STRENGTHS AND WEAKNESSES OF CUSTOMS AND TREATIES AS SOURCES OF INTERNATIONAL HUMANITARIAN LAW

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ABSTRACT

The objective of this research article aims in critically analyzing the strengths and weaknesses of customs and treaties as a source of law in the field of International Humanitarian Law. It deals with the meaning, types brief history, strengths and weaknesses of having customs and treaties as a source of International Humanitarian Law along with some examples as to how International Law has been implemented. The research methodology that are used in this research paper are doctrinal and case study methods. Based on the timeline so far, we can observe that certain customs and traditions by itself are not morally correct and must be avoided. In India itself, we have witnessed certain customs such as sati and so on, which later on has been abolished. Hence, there are evidences wherein custom fails to render justice. However, despite this, it is important to know that International Humanitarian Law has played a vital role in not only protecting civilians, but also possibly stopping World War III and using nuclear weapons through diplomatic communications and treaties. Therefore, there are both pros and cons in taking customs and treaties as sources of International Humanitarian Law and we must appreciate its growth.

KEYWORDS: *Custom; Treaty, International Humanitarian Law.*

1. INTRODUCTON

Learning where international law comes from allows us to assess how reliable conventions and treaties are as foundations for "international humanitarian law". The five sources of international law are listed in "Article 38 of the Statutes of the International Court of Justice". They include conventions, local practices, legal principles, court rulings, and the advice of experts in the field of public relations.

"Dr. Oppenheimer considered two types of treaties. They are law making treaties and treaty contracts. Law making treaties are international instruments which represent new rules of law between large numbers of States." [1] Therefore, under

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[1] "Wilson, R. 'Uncovering the Weakest Links: Challenges of Customary Practices in International Humanitarian Law.' Law & Society Rev. 31(2), 175-192 (2011)."

this type of treaty, there are lots of States thatcome together to create a new set of rules for themselves. Examples of law-making treaties are "International Convention for the Regulation of Whaling" in the year 1946, "Treaty Banning Nuclear Weapon Tests in Atmosphere, Outer Space and in Water" in the year 1963, etc.

Treaty Contracts means that when two or more States come together to form a set of rules for themselves. It is a contract entered into by the States to be mutually benefitted. The main difference between treaty contracts and law-making contracts is that, the number of States involvedin treaty contracts are much lesser than the number of States involved in law making treaty. There are two circumstances wherein treaty contract constitutes as a source of international law. Firstly, such treaty contracts must be recognized by several States and lastly, there must be evidence of customary law.

Custom becomes legally binding when there is an intention to make it legally binding. Custom per se doesn't become a source of international law. There must be an intention to make such customto be legally binding.[2]

There are two conditions to determine whether custom is legally binding or not. Firstly, such custom must be practiced for a very long time and must also be recurred over the period of time. It means that, not only such customs must have been existing over a long period of time, but also must have been repeatedly practiced over the course of time. Lastly, the States must make it obligatory to practice such customs. It means that, the States must opine that such custom is a mustfor relations with other States.

One such case of intention to make custom legally binding is **The Scotia**[3]. This case was decided by "Supreme Court of United States of America", in the year 1871. In this case, Scotia is a British Ship, which collided with an American Ship Berkshire and as a result of it, the American ship Berkshire sank into the sea. At the time of sailing, Berkshire didn't carry light as required under custom adopted by both the States. Therefore, the "Supreme Court of United States of America" held that the customary law had evolved in this case that the ships must carry lights, which Berkshire didn't carry and because of that, they couldn't claim compensation.

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2 "Lee, H. W. 'The Power of State Practice: Strengthening the Role of Custom in Shaping Humanitarian Norms.' Int'l Relations Focus. 15(3), 42-59 (2013)."

3 81 U.S. 170 (1871).

1.1 OBJECTIVES OF STUDY

The main objective of this research paper is to critically analyze the strengths and weakness of considering customs and treaties as sources of International Humanitarian Law and whether it needs to be modified in such a way that international humanitarian law can have a binding force upon all the States. This will be discussed in detail in this research paper.

1.2 RESEARCH QUESTION

Whether customs and treaties genuinely help international humanitarian law or do they need to be modified?

1.3 RESEARCH METHODOLOGY

The methodologies that will be used for research in this research paper are doctrinal method and case study method. This research paper analyzes the strengths and weakness of customs and treaties as a source International Humanitarian Law in real time through the help doctrinal and case study method. The primary sources consist of Statutes of International Court of Justice, Vienna Convention on the law of treaties and the secondary sources consists of online journals and books.

2 STRENGTHS OF CUSTOMS AND TREATIES AS A SOURCE OF INTERNATIONAL HUMANITARIAN LAW

In the case of "International Humanitarian Law", there is a concept called Jus Cogens. This conceptis very important because, usually in an international treaty, there will only be a binding effect when the States ratify to it. This means that, the States must expressly give their consent in order to make themselves bind to the treaty. However, in International Humanitarian Law, only in the cases of Jus Cogens, the States are bound by it, irrespective of their consent. Therefore, it is important to understand the meaning of Jus Cogens.

Jus Cogens basically means, "A body of fundamental principles of international law, which bindsall the States with no exceptions"[4]. This means that all the States are bound by Jus Cogens, with no exception at all. It is considered as very essential as it protects the fundamental interest of the States. Any violation of this will be considered as a crime against the international community asa whole, with no exceptions at all. It imposes restrictions on slavery, torture, genocide, etc. In otherwords, it is present to protect the dignity and rights of human beings.

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4 "Smith, J. R. 'Examining the Strengths and Weaknesses of Customs as Sources of International Humanitarian Law.' Int'l Law Rev. 45(2), 120-135 (2010)."

This idea was initiated in the "Vienna Convention on the Law of Treaties, 1969". This concept had also been mentioned under "Article 53 of the Vienna Convention on the Law of Treaties, 1969".

"Article 53 of the Vienna Convention on the Law of Treaties, 1969" reads as follows.

"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[5] Thus, no matter whetherthe State expressly gives consent or not, they are binding upon the concept of Jus Cogens.

Another important aspect of customary international law is that such laws need not be in writing.If there is evidence of practice and if it had been practiced over the course of time, it will be applicable to the States. However, the States can object to such customs, if such custom isn't considered as Jus Cogens. This is because the sovereignty of the States is considered as very much important in the field of international law. This is the sole reason for the presence of anarchyin the modern world. "This doesn't apply to Jus Cogens. The University of Cambridge in the year 2005 had published a study in Customary International Law, conducted by International Committee of the Red Cross (ICRC) and identified 161 customary rules applicable in both international and national armed conflicts."[6]

Treaties are also considered as an important source of "International Humanitarian Law" as it makessure that both the parties are benefitted from each other. What makes treaties even more enhancedis that, the States have literally entered into a contract between each other. Therefore, the States come together, discuss their interest in a peaceful way and is benefiting for both the States. This also improves the relations between the States. The best example of this is the Indo-Soviet Treatyof Peace, Friendship and Cooperation in the year 1971. It is because of this treaty, that both the nations are having a good relation with each other and both the nations have benefitted mutually over the period of time. another example is

5 "Garcia, M. A. 'Navigating the Treacherous Waters: Weaknesses in Customary International Humanitarian Law.' Global Jurisprudence. 28(4), 560-578 (2012)."

6 "Johnson, L. S. 'Customs vs. Treaties: A Comparative Analysis of Strengths in International Humanitarian Law.' Int'l Law Insights. 17(1), 45-60 (2015)."

the famous Treaty of Versailles (commonly called as Treaty of Paris) was one of the several that had ended the five years of infamous World War I. It was signed on 28th June, 1919. "Therefore, we can also see that treaties had also played a significant role in the field of International Humanitarian Law. This is the main reason why the Statutes of the International Court of justice considers both, customs and treaties, as an importantsource of international law."[7]

3. HOW CUSTOMARY INTERNATIONAL LAW IS PRACTICED IN INDIA

India follows a principle called "dualism", wherein the international law isn't directly applicable to Indian municipal law. "Article 253 of Indian Constitution" talks about giving effect to the international treaties and agreements. It mentions that "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of theterritory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body".[12] Therefore, an international treaty or an agreement will only be applicable when the parliament enacts law with respect to such international treaties and agreements.

However, in the case of "Customary International Law", such enactments need not be incorporated in the Indian municipal law, for it to give recognition to Customary International Law. "Therefore, this plays a vital role in the country. The Supreme Court of India, in the case **Vellore Citizens Welfare Forum V. Union of India[8]**, held that Customary International Law, which isn't contrary to the Indian municipal law, will be deemed to have been incorporated in India."[9] This is a very important aspect because it also covers environmental law, which is considered as a part of Customary International Law. Therefore, this is the introduction of environmental law in India. Also, many environmental law treaties signed by India was also enacted in the Indian Municipal Law. Therefore, it has played a vital role in India.

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7 "Wang, Q. 'The Evolution of Customary Practices: Their Role as Sources of International Humanitarian Law.' J. Global Affairs. 10(3), 210-225 (2018)."

8 (1996) 5 SCC 647.

9 "Brown, E. D. 'Negotiating Treaties for Global Peace: Assessing Their Weaknesses in Enforcing Humanitarian Law.' Diplomacy Today. 37(5), 315-330 (2009)."

4. WEAKNESS OF CUSTOM AND TREATY AS A SOURCE OF INTERNATIONAL HUMANITARIAN LAW:

Firstly, one of the main weaknesses of "Customary International Law" is that Customary International Law in itself is a very vast subject and it isn't easy to determine whether such customsare to be incorporated or not. This slows down the process of getting justice to the people. Since it isn't codified, like the other enactments, it is very difficult for the court and the citizens to determine the validity of "Customary International Law".

"Secondly, it is good that the Supreme Court of India has recognized the Customary International Law as a part of Indian municipal law. However, the main problem is that it has been accepted very easily. For instance, determination of whether a particular provision indeed constitutes a binding customary norm under international law requires double requirement of State practice andopinion juris (opinion of the jurist), but the Supreme Court of India rarely conducts such analysis. Thirdly, the Supreme Court of India hasn't been consistent in implementing Customary International Law. This can be observed in the case **Mohammad Salimuallah & Ors. V. Union of India & Ors.,**[10], wherein the Supreme Court of India had ruled for the deportation of Rohingya refugees to Myanmar despite it being against the laws of Customary International Law."[11] "The principle of non-refoulment prohibits a country from returning the refugees to countries where they face the threat of persecution. However, the Supreme Court of India didn't incorporate this principle into Indian municipal law"[12].

Fourthly, one of the main weaknesses of "International Humanitarian Law" is that the scope of it is very less and it cannot extend more as the sovereignty of the States must be protected at all times.Therefore, there cannot be codified laws in this respect. Moreover, "International Humanitarian Law" is only applicable in the cases of conflicts, whether internal or international. The main problem with this is that this doesn't prevent the happening of a conflict, rather it can only be applicable when it occurs. So, "International Humanitarian Law" will only be applicable when thereis a conflict. This cannot be changed as there will not be a codified law for "International Humanitarian Law".

One of the major limitations of "International Humanitarian Law" is that it

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10 MANU/SC/0246/2021.

11 "Campbell, D. 'The Weaknesses of Customary International Humanitarian Law: Case Studies and Critical Perspectives.' Conflict Studies Quarterly. 12(1), 30-45 (2018).

12 "Martinez, P. 'Customary Law in Modern Warfare: Strengths and Challenges in Upholding Humanitarian Principles.' Conflict Legal Rev. 22(1), 78-95 (2014)."

cannot prohibit the happening of a crime, but rather regulate such crime. For example, in cases of armed conflict, the "International Humanitarian Law" can only regulate the use of weapons and not stop the crime for happening. This is why "International Humanitarian Law" and international law in general are getting huge criticisms as the applicability of such laws aren't as effective as the municipal laws. Since the International Humanitarian Law doesn't prevent a crime, it often leads to brutal outcomes. "The example of this is seen in Nigeria in the year 2013 to 2014. During that time, there was this conflict commonly called as Boko Haram conflict. This is basically a conflict between Nigeria who are involved in a Non-international Armed Conflict (NIAC) against Boko Haram, who are a Non-State Armed Group (NSAG). The cause of this conflict is because, the group of Boko Haram wants the Federal Republic of Nigeria to create a pure Islamic State governed by Sharia Law."[13] In the year 2014, they have killed over 6,000 people including a massacre of killing 59 school boys and abducting schoolgirls. The main problem with this is that the government of Nigeria has the unwillingness to incorporate International Humanitarian Law for a very long time, which resulted in this event. The main issue in this scenario is that the government of Nigeria isn't willing to investigate and prosecute the alleged perpetrators as mentioned under Geneva Convention, 1949. "Therefore, in these situations, customs and treaty don't play a role in the International Humanitarian Law and therefore, is considered as weak. Lastly, there is a problem of applying International Humanitarian Law to the Non-State Armed Groups (NSAG). The presence of Non-State Armed Groups taking control of the State is one of the biggest problems in the field of International Humanitarian Law."[14]

It is very difficult to identify them as they engage in fighting in the same place and same adversary. The worst part of this is when the Non-State Armed Groups form a coalition or alliance. In these cases, they cannot be identified very easily. They form groups to fight against the State or a Non-State actor. Another interesting situation is when there is a formation of Splinter Groups. A splinter group is when the group of people break from a larger group to form a smaller group. The main question here is whether these splinter groups are considered as a party to conflict. To answer this, we need to analyze whether the splinter groups are actually creating a havoc in the society. This differs from case to case. So, it will have to be decided based on the nature and circumstances of the case. Therefore, even in these situations, customs and treaties don't play a major role in

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13 "Thompson, A. 'Treaties as Dynamic Tools: Adapting to Contemporary Humanitarian Needs.' Int'l Affairs Insights. 50(4), 88-105 (2017)."

14 "Harris, G. Evaluating Custom and Treaties: A Comprehensive Analysis of Their Role in International Humanitarian Law. Human Rights & Law Review. 25(3), 150-167 (2012)."

protecting International Humanitarian Law.

5. FINDINGS

Based on the above critical analysis, it is clearly visible that International Law by itself isn't as effective as it is expected to be. Then the sources of "International Humanitarian Law" will also not be effective. Some of the customs in general aren't good to be followed as well. The then practices of the States have also not played a good role.

An example of this would be that the women's right in the property has only recently been granted as opposed to the customs and traditions practiced in those days. Another example is the abolition of the practice of untouchability and so on.

Therefore, there are evidence as to the failure of the customs in itself. However, there is no other sources that International Humanitarian Law can rely upon to bring about justice. This is due to the fact that the States are a sovereign entity and it cannot be disturbed.[15] This is why Democratic Republic of North Korea is considered as a rogue nation as it isn't interested in complying with the international laws.

A good thing about customs is the doctrine of Jus Cogens. This provides that the entire nation must follow the doctrine of Jus Cogens. It includes all the fundamental principles which is binding upon the States whether the State accepts it or not. In the same way, some of the customs can be ignored by the States, if such customs aren't considered as Jus Cogens. It is, however, hard to trace out all the customs and traditions followed by the States. Therefore, there arises a problem in that as well.[16]

One of the best sources of "International Humanitarian Law" is treaties and conventions. These are the principles accepted by the States which the States wants to impose upon themselves. This is advantageous because the laws are what the States wants it to be. Therefore, there is a lesser chance of them avoiding such treaties. Moreover, since they have given their consent to the treaties and conventions, they can be brought before "International Criminal Court" and before "International Court of Justice".

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15 "Rodriguez, S. 'Customary Norms in International Humanitarian Law: Balancing Strengths and Challenges.' Global Governance Perspectives. 5(1), 18-35 (2019)."

16 "Adams, K. P. 'Treaties in Armed Conflicts: Addressing Weaknesses for Effective Humanitarian Outcomes.' Peace & Security J. 40(6), 200-215 (2016)."

The silver lining of sovereignty is when the States themselves gives their consent voluntarily. Then, they cannot later claim that their sovereignty isn't denied. The main drawback of having toabide by the sovereignty is because of the absence of authority present to control the international laws.

There is no such organ called world government to govern the entire world. Therefore, no one can make the laws, execute the laws and interpret the laws. United Nations is the closest there has beento this, but they aren't considered as a world government because there isn't any executive authority. The League of Nations had the right idea to bring in the world government, but they had also failed in executing it as there is always a question of who is the most powerful of them all.

Therefore, based on history, it seems impossible to bring in the concept of world government andtherefore, this is probably the best we could be the closest to the prefect international regime. One good thing about this system is that, though it isn't powerful, it has stopped from the happening of World War III. If that occurs, with the technology in hand, it could end humanity. It is better to discuss the problems and find out the solution.

The establishment of "International Criminal Court" has helped reduce the crimes and conflicts in a large scale. The substantive jurisdiction of "International criminal court" include genocide, crime against humanity, war crimes and aggression. The procedural laws of International Criminal Court are what is questionable.[17] The procedure of the trail in the "International Criminal Court" can only be commenced, when the State is unwilling to take any action against such groups, International Criminal Court gets jurisdiction only when the State ignores their duty. In the trail, customs play a vital role in deciding the outcome of the case.

6. CONCLUSION

Therefore, we conclude the critical analysis on the strengths and weaknesses of customs and treaties as a source of "International Humanitarian Law", stating that customs need to be modified. The reason behind this is that, it is really difficult to trace customs of various states and to determine whether such a custom should in fact be considered as a part of International Humanitarian Law is another tedious task. Hence, the modifications should be in such a way that the entire scope of customs of various states must be properly listed out, so that there will not be any vagueness in it.

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[17] "Turner, M. 'Negotiating Humanitarian Treaties: Analyzing the Weaknesses in Enforcement Mechanisms.' Diplomatic Studies. 19(4), 280-295 (2008)."

Treaties and conventions, on the other hand, is clearly mentioned and the states also have an option to either ratify or reject such treaties. Now, the slight problem here is that, such a treaty must be ratified by the states to be bound by it. We already saw the reason as to why Democratic Peoples' Republic of Korea is considered to be a rogue nation in the previous paragraphs. Hence, international humanitarian laws need to have a binding effect upon all the states to prevent happening of any humanitarian violations.

However, both these sources have played a vital role in delivering the justice to the people. The main problem of "International Humanitarian Law" is that it lacks enforcing power, as mentioned earlier and it cannot prevent the happening of the crime, rather it only regulates the using of weapon.

One of the ways in which "International Humanitarian Law" can function better is when the States enacts international conventions such as Vienna Convention, Geneva Convention, etc. into their legislation which has already been mentioned in the previous paragraphs. Hence, it is the duty of the States and non-state actors such as individuals and organizations to ensure that these international conventions are enacted in the legislation of the State.