting out the conditions for the exercise of such jurisdiction is adopted.

Based on the aforementioned jurisdiction, the question of who must respect international humanitarian law revolves around who takes obligation under the law. Such juristic persons are called subject or legal personality. The States party to international humanitarian law treaties is formally bound to comply with the rules thereof. They must do everything in their power to respect and ensure respect for humanitarian law.

The individual juristic person is individual. International humanitarian law must be respected by everyone, combatants and the population as a whole. The obligation to comply with international humanitarian law is such that non-compliance can, in some cases, render the individual liable under penal law, as many national and international courts have recognized.

The question of whether respect for international humanitarian law is confronted with legality and morality, is still in contentious among scholars. The State is responsible for its citizens. It must ensure their protection in the event of war. Every culture has rules strictly limiting the use of force. International humanitarian law simply translates those rules into legal and universal language. By adopting them, States give themselves the means of ensuring respect for humanity in time of war; they also guarantee that human dignity will be upheld in circumstances that threaten it.

There is the question of a reasonable military option in international law literature (Goldstein, 2001; Charles, 2007; Karen, 2004, 2005; Brown, 2001). These studies viewed military action mainly on a humanitarian ground. What actually constitute humanitarian

intervention was not conceptualized by them. However, acts such as the massacre of civilians, the slaughter of surrendering troops and torture of prisoners have never led to military victory. Respect for international humanitarian law, and for its concepts such as proportionality, is part of a modern strategy based on the rational use of resources. This presents the stand of this paper different from previous studies.

Another contentious issue in international humanitarian literature is the notion of a sensible political choice. Whereas a study, Margesson (2011) conceptualized it as a divine passion for armed forces without explaining what made him to attribute the concept of divinity to it. His conceptualization left in the mind of readers wondering the interconnectivity with a sensible political choice of armed forces in warfare with divinity. The paper takes a step further to argue that, the spirit of the international humanitarian law regarding a sensible political choice implies treating the enemy armed forces and population with due regard for international humanitarian law is undoubtedly one of best means of inciting the enemy to do so, too. Respecting one's obligations encourages others to do the same. The obligation is legal but not moral. This is because when a State becomes party to a treaty of international humanitarian law, it undertakes to respect all the obligations contained in that treaty. It may, therefore, be liable under penal law if it does not meet its obligations (ICR,1999).

This conclusion suggests that moral duty and legal obligation are not antithetical in international law. But the submissions by previous studies such as (Goldstein 2001, Charles 2007, Karen 2004, Rourke 2005 and Brown, 2001) present as if member-states are only legally bound to perform obligation incumbent on them without moral propensity to do so. These scholars are overzealous of the legality of the duty of States with no emphasis on the moral justification to act as expected. This paper holds different view regarding the nexus between legal duty and moral obligation. To this end, in international law, legal duty is shrouded with moral obligation. Invariably, legal obligation comes with moral duty. The will to perform a legal obligation customarily makes such will immoral if not performed as prescribed by the law. In other words, moral duty and legality of obligation meet a point of compromise in ensuring respect for international humanitarian law and international law in general. International humanitarian law is still all too often violated. A number of measures must be taken to remedy this situation.

The debate between legality and morality in international law comes with the notion of legal measures accompanied by political action. Margesson (2011) shared the permissive notion. He is of the view that the respect for international humanitarian law implies taking a number of legal measures (for example, ratifying the appropriate international instruments and adopting the required legislation and implementing rules). This notion is purely legal and it does not suffice, though. Because ensuring respect for international humanitarian law also implies breathing life into it, by spreading knowledge of its contents and ensuring respect for the principles on which it is based, by political means as well. We agree with Margesson's submission because parliaments and their members have a key role to play in promoting

respect for the rules of international humanitarian law and the punishment of violations of these rules not only where armed conflicts have actually broken out but also, on a preventive basis, outside periods of hostility. In other words, the fear of the International Criminal Court alone could prevent crime against humanity.

The notion that the respect for law ‘in time of war is the same as in time of peace’, is a doctrine in the field of international humanitarian law, which was popularized by the International Committee of the Red Cross, on the ground that war does not abrogate law (ICRC, 1999). In other words, warfare is not absence of law. While this paper agrees with this notion, the literature did not specify what measures should be taken at wartime to ensure that international humanitarian law is respected. This paper thus sees this angle as a gap in the literature. This is because, just as most countries prepare their defenses even when threatened by no immediate conflict, it is in time of peace that measures must be taken to ensure that any war will be conducted with due regard for international humanitarian law.

When conflict seems likely, it is often already too late. Countless preventive measures can be taken in time of peace to ensure compliance with international humanitarian law but difficult to take measure in wartime. This gap needs to be filled as the notion of ‘within and beyond national borders is crucial to the understanding of the doctrine of ‘in time of war as in time of peace. Perhaps, the idea that States must not only respect international humanitarian law within their borders but also ensure its respect throughout the world is fundamental. That is why in Article 1 common to the Geneva Conventions, 1949, the parties undertake to “respect and ensure respect for” the rules of Convention. What the International Committee of the Red Cross did not take into consideration is that, many people, when they first think of it, find the idea of limiting the violence of war nonsensical. History has shown, however, that while there have been few clean armed conflicts; some have been much more respectful of the human being than others. They have also been less costly in terms of human and material resources, resulting more easily in peace treaties, and were settled with a view to reconstructing society.

International Law and the Morality Question: International Humanitarian Law as a Changing Trend in International Law

The nexus between international law generally and morality is interesting and contentious. The argument is rooted around the positivism and naturalism school of thoughts. Austin called international law positive international morality. According to Austin, law is the command of the sovereign, and the indeterminacy of sovereign at the international level and the lack of coercive force had made him classify international law as mere positive morality. His argument is premised on the ground that sovereignty of the nation-state is one of the fundamental principles of international law. International norms were binding on the States only to the extent expressly consented to by them. Thus, the enforcement is based on, what may be called, “naming and shaming”. In other words, the loss of good faith at the international arena functioned as the only mechanism to ensure compliance with international norms by sovereign-states.

The sovereignty question that restricts international relations among States throws the enforcement of international law obligation to the compliance of States. As a result, the naturalists viewed it as the matter of morality. No wonder, the naturalists see the enforcement of international law as a moral duty and they described its enforceability as non-coercive mechanism. These scholars mainly equated the enforcement and enforceability of the international law that domestic law is not only narrow minded but unfair. Both international law and municipal law operate in different environment and scope and as such, enforcement mechanisms ought not to be the same. Even the traditional notion of sovereignty that the naturalists used as the basis of their argument has gradually been redefined in contemporary international relations.

International humanitarian law now gives the international community the impetus to intervene in internal affairs on humanitarian grounds. On the positivism premise, compliance with international law is no longer an act of morality, but necessary and, in fact, enforceable. This notional transition of international law primarily occurred due to the interdependence of States in all walks of life, the evolvement of international humanitarian law, a move from self-dependence to globalization. In this contemporary time, States are no longer mere contributors of law, but are both contributors and recipients of law, therefore, their involvement in the enforcement of international law is not a moral duty as argued by the naturalists but a necessary obligation with legal implications.

Conclusion

The viable growing nature of international humanitarian law has influenced the legality of State's enforcement responsibility of international law against the argument of the naturalists. The development of international humanitarian law came with new grounds that changed the traditional notion of sovereignty which the naturalists used to question the legality of international law. This changing notion of sovereignty in international law has even covered more spheres of law even at the domestic level, especially the human rights. The influence of international humanitarian law in the development of international law generally is not strictly confined to humanitarian law, even trade law is inclusive. It reaches out to all walks of global concern including environmental law. The world is moving towards a world community, especially fortified by the rapid development of technology and the consequent globalization and interdependence.

The co-operation of the nation-states in order to maximize the benefits for all, combined with the drive for development has led to the increasing influence of international law. The increasing global interdependence is unavoidable, and compliance with international law becomes necessary both in national and international interest. The evaluation of international humanitarian law which is more complex than aspects of international law is a strong aiding factor. Non-compliance with a decision of the International Criminal Court does not make the

international humanitarian law (international law) a moral duty or/and not law. Disobedient to court order is not peculiar only to international law. International humanitarian law as an aspect of public international law has made compliance with international law a great deal of benefits to the country, though along with challenges. Definitely, humanitarian issues are global concerns. In recognition of emerging trends, the enforcement mechanisms of international law and its enforceability cannot be dismissed as not doing well in facing up international challenges with confidence and is set to do better in future.

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Brief Bio-Data

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