INTERNATIONAL LAW IN INDIA: ANALYZING THE LEGAL AND POLICY FRAMEWORK THROUGH INTERNATIONAL HUMANITARIAN AND REFUGEE LAWS

Aswathy Madhukumar*

Abstract

The Paper explores the role of municipal law and policy in the implementation of international laws at the domestic level. International Law has remained on a special turf since its inception especially owing to the absence of any global sovereign conventionally associated with law, to ensure compliance. Despite this, international law has played a major normative role in determining the conduct of States as well as international Organizations. However, effective implementation of international law depends not only on the existence of legal principles but also willingness of the State to conduct itself in line with the obligations. This Paper argues that this requires adequate policy mechanisms and not mere adoption of law into the books – that is, implementation of international law at domestic level is a point of intersection of law and policy. Predominant academic attention is focused on international law as a legal discipline, while political analysts focus on domestic and foreign policy. This Paper looks at international law in this duality – focusing on its legal as well as policy aspects simultaneously, in the Indian context. It examines India's approach to international law from the legal as well as policy perspectives, looking at how law informs policy and the other way round. The Paper uses specific examples in international humanitarian and refugee laws to draw out this crucial interface.

Keywords: India, International Law, Humanitarian Law

* Assistant Professor, India International University of Legal Education and Research, Goa, India. Contact: aswathy.mkumar94@gmail.com.

1. Introduction

International law has, since its inception, held a special position in jurisprudence as it does not fit into the pigeonholes meant for domestic legal principles emanating from the State's sovereign authority as the all-powerful entity. Lacking a formal sovereign to legislate or implement these laws (though the latter part may be attributed to the International Courts and Tribunals), the actual effect of international law as 'law' is often challenged in principle. However, it has been accepted across legal systems and jurisprudence now, that may as it be in terms of actual implementation, international law is 'law' and States are obligated to obey and follow the mandates laid down.[3] Effectively, international law requires States' willingness and cooperation to implement and respect its mandates without impinging on their sovereignty. States implement international law based on the system they follow, with monist countries considering international law as a part of domestic law; and dualist countries requiring that the State has to translate international law into its domestic system for it to become a part of the domestic system. Dualist States thus require an express adoption of the law into the municipal system, while Monist States do not.[4] The mechanism by which international law is incorporated into domestic law is per the State's prerogative, through its Constitutional scheme, Parliamentary process and judicial system. Customary and Treaty obligations are often seen to play out differently in their implementation at domestic level. States cannot per se ignore Treaty obligations without incurring the consequences envisaged in the Treaty for violations, especially not without facing challenge in the concerned international tribunal or Court. However, as Stateshall see in the later part of the Paper, customary obligations are often circumscribed using State policies befitting domestic interests. As noted by (Sehrawat, 2019), States implementation of international law is contingent on its policy objectives and values. These values, in turn, are often reflected in the Constitution, and are further concretized by Courts in deciding cases premised on these values.

This Paper seeks to explore the relevance of domestic policy in the actual implementation of international law in the State's operation. That is, it argues that mere agreement to international law by a State does not guarantee compliance per se. Despite the possibility that the international community may hold the State accountable *politically,* rights or duties under international law do

[3] It can be seen in the conduct of States in being part of organizations such as the United Nations, International Labour Organization, etc. and in their cooperation in the Resolutions, Treaties, and other initiatives of such Organizations. For theoretical analysis, see, for instance, Philip Allott, International Law as True Law: A New Approach to a Perennial Problem, *EJIL: Talk!* Jan. 12, 2022 at <https://www.ejiltalk.org/international-law-as-true-law-a-new-approach-to-a-perennial-problem/>

[4] Monism and dualism are two theoretical approaches to the relationship between domestic law and international law. Though States cannot be places into these categories like pigeonholes, it is generally perceived that monism perceives domestic and international law as parts of the same universal system of law, while dualism holds domestic and international laws as separate and the letter requiring the former's adoption in order for it to be applicable. For more, see Madelaine Chiam, Monism and Dualism in International Law at <https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0168.xml>

not automatically become justiciable in Courts by way of individual petitions or cases. Hence, this Paper holds that no amount of international principles would suffice to ensure compliance unless the State adopts domestic policies towards implementation of these laws, depicting their political will beyond building international optics and image. This argument is built specifically through the example of India, examining its political and legal landscape as regards compliance with international legal obligations.

The next part of the Paper will outline the Constitutional framework, legislative history, and the Supreme Court's jurisprudence around India's stance on international law. The subsequent part will look at the instances of international humanitarian law (IHL) and international refugee law (IRL) to depict that international obligations normatively agreed upon, could be flouted by States using their domestic law and policy measures unless these international obligations themselves reflect in domestic law and policy adequately. The last part of the Paper will highlight the importance of domestic policy decisions specifically in the field of international law, urging the international community to insist that State parties agreeing to international obligations through Treaties and Conventions be required, post-ratification, to enact domestic policy frameworks to ensure that the obligations are reflected under municipal law as well. Especially in obligations that lay down international human rights framework, it must be ensured that the corresponding domestic laws are made justiciable.

2. India and International Law: The Path Traversed

The basic values of the Constitution of India were settled by the Supreme Court of India through several cases that arose out of State actions that violated Fundamental Rights envisaged in the Constitution. Within dualism, there are different approaches through which an international legal principle becomes a part of municipal law, the most common one being the specific adoption or transformation theory. Sovereignty requires that the ultimate authority to determine the application of legal obligations on the State remains with the State itself (Mendez, 2013). Domestic adoption of international law will ensure that the State could retain its sovereignty while still complying with international obligations, since it is now voluntarily abiding to undertake these obligations, without eroding its sovereignty. In addition to the philosophical aspect of demonstrating sovereignty, States also need to exercise caution in ensuring that their domestic interests are not prejudiced in implementing international obligations. This often means that States' actual response to international obligations reflects more foreign policy concerns than international legal concerns. In deciding on the implementation of international principles, States may be seen to take more into account their foreign and domestic policy considerations than their obligations under international law. This is more so with respect of matters concerning national security, such as cross-border movement of people (such as refugee laws or laws on asylum and migration) or international humanitarian law.

India requires international law to be adopted into the municipal system, and domestic Acts are passed to implement international obligations that the State agrees to. Respect for international law is a part of India's law and policy, envisaged in the Constitution by its makers from the inception of the State as an independent sovereign.

The State took upon itself the obligation to respect international law and to maintain good international relations, in keeping international peace and security. In addition, the Parliament is vested with the power to legislate for the Nation to implement any international obligation. (Constitution of India) International law is not get automatically regarded as binding principles, but needs to be brought into the domestic realm by the Parliament. In the interaction of domestic (municipal) law with international law, this means that the two categories of law are regarded as distinct and separate. Courts in India have, however, sometimes taken a different approach by applying international legal principles to cases, at times invoking them even in the absence of any domestic legislation or rule on the matter.[5] This marks a shift in the judiciary's perception and treatment of how international legal principles must guide their jurisprudence, though it does not change the nature of India's relationship with international norms per se. It is, rather, the Court perceiving that if India has agreed to certain principles and obligations at the international level, then the ensuing duties may indeed be placed on the State.

2.1 International Law and the Indian Constitution

India's position on international law was determined in the Constituent Assembly on what India's international interaction should be like – that is, what foreign policy India is to follow, and what relationship it would maintain with the international community. In the same proceedings, the question of international peace and India's policy on war were also discussed to some extent.

The Constituent Assembly debates give us some insight into what was intended when the makers drafted the Constitution. Art. 51 reads,

> *"Promotion of international peace and security.*
> *The State shall endeavour to:*
> *(a) promote international peace and security;*
> *(b) maintain just and honorable relations between nations;*
> *(c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and encourage settlement of international disputes by arbitration"*

[5] Though India does not directly implement international law, the Supreme Court of India referred to international obligations while deciding *Visakha v State of Rajasthan* AIR 1997 SC 3011. Read the full text of the decision at <https://main.sci.gov.in/jonew/judis/13856.pdf>

The original text of the Draft Constitution read so:

> *"The State shall promote international peace and security* ***by the prescription of open,*** *just and honorable relations between nations,* ***by the firm establishment of the understandings of international law as the actual rule of conduct among governments and by the maintenance of justice and respect for treaty obligations*** *in the dealings of organized people with one another".* (art. 40, Draft Constitution of India)

Several amendments were moved by different members of the Assembly, including Dr. Ambedkar, whose proposed substitution is very similar to the text as it stands today. Dr. Ambedkar moved the amendment to replace the Draft article with: *"The State shall - (a) promote international peace and security; (b) seek to maintain just and honorable relations between nations; and (c) endeavor to sustain respect for international law and treaty obligations in the dealings of organized people with one another.*" Similar amendments were also moved by other members such as Mr. Kamath, which sought only a structural change in the language while the essence was the same as that moved by Dr. Ambedkar. The amendment moved by Mr. Kamath would make the provision read as such: *"The State shall endeavor to (a) promote international peace and security; (b) maintain just and honorable relations between nations; and (c) sustain respect for international law and treaty obligations in the dealings of organized people with one another."* The change in language seems merely technical, but a crucial difference can be noted in terms of how in the original art 40, *"international peace and security"* was related *to "just and honorable relations between nations"* and *"maintenance of justice and respect for treaty obligations"* using the conjecture ***"by"***. If the provision had stood so, international peace and security would have been a function of the relationship between nations, international law, and respect for treaty obligations; rather than each of these being separate obligations of the State. No discussions were made on this particular aspect regarding how the new format would alter the inter-relationship between the three clauses.

Though not with respect to this aspect, one of the members pointed out that any change in language, however superficial the difference might seem, embodies a difference of approach, outlook and even that of intention. Prof. K T Shah, a member of the Constituent Assembly, moved his own amendment altering the Draft art. 40 to this: *"The Federal Republican Secular State in India shall be pledged to maintain international peace and security and shall to that end adopt every means to promote amicable relations among nations. In particular, the State in India shall endeavor to secure the fullest respect for international law and agreement between States and to maintain justice, respect for treaty rights and obligations in regard to dealings of organized peoples amongst themselves."* He emphasized that India must *pledge* to maintain international peace and security, placing the duty more vehemently on the State. One might hold the same true for the change in language in the Draft, the amendments proposed, and the final provision as it exists today.

The discussions went on about what foreign policy must be adopted by India, with a particular focus on armaments and war as well. The Hon'ble members exchanged views on how they purported to achieve international peace, in the context of the international political situation then. The UN Security Council had been in a deadlock on disarmament during the time the Constituent Assembly was assessing India's position, which clearly influenced the thought process. (Debates C. A.) Several members mentioned the UN and the international security ecosystem while speaking of their concerns on what stance India must adopt. (Constituent Assembly of India Debates (Proceedings), Vol. VII). Despite the efforts of the UN and its failed predecessor League of Nations, the arms race was prevalent in the West and imperialism had not ended as yet.[6] UN peacekeeping forces had been sent to the Middle East, South Asia, Africa, and Central America that year (1948), (Moritan) and the Security Council was in a deadlock on disarmament. (Beghhoefer).

This political context must have influenced the Assembly Members' perceptions on India's position on international peace, extending to a discussion on war and military strength. While some maintained that the State must stick to the ideals of peace and eschew violence at all costs (See statements by Prof. KT Shah, Shri. BM Gupte, Shri. M Ananthasayanam Ayyangar, etc. which invoked Gandhi and the ideals of peace.), Shri. Mahavir Tyagi made a statement in favor of being willing to display military strength if the need arises. He broadly supported the motions made by other Members towards peace, but made his reservations clear by invoking the need for power and armed forces (extending to war) to achieve the stated objective of peace and harmony. Opposing perspectives were put forth in the discussions, given that the international political atmosphere was volatile, and India was much weaker in its position relative to other states.

The United Nations had only recently come into existence, and efforts at securing any big power (US or the USSR) to initiate disarmament had not been fruitful. Nuclear weapons were also in existence, and the world was divided in blocs.[7] India had categorically maintained its distance from any blocs, which was morally the right position to assume, but rendered India vulnerable as a newly independent State. Some members wished India would take its position on international

[6] The League of Nations was disbanded in 1946, transferring its powers and functions to the United Nations in 1945, after the former was unable to prevent the Second World War from breaking out. Many attribute this failure to the conduct of member States that did not abide by the rules of the League in their own conduct, especially in their attitude towards aggressor States. For instance, Winston Churchill said, "[T]he League did not fail because of its principles or conceptions. It failed because those principles were deserted by those states which brought it into being, because the governments of those states feared to face the facts and act while time remained." See League of Nations: Transition to the United Nations at <https://www.ungeneva.org/en/about/league-of-nations/transition> Alongside, the Cold War began in the late 1940s, creating yet another international tension and apprehensions on sustainable peace.

[7] Blocs were the polarized coalitions of socialist and capitalist States that opposed each other in the aftermath of the Korean War and then the Cold War. The capitalist bloc supporting the United States of America, and the socialist bloc supporting the Soviets parted most of the World into two. Amidst this, India was a part of the Non-Aligned Movement (NAM), which professed its neutrality from either bloc.

peace more proactively, leading by example and not acquiring arms and by not militarizing prominently.

There already was skepticism on the World's intention to implement their own international promises. This reflects in India's Constituent Assembly Debates as well. Prof. Shah made very poignant points in this regard: *"...the powerful nations of the world do not really intend to disarm. They do not desire peace and security for peoples, but only for their friends and associates, and of course, for themselves."*

He addressed the permanent distrust between States, and concerns on national security that prevent them from initiating disarmament on their domestic end. However, he suggested that India could follow the lessons of non-violence not only at the individual but also at the national level. He also reminded the Assembly that Gandhi in the Second Round Table Conference had indicated that if *Swaraj*[8] is attained and Congress leads it, the State would strive to disband the army and the Police. However, of course, he did not insist on the action given the current circumstances. It seems clear that the speaker did not expect that the State would disband its army and Police; but this was only invoked only to put across a point that the peace process has to have a beginning at some point, at a practical level rather than in mere rhetoric. His emphasis was on the nascent stage that India was in, where had the opportunity to shape India's foreign relations policy on peace, along with parallel practical steps to assure the international community that the commitment to peace is indeed real.

Shri Biswanath Das was in support of Dr. Ambedkar since his proposal accounted for flexibility in approach as needed, since the State could not predict all of India's predicaments that could arise in the future. Shri. BM Gupte and Shri MA Ayyangar moved for the addition of arbitration into the provision, for the purpose of resolution of disputes. The discussion depicts how peace cannot be achieved in isolation but is contextualized in the surroundings; for peace to really prevail, neighboring States must also be secure socially and economically as well. Since India was not in a position to take on the world's imperialist powers to secure freedom for all people of the world, as desirable as that would be ideally, the State resorted to adopting peaceful methods of resolution of disputes. The motion to add *"to encourage the settlement of international disputes by arbitration"* was thus moved and accepted without much issue. The only opposition came from Shri Tyagi as discussed before, pointing out the need for wars in some circumstances.

It is important to mention his views to fully understand what transcribed in the Assembly on the subject of peace, international relations, and war. Despite valuing the ideal behind the other Members' proposals towards peace, he held that war is preferable in some cases, particularly since finding honest arbitrators to resolve international disputes was already difficult. His statement

[8] *Swaraj* was a concept propagated by Mahatma Gandhi (Father of India) as part of the Indian independence movement. The term stands for 'self-governance' or 'self-rule'.

reveals a fear (which might have been shared by many, within and without the Assembly) of how India would survive if it took a passive stance, rooting for peace, when clearly the world around was getting armed to the teeth. Interestingly (and perhaps ironically), his view was that India needed to assert power and be armed if it needed to achieve the objectives of peace and good international relations. To quote, the words used were: *"…if we want to maintain peace and seek to maintain just and honourable relations between nations, then I say it is not possible if we remain weak and remain merely a meadow of green grass for bulls to come and graze freely."*

Ultimately, though the Assembly stuck to its preference of peace and arbitration to drive its foreign policy, India did, in the following decades, build a strong army and arsenal despite its commitment to peace (Ganguly, 2015).[9] Or perhaps, from another perspective, this was perfectly in consonance with its commitment to peace. International relations have, since the very inception of Nation-States, followed the view that a potential for violence is the foundation for peace and security. As ironic as it is, it is unsurprising given the political context of different States, domestically as well as with the international community. To that extent, though the Assembly seems to have not engaged with Shri Tyagi's perspective, that is what State practically followed, albeit to a limited extent.

Per the Indian model, international law could be applied to India only after it is made a part of the domestic system by the Parliament. The Constitution gives the Parliament the power to make laws binding on all of India to implement any international obligation. (Constitution of India, art. 253). However, there is no obligation that the State must do so, but only a power that enables the Centre to exercise legislative jurisdiction over any matter across the Country to give effect to an international obligation.

The provision as it stands today is more or less similar to the one included in the Draft Constitution,[10] and not much debate happened in the Constituent Assembly on its adoption. The only Amendment moved was to substitute the phrase *'for any State or part thereof'* with *'for the whole or any part of the territory of India'*, which did not alter the essence much. (Debates C. A.).

A general concern for maintaining States' autonomy within the system is clear in the deliberations and the final acceptance of provisions by the Assembly. But when it came to the power of Parliament to legislate in respect of international obligations, discussion was scarce, possibly indicating a general understanding that maintaining international relations would mean

[9] India built a conventional military force in the years following independence, though the first Prime Minister Shri Jawaharlal Nehru had a dislike for arms and arming. It is considered that the eventual arming occurred in response to the threats perceived in the neighbourhood, changing geopolitical landscape, and national security concerns. The Global Firepower Index report lists India as the fourth most-powerful military. See https://www.globalfirepower.com/countries-listing.php

[10] It was art. 230 in the Draft Constitution, and read so: "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for any State or part thereof for implementing any treaty, agreement or convention with any other country or countries.")

that Parliament essentially would get jurisdiction over all States even in matters that are otherwise outside its purview. The Constituent Assembly was thus mindful that a neonatal democracy like India has to ensure from its inception as a political entity, it has to have good relations with the international order. While there is respect for international law, there also is adequate power with the Centre to decide how international obligations are to be implemented in and on the State.

2.2 Indian Courts on International Law

Indian Courts have taken an innovative approach to international law, though the application of these principles to the State. What is often referred to as 'judicial activism' is sometimes a necessary proactive role assumed by the Courts to ensure justice to people rather than the mere application of the letter of law.

Indian Courts have evolved in their take on international law, and the Courts often attempt to read principles of international law along with similar provisions under the Constitution, provided there is no inconsistency between the two, even in the case of a gap in domestic legislation. In one of the most landmark cases, the Supreme Court took recourse to the role of International Conventions to give effect to women's rights at workplaces. (Vishaka and Ors. v State of Rajasthan, 1997) However, in case of a conflict between domestic and international law, domestic law will have precedence in the Indian Courts (National Legal Services v. Union of India, 2013). International law has been used by Indian Courts for the construction of domestic law in cases especially pertaining to human rights.

However, in some cases, the Court could be seen to have followed the letter of law – domestic – completely ignoring the existence of customary international law. As opposed to treaty obligations, customary law leaves an unsaid scope of being pushed under the carpet, as would be seen in the case of refugee laws in India (Mohammad Salimullah v Union of India, 2021). Though *non-refoulement* is recognized widely as a principle of customary international law, the Indian Govt. claimed in the Supreme Court that India is not bound by the principle as India is not a party to the Refugee Convention (Convention relating to the Status of Refugees , 1951). The Supreme Court subsequently read the rights of refugees under the Constitution of India (particularly the Right to Life under Art. 21) without examining the customary law angle of the principle. The silence of the State regarding the bindingness of *non-refoulement* despite India not being party to the Convention (which also carries the same principle in Art. 33) speaks loudly in itself. It is here that State need to examine the role of policy – both domestic as well as international – in the State's actual approach to international law.

3. Role of Policy in the Implementation of International Law

Having looked at International Law in general, we now take the specific examples of International Humanitarian Law (hereinafter: IHL) and International Refugee Law to examine the role of policy in the implementation of international law. It is impossible to separate politics from law, especially in the field of international law, and all the more so in international humanitarian law and refugee law. IHL has accepted a 'compromise' – in the 'tension between humanitarian and political requirements'. (Sandoz, 1987).

This "compromise" aspect is visible throughout the principles of IHL as well, such as "necessity" and "proportionality". Though the underlying philosophy is humanitarian, regulation of military action carries obvious and unavoidable implications on state sovereignty and security. Apart from other branches of international law such as international trade or international environmental law, IHL carries a direct implication of the State's sovereignty not only rhetorically but in real terms, making it all the more difficult for international institutions to insist it on States, since they are also bound to respect sovereignty. Hence, the actual implementation of IHL by States exists on a tricky terrain where States are required to abide by international norms at a potential cost to security concerns. This gamble, the law requires them to take; but caution often stops them from doing so. Speaking of actual implementation of IHL at domestic level requires us to integrate policy into the narratives of law.

Currently, they tend to exist on separate plains and as part of separate conversations. Academic focus on international law looks at the theories and legal aspect of implementation – in terms of domestic legislations, monistic/dualistic nature of the State, interpretation, Court decisions, etc.; while policy is primarily analyzed from a political or security perspective. For instance, in India, military strategy and analysis, including that of IHL, is primarily done by organizations such as IDSA, USI, ORF India, CLAWS, etc. The research culture and tendency of such organizations lean towards a practical perspective concerning geopolitics, military strength, statistics, etc.; and the space afforded for law is whatever is allowed within this scope. One of the major reasons, the researcher feels, is the psyche of the author that is set in a particular narrative die to factors such as previous association, perspective bias, etc. Most of the writers looking at the policy aspect of IHL in the aforementioned Institutions are retired defense personnel, security analysts, etc. who, obviously, look at the matter from the lens of national security and defense. On the contrary, most academic analyses look primarily at aspects such as the provision for reservation in Treaties, interpretation of provisions, jurisprudence and philosophy, etc. The disconnect arises when the two aspects function as if they exist on separate islands, and fail to speak to each other. On some occasions though, academicians have realized the need to adapt IHL into military strategy, noting that the practical application of law means its effect on battlefield conduct. (Morrow, 2014)

IHL is only as effective as the actual *policy* is, irrespective of how strong the *law* might be, since the mandate of international law is rather easily surpassed by the sovereignty of States

when it so wills. Black's Law Dictionary (year) defines "Policy" as *"The general principles by which a government is guided in its management of public affairs, or the legislature in its measures. This term, as applied to a law, ordinance, or rule of law, denotes its general purpose or tendency considered as directed to the welfare or prosperity of the state or community."* Law is defined as *"That which is laid down, ordained, or established. A rule or method according to which phenomena or actions co-exist or follow each other. That which must be obeyed and followed by citizens, subject to sanctions or legal consequences, is a "law."* (Ref. Koenig v. Flynn) An effective protection of civilians would require that these concepts are defined not only in law but also in policy-implementation levels, particularly national military manuals and rules of engagement. While laws and regulations are always publicly known and are open to popular scrutiny, intricate operational aspects of armed confrontation would not be (and cannot be reasonably expected to be) made public, at least not prior to their execution. However, the inclusion of principles into rules can be revealed without prejudicing operational safety, by making the military manual public, and having a national committee on IHL to look at the implementation of the law. Implementation in the battlefield would need to go one step further, limiting the violence in each act of soldiers, and controlling behavior in the field. This further boils down to limiting violence in different circumstances – deliberate violations, opportunistic violations for short-term military advantage, and self-interested interpretation of law. This is noted as one of the difficult aspects of the implementation of IHL (Morrow, 2014). This research argues that this separation of effects also must be analyzed from the level of combat addressed – one, at the individual action on combatant level; and second, at the wider-scale action on the command-level. The former, per this view, is what transpires in operations involving inter-personal confrontation, use of small arms, and operational decision-making happens at individual level. The latter, on the contrary, happens at a wider level, where the higher command's decision is carried out without (or with only limited) scope for modification during the actual action; such as aerial bombing of a pre-decided military target, without individual-level combat action.

Similar is the state of refugees in India, since they have no specific recognition under the municipal law and are regarded as foreigners who have entered the State illegally under the Foreigners Act and Passport Rules. In the case of *Mohd. Salimullah* (Mohammad Salimullah v Union of India, 2021), the Hon'ble SC stated that they cannot be deported unless the procedure under law is followed. This procedure under law is none specific to refugees, but a general process of deportation followed by the State for all persons who enter w/o requisite documentation. The case of *Ibrahim Ali v UoI W.P.*(C) 3959/2021 mentions that the deportation process is contained in an MHA Office Memorandum 25022/19/2014-FI dated 24-04-2014. The Ministry submitted the Office Memo to the Court in a sealed cover, since the process followed is still a part of confidential policy.

Broadly speaking, it involves verification of nationality from the origin State and deportation to that State through their authorities. The law governing refugees comes under the 1951 Convention, which expressly prohibits refoulement. Then again, India has been deporting

Rohingyan refugees to Myanmar, citing in the SC that the State is not paty to the 1951 Convention and hence is not bound by the principle. However, the principle is also a part of CIL and is binding on us irrespective of its presence in the Convention, and us not being Party to it is actually inconsequential as far as refoulement goes. But India is able to follow this narrative since its *policy* takes a different route than its international obligation.

So, in fact, India could technically, legally, deport foreign nationals, including refugees, provided the procedure of deportation is followed. This procedure is contained in an Office Memorandum, which is not public. This takes us to the question of 'procedure' under art.21 of the Indian Constitution that guarantees a 'Right to Life and Liberty' to all people – is it enough that there exists some semblance of a procedure as was laid down in AK Gopalan[11] (*A K Gopalan v State of Madras* AIR 1950 SC 27) that or do we test the procedure on its post-Maneka[12] constitutionality? We do not know, because the procedure is confidential. It is merely a part of Govt. policy and has not been formalized into a statute. So, speaking of international obligations, the law remains, but State does what State does.

4.Conclusion

Both the instances above - application of IHL as well as Refugee Laws – evidence that their effectiveness depends on creating and implementing a policy that is in line with international obligations. But when the State academically speaks of IHL and Refugee law, state of the law, State teaches and learns the law; policy is often left to political analysts. Considering how IHL and refugee laws carry tremendous direct implications on human rights and even human existence, the law must be regarded not merely as a rhetoric that needs to exist in textbooks but also with respect of its actual ground-level effects. Maybe also teach it that way, in applied law. There, theory – the law – intersects policy in a way that cannot be separated.

One of the major limitations of successfully applying IHL to domestic law, as is with any international law to the domestic sphere, is that of sovereign political will. It is impossible to separate politics from law especially in the field of international law, and all the more so in IHL and IRL. Though the underlying philosophy of both are humanitarian, regulation of military action or non-stringent laws on asylum carry obvious and unavoidable implications on state sovereignty and security.

[11] A case decided by the Supreme Court, that has since been overturned, that ruled that deprivation of liberty and life only needed to follow a 'procedure' that was *established* by law, and *due process of law* was not a standard to be applied.

[12] *Maneka Gandhi v Union of India* 1978 AIR 597. A case where art. 21 was interpreted to imply that the 'procedure' that deprives one of life and liberty must be just, fair and reasonable and not any random procedure that law has established. This is the standard currently followed to examine the constitutional validity of laws that infringe on the life and liberty of persons, to examine whether it breaches art. 21.

Hence, actual implementation of IHL and IRL by States exists on a tricky terrain where States are required to abide by international norms at a potential cost to security concerns. This gamble, the law requires them to take; but caution often stops them from doing so. Speaking of actual implementation of these laws at the domestic level requires us to integrate policy into the narratives of law.

Currently, they tend to exist on separate plains and as part of separate conversations. Academic focus on international law looks at the theories and legal aspect of implementation – in terms of domestic legislation, monistic/dualistic nature of the State, interpretation, Court decisions, etc.; while policy is primarily analyzed from a political or security perspective.[13] The research culture and tendency of such organizations lean towards a practical perspective concerning geopolitics, military strength, statistics, etc.; and the space afforded for law is whatever is allowed within this scope.[14]

On the contrary, most academic analyses look primarily at aspects such as the provision for reservation in Treaties, interpretation of provisions, jurisprudence and philosophy, etc. The disconnect arises when the two aspects function as if they exist on separate islands, and fail to speak to each other. IHL and IRL are only as effective as the actual *policy* is, irrespective of how strong the *law* might be, since the mandate of international law is rather easily surpassed by the sovereignty of States when it so wills. Apart from other branches of international law such as international trade or international environmental law, IHL carries a direct implication of the State's sovereignty not only rhetorically but in real terms, making it all the more difficult for international institutions to insist it on States, since they are also bound to respect sovereignty. IRL, on the other hand, comes with implications on the State's resources to provide adequately in cases of mass influx, in addition to the national security opposition and the fear of changing demography expressed by citizens of the host State.

Though States may be keen to sign and even ratify international instruments, not all obligations in fact translate into domestic law. Ratification comprises the legal documentation concerning the political will to abide by international law, but that does not necessarily mean the State practices compliance. International law may be incorporated into the domestic ambit in different ways, depending on the model the State chooses to follow (monist or dualist). But in terms of real implications, the application of international principles may be throttled by resorting to domestic policy decisions, as is often the practice of States.

[13] For instance, in India, military strategy and analysis, including that of IHL, is primarily done by organizations such as IDSA, USI, ORF India, CLAWS, etc.

[14] One of the major reasons, the researcher feels, is the psyche of the author that is set in a particular narrative die to factors such as previous association, perspective bias, etc. Most of the writers looking at the policy aspect of IHL in the aforementioned Institutions are retired defense personnel, security analysts, etc. who, obviously, look at the matter from the lens of national security and defense.

The realm of policy is often kept as a separate doctrinal inquiry, distinct from the analysis of law, leaving policy to be scrutinized by political scientists alone. This Paper submits that the scholarship of international law cannot be separated from a study of domestic policy measures, considering the inevitable overlap between the two. For international law to be implemented in spirit, adequate policy measures need to be adopted by the State at the domestic and international levels.

Numerous instances reveal that the State takes up legal obligations at the international front, and desists drawing up parallel policy measures to bring these obligations into practice; effectively stalling the desired effect of the legal obligations. Analysis of law and policy being conducted separately, however, divides the scholarship into two and treats as if the subjects exist on two separate islands. The lack of inclusion of policy into the study of international law negatively impacts the perspectives taken on it. In IHL, for instance, India's domestic enactment of Geneva Conventions Act of 1960,[15] or the signing of the Geneva Conventions, or the participation in international discussions on humanitarian law does not reveal the full picture of how India abides by its obligations.

The absence of corresponding policy changes in matters of defense and security is where the lacuna in implementation actually rests – a sphere the study of international law does not per se analyze. Here, we need a change in perspective and practice, integrating political science and law into the same enquiry – how to persuade States to not only ratify but also apply and implement international obligations?

[15] In compliance with its obligations under the Geneva Conventions, 1949.

REFERENCES

Primary Sources (Statutes, etc.)

Constitution of India, 1950, Art. 253, C. o. (bez datuma). The provision reads: "Legislation for giving effect to international agreements: Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of.

Draft Constitution of India, a. 2. (bez datuma). *"Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for any State or part thereof for implementing any treaty, agreement or convention with any*.

Constitution of India. (1950). India.

Constitution of India, 1 See art. 253.

Convention relating to the Status of Refugees . (1951).

Debates, C. A.

Debates, C. A. (Proceedings), Vol. VIII. (See Debates dated June 13, 1949, on art. 230).

India, D. C. (bez datuma). art. 40.

Books and Book Chapters

Mendez, M. (2013). The Legal Effects of EU Agreements. *OXFORD SCHOLARSHIP ONLINE*.

Moritan, R. G. ((UNIDIR, 1961) at 136). *"Specific Tasks for the United Nations" in Jayantha Dhanapala (ed.), The United Nations, Disarmament and Security: Evolution and Prospects* .

Morrow, J. D. (2014). *Order Within Anarchy: The Laws of War as an International Institution.* New York: Cambridge University Press.

Sehrawat, V. (2019). IMPLEMENTATION OF INTERNATIONAL LAW IN INDIAN Legal System. *Florida Journal of International law, 31*(1), 97-119.

Yves Sandoz, C. P.-P. (1987 xxxiv.). *Commentary on the Additional Protocols to the Geneva Conventions* . Geneva: Martinus Nijhoff Publishers/ICRC.

Articles in Journals

Beghhoefer, B. G. ((1962)). “The Disarmament Deadlock: 1946-1955”. *Current History 42 (249)* , 257.

Ganguly, Rajat, (2015). "India's Military: Evolution, Modernisation and Transformation". *India Quarterly* 71 (3), 187.

Case Laws and Miscellaneous

Explanation. (bez datuma). For instance, the basic values of the Constitution of India were settled by the Supreme Court of India through several cases that arose out of State actions that violated Fundamental Rights envisaged in the Constitution.

Mohammad Salimullah v Union of India, WRIT PETITION (CIVIL) NO.793 OF 2017 (Supreme Court of India 2021).

National Legal Services v. Union of India, Writ Petition (civil) No. 604 of 2013 (Supreme Court of India 2013).

Ref. Koenig v. Flynn, 258 N.Y. 292.

Vishaka and Ors. v State of Rajasthan, AIR 1997 SC 3011 (Supreme Court of India 1997).