

The Legality of New Armaments from the Viewpoint of International Humanitarian Law

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Abstract

The rapid and intensive progress in science and technology in the world, despite its abundant advantages and gifts of welfare and comfort for the mankind, in many ways, it has pushed human security to face grave tragic events. To give an example, the progress in chemistry before the Great War, made it possible to produce and use toxic gases including Phosgene gas causing enormous deaths of both military personnel and civilians. Another example in man's progress in nuclear physics led to innovating nuclear bomb with no precedent and unheard of in terms of mass destruction and ruins.

In turn, the international humanitarian law, despite its progress in recent decades, has had been slower than the development of aforementioned scientific progresses. Nonetheless, one should consider the point that those disciplines of human sciences have more essential and fundamental principles that provide it with the ability to prevail with new conditions and situations. To elaborate the subject, although the international humanitarian law lacks explicit rules, regulations and treaties in addressing many of the modern armaments and warfare, it still possesses the principle of distinction, principle of unnecessary pain and suffering, principle of preventing vast and long-term damages that could be enforced on new arms by assessing its legality in order to boost human security. The present paper aims at studying various aspects of this issue.

Keywords: Human Security; International Humanitarian Law; New Arms; Principle of Unnecessary Injuries and Suffering; Principle of Distinction.

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Introduction

The promotion of human status in international laws and more international attention to the issue of human rights have caused deep developments in different branches of international laws including arms control law. In fact, the formation of “human security” concept in the international laws has affected arms control policies. In other words, in this way the parameter of human security has been considered along with the national security parameter, and has acted in restricting armament as much as the national security element. Since weaponry are basically considered as the main element in damaging people’s security, the removal of weaponry threats would be one of the important parameters for promoting human security. It has been emerged that threats that the world community is currently facing with would be far more extended than invasion threats made to a country. Despite a considerable decrease in the number of wars after the cold war, people around the world continue facing with new threats such as risk of an invasion by a foreign country and the utilization of chemical, biological and nuclear weapons.

These new threats could be environment degradation, terrorism, and sectarian revolts and wars. Undoubtedly, with the extension of threats, the sole concentration on state security (national security) no longer works and it would be necessary that a new interpretation of the security concept is represented in a way that it would be capable of dealing with all kinds of security challenges and providing solutions for it. In fact, in response to this requirement of the world community, the concept of human security was propounded with core issue based on the support of people’s fundamental liberties against any threats.

International humanitarian laws or “human rights at war time” as a series of international regulations used for international armed conflicts are of fundamental principles in which, human security has been properly considered. In other words, such a consideration will undoubtedly help promote human security. One of the areas in which the fundamental principles of international humanitarian laws are very much used is to assess the process of new armament legitimacy.

Despite old age, these fundamental principles and rules such as principle of

distinction, principle of proportion, principle of unnecessary injuries and suffering, due to their intrinsic flexibility, could be enforced on new arms fields. Perhaps, it is for the very reason that the International Court of Justice on the issue of nuclear arms has justified enforcing the international humanitarian law on all types of arms and the fact that those arms are new has not hindered imposing those laws on them (Advisory Opinion 1996: Para 86). In addition, the court speaks of “Martens Condition” and considers it as an “effective tool to face rapid changes in military technology (Advisory Opinion 1996: Para 78 & 87). Based on this condition, if there is no explicit principle to support civilians and military in armed conflicts, those people will remain under support and authorization of the principles of international law as a result of fixed customs, principles of humanity and requirements of public conscious.

As it could be seen, essentially, “Martens clause” could be enforced in conditions when there exists no explicit international law and this is exactly compatible with the subject of this paper; for, there is no explicit international law on the legality of many of the new armaments;

however, by attributing to various principles of international humanitarian law, it becomes possible to express views on the aforementioned arms.

In view of this subject, it can be concluded that:”Although the technical forms (war) have changed extensively per time and place, the major subjects that emerge from efforts to enforce balancing (softening) norms on behavior in armed conflicts have not changed much in their essential nature. The experiences since 1864 have shown that the mentioned principle is much more than a dream. If we just remember this point, we could keep hopes on continuation of progress and the sufferings caused by armed conflicts, if such happen, could be reduced as much as possible” (McCoubery, 1998: 19-20).

Considering these, this research paper intends to answer to this fundamental question as “what role international humanitarian laws could play in restricting new armament legitimacy?” In response, it would be initially necessary to know whether or not, from the law point of view, there is a requirement to assess the legitimacy of new arms. If so, by representing a definition of new arms, we would then be able to address humanitarian

criteria of the assessment.

In this regard, the consideration of a practical approach taken by some governments in assessing the legitimacy of new armament using the principles of humanitarian laws would be beneficial. Thus, this matter is addressed in a section of the paper.

The Legal Basis of Assessment of Legality of New Arms

The Saint Petersburg Declaration is considered as a pioneer document in armed control and the first international agreement that has noted the importance of reviewing the legality of new arms.

On the historical records of Saint Petersburg Declaration, it should be said that in 1863 the Tsarinas Russia government developed its “explosive shell” industry to use them against enemy’s armament facilities. In 1867, a new type of shell was produced by Russia that would be exploded when hit human soft tissues and would cause much damages to human body. Those weapons had in fact smaller calibers than ordinary shells of that time. The Russian government was usually afraid that the armament factories of its enemies such

as France, Britain, German etc. would develop those inhuman weapons and therefore, in order to ban their productions, it arranged for Saint Petersburg Conference that resulted in the conclusion of a declaration by sixteen powerful countries in 1868 (McCoubrey, 1998: 231). As it could be seen, essentially, the main motive behind signing the declaration was the growing concerns about the development of a new weapon then.

In a section of that declaration, it was written: “With respect to the scientific progress on armies arsenals, shall there be any new proposals, the parties to the treaties with governments that will join (this declaration) subsequently, will reserve the right to gather and reach agreements for the purpose of maintaining the stipulated principles (in this declaration) in order to coordinate the war necessities with the humanitarian rules.”

The new implication of this issue could be observed in Article 36 of the First Additional Protocol to the four-conventions in Geneva (approved in 1977). According to this article, “in the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High

Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.”

According to the International Committee of the Red Crescent, Article 36 was completed by Article 82 of the first additional protocol (ICRC, 2006:933). According to this article “the High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.”

The commitment stipulated in the above-mentioned articles gives governments the opportunity to assess if they are able to observe their international legal obligations during armed conflicts. In fact, the process of revision of legality of new arms provides the capability to predict legal challenges based on the fundamental principles of humanitarian law that the governments might face when they use some armaments

with the purpose of giving them the opportunity to think ahead and consider those principles upon developing new armaments technology and/or in reviewing the legality of new arms.

On the other hand, it seems that the aforementioned regulations must be interpreted in line with governments’ obligations to execute the international humanitarian law with good faith (Doswald-Beck & Cauderay, 1990: 565).

In fact, the principle of good faith in executing conventions obligations urged governments to assess the legality of new arms based on the fundamental principles of the international humanitarian law when they start producing and developing such weapons and in this way, the mentioned principles that were supposed to be enforceable in using the arms in wartime have eventually expanded to include the pre-use period to become a basis to control arms.

It should be mentioned that the necessity of establishing national mechanisms to revise the legality of new arms has been already emphasized on in various meetings and gatherings. In the 27th international conference of the Red Cross and the Red Crescent in 1999, governments were urged

to develop mechanisms and procedures to check if using a certain weapon, whether developed by own or obtained from another country, is contrary to the international humanitarian law or not? In addition, the committee asked governments to show more cooperation and exchange of information in this regards (ICRC, Plan of Action 1999).

Further, the participant countries in the second conference on revision of conventional armed convention in 2001 addressed the issue of revising and assessing new arms and asked those governments that were careless in observing their obligations stipulated in article 36 of the First Additional Protocol, to take actions on revising their new arms in accordance with relevant principles and laws. In the final declaration of the conference it ruled:

“Governments that have not taken such actions so far are required to perform revision in accordance with article 36 of the First Protocol of Geneva in order to specify if any of their new arms or new war methods and tools is banned on the basis of the international humanitarian law and/or other international imposable

laws?” (CWC/Conf. II/2 2001:11)

Definition of “New Arm”

It should be noted that by those arms, it does not mean the newly innovated arms, but the concept of the term is much more extensive than the literal one. In explanation, it should be said that if a certain type of arm is being used by country A and later, country B buys that weapon from country A, that weapon will be considered as “the new arm” for country B and according to the regulations, it should undergo revision process (McClelland, 2003: 404).

Second, there is some advancement in any weapon as time passes and armament producers try to update their products. Here; too, it is necessary to know that an “updated arm” is also considered as a new arm. Nonetheless, it should be observed that any changes could not be a proof of considering the arm a new arm as included in concept of Article 36 and only those changes are accounted for that cause promotion of the “capacities” of a weapon. Therefore, as an example, lowering the weight of a weapon to make it easier to carry it does not change that weapon into a

“new arm” (Copland and Shoey, 2002: 354).

And the last, one must pay attention to the point that any weapon should be studied and revised as per the mode it is supposed to be used; for, “legality of a weapon does not depend merely on its design or its target, but to the method that the weapon is expected to be used as well” (ICRC, 2006: 938).

Indirect Impact of Commitment Stipulated in Article 36 on Arms Production

Although Article 36 is on “using” new arms rather than “producing”, the obligations set forth in this article would affect “production” of those arms too; because, as we know, one of the characteristics of the assessment mechanisms of new weapons legality in national level is that it covers the production stages from first to the last. That makes it possible for arms producers to become aware of the viewpoints of the views of the legality assessment bodies and consequently, refrain from producing weapons that are not consumable in army. With no doubt, this will be effective in proceeding arms control goals. Some authors and scientists believe that this article is in fact “a surprising provision” in

the protocol and it was more expected to be included in a disarmament treaty (Breton, 1978:61).

On the other hand, in fact, regulations on arms issue could not separate from the provisions of humanitarian laws. In fact, both sets of regulations have been established for promoting and improving people’s conditions in war (Detter, 2000: 213).

A group of delegates that participated in the diplomatic conference for concluding Additional Protocols (1977) opposed including this article in the first protocol since they believed it to be a subject related to disarmament field; hence, in their opinion, approving such article was beyond the framework of activities of the diplomatic conference. Furthermore, another group of delegates in the conference requested to refer this article to Article 51; that is, attacks without distinction. In any way, the efforts and objections of those delegates did not prove effective and Article 36 was included in the protocol in the same way it was.

Governmental Procedures

Unfortunately, a few governments established official procedures for revision and review of

new arms legality on national levels. The reason may be that most countries do not produce arms and they buy from other countries and content themselves to the assessments made in the buyer country. Of course, it is possible that a number of governments assessed new arms “in practical” way; however, since there is no official information in this subject, it is not easy to have access to the details of the issue. Despite this atmosphere, it seems that more efforts are required to encourage governments in this respect and the NGOs and civil society could render valuable contributions in this subject.

It should be mentioned that in order to help governments in establishing national mechanisms in revising the legality of new arms, in 2006, the International Committee of the Red Cross developed and released a guideline on legal revision of arms, armaments and new war methods with the help of 30 experts from ten countries. This document is in fact an interpretation that the committee could develop based on the existing sources such as the contents of Article 36, the interpretation of the International Committee of the Red Crescent from the first Additional Protocol,

the declaration of the International Conferences of the Red Cross and the procedures of few governments on that subject (Lawand, 2006: 926-927).

The United States and Norway are among countries that have established complete national mechanisms on revising the legality of arms. We will take a brief look at those mechanisms.

The United States of America

The United States of America is one of the countries that have predicted codes of assessment and revision of legality of new arms in national level. Although the country has not joined the First Additional Protocol, it is still a pioneer in the aforementioned field.

“American Arms Revision Plan” was developed by the Defense Department in 1974 after Vietnam War. In that procedure, the army prosecutor with the cooperation of “General Council of Defense Department” and if necessary, the legal advisor of that department would perform revision task and in this approach, they benefit from the consultation and information provided by experts including physicians, arms design engineers and environment experts. In

addition, they might obtain additional information on a weapon from producers. It should be mentioned that the procedure of revising arms legality, according to the American laws, includes the first stage of research and studies to the production and test stage and any acquiring and obtaining new arms is associated with a satisfactory legal revision (Daoust et al., 2007: 190-192)

Norway

In 1994, the Defense Ministry of Norway too, established a committee for assessing the legal aspects of new arms, and war methods. The committee included representatives from the defense studies of the ministry and the logistic resources management department. Like America, Norway too, performed revision from the first to the last stages of arms production that includes all types of the arms with no exceptions. It should be mentioned that similar procedures are taking place in Australia and Sweden as well (Daoust et al., 2007: 189-194)

The Criteria of Assessment Process

This part tries to answer following questions:

What legal standards are considered as the criteria in the process of assessing new arms?

What is the basis of legality or illegality of new arms?

Following is some criteria and standards in this field:

A: Banning Weapons Inflicting Extraordinary Injuries and Suffering

As mentioned before, by unnecessary injuries and suffering, it means a suffering that has no proportion to the military necessity. In another words, in the international humanitarian law, pain and suffering is considered legal to extent that it would fit the necessity and military benefits as achieved. Two different aspects must be considered when this criterion is being used: qualitative and quantitative. By qualitative aspect, it means the nature of pain and suffering. In fact, in this stage, it is studied if that new arm would or would not increase the level and degree of damages and pains of an individual. It also means that if using the new arms would increase the number of people who are exposed to extraordinary pain and suffering or not? As we could see, this aspect of first criteria has close ties with the second one; that is, the

distinct criteria between military and civilian goals, as discussed in following sections.

The interesting point in this part is that, each weapon might be used in a way that would cause unnecessary pains and suffering; however, the point in the assessment procedure is to check whether or not an ordinary use of a weapon would naturally cause some effects. If a weapon has naturally such effects, it could be said that it is illegal to use it.

The reporter of third committee in negotiations on approving the Additional Protocols (1974-1977) on the nature of commitments included in above-mentioned article states:

“...[this] article asks the governments to study if using a weapon for an ordinary and expected use is prohibited in some or all conditions. There is no need for a government to predict and analyze possible abuse of a weapon; for, almost any weapon could be used in a prohibited manner.”

It should be mentioned that the Red Cross; too, had accepted and confirmed that interpretation (Sandoz et al., 1987:247).

B. Banning Weapons with Distinct Impacts

According to these criteria, in assessing the legality of new arms, it should be seen if that weapon has the capability to be used in a way that would only aim at military targets not civilians. Undoubtedly, in this approach, a certain characteristics i.e. the high “precision” of those weapons in aiming the targets play a major role. As a weapon has more precision, the observation of principle of distinct will become easier. This characteristic has military importance too; because, it is important for governments; too, to buy arms that would have a precise aiming specification (McClelland, 2003: 408). (As it could be seen; here too, compatibility has appeared between military and humanitarian targets).

The point that should be considered is that, arms differ in terms of “precision”. As an example, the precision of a “sniper” in its aiming could not be compared with a “canon” because essentially, the targets of the two weapons differ and each is used for a particular purpose. Therefore, in the process of revising new weapons, those considerations should be taken into consideration by the controlling authority.

C. Banning Arms with Negative Impacts on Environment

In this criteria, this point is addressed if the weapon has a “long-term, extensive and intensive” impacts on environment (see Clause 3, Article 35 of First Additional Protocol), or if that weapon is designed in a way that would enable it to cause extensive damages to the environment. In addition, the criteria studies if the expected method of using a weapon is in a way that would directly or indirectly causes harmful impacts on environment.

The Source of Information of Revision Body

In this part, we try to answer that in performing the revision process, which information sources are used by the new arms legality revision body and authority? Or, it is based on what type of data and information? To answer, it should be said that the revising reference uses several information resources including: the data given by arms producing companies; reports of relevant experts; medical reports.

A. Information Supplied by Arms Producing Companies

Essentially, the most primary and the easiest way to collect data on a weapon are to seek it from its producer. More basic

information on a weapon could be obtained by referring to the information that is given by companies. Of course, it should be mentioned that normally, producers give good words about their products; therefore, a revision institute should not content itself to that information and should complete its information by using other methods as mentioned below.

B. Experts' Reports

The revision institute might use information of an expert or a team of experts on the arms subject of revision in order to complete its information. The revision body might test the arms and assess its various aspects including precision in aiming and its impacts and send valuable reports to the revision reference and authority.

C. Medical report

Another way of collecting data is to study the harmful impacts of a weapon by a council of physicians. In this method, it is studied if the weapon subject of revision would cause unnecessary and extraordinary pain and suffering in its victims.

The problem of this method is that, there is a possibility of absence of medical evidences on the weapon when the new arm

is being studied so the physicians could give their expertise views and there would be no means to test the impacts on human targets. In such cases, if there is a record of using that arm in another country, it will be tried to use the medical evidences in that country and if there is no record in production and using that weapon in another country, the physicians will assess the impacts of those weapons including probable death, amount of injuries...based on the materials used in the manufacturing of that weapon as well as its design.

Legality of Vote of Revision Body

It seems that when a revision body votes on the illegality of a weapon, continuation of obtaining or using that weapon by a government will lose its legal justification and causes international responsibility of that government for breaching the international humanitarian law or other relevant regulations and laws (ICRC, 2006: 954). In the United States, no weapon could be obtained without permission of a revision body. In the "Marine Instruction" of this country, it has been written: "No weapon or arm system without legality revision is allowed to be obtained."

(Department of Navy, 2004: Section 2.6).

The same condition is ruled in Australia.

Conclusion

In any event, with respect to the above-mentioned subject, one could conclude that despite the importance of principle of "sovereignty" in the contemporary international law, this concept has undergone deep changes as a result of promoting international norms and criteria and humanitarian laws. If in past, production and obtaining any types of arms for defending national security was considered as a sovereign right of governments, today, this right has lost its previous value and credit in favor of supporting and protecting human rights, and in general, human safety. In fact, the human rights and humanitarian law rules have chained sovereignty to prevent governments from self-emerged attacks and have in turn promoted the position of "individual" in the international society.

By employing humanitarian concerns in this context, an effective step has been made by states in helping to cooling off the fire of wars in clashing regions, preventing serious breaches of human rights and

humanitarian laws, lowering damages to civilians, preventing unnecessary pains and suffering on combatants and reducing armed conflicts and hostilities in clashes and in this way, they observe human rights and humanitarian law provisions themselves and guaranty their observation by others as well.

As it could be said, shifting the fundamental principles of the international humanitarian law into becoming a criteria to assess the national decisions and policies in arms transfers as well as assessing the legality of new arms is a phenomena in line with binding the absolute sovereignty of governments in arms and influence of the international humanitarian law on controlling arms.

Anyhow, it seems that, today, the creation of disarmament laws and weaponry control has been hardly affected by international humanitarian laws. It could be even said that in many circumstances where disarmament laws lack a regulation, international humanitarian laws would be utilized to resolve the shortage.

Here, it is worth mentioning that in this concept the armament control finds a humanitarian concept too. It means that the armament control is no longer considered as a

separate matter to international humanitarian laws but it would be one of its sub-disciplines. In fact, if we want to better define the position of this subject among international laws, we can say that it is in the section of rules related to “means and methods of warfare” which is one the main sections in international humanitarian laws. This is the reason why the new terminology of “the humanitarian arms control” has been created. In this approach, governments attempt by reminding negative consequences of some arms utilization on human health and environment and also suffering and pains on women, children, elderly people and combatants create a political motivation among the governments to restrict the production and purchase of some arms.

In the context of armament control, it would be basically better to pay more attention to humanitarian parameters and criteria as there are little differences on these parameters and criteria between governments. Undoubtedly, policies based on instantaneous interests of countries will draw an unclear future on the subject of armament control. The fundamental principles of humanitarian laws as a common platform for policy making

regarding the assessment of new armament legitimacy could deeply affect the unification of the assessment process at the national level of different countries. This will surely influence the control of new armament.

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"ارزیابی مشروعیت تسلیحات نوین از منظر حقوق بشردوستانه بین المللی"

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پیشرفت سریع و شتابان علم و تکنولوژی در جهان به رغم مزیت های فراوانی که به همراه داشته و رفاه و آسایش برای نوع بشر به ارمغان آورده است، در عین حال در بسیاری از مواقع بشر را با مصایبی بس سهمگین روبرو کرده است. برای مثال پیشرفت در علم شیمی در قبل از جنگ جهانی اول، امکان ساخت و تولید و استفاده از گازهای سمی از جمله گاز فسژن در این جنگ را فراهم نمود که جان بسیاری از نظامیان و غیر نظامیان را نیز گرفت و یا نمونه دیگر پیشرفت بشر در علوم مربوط به فیزیک هسته ای بوده است که منجر به اختراع بمبی گردید که هنوز هم جهان بمبی دهشتناک تر از آن، به چشم ندیده و به گوش نشنیده است.

در مقابل، حقوق بشردوستانه بین المللی به رغم پیشرفت های خوبش در دهه های اخیر، حرکت کند و آهسته تری به نسبت توسعه علوم مزبور داشته است. اما با همه این احوال باید این نکته را در نظر داشت که این رشته از علوم انسانی از اصول بنیادین و اساسی برخوردار است که قدرت همپا شدن آن را با شرایط و موقعیت های نوین فراهم می کند. توضیح مطلب آنکه، هر چند حقوق بشردوستانه بین المللی در خصوص بسیاری از سلاح ها و ابزارهای جنگی مدرن فاقد قواعد، مقررات و معاهدات صریح است ولی از اصول بنیادینی همچون اصل تفکیک، اصل درد و رنج غیر ضرور، اصل منع ایراد خسارات گسترده و طولانی مدت به محیط زیست و... بهره مند است که قابلیت اعمال بر این سلاح ها را دارند و می توانند معیارهای خوبی برای ارزیابی مشروعیت این سلاح ها به حساب آیند. مقاله پیش رو در صدد آن است که به بررسی ابعاد مختلف این موضوع بپردازد.

واژگان کلیدی: حقوق بشردوستانه بین المللی، تسلیحات نوین، اصل درد و رنج غیر ضرور، اصل تناسب، اصل تفکیک.

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