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HUMANITARIAN LAW IN THE LAW OF INTERNATIONAL

Abstract:

With moving from the rules of common law, responsibility of international law is to form binding rules, which is valid for all of international community, and to provide international community to feel itself subjected to these rules. This responsibility entails to reconsider the traditional institutes of international community to take steps toward keeping the fundamental values of the society. International laws aim to keep of first priority the interests and values of international community, rather than the interests of governmental and nongovernmental elements taking place in international system. In the direction of this aim, the rules receiving its superior/privileged quality from the fundamental values (jus cogens/writ) of international community, as an important argument of law of international,. the protection of the interests and values of the international community should be a priority based on the norms of jus cogens is a case of humanitarian law, which is one of the best reflections.

Keywords:

International law, humanitarian law,international community.

JEL Classification: K33, K33, K33

INTRODUCTION

International law, in the framework of the rules of international law on treaties, shapes the international society with the agreements formed by the mutual statements of parts and bringing rights and responsibilities in compatible with international law. In this shaping, considering the values and needs of international society will provide the rules of international law to be more effective. This effect will be provided by *jus cogens* norms, filled by the concept of international public order and generally accepted that it has a superior authoritarian identity. Therefore, governments, while making international treaties, should be also taken into consideration the main values of international society for validity of this treaty.

While norms, which we can qualify with *Jus cogens* or the concept of authoritarian norm, protect an actor, legal personality, or value, they consider the moral and humanistic values and protect the interests of international society, rather than those of governments. In this direction, international society also takes into consideration the humanistic problems, resulted from the war or armed conflictions and adopts the principles of humanitarian law.

In this study, the values of international society are scrutinized in the scope of humanitarian law. Humanitarian law is interested in how the war is executed without regarding to whether or not the war is legitimate. Therefore, for protecting the welfare and values of international society, the principles of humanitarian law are considered in solving the international problems resulted from armed conflictions in the national or international quality. Hence, setting out from the humanistic principles including the humanistic reasons, the effort to bring limitations the method of war or armed conflictions or use of instruments, in the direction of the desires of parts, gives direction to the humanitarian law.

1. DEFINITION OF HUMANITARIAN LAW

Humanitarian law includes the arrangements formed for solving the humanistic problems resulted from the armed conflictions in the national or international quality and brings the limitations to the method of war or use of instruments. Therefore, humanitarian law is defined as agreement or practice originated international rules protecting the people that damage or may damage from confliction (Öktem, 2007, p.71-72). As will be also understood from the definition, humanitarian law is interested in how the war is executed without regarding to whether the war is legitimate or not.

The phenomenon war forms the main distinction between humanitarian law and human rights law. Such a distinction, although human rights law arranges the rights and freedoms that cannot be also violated especially during war, arises from that it generally arranges the norms and institutes toward the non-combatant extraordinary regime conditions. In addition, the main argument of human rights law consists of the element government, humanitarian law also incorporates the non-governmental formations (Öndül, 1998, p.4). Therefore, the concepts of war law and humanitarian law are mostly used synonymously. However, in La Haye Agreements Conventions of 1899 and 1907, war law was defined as determining the instruments and methods in the armed conflictions and providing the order of operation. However, humanitarian law aims at protecting the military staff remaining out of war and people not

participating in the war at all and reducing the effects of the armed conflicts. Hence, while the state security and principles of military obligations form the essence of war law, humanitarian law does not vest any authority to damage to the individual to the governments (Öktem, 2007,p.69). Thus, humanitarian law arranges, in an area limited with the phenomenon war, the actions that are related to both the warring factions and individuals remaining out of war.

The formation of war that coming into our face as an unavoidable phenomenon in the historical process of mankind cannot be arranged legally and only execution of war and results can be arranged (Acer, 2004, p.48). In this scope, a lot of issues regarding to that war is prevented and its damages are limited; whether or not what kind of arms will be used; whether or not which objects will take place on the target of war; how the nature and cultural heritage will be protected; and what kind of rights the civilian people and prisoners of war will have are considered in the scope of humanitarian law (Öndül, 1998, p.5).

In the historical process of international law, it is generally accepted that the principles of humanitarian law (partly war law) emerged after 1859 Solferino War with the movement of Red Cross, established with the attempt of Henry Dunant (Dunant, 2007)¹. In the process beginning with taking an important part of Red Cross in placing and developing the rules of humanitarian law, with many documents such as 1864 Geneva Convention, Lieber Code, 1874 Brussels Declaration, Oxford Manual that was accepted by International Law Institute in 1880, and 1899 and 1907 La Haye Conferences and Conventions, an emphasis was made on the difficulties of war and the requirements of humanistic laws. Thus, with being codified the practices toward war law after 19th century, distinction of *jus ad bellum* (right to combat) and *jus in bello* (in-war law) was made and the foundations of humanitarian law were laid out (Öktem, 2007,p.112).

In the period between two world wars, codification studies continued and Treaty on the Use of Submarines and Noxious Gases in Warfare (1922- Washington), Protocol on Banning Suffocative, Noxious, and Other Gases, and on Bacteriological Warfare Method (1925-Geneva), and Paris Pact (1928-Briand-Kellog), the first international document banning the war, were signed. 1949 Geneva Conventions,² seen a tangible document of the studies of Red Cross on humanitarian law , and 1977 Protocols, prepared as supplementary to these conventions, have also been today accepted as the main treaties of humanitarian law. For example, on the Case of Military and Similar Activities Against Nicaragua, UAD 1949, referring to Geneva Convention, approved that this conventions expressed the principles of humanitarian law and that its content transformed into international practice. Hence, humanitarian law, as also emphasized in Geneva Conventions, integrated with the arrangements guaranteeing

¹ Dunant, being so impressed from Solferino War passing North Italy between Austria Empire and French Sardinia Union, wrote a work called "A Solferino Memory". In this work, he demands that in all European countries, voluntary associations to help those injured during war, without regarding to which nation are from, are founded in peace period and that the countries become part in international treaties in order to protect the injured people and provide the medical aid with them"

² Geneva Conventions accepted on the date of August 12, 1949; Convention for improvement of the states of patients and injured people of the armed forces in war, Geneva Convention about improvement of the injured, ill, and wrecked members of marine armed forces; Geneva Conventions on the procedures to be applied war prisoners; Geneva Convention on protection of civilian people in war time; and two supplementary protocol dated 1977 are regarding to the protection of victims of international conflicts , and to the protection of victims of conflicts not having an international quality.

the protraction of individuals and properties, and it was also strengthened with the fact of announcing of the counter agreements, affecting the protection of main human rights of individuals and their actions as illegal, the main feature of *jus cogens* norms

2. VIOLATION OF HUMANITARIAN LAW

Although the rules of international humanitarian law are adopted by international society as a practical rule, especially when the actions of USA in post-September 11 are considered, in contrast with *jus cogens* norms, it is seen that the rules of humanitarian law were violated and that the rules of humanitarian law did not reflect so much on the actions of governments. In this context, after September 11 attacks, evaluating the status and judgment of militants, caught during the military operation performed against Afghanistan, in the scope of the rules of humanitarian law matters. However, for being able to discuss the issue in the scope of humanitarian law, first of all, it is necessary to determine whether this intervention is an armed conflict in international quality or not.³ The attack of USA against a non-state organization holds a distinct quality from the classical definition of armed conflict (a conflict made between two or more states) and makes difficult international law to define this process (Öktem, 2007, p.142).

During the intervention made to Afghanistan with the justification that it supported those who are responsible for September 11 attacks and rejected to return them, the militants caught were brought to Guantanamo military base located in Cuba.⁴ The use of Guantanamo Gulf as a military jail is criticized by the human rights organizations and it is claimed that the prisoners were agonized and exposed to cruel treatment. In addition, it is attracted attention that the people kept here could be defined neither war criminal nor ordinary criminal. In the report on this issue, prepared by UN Human Right Committee, the determinations on that especially the rights to a fair trial of individuals, taken into custody, were violated, and on that the investigation techniques uses could reach the level of persecution take place (Öktem, 2007, p.144).⁵

American Human Rights Committee made a decision of precautionary measure related to the issue and demanded USA to take a necessary actions for an authorized court to be able to determine the legal status of the prisoners in Guantanamo. However, USA declared that the committee did not have such an authority to take precautionary measure and, in the scope of 3rd Geneva Convention, the militants of Al-Qaeda and Taliban, who were arrested, were not in the status of warfare (Monbiot, The Guardian, 2003). That USA did not view the people, who were arrested, in the scope of prisoner of war were met with reaction by a number of Western countries such as United Kingdom and France. It was claimed that USA viewing these people as illegal warriors or aggressive civilians violated Geneva Conventions (Taşdemir, 2006, p.93). Hence, as reflected on public opinion, those experienced in Guantanamo Jail show that both the

³ After UN Organization, in accordance with the principle that the governments should not be used force, the term of armed conflict is used instead of the concept war.

⁴ Guantanamo camp taking place in Guantanamo Gulf has been used as a military jail since 2002. The people caught and doubted that they are related to Al-Qaeda and Taliban, in the various countries, especially Afghanistan, are kept here. Facility is referred to Guantanamo, Gitmo or Kamp X-Ray

⁵ These determinations also took place in the report of European Parliament.

norms of human rights law and of humanitarian law that have the quality of *jus cogens* were clearly violated.

In the recent past, the intensity of events beginning in Syria and spreading a large part of country in a short time changed into the dimension of armed conflict that has not an international quality. Regime powers, using disproportionate force, took severe actions against meetings and, even in time, the troops belonging to army and heavy weapons were used. Although Syrian Government denied the claim that heavy weapons were used, International Red Cross Organization, in its report dated of 2012, declared that a high intensified conflict that was not in international quality was experienced in Syria (BBC, July 16, 2012)

Syria, in the scope of international agreements, whose part it is, has international responsibility. This responsibility, apart from 1949 Geneva Conventions, also includes the international human rights conventions and core rights forming the essence of human rights such as especially right to live, prohibition of slavery and persecution, and principle of legality.⁶ In this context, whether it is part or not, in accordance with the common 3rd item of 1949 Geneva Conventions bringing bindingness to *the non –state forces participating in hostility* in the same measure, those leaving their arms, those remaining out of war or conflict due to their being ill and injured or in view of another reason and those not directly participating in this hostility will see a treatment fitting to the human in every condition honor without being subjected to any discrimination with the measures such as the race, color, religion, belief, and gender.

With attribution to Rwanda Criminal Court, founded the decision of 1994 UN Security Council, also in domestic armed conflicts, the serious conflicts of the common 3rd item and Supplementary Protocols numbered 2 also include the international responsibility of governments as well as individual criminal responsibilities. In this context, as also pointed out in UN reports, the events lasting in Syria since March 2011 require the individual criminal liability [due to] both the members of Baas regime and its opponents to violate the command 3rd item and civil rules and commit an offense, which is not connected with armed conflict, to mankind (Taşdemir, 2013,p.3). In short, committing the offenses such as killing, dishonorable treatments, enslaving, relegation and transportation of population, imprisonment, persecution, rape, badgering, taking hostages, sexual offenses, and looting as a part of spread an systematic attack against the civilian people reveals that *jus cogens* norms and humanitarian law are clearly violated and also require the individual criminal liability. Therefore, those violating humanitarian law in Syria are obliged to perform the criminal liability whether the member of Baas Regime or from the opponent part. Syria, although it is not a part of 1998 Rome Status, in accordance with the item 13/b of Status, according to 7th section of UN Treaty, can report the case that one or more offences are seen

⁶1949 Geneva Treaties; 1925 Geneva Protocol on Banning Use of Suffocating, Noxious, and Similar Gases and Bacteriological Instruments, 1948 Convention on Preventing and Punishing Genocide; 1954 La Haye Convention and Protocol on Preventing Cultural Assets; and 1989 Convention on Children Rights and Selection Protocol of Children Rights Conventions dated 2000 are parties to “Convention Against Persecution”, accepted by United Nations on the date of December 10, 1984 and coming into action on the date of July 26, 1987. This convention, related to removing the persecution, is the only convention having the legal bindingness. Syria is also party to Convention of Civil and Political Rights that was known Twin Conventions, signed in 1966 and coming into action 1976, and Convention on Economic, Social, and Cultural Rights.

committed by UN Security Council to prosecution office. In this context, even if Syria was not a part of Status, due to the actions that are committed both in any country and out of country by its citizens and that take place in the scope of Status, judicial power of International Criminal Court can be put in action by UN Security Council just as Darfur and Libya.

CONCLUSION AND DISCUSSION

International society, as in every society, has a main value that is necessary to be protected with priority. Protection of these values, different from the ordinary norms of international law, are provided with *jus cogens* norms that have authoritative and superior qualifications. In acceptance of the existence of these norms in the sight of international society, the limitation of authority of governments to make treaty, which come to our face as an extension of state sovereignty plays important role. Here, the freedoms of states are surrounded with the main values and interests of society rather than being a limitless quality. Hence, in both national and international law orders, it must be accepted that the main values of society and its interests depending on this are more superior and more prioritized than the interests of individuals and states individually and the way of applying the main values in the scope of *jus cogens* norms must be opened. In this context, international humanitarian law, on the name of protecting the values of society and providing the international public order, should not be capitulated from its main principles. Provided that humanitarian law is applied, it will remind to the governments their international liabilities and criminal responsibilities to individuals.

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