Legality versus Legitimization: Questions in Implementing the International Humanitarian Law – A Review of the ICC

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Abstract: *However much it may appear that every civilized State today has properly understood the meaning of armed conflict within the context of the law of Geneva, still remains a big paradigm. It is a challenge to presume that State parties have fully accepted the reasons why they should comply with the rules of the treaty to the letter. It is explicitly clear that many States have failed to generate adequate respect for the international criminal judicial system. This article seeks to discuss the paradox facing the implementation process by referring to the legality and legitimization of the International Humanitarian Law within the auspices of the International Criminal Court (the ICC). The foresaid previewed article brings into critical analysis main hurdles currently frustrating the law enforcement through domestication process and compatibility of law with modern socio-cultural, socio-economic, political and technological vested interests from various actors. This academic analysis seeks to thoroughly discuss the hypothetical predictions concerning the actual relevance of the Geneva Law in contrast to the rapidly changing international world order in relation to the current developing jurisprudence of the international criminal justice. It critically analyzes some of the key challenges posed to the*

effectiveness of the implementation process by the current dynamics of non international armed conflicts and the unfolding scenario reflected in the State resistance[1] or opposability.

BACKGROUND STUDY

This article is premised on the original sentiments of the young Swiss national, Henri Dunant, the founding father of the international humanitarian law (IHL) as we know it today[2], which eventually translated into general rule and practice in the customary international humanitarian law.

It was not by default but by design that what a Swiss based charitable organization, the International Red Cross and Red Crescent Movements had advocated for since the 19th Century, eventually became an impeccable system of law promoting humanitarian principles by protecting human rights, and human dignity of victims during armed conflicts in our modern time. The establishment of the International Committee of the Red Cross (ICRC) back in 1863 has been a great breakthrough in the entire history and development of international criminal justice in regard to the rule of law applicable during hostilities.

[1] Reference is made to the Kenyan Case at the ICC and Government attempts to refer and defer the cases. By alleging lack of evidence, The Office of the Prosecutor conceded the Case involving Mr. Francis Kirimi Muthaura and the Trial Chamber 5 dropped the case in March 2013.

[2] MAURICE TORRELLI, *Le droit international humanitaire*, Presses universitaires de France, 1985, p. 6.

The mandate of the ICRC *is to protect the lives and dignity of victims of armed conflicts and other situations of violence and to provide them with assistance. To do this it promotes and strengthens the humanitarian law and universal humanitarian principles*[3].

Under common Article 1 of the four Geneva Conventions of 1949 States are called upon to fully cooperate with the Geneva Law, and to expeditiously respect their international obligations in line with the spirit and letter of the United Nations Charter.

Coercing sovereign States to generate respect for the international humanitarian law constitutes part of the general requirements of compliance with the International Criminal Court and, thereto, to promote its cause. The obligation which is categorically spelled out in the 1929 and 1949 Geneva Conventions in common Article 1[4] has been the epitome of the enforcement process that this discussion seeks to address.

Interestingly enough respect and ensuring respect for the international humanitarian law has been a big challenge despite the imperative call for States to uphold their international obligations to the letter. Some States and governments have developed a tendency of going around such international conventions, treaties and protocols with an aim to overrule them. Such behavior though prohibited by the law of *jus cogens,* seems to be spreading among pariah States. In

[3] ICRC (2005). *Discover the ICRC*.

[4] Rule 139. Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control.

addition, the law of treaty[5] clearly stresses on *pact sunt servanda* principle in ensuring that State parties adhere to the rules of treaty and promote its cause.

The persistent call to member States to implement and to uphold the rules of the international humanitarian law was again highlighted in the 28th International Conference of the Red Cross and Red Crescent in 2003[6] held in Vienna.

The conference raised tenable questions on the compliance with the four Geneva Conventions and the relevant Protocols generating debate on many pertinent issues such as fight against terrorism, extraterritorial "self-help" operations, international and non-international armed conflicts featuring under Art. 2, of the Geneva Conventions[7]. The Conference admitted, *inter alia* that there are several sophisticated challenges facing the regime of the international humanitarian law that need urgent attention of the international community.

State resistance and the spreading non compliance attitude by some members lead us to review the legality and legitimization of the humanitarian law in relation to its subsequent implementation process. There is no any other better way of reviewing the enforcement of law without considering how international and national jurisdictions inter-relate and support each other. The affinity between the two legal domains is what eventually should lead to the achievement of ultimately expected functionality of justice which law is made to redress.

[5] See Vienna Convention of 1969.

[6] 28th Conference of the Red Cross and Red Crescent, Geneva, 2-6 December, 2003, the theme- "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts".

[7] The San Remo Roundtable, Italy, 2003.

I. THE REGIME OF IHL

The perception that law does not operate in a vacuum, but rather in a politically charged social context, therefore, justifies its legality and legitimization. Law is founded on a politically engineered human society and its operations must be felt around the Aristotelian expression that "man is by nature a political animal"[8]. Admitting this maxim, it logically follows that law enforcement mechanism requires keen attention on the unfolding political scenario and the change of paradigm.

Any given legal regime operates within a complicated and changing legal context with a powerful influence from *politics, economy, culture* and *technology*. The proof to this effect is in the very interpretation of the concept of "armed-conflict" and "asymmetric war" which seem to present a change of paradigm and new dawn in the history of humanitarian law today.

Domestic laws need international law framework in order to operate effectively and promptly address juridical needs of State Parties. It is to say that very concepts found within municipal laws are subjected to general principles of the international law in both dualist and monist systems alike.

However, it would be paradoxical to discuss the legality and legitimization of law without contemplating the forces that underpin the law. A force that tends to hold the world together promoted by non-liberals and the other that tends to break away from the principle of collectivity enhanced by liberals.

[8] http://en.wikiquote.org/wiki/Aristotle (research done on 27.03.2003).

International humanitarian law finds itself within this dichotomy of forces that is constantly changing, and dynamic world of interests. When such conflicts of interests clash they frustrate the international judicial system. To reverse this trend law has to search for its relevance in politics, economy, culture and technology, in order for it to effectively assert itself in the diversified socio-cultural context in what we shall discuss under legitimization rule.

It is correct to allege that complexity and inaccuracy that benchmark our modern legal systems leads us to believe that any ratified Convention or Protocol shall always find itself in contrast with several realities on the ground making its legality and legitimization suffer serious drawbacks.

The main scope of the humanitarian law or Geneva law is to reduce excessive human sufferings and protect human rights during armed conflicts and minimize consequential human cost. This can best be achieved by setting a balance of interests between what is public and private; what is national and international in order to avoid extensive human sufferings.

On this account, dignity and rights of an individual or group are adversely violated during international and non-armed conflicts. It therefore follows that the need for the international lawyers to exhaustively explore new horizons that would render international law more compatible with the dynamics of human sufferings in the modern time is imperative. This shall include re-evaluation of the international treaties and discerning the jurisprudence behind the law and how such legal ideals could find their analogous expressions across various cultural contexts. It is possible to now to critically analyze how law relates to different dimensions of human life.

II. LAW AND POLITICS

As has been discussed before, the international humanitarian law operates within a politically charged environment, meaning that, we cannot divorce politics from law. International juridical order shows clearly that the magical force that keeps the world together is the law of international organization which also has its political structure in order to operate.

The United Nations system is the organizational structure ensuring the enforcement of international law since 1945 keeping in mind the role of its main legislative organ, the General Assembly, which in the Charter is the political structure of the organization.

Legislative characteristic of international law has been a centre of dispute, however, the United Nations General Assembly has also the mandate to safeguard international peace and security. Its resolutions, deliberations and recommendations are passed to the Security Council which is a Government-like organ charged with the law enforcement, administrative and policy making duties among others. Law making role is delegated to the UN Commission for International Law that prepares the drafts at the request of the UNGA.

International humanitarian law (IHL) is not subjected to the United Nations control or any other political influence whatsoever. It is a branch of law which operates independently from the United Nations Security Council and the General Assembly. IHL is under the surveillance of an independent, neutral and non political body, the International Committee of the Red Cross (ICRC), formed in 1863. The neutrality principle and the independence from any political order

have subjected IHL to diplomatic mechanisms such as negotiations and diplomatic conferences making the law enforcement process be more of persuasion than imposition.

In discussing the legality and legitimization of the IHL[9] we need to consider *humanity, impartiality, neutrality, independence, voluntary service, unity and universality* as key principles characterizing and defining the law of Geneva and its relevancy today[10].

International humanitarian law is disassociated with local, national and international politics or any interest group. The rationale behind the seven principles is to render humanitarian law more legitimate, persuasive, diplomatic and acceptable to all.

It is important to reiterate the impartiality or *superpartes* dimension of criminal justice system reflecting what is required of any criminal justice system including UN based *ad hoc* tribunals and the International Criminal Court (ICC). IHL respects the criteria that the law is equal to all *erga omnes* in disregard to official positions, race, sex or other characteristics such as social classes. Law is to serve the humanity in general.

Considering its neutral position in the national and international politics, the international humanitarian law customarily has been slow in influencing the political giants and impact on public opinion as compared to its counterpart human rights law.

[9] ICRC, September 2005, *Discover the ICRC.*

[10] VIENNA CONFERENCE: 20TH INTERNATIONAL CONFERENCE OF THE RED CROSS HELD IN VIENNA IN 1965.

In several member States it is evident that legislators rarely take into account the urgency in implementing the IHL in their domestic laws, not as a failure to recognize its values but due to its diplomatic and neutral stand in political interests.

In regard to this high standard of integrity, code of conduct and respect of values are attributed to the IHL due to its non partisan characteristic. Due to its detachment from government forces and support, IHL has since acquired high level of esteem and honor in several nations than human rights law. Yet this does not exclude it from other battles that may hinder its rapid enforcement in the international judicial system in general. Some supportive case by case analysis shall be helpful.

a) Case of Kenya: Post Elections Violence

Kenya presents a typical double standard state of affair which explains on one hand, the State willingness to comply with its international obligations and fully enforce the norms of the IHL, and on the other, some orchestrated reluctance to fully collaborate with the Office of The Prosecutor (of the ICC). Post Elections Violence (PEV) that left over 1300 persons killed, several IDPs and many other victims[11] posed a peculiar challenge to the international criminal justice system in 2007/8.

In 2007 and 2008, Kenya underwent a bad experience of violence provoked by ethnic and long time divisive politics. The nation was polarized as armed-conflict flared up and crimes occurred. Belligerent factions were armed and both parties caused atrocities that were recognized as acts of

[11] See MACHIRA APPOLLOS, (2010). *Armed Conflicts and the law*. Kenya: The Centre for Conflict Resolution.

hostilities with genuine and cognizable criminal offences and violations of the Rome Statute and Firearms Act CAP 114. Despite the fact that Kenya enjoys one of the best legal systems with proper laws still the armed conflict broke out putting legality and legitimization principles in question.

Convinced of this fact the government of Kenya expeditiously formed a statutory commission on the Investigation of Post-Election Violence (CIPEV)[12] lead by Justice Philip Waki to diligently investigate into the alleged crimes and make a comprehensive report in regard. Truth, Justice and Reconciliation Commission Act (TJRC)[13] was enacted to receive applications for reparations, to determine who is a victim, and to make recommendations for implementation of reparations. All this engagement by the Government is a proof of being on the side of law.

In furtherance to the respect for the law the Parliament went ahead and came up with a legislation to establish a special criminal tribunal that was to handle investigations into the PEV cases[14] and bring perpetrators and co-perpetrators to justice. The legislators did not come up with a consensus on the Bill that would have created a special tribunal. They anonymously voted for the International Criminal Court (ICC) as the best option to bring justice to the victims and perpetrators.

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[12] THE KENYAN SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS, (2011). *Rule of law Report 2010/2011: Transitional Justice in Kenya: Looking Ahead and Looking Back*. Pp. 80f.

[13] *OP. CIT.* pp. 111.

[14] Cfr. MACHIRA APPOLLOS, (2010). *Armed Conflicts and the law*. Kenya: The Centre for Conflict Resolution.

By favoring the ICC as the ideal prosecutorial body in the PEV cases, Kenya was directly and legitimately supporting the international criminal justice through legislative process. It recognized its effectiveness and appropriateness in dealing expeditiously with crimes against humanity as compared to the national court system in Kenya by then.

In affirming the usefulness of the international judicial system the Parliament endorsed International Crimes Act in 2008 in a process of rendering her judicial system capable of handling international criminal offences within her national jurisdiction. In 2012, Internally Displaced Persons Act was adopted to show the willingness of the State compliance with the criteria of the IHL and approved the legality aspect of the international law.

However, Kenyan politics has ever since been divided on the legitimization of the ICC in what the government referred to as inadmissibility challenging the cases mentioned by the Office of the Prosecutor (OTP) on the legitimization ground. The Attorney General's office made several attempts demanding referrals and deferrals of the cases[15] back to Kenyan jurisdiction or proponing dates. In this trend wonderful reports from commissions have been frustrated by the Government[16] to extent of fanning the culture of impunity and shielding perpetrators that are deemed to be very powerful personalities. The *ex post* change of attitude towards the ICC contradicts the *ex ante* appreciations of the Court. The sudden change of attitude eventually it defies the legitimization of the Court in a manner that could call for court contempt by a State member and subscriber to the Rome Statute.

[15] "The evolution of the ICC Jurisprudence on admissibility" by Ben Batros in http://ssrn.com/abstract=1537605.

[16] Cfr. *Op. Cit.p. 16.*

There is more than meets the eyes in the "non-collaboration attitude" in several applications made by the Government citing inadmissibility of the cases in the ICC.

Kenyan case that was initiated by the Office of the Prosecutor in *proprio motu* is creating new precedent in the international criminal justice system frustrating the enforcement process of the Rome Statute, and other related international treaties[17].

The Government appears to be shielding the perpetrators against the victims and weakening the witness protection. Inadmissibility applications from the Government of Kenya, and using political power to circumvent justice is a recent evolution in the ICC jurisprudence[18]. The widely debated provision of complementarity in the Rome Statute, significantly contemplate, how Governments should back-up the efforts of the ICC in fulfilling its mandate. The alleged failure by States to cooperate and to fully support the Court is tantamount to defying the Court or disrespecting its main judicial organ, the Independent Office of the Prosecutor making the office look bad. The Kenyan cases at the ICC have been nationally, regionally and substantially politicized to an extent that the whole process seems to tilt towards losing ground.

[17] Ibidem.

[18] THE KENYAN SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS. Realizing Victims' Right to Reparations: Policy Proposal for Kenya, (Nairobi: www.icj-kenya.org), p. 1.

III. IHL IN DEVELOPMENT (SOCIO-ECONOMIC DIMENSION)

It is additionally important to substantiate the role played by the affluent society[19] in slowing down the process of international judicial system.

Like any other branch of international law, IHL finds itself within an economic reality that is opposing some important Conventions. Economy is the epitome of the causes of international and non-international armed-conflicts and States are aware of this. For instance, trading in conventional small arms or light weapons has become a strong business objective for corporate community which has repeatedly led to the failure of the treaty regulating arm productions, trading and transfer. Major industries producing, fire-arms: rifles, guns, pistols and ammunition among others, make good turn-over out of the profitable big business. Making reference to the demand and supply principle in business, such agents and their governments dealing in small arms or light weapons shall not easily endorse any law that may interfere with their economic interest,[20] whatever cost. Owing to this hardliner position, the economy still holds a lot to do with the proliferation of arms around the world after over six decades since the historical endorsement of the Four Geneva Conventions and Additional Protocols.

[19]Cfr. J.K. GALBRAITH, *The Affluent Society*, Pelican Book, USA, 1958. "the divorce of production from security" on pp. 237ff. John Kenneth has expounded on economic effect on security.

[20] The Global Reported Arms Trade under the UN Registry of Conventional Arms (www.un-register.org). The source only presents the official transfer of small arms and light weapons. Many countries regularly report their arms imports and exports to the UN creating more confidence and conformity with the UN Charter.

It is now known that there are militia groups, gangs, war and drug lords that trade with conventional weapons which cause substantiated serious human sufferings in violation of the IHL.

Indeed, the economic demand pays little attention to the ethics and morals of the international humanitarian law. Producers and consumers always tend to be reluctant to any change that may hinder their key business.

International treaties seeking to put checks and balances in the production, acquisition, possession or transfer of armaments have not made great achievements[21] so far due to business potentials and lack of political good will from the international community. Light weapons are ever in circulation among non military individuals and gangs grossly violating international regional treaties and Acts of Parliaments. Rampant circulation and trafficking of such small arms is not only in the control of the government forces, as required by law, but several arms are possessed by civilians known as "Non-State Actors". A large number of such arms and ammunitions are possessed by terrorist groups, militias and bandits that use them in what is known as asymmetric warfare which creates another challenge to humanitarian law around the globe.

[21] Disarmanent law and policies have failed in many States including the United States of America. In 1952, the UN General Assembly Res. 502 (VI) created the United Nations Disarmament Commission (UNDC). UN Multilateral Arms Regulation and Disarmament Agreements (UNODA). Arms Reduction Treaties among others. Kinshasha Convention: Central African Convention for the Control of Small Arms and Light Weapons, the Ammunition and all Parts and Components, that can be used for their manufacture, repair and assembly. NTP – Treaty on Non-Proliferation of Nuclear Weapons.

Dominating business community is subjected to a non binding corporate social responsibility and ethical principles which are supposed to regulate their affairs to respect some standardized code of conduct deterring conducts that would cause or aggravate human sufferings during armed conflicts. However, the corporate world is the most lucrative sector determining the economy of the world. Regulations and policies seeking to interfere with the sector usually encounter disproportionate resistance and equally drastic objections from designated interest groups including "State" and "Non State Actors".

International humanitarian law (Conventions & Additional Protocols) seeks to implement itself within national jurisdictions but through governments and State parties using the traditional diplomatic means such as negotiation conferences. The rule has it that, it is within the responsibility of every government party to the Four Geneva Conventions and the 2 Protocols to categorically respect its obligations to the international law[22]. Abiding by such conditions a civilized State is expected to regulate the corporate behavior within its territory in matters that may cause mass destruction or affect human dignity of persons within its borders and across.

Food security and cost of living in general in Kenya have made it difficult for many citizens to live decent and dignified life. Economic challenges caused by joblessness, hardships and inaccessibility of necessities by many citizens form part of the main basis for mass suffering that would equally attract humanitarian considerations.

[22] See, Hague Statement on Respect for Humanitarian Principles.

Socio-economic inequality among the citizens is one of the causes of urban violence and steady uprising of gangs in the several urban set-ups today[23]. Many citizens prefer living in the city in order to access better services, and opportunities for occupation *inter alia*. This challenge is a recipe to humanitarian problems that can as well be contextualized below.

IV. LAW AND CULTURAL RELATIVISM

The perception that culture is a dynamic sector that changes with time justifies the dynamic aspect of law in a context. Every change comes with its behavioral consequences some of which may be in adverse breach of international humanitarian law. However, law is part and parcel of human culture which we cannot dispute. Law shall always tend to respect a given cultural context within which it seeks to operate. States opposing the Rome Statute would argue that they are targeted or their culture is not taken into consideration by the international judicial system.

However, making reference to the key principle of *jus cogens*, no culture can abrogate preemptive norms that have been generally accepted by civilized nations as a rule. Given this supremacy of law, no State party to the Four Geneva Conventions can use culture to justify the violation of its norms or failure to respect its international obligations.

In Kenya, there have been increasing cases of Non-Armed Conflicts (NACs) especially in arid hardship-zones occupied mainly by pastoralist communities. During such conflicts as animal rustling or cattle rustling, lots of human sufferings have been recorded in the past few years. In the region of Suguta Valley in Baragoi in the northern part of Kenya where over 40 armed police

[23] MARRION HARROFF-TAVEL, "Violence and Humanitarian Action in Urban Areas: New Challenges, new Approaches", in the *International Review of the Red Cross*, Vol. 92, Number 878, (June 2010), p. 334.

men and women lost their lives in a clash with gangs caused substantive humanitarian tragedy in 2012. The same episode was repeated in the Tana Delta in the Coastal region where communities of Orma and Pokomo got into an armed conflict which left substantial humanitarian disaster due to use of violence in 2012. Such arbitrary loss of human lives and property is likewise a breach of international conventions. In the customary practice of pastoralist communities in Kenya, destroying an adversary during cattle raiding exercise is tacitly a licit and a noble thing to do[24]. Instead the Kenyan Penal Code and Criminal Law, cattle-raiding is interpreted as capital crime, that is, robbery with violence, and deserves capital penalty. Crimes committed during traditional raids should be prosecuted according to law just like any other criminal offence despite the underpinning cultural contention.

It is proved that such repeated non-international armed conflicts (NACs) in Kenya are violations of the humanitarian law and the Director of Public Prosecution Office has his discretional prosecutorial power to handle such matters domestically. The failure to do so may predictably translate into lack of good will or a tacit application of *nolle prosequi* principle.

Rule 143: States must encourage the teaching of international humanitarian law to the civilian population[25]. This rule provides for the teaching of IHL at law schools and taking appropriate steps necessary to make the Geneva Law known and appreciated to the civilian populations at large.

[24] Customary Law of Pastoralist Communities: information from interviews with some elders from Boran and Rendile Communities, in 2011 Marsabit – Kenya (Catholic Church, office for Peace and Justice).

[25] "Compliance with international humanitarian law" – in *Customary International Humanitarian Law*, Vol. I, Rules, p. 495.

The Internally Displaced Persons Act in Kenya has honoured this rule[26]. Such rule shall enhance the legitimization of law and allow the people to forthrightly own it. The Hague Convention for the protection of cultural property in the event of armed conflict on 14th May 1954 proves the human value related to the cultural property a sign that the international humanitarian law and the law of war are safeguarding the culture of humanity. However, given the importance humanitarian attaches to the value of humanity, no culture (cultural context) can justify arbitrary killings, crimes of genocide or crimes against humanity as stipulated in the Rome Statute.

IV. Ethnic dimension

Ethnicity[27] and protected persons under the Forth Geneva Convention is explicitly mentioned in Case IT-94-1-A (15 July 1999), ICTY (Appeals Chamber) at [166] *Prosecutor v Dusko Tadic*, "as to the interpretation of 'protected person' where ethnicity may become determinative of national allegiance"[28]. Maintaining that the provision under Art. 17 of the Fourth Geneva Convention in defining "protected person" does not express the term ethnicity, yet it contains some implications of ethnicity determining national allegiance.

[26] Part IV of the Internally Displaced Persons Act, 2012 emphasizes on Public awareness, sensitization, training and education.

[27] MACHIRA APOLLOS, *Armed Conflict and the Law*, The Centre for Conflict Resolution, Kenya, 2010, p. 23.

[28] http://www.lexisnexis.com/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T16940931826&format=GNBFULL&startDocNo=0&resultsUrlKey=0_T16940931828&backKey=20_T16940931829&csi=274661&docNo=1&hitNo=ORIGHIT_1&scrollToPosition=0. (Search done on 18th March, 2013)

Most of the non-international armed conflicts in Africa and that of the Balkan region in the Eastern Europe have been caused by ethnic dimension of the alleged crime. A perpetrator whose intention was to ruin one ethnic group or make it suffer is committing genocidal crime will usually receive protection from his or her assumed ethnic group. Targeting an ethnic community is a serious crime even if ethnicity is not a term of law though related to criminal offences. Another example of ethnicity was in Iraq when the defunct Government of Saddam Hussein targeted Kurdish community and killed a substantial part of the community using chemicals.

European Court of Human Rights has handled several cases based on ethnic discrimination. An example of Ciubotaru v Moldova[29]: Private life, Ethnic identity, Applicant's parents born in Romania – Applicant seeking to have his ethnic identity entry changed from Moldovan to Romanian. Respondent state's authorities refusing to register applicant's Romanian ethnic identity because Romanian ethnicity not indicated in his parents' documents; Whether refusal to register applicant's ethnicity as declared by him breaching applicant's right to respect for private life; Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 8.

Violence based on ethnicity is becoming common in the African region[30] more than any other region. The same has caused crimes against humanity and mass killings. International humanitarian law and criminal law systems treat ethnicity as a problem especially in highly multiethnic contexts such as the case in Kenya.

[29] App no 27138/04

[30] Negative ethnicity is evolving into substantive law in Kenya. Hate speech is a criminal offense in the Kenyan law and a commission for national cohesion and integration was established by the Constitution 2010 to ensure that perpetrators are brought to justice.

V. LAW AND TECHNOLOGY

Another key factor that we should discuss before explaining legality and legitimization is the advancement of the scientific community. Technology is growing and engaging States in funding more advanced scientific weapons[31]. Among the conventional weapons, the technology has come up with superior arms some with lethal consequences than expected. The prohibited exploding or expanding bullets (Asphyxiating, poisonous gases[32]),[33] production, stockpiling and use of bacteriological weapons that have been since prohibited by law are all fruits of modern technology that the international humanitarian law is aiming to tame. Non- detectable fragments[34], use of land mines, booby-traps[35], and other devices such as incendiary weapons[36], are fruits of the modern scientific inventions. Production, stockpiling and use of chemical weapons or nuclear weapons that can cause mass destruction of humanity are consequences of technology. At our modern time the scientific community is increasingly coming up even with more delicate technology such us laser, and robots that have been deployed during targeted killings. Deployment of army robots, that use heat sensors to detect humans, aim and shoot[37] is

[31] PATRICK MACHANGANI & AGENCIES, "Protestors up in arms over the use of killer robots: Will the next war theatre pit human beings against machines? Thousands of protestors took to the streets demanding that these robots be recalled", in *The Standard Xtra*, Friday, June 7, 2013, Nairobi, Kenya, pp. 1-4, Cover Story.

[32] GENEVA GAS PROT. 1925.

[33] The Hague Declaration of 1899 concerning expanding bullets, the so-called dum-dum.

[34] CCW PROT. I, 1980 – Convention on Certain Conventional Weapons (5 protocols).

[35] CCW PROT. II, 1980

[36] CCW PROT. III, 1980

[37] Ibidem.

an unfolding reality in the modern system of warfare. Technology therefore, has a lot of impact on law in regard to its legality and legitimization.

International treaties prohibiting the acquiring of nuclear weapons or heavy weapons have not been fully respected by many States rendering it hard to enforce the humanitarian law as it ought to. Long time threats from North Korea that defies international Conventions to attack South Korea and the Iranian advancement with developing nuclear weapon to threaten its adversaries have not yielded any positive fruit in the history of the International Humanitarian Law. The defiance exercised by sovereign States in violating their international obligations is ripe in our modern world.

As much as the international community collectively detest anything that can lead the world to another world war, some States increasingly acquire superior or heavy weapons despite their arbitrary production and use to destroy humanity that incur substantive sufferings.

Rule 73 states that use of biological weapons is prohibited. This rule is based on Geneva Gas Protocol and the Biological Weapons Conventions and rule 74 prohibits the use of chemical weapons. Such rules prohibiting the use have not illegalized the production of such weapons or impede member States from developing interest in them.

Technology in the modern warfare is changing its dimensions with time which makes the situation of armed conflicts equally intricate. Technology in the modern warfare is a come back of "Nation-State" power that had already caused the world great human loss. Scientists have not relented from their eagerness to come up with peculiar inventions in the field of armaments and

developing superior weapons. Such is a sign of the law not meeting legitimization threshold in implementation of the international treaties.

Such use of blinding laser weapons have been prohibited by IHL[38] and more research is under way to put checks and balances of any technology that would cause unnecessary harm or indiscriminately cause human sufferings. Cyber crime, hate crime and gender based crimes are all new trends that cause unnecessary human sufferings and violations of international humanitarian law that needs concern and attention.

VI. COMPLIANCE CHALLENGE

Discussions at the regional expert seminars revealed that compliance with the IHL in non-international conflicts (NACs) remains a grueling task[39] in the modern world. Making reference to politics, economics, culture and technology we can deduce that the legality and legitimization of the IHL and the international judicial mechanism are not tenable.

a) LEGALITY

Black's Law Dictionary defines legality as strict adherence to law, prescription, or doctrine (the quality of being legal)[40]. Strict adherence to law demonstrates coercive and punitive or compensatory aspect of law that should treat every circumstance with equality and fairness. It therefore necessarily follows that the principle of legality shows that the law must be enforceable

[38] CCW PROTOCOL, IV, 1995.

[39] ICRC: 28th International Conference of the Red Cross and Red Crescent, 2-6 December, 2003, Geneva.

[40] BLACK'S LAW DICTIONARY, "Legality" or the principle of legality, p. 977.

by recognized constitutional judicial bodies in place without fear or favour. Any law that is not obeyed lacks legality or legitimization.

In the general practice of international law, States have the monopoly of coercive power[41] in line with law enactment and enforcement within their jurisdictions.

The international humanitarian law enjoys coercive powers by virtue of the *pacta sunt servanda* principle of the treaty law[42] but each State must show an amount of willingness. Signing, endorsing and ratifying of the four Geneva Conventions already gives the law its automatic legality.

In Kenya, any international convention or treaty will still have to pass through legislative processes as required by the law of treaty before it is ratified despite constitutional provision under Article 2 (5)[43]. Once, ratified, the international convention shall have the recognition of the domestic law and full force of law when it is empowered by national legislations and statutes. By doing this the international convention enjoys full force of law or the *legality*. All this process that take a lengthy time that requires legal procedures and eventually some level of political consensus.

Provision of Section 2(5) on the general rules of international law in the Constitution 2010 is an indication that Kenya is serious about her implementation of the four Geneva Conventions and

[41] http://www.lexisnexis.com/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T16886326905&format=GNBFULL&startDocNo=0&resultsUrlKey=0_T16886326907&backKey=20_T16886326908&csi=274661&docNo=2&hitNo=ORIGHIT_1&scrollToPosition=0 (Research done on 11th March, 2013).

[42] VIENNA CONVENTION ON THE LAW OF TREATY OF 1969.

[43] The general rules of international law shall form part of the law of Kenya.

Protocols, one face of Kenya. This is a sign of legality of the law explained in the juristocracy or the rule of law principle. However, obedience to the law calls for wider range of consensus, understanding and plebiscite process that again makes the law lawful.

b) LEGITIMIZATION

International humanitarian law must seek its compatibility in given domestic laws in the State parties through legitimization process. Black's Law Dictionary defines legitimization as the act of making something lawful[44]. *In primis* the people must know, appreciate, and endorse the international conventions before proving its legality. Consensus of the people is significant in ascertaining the legitimization of the law.

The success of the judicial process relies on the legitimization of the law and the UN Tribunal of Cambodia is one of the demonstrative examples[45] in which the people supported the prosecution to an extent of making it a legitimate process.

The contrary is when people appear to be protesting against the prosecution. Such protest results into the failure to mobilize sufficient public support to make the process sufficiently legitimate.

[44] BLACK'S LAW DICTIONARY, p. 984, "legitimization" – lawfulness".

[45] KHMER ROUGE TRIBUNAL – (EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA) "The remit of the Extraordinary Chambers extends to serious violations of Cambodian penal law, international humanitarian law and custom, and violation of international conventions recognized by Cambodia, committed during the period between 17 April 1975 and 6 January 1979. This includes crimes against humanity, war crimes and genocide. The chief purpose of the tribunal as identified by the Extraordinary Chambers is to provide justice to the Cambodian people who were victims of the Khmer Rouge regime's policies between April 1975 and January 1979. However, rehabilitative victim support and media outreach for the purpose of national education are also outlined as primary goals of the commission". Wikipedia, http://en.wikipedia.org/wiki/Khmer_Rouge_Tribunal (researched on 9th May, 2013).

A Typical example of this kind is the Post Elections Violence in Kenya in 2007/8. In March 2013, Kenyans voted and the winners of the general elections were persons already indicted by the ICC on criminal offenses. The electorates were fully aware of the event and went ahead to prove the contrary. This is a sign that the Rome Statute has not been legitimately endorsed by the people of Kenya despite the available legislative documents.

The traditional ratification process advocated for in the treaty law alone is not sufficient ground to render law effective, forceful and legitimate. A clear sign is realized when many States subscribed to the Rome Statute developed a tendency of defying the Court by refusing to execute the unsealed warrant of arrest put on President Omar Al-Bashir in what might be alleged as Court contempt. Many States from the African region (AU) have shown a dissenting attitude of no-collaboration with the International Criminal Court regarding this as oppressive and a breach to State sovereignty and territorial integrity.

Such resentment of a customary international law by Sudan, Kenya, and Ivory Coast, sends a wrong signal to the world. There is lack of good will and such States have not proved to the ICC that they are doing enough to ensure that justice is given to the victims and the perpetrators.

On 8th of March, 2013, two personalities in the Kenyan politics, Mr. Uhuru Muigai Kenyatta was proclaimed the winner of democratic national elections, winning with a landslide[46] number of voters. His running mate Mr. William Samoi Ruto, also charged with criminal offences at ICC, used the same tactful procedure to challenge the legitimization of The Hague based Court using the consensus of the people to shield himself from justice.

[46] GENERAL ELECTIONS IN KENYA 4th March, 2013. Results: Mr. Uhuru Muigai Kenyatta was proclaimed a winner with a landslide putting the international community in dilemma..

As has been mentioned earlier by virtue of voting persons already indicted by the ICC, it goes down the world history that Kenya with *decorum* has eventually introduced a new precedent in the international jurisdiction challenging the legality and legitimization of the Court by politicizing the work of the ICC questioning the credibility of the international law mechanism in dealing with crimes involving signatory State[47].

There is enough ground to believe that international Conventions (Geneva Law) do not only need to consider the legality process, which is the routine endorsement and procedural ratification of law but most importantly that the Convention wins sufficient credibility of the nation through political processes in order to enjoy its full legitimization.

It is true that several African States argue that international treaties, conventions and protocols are designed under Western philosophy, beliefs and may not be compatible with some African cultural values and ideals for justice and peace. However, the principle of universality underpinning international humanitarian law, enshrines "humanity" and the principles of natural justice and fairness which includes Africa without favour or fear. The fact that several of the alleged crimes happen within the Continent of Africa does not justify the claim that ICC is targeting Africa. The quantification of the cases and blaming ICC for getting more involved in the cases in Africa is still challengeable however time shall tell.

[47] "ICC: We have enough evidence on Uhuru", in *The Standard*, Tuesday, March 19, 2013, pp. 1-2. During his campaigns Uhuru had made a statement reading that vote for him and Ruto would be a vote of no confidence in the ICC. This statement is sending negative signals to the international criminal justice system – there is a problem with legitimization of the law.

Africans are members of the human race, *ipso facto*, there is no way an international justice system would alienate Africans from the international justice system since this would create another blame.

International humanitarian law is based on human values and dignity which fall under minimum standard. Human dignity and the need to ensure its adequate protection during armed conflicts is reasonable ground for its enforcement. Any action that may destroy humanity or bring unnecessary sufferings to human persons is prohibited by the law. States parties to the Geneva Conventions and Protocols are respectively obliged to respect the international humanitarian rules and ensure respects[48] at whatever cost.

In this manner, Geneva Conventions and relevant Additional Protocols that constitute the international humanitarian law are not blind of the legality and legitimization principles when they consider the implementation process[49].

Conclusion

The current resistance by States and their governments to collaborate fully with the rules of international criminal law including the Four Geneva Conventions, Three Additional Protocols

[48] Common Article 1 of the 4 Geneva Conventions – Rule 144 "States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law".

[49] CUSTOMARY INTERNATIONAL HUMANITARIAN LAW. VOL. I, RULES: Chapter 40 "Compliance with International Humanitarian Law", the rule proceeds with the enforcement rules and international cooperation in criminal proceedings.

endorsed by over 194 States, is justified by the failure to legitimize the law and African States and their Governments to show commitment to the cause.

Purportedly it is not enough for a State to endorse and ratify the Rome Statute in effectuating the implementation of the law. Much more is needed to show that the people do the same through their domestic legislative processes or through appropriate public national plebiscite. Such legitimization rule should include public awareness and the majority accepting the law with intention to fully defend it. By doing so the populace ought to be on the side of the law for the sake of law and the criminal judicial body to achieve its desired goals.

It is alleged by the Chief Prosecutor of the ICC, Ms Fatou Bensouda[50] that Kenya is not willing to allow its current suspects to be prosecuted by denying the Office of the Prosecutor sufficient access to vital documents needed to sustain the case against Mr. Francis K. Muthaura[51].

The suspects seeking public support through political consensus of the people is a predictable sign that the suspects may later decline to comply with the Court or delay the process until the ICC shall be completely irrelevant. Witnesses of the victims and some of the victims will disown the Court paralyzing the good intentions of the Prosecutor. There is high probability that some other States shall do as Kenya and get away with serious breaches of international criminal law.

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[50] PATRICK MAYOYO & DAVE OPIYO, "Judges to rule on Ruto trial date", in Daily Nation, Nairobi, Tuesday May, 2013, p. 6. "Ms Bensouda has accused the government of undermining the court's investigations thereby limiting the evidence available to the trial judges...". *Op. Cit.* "The State had failed to provide most critical documents and records".

[51] Mr. Francis Kirimi Muthaura was acquitted in March 2013 when the OTP submitted a claim that she (Ms Fatou Bensouda) had no enough evidence to proceed with the case saying that the Government of Kenya did not enable her to access key documents.

Hypothetically, if the ICC decides to offer amnesty to President Uhuru and his Deputy Rt. Hon. William Samoi Ruto, then it will deny the victims justice in what may call for even more serious protests against the Court by other stakeholders.

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