



Vivekananda International Foundation

International Law and Armed Conflict in the 21st Century



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List of Abbreviations

Abbreviation	Explanation
ICJ	International Court of Justice
UN	United Nations
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IACHR	Inter-American Commission on Human Rights
PCIJ	Permanent Court of International Justice
IHL	International Humanitarian Law
IHRL	International Human Rights Law
CE	Common Era
BCE	Before Common Era
IDP	Internally Displaced Person
UDHR	Universal Declaration of Human Rights
ICRC	International Committee of the Red Cross
POW	Prisoner of War
ILC	International Law Commission
ICC	International Criminal Court
UNSC	United Nations Security Council
UNGA	United Nations General Assembly
BWC	Biological Weapons Convention
CWC	Chemical Weapons Convention
CPPED	Convention for the Protection of All Persons from Enforced Disappearance
ENMOD	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques

CERD	Convention on the Elimination of All Forms of Racial Discrimination
CRC	Convention of the Rights of the Child
CAT	Convention against Torture

Chapter 1: Introduction and Background

"The peaceful nations, fall down, yet rise again; but the others, once they go down, do not come up -- they die. Blessed are the peacemakers, for they shall enjoy the earth." - Swami Vivekananda¹

Since the dawn of civilisation, war and armed conflict has posed one of the most significant threats to human life, liberty, property and indeed the very notion of humanity as a moral and ethical concept. In the words of Isaac Asimov, *"Every period of human development has had its own particular type of human conflict its own variety of problem that, apparently, could be settled only by force. And each time, frustratingly enough, force never really settled the problem. Instead, it persisted through a series of conflicts, then vanished of itself."*²

The naked violence and utter savagery that often accompanies war or armed conflict has caused unspeakable and unquantifiable suffering to millions upon millions of people throughout the course of human history. On a purely logical plane, it seems astoundingly absurd that the murder of one or a handful of individuals is accorded negative social sanction and is treated as a crime; but the murder of several thousands is lauded as a noble act in patriotism or holy duty in religion. Jean Rostand captures this tendency most eloquently when he says, *"Kill one man, and you are a murderer. Kill millions of men, and you are a conqueror."*³

Throughout the vast period of time that has encompassed man's presence on earth as a social animal having distinct social characteristics in the nature of cohesion, organisation, division of property, labour and resources, there has always been some form of conflict. Each conflict has ended either conclusively or inconclusively, in both cases only to either manifest itself in some other form at a later juncture or wither away with time and give to birth to or lead to another conflict as a new social group occupies a certain territory and adapt to a new social and economic environment. The history of human warfare is therefore replete with myriad examples of the permanence of conflict among social groups, which over the course of time have come to acquire the distinct character of national groups or nation states. The prevalence of war throughout the timeline of human history makes it amply evident that it would be a folly to consider warfare as an exception to human behaviour.⁴ Every epoch in history has seen significant armed conflict between kingdoms, republics, empires and nation states. New conflict has often been a continuation of subsisting differences of opinion or a pre-existing conflict of competing interest. War has been persistent in the recorded experience of humankind.⁵

¹ Swami Vivekananda, *The Complete Works of Swami Vivekananda*, Volume 8, Lectures And Discourses.

² Isaac Asimov, *I, Robot*, Gnome Press, 1977, p. 102.

³ Jean Rostand, *Thoughts of a Biologist*, Heinemann, 1956, p. 93.

⁴ Mary Dudziak, *War Time: an Idea, Its History, Its Consequences*, Oxford University Press, 2014, p. 56.

⁵ Braden R. Allenby, *The applied ethics of emerging military and security technologies*, Routledge, 2015, p. 34.

In the 3rd Century BCE, Emperor Ashoka in India fought a series of battles, first with his own brothers to eliminate any succession disputes, and then with rival kingdoms in the region and beyond to consolidate the Mauryan Empire into a vast territorial behemoth. From the beginning of the 1st Century BCE, the Roman Empire expanded exponentially and then collapsed through wars fought over a period of 500 years. At the same time as the Roman Empire was expanding its influence in the first few centuries of the Common Era (CE), the Gupta Empire in India, with its leaders such as Samudragupta were expanding their own territory through a process of the victorious waging of armed conflict against adversaries.⁶ From 1095 to 1291, a series of battles were fought in the name of religion between the armies of the Christian West and those of the Muslim Middle East over the control of territory considered holy by both of them.

At around the time of the last few battles of this series of wars being fought, a force rose from the east; one that would shatter the edifice of existing empires and write their own chapter in human history with the blood of their victims. That force was The Mongols; estimates for the number of deaths resulting from the Mongol conquests range from 30 to 80 million as a succession of Khans established the largest empire on a contiguous landmass in history.⁷ At around the same time, the soil in India trembled as the sound of the gallop of Turkic and Afghan horses could be heard far and wide, across the length and breadth of the northern Indian plains, hordes of invading armies from Central Asia conquered north India and established empires, most notably, the Delhi Sultanate, which was established after the Battle of Tarain in 1192.⁸

From 1337 to 1453, The Hundred Years' War saw conflict between England and France over territorial and dynastic claims.⁹ The Eighty Years' War, was a mixture of political, religious and economic grievances against the rule of Spain's Philip II, resulting in the independent Dutch Republic.¹⁰ Simultaneously, the Thirty Years' War raged on from 1618 to 1648, it was one of the most destructive conflicts in European history and claimed as many as 8 million lives and transformed Europe's religious and political landscape.¹¹ From 1622 to 1653, South Asia witnessed two different armed conflicts between two of its most formidable powers, Mughal India and Safavid Iran, over the control of Kandahar in Afghanistan. These wars resulted in considerable casualties on both sides.¹² In the following century, the Seven Years' War from 1756 to 1763 split Europe into separate alliances led by Britain and France. It was the first worldwide conflict

⁶ Romila Thapar, *The Penguin history of early India: from the origins to AD 1300*, Penguin Books, 2003, p. 156.

⁷ Timothy Michael. May, *The Mongol conquests in world history*, University of Chicago Press, 2012, p. 23.

⁸ Hari Krishen. Kaul, *Historic Delhi: an anthology*, Oxford University Press, 2000, p. 72.

⁹ Anne Curry, *The hundred years war*, Osprey Publishing, 2003, p. 68.

¹⁰ James D. Tracy, *The founding of the Dutch Republic: war, finance, and politics in Holland, 1572-1588*, Oxford University Press, 2007, p. 86.

¹¹ Geoffrey Parker et al., *The thirty years' war*, Routledge, 2007, p. 30.

¹² Satish Chandra, *Medieval India: from Sultanat to the Mughals*, Har Anand Publications, 2004, p. 325.

and precursor to the American Revolution.¹³ The French Revolutionary and Napoleonic Wars (1792–1815) saw 7 million Europeans die, with conflict spreading across much of Europe as France sought first to depose its monarchy, next to defend the revolution from other European monarchs, and then to overthrow those opponents.¹⁴

At around this time, in India, Mughal power was declining and the Maratha Confederacy sought to fill the vacuum left behind by the receding Mughal presence. The Marathas sought to expand their influence well beyond their traditional stronghold south of the Narmada, and at one point, in 1758, even crossed the Indus to reach as far as Attock and Peshawar. This brought Maratha interests in direct conflict with that of the Afghans, resulting in armed conflict that culminated in the Third Battle of Panipat in 1761, leading to the complete annihilation of Maratha forces and wiped out an entire generation of the top echelon of Maratha leadership.¹⁵

Hundreds of thousands more lost their lives in the devastating American Civil War from 1861 to 1865. In 1914, the outbreak of the First World War brought with it technological advancements that made it possible for armed groups to carry out the mass slaughter of entire populations on an industrial scale.¹⁶ It was called the “war to end all wars”, but didn’t quite live up to the billing, as soon afterwards, there was another great war, the greatest war in human history. The Second World War led to unparalleled loss in human life never before seen in the history of human conflict. Over 60 million people - 3% of the entire world’s population at the time¹⁷ -- were wiped off the face of the earth. Even the senseless, merciless butchery of the Second World War didn’t cajole the collective conscience of humanity enough for it to discard warfare as a means of dispute resolution; there have been several wars since the nuclear bombs were dropped on Hiroshima and Nagasaki, instantly vapourising thousands, and ending the Second World War.

Civil wars in Africa, in the Balkans, India-Pakistan wars, the war in Vietnam, the war in Afghanistan, the Arab-Israeli wars are all just examples of the many wars that beset the second half of the 20th century. Armed conflict continues to be used as an instrument for the advancement of political interests, just as it has been for centuries, from the time of the Romans and Ashoka. More recently, the 21st century in particular, wars have taken an entirely different dimension. These wars include the war being fought in Pakistan, Chechnya, Palestine, the Naxal-infested districts of India, Yemen, Libya, and so on. Very few of them are fought

¹³ Matt Schumann & Karl Schweizer, *The Seven Years War: a transatlantic history*, Routledge, 2010, p.142.

¹⁴ Don Nardo, *The French Revolution*, Lucent Books, 2008, p. 74.

¹⁵ Uday S. Kulkarni, *Solstice at Panipat, 14 January 1761: an authentic account of the Panipat campaign*, Mula Mutha Publications, 2012, p.61.

¹⁶ BBC - History - World Wars: The Western Front and the Birth of Total War, BBC News, http://www.bbc.co.uk/history/worldwars/wwone/total_war_01.shtml (last viewed Feb 22, 2017).

¹⁷ International Programs, World Population, US Census Bureau, Demographic Internet Staff, https://www.census.gov/population/international/data/worldpop/table_history.php (last viewed Feb 22, 2017).

directly between nation states. This is because the changing political dynamics of the world, with a solid rules-based global system with the United Nations as its lynchpin being in place, that for a large part acts as a force against any aggressive designs that any country may harbour.

Another reason is technological, the development of nuclear weapons and the miniaturisation of nuclear weapons to include tactical weapon systems under the full-spectrum deterrence umbrella, has meant that the scope for conventional war fighting has been minimised and a sub-conventional theatre has resultantly been thrown open. Non-international armed conflicts, irregular, asymmetric insurgencies and protracted proxy wars have taken the place of what was once an affair to be sorted out by a head-on collision of two masses of men in a melee lasting a few hours. Now, more than ever before, two trends in the world's social and politico-economic structure mean that wars are anything but over, and they are if anything, going to be more lethal. The advancement of technology had led to the development of more lethal weapon systems with immense destructive potential and pressures on resources due to population growth and unsustainable consumption patterns has created the politically divisive atmosphere in societies the world over, which makes it ripe for a heightened level of conflict. Therefore, the challenge that armed conflict poses is a very evident and significant one.

This exposition of the historical all-pervasiveness of war and armed conflict throughout human history makes it amply apparent that it is among the most fundamental of human social behaviours and activities. To the extent that law is one of the instrumentalities of social control¹⁸, war too, like most other social behaviour and activity, ought to be governed and regulated by legal controls. The fact that war is one social behaviour that causes a great deal of suffering to its victims and indeed is often tantamount to murder, one of the most serious offences under criminal law, on a mass scale, reinforces the need for it to be regulated by law. All law must be constituted by will, either directly or indirectly, of the community it seeks to govern, or a body deriving authority through the will of such community to enforce laws as it may deem beneficial or desirable. This community in the case of marital laws and tort laws would either be a nation or a sub-national or religious group, as in the case of personal laws. In the case of war however, the parties aren't spouses or individuals. They are groups, sub-national, national, or trans-national, bearing the force of arms. The community that must decide and agree upon the laws of war is, therefore, an international community and the law that must govern warfare is hence of an international character, it is international law.

Modern international law recognises two distinct aspects of the law pertaining to

¹⁸ E. Litwak, Three Ways in Which Law Acts as a Means of Social Control: Punishment, Therapy, and Education Divorce Law a Case in Point, 34 Social Forces 217–223, 217-223 (1956).

war. *Jus in bello* and *Jus ad bellum*. These two are distinguished on the basis of the places in the chronological, sequential chain that they occupy. While the latter deals exclusively with the law governing the justification for imposing a war, the former is concerned with the conduct of the war once it starts.¹⁹ This work will fundamentally consider *Jus in bello* in general and the rights and duties it confers and imposes in particular.

There are primarily two approaches to looking at the history and background of International Law relating to armed conflict. Lawyers and jurists are divided insofar as their opinion regarding the origin of this stream of international law is concerned, some are of the view that it is a story about the humanisation of war and law; others see it as a story of imperialism and oppression.²⁰ The majority among lawyers, jurists and thinkers is of the opinion that the laws of war have always existed to limit the destruction of war.²¹ All major civilisations, from India to China, Japan, the West and the Islamic world, all have their own traditions of rules of warfare.²² Even though all major civilisations displayed a concern for the regulation of the conduct of warfare, it was not until the 19th century that a movement to codify the laws of war began in earnest and modern International Humanitarian Law (IHL) was born.²³

The Battle of Solferino in 1859 was arguably the most crucial moment in the history of modern IHL. The Swiss businessman Henry Dunant happened to be present at the scene of that battle. He was so horrified by the suffering of injured soldiers, he decided to establish the Red Cross movement, which went on to become the most influential body in IHL as a promoter and custodian of the humanitarian idea and the primary initiation for its transition into IHL.²⁴ The movement that Dunant started gained momentum and it resulted in the adoption of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field in 1864. This Convention marks the start of the Geneva tradition of humanitarian law. It was followed by several other conventions, including the other pre-Second World War Geneva Conventions, the 1907 Hague Convention, the 1949 Geneva Conventions and the 1977 Additional Protocols.

There is also the Hague tradition, which grew simultaneously as the Geneva tradition of humanitarian law. It did not begin in The Hague, but in St Petersburg

¹⁹ What are jus ad bellum and jus in bello? International Committee of the Red Cross (2015), <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0> (last viewed Feb 22, 2017).

²⁰ A. Alexander, A Short History of International Humanitarian Law, 26 European Journal of International Law 109–138, 109–138 (2015).

²¹ Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary international humanitarian law*, Cambridge University Press, 2007, p.49.

²² H. McCoubrey & Nigel D. White, *International law and armed conflict*, Dartmouth, 1992, p.73.

²³ Theodor Meron, *The humanization of international law*, Martinus Nijhoff Publishers, 2006, p. 54.

²⁴ Gerald Irving A. Dare. Draper & Michael A. Meyer, *Reflections on law and armed conflicts: the selected works on the laws of war by the late professor colonel G.I.A.D. Draper, OBE*, Kluwer Law International, 1998, p. 189.

in 1868.²⁵ The International Military Commission which, on the invitation of the Russian Government, met in St. Petersburg 'to examine the expediency of forbidding the use of certain projectiles in time of war between civilised nations', concluded that projectiles which exploded subsequent to impact and weighed less than 400 grammes had to be banned. The St Petersburg declaration read, 'the progress of civilisation should have the effect of alleviating as much as possible the calamities of war', it considered that 'the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy'. For this purpose it would be 'sufficient to disable the greatest possible number of men', and 'this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable'. The employment of such weapons 'would, therefore, be contrary to the laws of humanity'. As per the declaration, it was the commission's prerogative to fix the 'technical limits at which the necessities of war ought to yield to the requirements of humanity'. This was the beginning of the principle of balancing military necessity with humanitarian considerations.

It is interesting to note that the debate that, in another form, continues to be an important part of the discourse on IHL even in the 21st century, first came to prominence as early as 1868 during the St Petersburg conference. The bigger powers wanted to exclude resistance fighters from the purview of the term 'combatants', while the smaller powers, naturally viewing their need to resort to sub-conventional means of warfare, wanted to include them under that category. The logjam was eventually broken by a stroke of brilliance rarely witnessed in such diplomatic conferences. The Russian diplomat and jurist Friedrich Martens proposed what later went on to be called the 'martens clause'.²⁶ The martens clause was inserted into the preamble of the declaration and it recognised that while it had not been possible to resolve all problems, the contracting parties declared that it was not their intention 'that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders': on the contrary, in such unforeseen cases both civilians and combatants would 'remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience'. This phrase created a legal effect far wider in scope and far more substantial in significance than the problem it was originally intended to deal with, i.e. armed resistance fighters in occupied territory, it effectively meant that no matter what states agreed upon or failed to agree upon, the principles of international law would absolutely and unqualifiedly cover the entire gamut of armed conflict, including non-international armed conflict, contrary to what some argue even in

²⁵ Frits Kalshoven & Liesbeth Zegveld, *Constraints on the waging of war an introduction to international humanitarian law*, Cambridge University Press, 2014, p. 43.

²⁶ Theodor Meron, The Martens Clause, Principles of Humanity, and Dictates of Public Conscience, 94 *The American Journal of International Law* 78, 78 (2000).

the 21st century.

After the St Petersburg came the First Hague Peace Conference in 1899. The preamble of the Convention of 1899 states that the regulations have been inspired by the desire to diminish the evils of war, as far as military requirements permit. It therefore re-affirms the St Petersburg-established principle of balancing military necessity with humanitarian considerations. Distinct from The Hague and Geneva traditions of humanitarian law, and relatively recent in its development, is the New York trend. It began with the establishment of the United Nations following the horrors of the Second World War; when humanity vowed to do everything necessary to prevent conflict,²⁷ and where unavoidable, mitigate its ill effects. This narrative²⁸ therefore is to equate the multifarious and multifaceted approaches to the laws of war adopted over the course of human history in different parts of the world with modern IHL. Though the ancient and medieval approaches to the laws of war are not identical with modern IHL, their shared humanitarian values are considered points of commonality and contiguity.

It is important to note however that such a historically contiguous understanding and construction of the law might be inaccurate as the term 'International Humanitarian Law' (IHL) didn't appear for the first time until quite late in the 20th century. The earlier attempts at creating legal philosophy and jurisprudence pertaining to warfare have often been called just the laws of war and delinked from the modern understanding of the term IHL by some thinkers.²⁹ In recent times, the distinction between International Human Rights Law (IHRL) and IHL has also blurred considerably.³⁰ It is becoming increasingly accepted that both these streams must work in conjunction with each other and their collective effect should encompass the entire gamut of rights available to the victims of armed conflict.

In an age when the nature, intensity and context of armed conflict are rapidly changing, the response of the law must be equally dynamic. It must be applied in a manner suitable to different situations of armed conflict without losing the overarching spirit of the law. The chapters that follow will be an attempt at understanding the provisions of international law relating to the rights of the victims of armed conflict. The endeavour is to bring to light the dynamic nature of the law in relation to armed conflicts and the imperativeness of the protection of the rights conferred by the law through implementation in practice by national and international institutions.

²⁷ Rumki Basu, *The United Nations: structure and functions of an international organisation*, Sterling Publishers, 2004, p. 102.

²⁸ See Henckaerts & Doswald-Beck, *supra* note 20.

²⁹ See Alexander, *supra* note 19.

³⁰ Orna Ben-Naftali, *International Humanitarian Law and International Human Rights Law*, Oxford University Press, 2011, p. 204.

Objectives

This paper will look into the theoretical aspects and practical realities in the present international scenario to determine the nature of, and extent to which international law, which comprises both IHRL and IHL, plays a role in addressing the complex and changing dynamics of 21st century armed conflict. It aims to examine the relationship between IHRL and IHL in this regard. It further seeks to delve into concepts such as responsibility, and the levels thereof, for violations and non-compliance with International Law in situations of armed conflict and the difference and similarities between State responsibility and individual responsibility.

Furthermore, it will aim to create an appreciation of the legal character of the rules of international law regarding armed conflict. It will then approach the specifics and deal with reparations awarded to victims. The applicability of many of the provisions of IHL in non-International armed conflicts has often been questioned, and this study aims to examine these questions to generate greater clarity. Another issue that will be examined is the protection extended to persons who have been deprived of liberty.

Internally Displaced People, as a result of armed conflict, will be another issue in focus, along with the relationship between the protection of the natural environment and the law of armed conflict. From there, it will seek to look into one of the more pressing issues in contemporary international legal discourse, the question of bringing justice to the victims of war crimes.

Finally, it will probe the role of the United Nations in this regard and attempt to answer the vexing question of whether international law continues to provide an effective, efficacious and appropriate response to the challenges and problems arising out of modern armed conflict?

Chapter 2: Relationship between International Human Rights Law and International Humanitarian Law

International Law Applicable to Armed Conflict

There are, broadly speaking, two branches of International Law. Public International Law and Private International Law. Private international law is specifically limited to that part of the law that is administered between two or more private citizens of different countries to the extent of their private rights, duties and responsibilities. It is concerned with the definition, regulation, and enforcement of rights in situations where both the person in whom the right inheres and the person upon whom the obligation rests are private citizens of different nations. It is a set of rules and regulations that are established or agreed upon by citizens of different nations who privately enter into a transaction and that will govern in the event of a dispute. In this respect, private International Law differs from public international law, which is the set of rules entered into by the governments of various countries that determine the rights and regulate the intercourse of independent nations³¹.

Public international law is traditionally defined as the law between sovereign nation-states, especially within the context of the laws of war, peace and security, and protection of territories. While these concerns of international law remain paramount among states today, the classic definition of public international law has expanded to include a more diverse group of subjects and a broader scope of activities³². The subject of armed conflict, though not always pertaining to inter-state interaction, is clearly distinct from issues of private rights of individual citizens belonging to different countries. Hence, all international laws regulating the rights of victims of armed conflict are of the nature of Public International Law.

The public nature of International Law governing armed conflict having been established, it will be expedient to enumerate the branches of the law in question. These are specifically, IHL and IHRL. A recent trend has been the development of International Criminal Law (ICL) as a distinct branch³³.

At the outset, it can be stated in a nutshell that IHL regulates the conduct of the parties to an armed conflict, i.e. the conduct of hostilities. It further provides for legal safeguards and rights to ensure the protection of various persons affected by the armed conflict. These persons can be classified into ex-combatants *hors de combat*, civilians and civilian objects. IHL has to be applied equally by all sides to

³¹ Private International Law, *Collins Dictionary of Law*.

, [http://legal-dictionary.thefreedictionary.com/private international law](http://legal-dictionary.thefreedictionary.com/private+international+law) (last viewed on Mar 26, 2017).

³² Kelly Vinopal, Researching Public International Law, available at: https://www.asil.org/sites/default/files/ERG_PUBLIC_INT.pdf (last viewed on Mar 22, 2017).

³³ G. P. Fletcher, Parochial versus Universal Criminal Law, 3 *Journal of International Criminal Justice* 20–34, 20–34 (2005).

every armed conflict, regardless of the justifiability of the *casus belli*. This equality between the belligerents thereby distinguishes an armed conflict, to which IHL applies, from a crime, to which only criminal law and the rules of human rights law on law enforcement apply. IHRL is distinct in the sense that it exists even outside of the ambit of IHL's limited application to armed conflicts. It deals with inalienable and universal rights that are vested in every individual citizen of every state which are rights against the government or state under whose legal ambit the citizen falls. These rights are inherent in all human beings, regardless of race, sex, national or ethnic origin, religion, skin colour, language, or any other status, and are indivisible, interrelated and interdependent. It can be said that ICL is a blend of these disciplines, which differ as to their nature, values, goals, contents, methods, subjects and techniques³⁴. It therefore helps in establishing individual criminal responsibility for serious crimes of international concern.

The two primary branches or streams of law dealing with armed conflict are therefore, IHL and IHRL. These two branches often differ in their applications and at times also overlap to a certain degree. In fact, increasingly so nowadays, it has been recognised that these two branches have more similarities than differences. The relationship between will be the subject matter of the evaluation being undertaken in this chapter.

International Human Rights Law

IHRL is the result of a set of core treaties and conventions these include, inter alia:

- a. The Universal Declaration of Human Rights (UDHR).³⁵
- b. The International Convention on the Elimination of All Forms of Racial Discrimination.³⁶
- c. The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.³⁷
- d. The Convention on the Elimination of All Forms of Discrimination against Women.³⁸

³⁴ M. Cherif Bassiouni, Challenges to international criminal justice and international criminal law, *The Cambridge Companion to International Criminal Law* 353–391, 353–391.

³⁵ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> (last viewed on 26 March 2017).

³⁶ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: <http://www.refworld.org/docid/3ae6b3940.html> (last viewed on 26 March 2017).

³⁷ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html> [last viewed on 26 March 2017].

³⁸ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <http://www.refworld.org/docid/3ae6b3970.html> [last viewed on 26 March 2017].

- e. The International Covenant on Civil and Political Rights.³⁹
- f. The International Covenant on Economic, Social and Cultural Rights.⁴⁰
- g. The Convention on the Rights of the Child.⁴¹
- h. The International Convention for the Protection of All Persons from Enforced Disappearance.⁴²
- i. The Convention on the Rights of Persons with Disabilities.⁴³

International Humanitarian Law

IHL has sources in both customary law and a series of treaties and protocols. The core instruments of IHL are as follows:

- a. The Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.⁴⁴
- b. The Geneva Convention for the Amelioration of the Condition of the Sounded, Sick and Shipwrecked Members of Armed Forces at Sea.⁴⁵
- c. The Geneva Convention Relative to the Treatment of Prisoners of War. ⁴⁶
- d. The Geneva Convention relative to the Protection of Civilian Persons in Time of War. ⁴⁷
- e. The Protocol Additional to the Geneva Conventions and relating to the Protections of Victims of International Armed Conflicts. ⁴⁸
- f. The Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflict. ⁴⁹

³⁹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [last viewed on 26 March 2017].

⁴⁰ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [last viewed on 26 March 2017].

⁴¹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [last viewed on 26 March 2017].

⁴² UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, available at: <http://www.refworld.org/docid/47fdfaeb0.html> [last viewed on 26 March 2017].

⁴³ UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106, available at: <http://www.refworld.org/docid/45f973632.html> [last viewed on 26 March 2017].

⁴⁴ International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31, available at: <http://www.refworld.org/docid/3ae6b3694.html> [last viewed on 26 March 2017].

⁴⁵ International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85, available at: <http://www.refworld.org/docid/3ae6b37927.html> [last viewed on 26 March 2017].

⁴⁶ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, available at: <http://www.refworld.org/docid/3ae6b36c8.html> [last viewed on 26 March 2017].

⁴⁷ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: <http://www.refworld.org/docid/3ae6b36d2.html> [last viewed on 26 March 2017].

⁴⁸ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: <http://www.refworld.org/docid/3ae6b36b4.html> [last viewed on 26 March 2017].

⁴⁹ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, available at: <http://www.refworld.org/docid/3ae6b37f40.html> [last viewed on 26 March 2017].

g. The Hague Regulations respecting the Laws and Customs of War on Land.⁵⁰

Points of Convergence

On a broad level, the points of convergence between IHL and IHRL are numerous and significant. They share the principle of respecting the dignity of humanity and human life. The 'elementary considerations of humanity' principle is applicable to IHRL⁵¹, just as it is applicable to IHL.⁵² In furtherance of the 'elementary considerations of humanity' principle, both IHL and IHRL provide for the protection of the especially weaker and vulnerable sections of society. In the case of IHRL, it is people with disabilities, children, women, etc. While in the case of IHL, it is wounded and sick people hors de combat, POWs and civilian populations.

While IHRL regulates the right to adequate healthcare and food, as evinced in Article 25 of the UDHR⁵³, the ICRC is one of the leading agencies responsible for humanitarian relief work.⁵⁴ Similarly, in the case of IHRL, when there is a breach, it gives rise to state responsibility along with individual criminal responsibility; similar obligations are placed by IHL.⁵⁵ Additionally, the Convention Against Torture prohibits torture and cruel treatment.⁵⁶ The corresponding provision in IHL is the common Article 3 to the 1949 Geneva Conventions.

Divergence

The analysis now shifts to the areas of divergence between these two branches of public international law. In IHRL there is the concept of derogation⁵⁷, which is universally recognised and has been built into many of the conventions and covenants to take into account emergency situations. There is no concept of derogation in the case of IHL, although military necessity⁵⁸ does often play a role not dissimilar to derogation. A major difference is that while IHL instruments list the rules of behaviour that parties to a conflict have to adhere to in relation to

⁵⁰ International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, available at: <http://www.refworld.org/docid/4374cae64.html> [last viewed on 26 March 2017].

⁵¹ Corfu Channel Case (United Kingdom v. Albania); Merits, International Court of Justice (ICJ), 9 April 1949, available at: <http://www.refworld.org/cases,ICJ,402399e62.html> [last viewed on 26 March 2017].

⁵² Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986, available at: <http://www.refworld.org/cases,ICJ,4023a44d2.html> [last viewed on 26 March 2017].

⁵³ See note 5.

⁵⁴ International Committee of the Red Cross (ICRC), Customary International Humanitarian Law, 2005, Volume I: Rule 55, available at: <http://www.refworld.org/docid/5305e3de4.html> [last viewed on 26 March 2017].

⁵⁵ Marco Longobardo, State Responsibility for International Humanitarian Law Violations by Private Actors in Occupied Territories and the Exploitation of Natural Resources, 63 Netherlands International Law Review 251–274, 251–274 (2016).

⁵⁶ UN Committee Against Torture (CAT), Report of the Committee against Torture, 41st session (3–21 November 2008); 42nd session (27 April–15 May 2009), 2009, A/64/44, available at: <http://www.refworld.org/docid/4ae5b5f12.html> [last viewed on 26 March 2017].

⁵⁷ Evan J. Criddle, Protecting Human Rights During Emergencies: Delegation, Derogation, and Deference, Human Rights in Emergencies 32–55, 32–55.

⁵⁸ Jens David Ohlin & Larry May, Necessity in Human Rights Law and IHL, Necessity in International Law 121–140, 121–140 (2016).

the conduct of the hostilities and the treatment of specific categories of people, the IHRL instruments list out a number of rights that can be claimed by individuals against governments. While IHL always operates at the global level, IHRL has provisions for regional human rights treaty arrangements. Most prominent and steadfastly enforced among these are the ones in force in Europe.⁵⁹

Another area of divergence is the provision for reparations. Unlike IHL, where the provisions are sketchy at best, all major IHRL instruments mention reparations and explicitly provide for award of the same when some harm has been caused in violation of the rights conferred by IHRL. In IHRL, a wide range of legally binding as well as quasi-judicial instrumentalities and enforcement mechanisms have been set into place. So much so that certain scholars have argued in light of the paucity of enforcement mechanisms under IHL, IHRL instruments should be used to enforce IHL.⁶⁰

Complementary Sources of Legal Obligations

From a historical perspective, it must be noted that the UDHR does not specifically touch upon the issue of respect of human rights in situations of armed conflict.⁶¹ It is more of a general declaration of principles universally applicable but the element of specificity is conspicuous by its absence. Similarly, it must be noted that the Geneva Conventions of 1949 barely have any mention of the term human rights.⁶² This was the position at the dawn of the United Nations era. A change happened with the 1968 United Nations Human Rights Conference in Tehran⁶³. It was the beginning of the combined usage of both IHL and IHRL by UN organs in their reports and presentations on the human rights situations in various countries, as several countries are in situations of armed conflict and peace almost seamlessly owing to the fluidity of the political dynamics.

Traditionally and historically, the belief was that the difference between IHRL and IHL was that the IHRL applied in times of peace and IHL in situations of armed conflict. Modern international law, however, recognises that this distinction is not entirely sufficient or indeed accurate to have an understanding of the position in law with regard to these two branches of public international law. Human rights are indivisible, interrelated and interdependent⁶⁴. They are

⁵⁹ S. Douglas-Scott, *The European Union and Human Rights after the Treaty of Lisbon*, 11 Human Rights Law Review 645–682, 645–682 (2011).

⁶⁰ Frits Kalshoven & Liesbeth Zegveld, *Constraints on the waging of war an introduction to international humanitarian law* (2014).

⁶¹ Lindsay Moir, *Human rights during internal armed conflict*, *The Law of Internal Armed Conflict* 193–231, 193–231.

⁶² International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: <http://www.refworld.org/docid/3ae6b36d2.html> [last viewed on 28 March 2017].

⁶³ United Nations, *Final Act of the International Conference on Human Rights, Tehran*, 13 May 1968, available at: <http://www.refworld.org/docid/3ae6b36f1b.html> [last viewed on 28 March 2017].

⁶⁴ Chapter 1. Indivisible, Interdependent, and Interrelated Human Rights, *Indivisible Human Rights* 1–10, 1–10.

inherent to all humans, so it cannot be said that they apply only during peacetime or war. They exist at all times throughout the course of the social, economic and political lives of individuals and states and therefore cannot be viewed in isolation. Nowhere is it mentioned in the treaties and conventions of IHRL that the rights enshrined therein are only applicable in situations of peace and not in armed conflict. Therefore, IHL and IHRL are both concurrent and complementary sources of obligations in situations of armed conflict. One instance of this is the International Covenant on Civil and Political Rights (ICCPR), which, as per the United Nations Human Rights Committee, is applicable equally in situations of armed conflict⁶⁵. Furthermore, the UN's Human Rights Council (UNHRC) has stated that IHRL and IHL were complementary and mutually reinforcing⁶⁶.

International Humanitarian Law: Lex Specialis

The *lex specialis derogat legi generali* principle is one of the most widely accepted maxims of legal interpretation and techniques for the resolution of normative conflicts in the interpretation of the law. The principle establishes the fact that in case of conflict, the special law is to prevail over the general law, to the extent that the latter is repugnant to the former.⁶⁷ Given that both laws are applicable to armed conflicts, but IHRL has a wider application to include situations that arise during peacetime, it becomes apparent that the role of IHL is more that of *lex specialis*. IHL and IHRL are often applied in a concurrent manner with their respective protections complementing each other. Yet there are instances in IHL and IHRL when they provide different solutions to the same legal problem posed. They sometimes regulate the same legal issues in their unique ways thereby yielding different results.

In these situations of normative conflict, it has been well established that the principle of *lex specialis* is one of the principles that can be applied in order to resolve any normative bottlenecks of this kind. Conceptually, there are two different ways to view the interplay between the general rule and a more specific one. The first one is where the specific rule is considered a technical specification, elaboration or update to the general rule and viewed from the prism of a broad framework as prepared by the contours of the general rule in question. The other way to view the interplay between the general rule and specific rule is that the special rule principle is needed to apply to situation when both sets of rule are equally valid and applicable given context, and there is no hierarchy in the relationship of such rules, resulting in a deadlock impairing the

⁶⁵ UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, available at: <http://www.refworld.org/docid/453883fd1f.html> (last viewed on 26 Mar 2017).

⁶⁶ UNHRC, Resolution 9/9, http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_9.pdf (last viewed on 26 Mar 2017).

⁶⁷ Dinah Shelton, *The human rights judgments: the jurisprudence of regional human rights tribunals – lex specialis or lex regionis?*, *Research Handbook on International Courts and Tribunals* 50–78.

law from taking a determinate course. It is in cases such as this, the point of view believes, that the *lex specialis* principle is used to resolve normative conflict. In both cases, however, the rule with a more precisely delimited scope of application has priority.⁶⁸

With reference to IHL and IHRL, it is no exaggeration to say that the concept of *lex specialis* has often been overplayed and overstated. This is because the areas of conflict between the two are very small and the points of convergence quite numerous as the protection provided by both IHL and IHRL is more or less similar in the majority of issues. In the majority of cases therefore, the principle of *lex specialis* need not be applied at all, and it is for this reason that the International Law Commission (ILC) has stated, “for the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.”⁶⁹

The principle of *lex specialis* applies to provisions that, when used in the specific set of circumstances of a particular situation, produce results at odds with each other.⁷⁰ *Lex Specialis* is the principle that determines which rule prevails over another in a particular situation.⁷¹ The crux of the principle of *lex specialis* is that when two provisions contradict each other or appear to be in contravention to the spirit of the law as espoused by the other, it is the more detailed provision that must shine through and be applied.⁷² In international armed conflict, some rules of IHL are recognised as *lex specialis* on a range of matters. An example of this is the ICJ’s 1996 advisory opinion which examined the relationship between IHL and IHRL within the specific context of the varied interpretations of the right to life under these two branches of public international law.

The ICJ held that it is a matter of principle that Article 6 of the ICCPR, which protects life from being arbitrarily deprived should also apply in cases of armed conflict. However, there is no test of arbitrariness in the deprivation of life in IHL, which is the *lex specialis* in matters of armed conflict. So, in this case, the *lex specialis* is insufficient to provide details. This was the case for the issue in question before the ICJ regarding the lawfulness of the use of a certain type of weapon. The court ruled that IHRL continues to apply to armed conflicts and that even if IHL was *lex specialis*, IHRL will continue to be applicable with regards to matters such as the determination of the degree of arbitrariness in the use of

⁶⁸ Fragmentation of international law: difficulties arising from the diversification and expansion of international law – Report of the Study Group of the International Law Commission (A/CN.4/L.682, paras. 56–57).

⁶⁹ Draft articles on responsibility of States for internationally wrongful acts, commentary to article 55.

⁷⁰ UN Human Rights Council, Outcome of the Expert Consultation on the Issue of Protecting the Human Rights of Civilians in Armed Conflict : report of the United Nations High Commissioner for Human Rights, 4 June 2009, A/HRC/11/31, available at: <http://www.refworld.org/docid/4a3f73a32.html> [last viewed on 28 Mar 2017]

⁷¹ UN General Assembly, Report of the International Law Commission, 23 July 1999, A/54/10, available at: <http://www.refworld.org/docid/3ae6af970.html> [last viewed on 28 Mar 2017]

⁷² Report of the Study Group of the International Law Commission (A/CN.4/L.682 para. 60).

weapon systems.⁷³ Therefore, in cases that involve harm being inflicted on civilians in attacks by a party to an armed conflict, the application of the principles of IHL, specifically proportionality and distinction will apply as *lex specialis* with the IHRL provisions serving to reinforce and complement the IHL provisions where the latter is found lacking. It could be argued that in this advisory opinion the ICJ recognised the status of IHL as *lex specialis* in situations of armed conflict.

The ICJ has also made amply clear that there may be situations in which the recourse to the *lex specialis* principle is vital to determining the scope and nature of the standards and protections available to victims of armed conflict. Moreover, the International Committee of the Red Cross (ICRC) has also said that circumstances exist in which the provisions of IHL, including but not limited to Article 3, common to all four Geneva Conventions, “must be given specific content by application of other bodies of law in practice.”⁷⁴

This point is illustrated by comparing the very broad based, and vague provisions of common Article 3 with that of Article 14 of the ICCPR to the extent of the right of fair trial. Moreover, a country affected by an armed conflict is still governed by IHRL when it comes to issues related to the work of law enforcement agencies.⁷⁵ Similarly, several human rights violations that take place during armed conflicts may not be direct byproducts of the hostilities and should therefore naturally be subject to the application of IHRL. Any party to a conflict taking part in any atrocities unrelated to the conflict in question would be governed by IHRL by virtue of the fact that IHL is not applicable. The use of deadly force against people is an area that, *prima facie*, presents a contradictory picture when it comes to IHL and IHRL. It is accepted that under IHL, the enemy combatants are targeted until and unless they raise the white flag to surrender and lay down their firearms and a cessation of hostilities is arrived at, or alternatively, are *hors de combat*. However, in the case of IHRL, it prohibits absolutely the use of deadly force except in certain circumstances where IHRL only limits it. This effectively means that when military personnel, even in conditions of a war, undertake law enforcement duties, IHRL will be applicable. IHL in no way prohibits the deliberate incapacitation or liquidation through the means of ending life, of an enemy combatant who is not *hors de combat* by virtue of surrender or injury. The opposite is true for civilians as IHL binds parties to a conflict from attacking civilian targets and obliges them to take all precautions to prevent civilian casualties.

⁷³ ICJ Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, para. 25.

⁷⁴ Jakob Kellenberger, President of the International Committee of the Red Cross, “International humanitarian law and other legal regimes: interplay in situations of violence”, statement to the 27th Annual Round Table on Current Problems of International Humanitarian Law, San Remo, Italy, 4–6 September 2003.

⁷⁵ UN Office of the High Commissioner for Human Rights (OHCHR), *Eleventh periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan: Killing and injuring of civilians on 25 August 2008 by government security forces: Kalma IDP camp, South Darfur, Sudan*, 23 January 2009, available at: <http://www.refworld.org/docid/4979bdbc2.html> [last viewed on 28 March 2017].

There are three primary principles of IHL, viz. distinction, precaution and proportionality. These yardsticks are vital in determining when a violation has occurred and helps evaluate the context in which harm occurred. The principles of precaution and proportionality are also present in IHRL, but they, unlike the same concepts in IHL, do not distinguish on the basis of the function or occupation of the subject, that is to say, they apply equally to civilians and combatants. The principle of distinction is therefore, unknown to IHRL. In furtherance of the strong restrictions on the use of deadly force, most treaties internationally prohibit arbitrarily causing death. The European Convention for the Protection of Human Rights and Fundamental Freedoms specifies that for a deprivation of life not to be arbitrary it must be absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.⁷⁶

The United Nations Special Rapporteur on summary, extrajudicial or arbitrary executions, Philip Alston, has said, *“the other element contributed by human rights law is that the intentional use of lethal force in the context of an armed conflict is prohibited unless strictly necessary. In other words, killing must be a last resort, even in times of war.”*⁷⁷ Therefore, while IHL continues to be the *lex specialis*, its relationship with IHRL is intricate and complex and attention to the situation as a whole must be paid with regard to the circumstances in order to determine which of the two will be applied, in case of a contradiction.

⁷⁶ The European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 2.2.

⁷⁷ UN Commission on Human Rights, Addendum to the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Sri Lanka (28 November to 6 December 2005), 27 March 2006, E/CN.4/2006/53/Add.5, available at: <http://www.refworld.org/docid/45377b400.html> [last viewed on 28 March 2017].

Chapter 3: The Rights of Victims and Levels of Responsibility

Rights of Victims

In IHRL, victims have been defined as persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.⁷⁸

Offences in contravention of the laws of war are considered criminal offences⁷⁹ and therefore, those who have suffered as a result of any offences conducted in the course of an armed conflict as a direct result of or due to a tangential link with that armed conflict are to be considered as victims.

While this definition of victims adequately addresses the rights of civilians who have been unlawfully targeted, it doesn't necessarily apply to many of the rights available to individuals hors de combat as they may or may not have been targeted unlawfully. It is perfectly possible for a soldier to be hit during the course of fighting, and be wounded legitimately, and he too is a *victim* of armed conflict.

This wider ambit and scope given to the term *victim* in IHL is evinced by the spirit of the work of the Henry Dunant⁸⁰, who primarily worked towards serving those who have been rendered hors de combat by virtue of wounds sustained in conventional armed combat, without presupposing the violation of any laws as the cause of the infliction such injury upon them.

Thus, the term *victim* in the context of armed conflict includes both those who have been victimised unlawfully and those who have been rendered hors de combat.

The Geneva Conventions

The foundation stone and lynchpin of the law guaranteeing the rights of victims of armed conflict are the four Geneva Conventions of 1949. These were evolved and developed over the course of many years since the first Geneva Convention in 1864. The conventions are, in entirety, applicable to international-armed conflicts, while Article 3, which is common to all four, deals specifically with non-international armed conflicts.

⁷⁸ UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power : resolution / adopted by the General Assembly, 29 November 1985, A/RES/40/34, available at <http://www.un.org/documents/ga/res/40/a40r034.htm> (last viewed on Mar 2 2017).

⁷⁹ Customary IHL - Rule 156. Definition of War Crimes,, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156 (last viewed on Mar 29, 2017).

⁸⁰ Charlotte Gray, Henry Dunant: founder of the Red Cross, the relief organisation dedicated to helping suffering people all over the world (1989).

Geneva Conventions and Rights in International-Armed Conflicts

When parties enter into hostilities, it is an invariable fact of conflict that certain members of the armed forces rendered hors de combat, or civilians, will fall into the hands of the opposite parties the law laid down under the Geneva convention is meant to provide adequate guarantees as to the protection of such individuals. The protection envisaged is, hence, is against the arbitrary usage of the absolute power that one party to the hostilities acquires by sheer force of arms and ammunition. It is not protection from the inherent violence of war itself.⁸¹

Protection of this type was granted, for the first time in 1864, to 'the wounded in armies in the field'. Since 1949 it extends to all categories of persons mentioned in the four Geneva Conventions of that year:-

- a. The Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (the First or Red Cross Convention);
- b. The Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (the Second or Sea Red Cross Convention);
- c. The Convention (III) Relative to the Treatment of Prisoners of War (the Third or Prisoners of War Convention); and
- d. The Convention (IV) Relative to the Protection of Civilian Persons in Time of War (the Fourth or Civilians Convention).

Protected Persons

The First Three Geneva Conventions provide protection to both combatants and non-combatant civilians (in cases where they are recognised as prisoners of war). The classes of persons protected under these three conventions are the following⁸²:-

- a. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
- b. ii. Members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organised resistance movements, fulfil the following conditions:-
 - i. that of being commanded by a person responsible for his subordinates;

⁸¹ Frits Kalshoven & Liesbeth Zegveld, Constraints on the waging of war an introduction to international humanitarian law (2014).

⁸² International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, Article 4, 12 August 1949, 75 UNTS 135.

- ii. that of having affixed distinctive sign recognised at a distance;
- iii. that of carrying arms openly;
- iv. that of conducting their operations in accordance with the laws and customs of war.
- c. Members of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power.
- d. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorisation from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
- e. Members of crews, including masters, pilots and apprentices of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
- f. Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.
- g. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies.

Some categories in the above mentioned list of protected persons are combatants and are therefore, doubtlessly extended all relevant protections of the Geneva Conventions. However, the list also includes such civilians, who have collaborated with the other armed force but did not take part in hostilities directly. When such civilians are held as prisoners, they receive the same rights as that of regular prisoners of war who are combatants.

Article 4⁸³ of the Fourth Convention is slightly different from the Article 4 found in the Third Convention, in the sense that it protects only categories of civilians and not combatants. Article 4 defines the protected persons as such individuals who are in the hands of a foreign state or any other hostile power, of which they are not citizens or members of, during the course of an armed conflict or as a result of it, at any given instance in time. The exceptions to this general principle are nationals of a neutral State on the territory of a party to the conflict and

⁸³ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, Article 4, 12 August 1949, 75 UNTS 287.

nationals of a co-belligerent⁸⁴, as long as they are nationals of a nation state which has some form of regular diplomatic presence in the belligerent country in whose hands such nationals of the said neutral country are in;⁸⁵ and, all those who are protected by Conventions I-III.

Conspicuous by their absence in any of these provisions are combatants of rebel groups and non-state entities. Such a lacuna is vulnerable to being exploited by states against such individuals, however it is in situations such as these that IHRL comes into play and is applied. The fundamental principle on which lays the system of protection laid down by the Geneva Conventions is that persons who have been accorded protection under the Conventions shall be, in all possible circumstances, treated with respect and with humanity. No discrimination of an adverse nature impairing the rights of such persons should be made merely on the grounds of their religion, nationality, gender, political inclination, race, and so on. They must be respected at all time, that is to say that there is an obligation not to harm and not to expose the said individuals to any kind of suffering, not in the least murder or mutilation.

Furthermore, such individuals are to be protected. There is an active element inherent in this term and it involves a duty to ward off dangers and prevent any harm from being done. Most important is the element of humane treatment. All these persons must be dealt with under the overarching umbrella of a humane spirit. Hate and a vindictive attitude would be in contravention of the spirit of the laws of armed conflict in general and the Geneva Conventions in particular.

General Protection to Civilians

The provisions of Part II of the Fourth Geneva Convention cover *“the whole of the populations of the countries in conflict” without discrimination, and ‘are intended to alleviate the sufferings caused by war’*.⁸⁶ These provisions give specific protection and assistance to civilians and these extend generally.

Protective Zones

Provision is made, first, for the establishment of two types of protective zone: ‘hospital and safety zones and localities’⁸⁷ and ‘neutralised zones’.⁸⁸ Hospital and safety zones and localities are supposed extend protection to pregnant women, children under fifteen years and mothers of children aged under seven years of age, old, sick and infirm people along with the wounded so that they are insulated to some degree from the harmful effects and inherent dangers of war. The people covered here are categories of persons who are not expected to make

⁸⁴ Frits Kalshoven & Liesbeth Zegveld, *Constraints on the waging of war an introduction to international humanitarian law* (2014).

⁸⁵ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, Article 4, 12 August 1949, 75 UNTS 287

⁸⁶ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, Art 13, 12 August 1949, 75 UNTS 287.

⁸⁷ Id. Art 14.

⁸⁸ Id. Art 15.

a material contribution to the war effort. However, the establishment of such zones is qualified by the recognition given by the opposite party to the armed conflict. An express agreement must exist between the two sides with regard to this.

When the Fourth Convention was being drafted, it has been envisioned that these zones would be far away from the frontline and would be substantially large in area. However, there have been no practical instances of such zones having been established during the course of an armed conflict. When wars these days are increasingly being fought in built-up urban and semi-urban areas, it seems unlikely that the spirit of this provision can materialise to the fullest extent in the foreseeable future.

The neutralised zones of Article 15 are to be established in the areas of fighting or in the vicinity thereof and are designed to protect on the basis of a principle of non-discrimination; victims such as civilians who aren't participants in hostilities and wounded and sick combatants hors de combat. Here also, an agreement between the belligerents is required and the Article specifies that such agreements must be concluded in writing.

What follows is a broad appraisal of the rights vested in the various victims of armed conflict through the provisions of the Geneva Conventions.

First Geneva Convention

The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted on August 12 1949, protects combatants who have been rendered hors de combat, or out of the battle. There were a total of 10 articles in the original 1864 version of this convention, but in the 1949 version, these have been expanded to include 64 articles that provide protection to the victims of armed conflict who were at some point active participants in the conflict. Additionally, the convention also protects those who are to care for the wounded and sick. That is to say:

- a. Medical personnel,
- b. Medical facilities,
- c. Medical equipment.

In certain cases, civilian personnel also accompany armed forces to the combat zone. These civilians, in case they are wounded, are also provided adequate protection. Also covered are civilians who spontaneously take charge to repel an armed invasion and military chaplains. The convention recognises the ICRC's role in assisting the wounded and sick.⁸⁹ The Red Cross societies so registered in respective countries are authorised to provide relief of an impartial nature, the

⁸⁹ International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, Article 9, 12 August 1949, 75 UNTS 3.

same power has also been given to other non-governmental organisations and neutral governments.

Thus there shall be no partiality in treating the wounded and sick and everybody shall be respected and protected irrespective of their race, gender, religion, and so on. They shall not be murdered, tortured or be subjected to biological experiments.⁹⁰ All those who have been wounded or sick shall receive adequate care and shall be protected against pillage and ill-treatment, it is the duty of all state parties to search for and collect the wounded and sick after a battle to provide the necessary information about them to the Central Tracing and Protection agency of the ICRC.⁹¹

Second Geneva Convention

The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949. This convention adapts the protections of the earlier convention and applies it to naval combat and personnel. Its application extends to members of the armed forces who have been wounded, sick or are shipwrecked along with hospital ships and medical personnel onboard. Civilians who accompany members of the armed forces are also given protection under this convention.

This convention provides for parties in battle to take all necessary and possible measures to search for and collect and care for the wounded, sick and shipwrecked.⁹² Of particular interest is the provision for the medical staff of a hospital ship. A warship cannot capture the medical staff of such hospital ship but it can hold the wounded, sick and shipwrecked as POWs provided that they can be safely moved and that the warship has adequate facilities to care for the same.⁹³

Hospital ships cannot be used for any military purpose whatsoever.⁹⁴ They have to remain immune from attack or capture and the names and descriptions of such ships must be conveyed to all parties in the conflict. An appeal can be made to neutral vessels such as merchant ships to help collect and care for the wounded, sick and shipwrecked. Those who agree to help cannot be captured so long as they remain neutral.⁹⁵ All religious, medical and hospital personnel who

⁹⁰ International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, Article 12, 12 August 1949, 75 UNTS 31.

⁹¹ Id. Art 15 and Art 16.

⁹² International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, Article 12 and 18, 12 August 1949, 75 UNTS 85.

⁹³ International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, Article 14, 12 August 1949, 75 UNTS 85.

⁹⁴ Id. Art 22.

⁹⁵ Id. Art 21.

are serving onboard combat ships are to be respected and protected. They are to be sent back if captured whenever such repatriation becomes possible.⁹⁶

Third Geneva Convention

This convention has a total of 143 articles and requires Prisoners of War (POW) to be treated humanely and for them to receive adequate care in the form of food, medicine, clothing and housing. The provisions also establish stringent guidelines for the conditions of labour, discipline, recreation and criminal trial. The most fundamental principle laid down by this convention is that under no circumstances must prisoners of war be subjected to torture, medical experimentation and must be protected against acts of violence, insults and public curiosity.⁹⁷

Upon capture, prisoners are required to only provide their name, rank and date of birth along with their military service number and no information can be involuntarily acquired from them.⁹⁸ Special provisions have been made for female POWs, as they are to be treated with due regard to their sex and without any adverse discrimination.⁹⁹

The convention goes on to add that all prisoners must be housed in clean and adequate shelter and should receive adequate food, clothing, medicine so that they can maintain good health.¹⁰⁰ Further, they mustn't be held captive in areas where hostilities are taking place and should not be used as human shields; they must not be exposed to fire as much as possible. If they are to do non-military jobs, these should be under reasonable working conditions and they should be paid adequately at a reasonable rate.¹⁰¹

Rules regarding tracing are also considerably strong, with the convention requiring the names of prisoners to be sent immediately to the Central Tracing Agency of the ICRC and POWs being allowed to correspond with their families and receive any packages in the form of relief aid.¹⁰² However, should prisoners violate any laws. They are to be made subject to the laws of the captors and can be tried in a fair and impartial procedure where they are allowed to have an advocate.¹⁰³

Fourth Geneva Convention

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War has a total of 159 articles. It protects civilians in an occupied territory and in areas of armed conflict from murder, torture, brutality and from discrimination

⁹⁶ Id. Art 37

⁹⁷ International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Article 13 and 14, 12 August 1949, 75 UNTS 135

⁹⁸ Id. Art 17.

⁹⁹ Id. Art 23.

¹⁰⁰ Id. Art 50.

¹⁰¹ Id. Art 54.

¹⁰² Id. Art 70, 71, 72 and 123.

¹⁰³ Id. Art 82 and 84

on the basis of race, nationality, religion, etc.¹⁰⁴ All Civilian hospitals and civilian hospital staff are also included within the protective umbrella.¹⁰⁵ The convention provides for specific care to children who have been orphaned or separated from their parents. The ICRC's Tracing Agency is authorised to assist in family reunification with the assistance of national Red Cross Societies.¹⁰⁶ Special protection is extended to the safety, honour, family ties and religious practices and customs of the civilian population.¹⁰⁷ Acts such as wanton destruction of civilian property, taking civilian hostages, pillage, and reprisal violence are absolutely prohibited under the convention.¹⁰⁸ Moreover, civilians cannot be collectively deported or punished.¹⁰⁹ Furthermore, the civilians cannot be forced into doing any kind of military assisting labour designed to aid the war effort against their will.¹¹⁰

The Fourth Geneva Convention has specific provisions for occupied territories and the rights of civilians in these areas, along with the corresponding obligations of the occupying forces. When the civilians are made to work, they are to be paid on a fair basis for whatever work has been assigned to them.¹¹¹ The occupying power must also ensure that food and medical supplies are provided to civilians along with public health facilities.¹¹² In case of a blockade, or a situation where a pocket of resistance is surrounded, the medical supplies and objects for religious worship should be allowed to pass through any cordon drawn around the area in question.¹¹³ However, in the event that this is not possible, the occupying power is to facilitate the relief shipments made by international and national humanitarian aid organisations when these are authorised by the parties to the conflict and are allowed to continue their relief activities.¹¹⁴

Insofar as the administrative structure of the occupied territories is concerned, it is to be allowed to function unmolested. The public officials will be permitted to carry out their duties and the laws of the occupied territory will continue to be in force unless and until they pose a security threat to the occupying power or its forces on the ground.¹¹⁵ The only time civilians may be deported is when there is an imminent security threat or danger, otherwise they are generally not to be detailed or deported or sent to internment camps. In case they have been sent to an internment camp, the internees are to receive adequate food, clothing and

¹⁰⁴ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, Articles 13 and 32, 12 August 1949, 75 UNTS 287.

¹⁰⁵ Id. Art 18.

¹⁰⁶ Id. Art 24 and 25.

¹⁰⁷ Id. Art 27.

¹⁰⁸ Id. Art 33 and 34.

¹⁰⁹ Id. Art 49.

¹¹⁰ Id. Art 40.

¹¹¹ Id. Art 54.

¹¹² Id. Art 55.

¹¹³ Id. Art 58.

¹¹⁴ Id. Art 59.

¹¹⁵ Id. Art 64.

medicines and are also to be located away from the war zone.¹¹⁶ They also have the right to send and receive mail along with the receipt of relief shipments.¹¹⁷

Most importantly, the rights of children and pregnant women are of paramount importance and take precedence when it comes to release from internment. Particular focus is given to mothers with infants and young children, along with the wounded and sick and those who have been interned for a long time.¹¹⁸

Levels of Responsibility

As is the case in any system of laws conferring rights and obligations, the responsibility for breaches or violations has to be established. International law with regard to armed conflict has a layered the levels of responsibility when it comes to violations of the rights of victims of armed conflict. These layers or levels of responsibility can be classified under the following two heads¹¹⁹:

- a. Collective or State Responsibility.
- b. Individual Responsibility.

Collective or State Responsibility

The acts of any armed force in the field, be it in a conventional or non-conventional conflict, are at the behest of a chain of command at the apex of which is political authority. The State constitutes the structure under which the chain of command is contained and political authority vests. The Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted in 2001 by the ILC shed some light on this.¹²⁰ This codification of the rules of international law applies to all, except in matters where the conditions pertaining to the existence of an act that is internationally wrong and to such extent that it is wrong or the implementation of an international responsibility incumbent upon a State are governed by certain special rules under international law.¹²¹

Beyond treaty obligations, the ILC Draft Articles state that any international wrongful act is constituted by the general breach of a state's international obligations and that this entails the international responsibility of that state.¹²² A State is responsible for violations of the rights of the victims of armed conflict under international law when these violations are attributable to it such as in the following cases:-

¹¹⁶ Id. Art 92, 90 and 91.

¹¹⁷ Id. Art 107 and 108.

¹¹⁸ Id. Art 132.

¹¹⁹ Dieter Fleck, Individual and State Responsibility for Violations of the Ius in Bello: An Imperfect Balance, *International Humanitarian Law Facing New Challenges* 171–206, 171-206 (2007).

¹²⁰ United Nations, International Law Commission, *Report on the Work of its Fifty-third Session (23 April–1 June and 2 July–10 August 2001)*, General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/56/10), available at: <http://www.un.org/law/ilc/reports/2001/2001report.htm>, pp. 29-365 (last viewed on Mar 29, 2017).

¹²¹ Art 55 of Draft Principles.

¹²² Art 1 and 2 of Draft Principles.

- a. When they are committed by such persons who have been delegated lawfully the authority to exercise the power of the apparatus of the State.
- b. When committed by organs of the state, such as the armed forces.
- c. When individuals or groups, upon being directed by another individual or institutions part of the state, act upon such instructions.
- d. When perpetrated by state-acknowledged and state-authorised private individuals or groups and the state assumes responsibility of their conduct, as if it were its own conduct.

However, the question often posed is, would such responsibility also apply to the leadership of an organisation claiming to fight for national liberation? The answer is that it would be, hence the qualifier 'collective' instead of just using 'state responsibility'.

Article 1(4) of Additional Protocol I¹²³ recognises "wars of national liberation" as international armed conflicts, and Article 96(3)¹²⁴ creates the possibility for the authority representing the people fighting such a war to address to the depositary a declaration holding the undertaking to apply the Conventions and the Protocol. This brings the Conventions and the Protocol into force for that party to the conflict "with immediate effect", and renders these instruments "equally binding upon all Parties to the conflict". As a result, the commencement of hostilities and the deposit of such declaration announcing the commencement of hostile activities of the nature of an armed conflict automatically and immediately bind the leadership of the people fighting a liberation war to become fully responsible for any violations of IHL.

Individual Responsibility

All states and collective bodies and organisations are composed of individuals. Thus, the individual nature of the acts cannot be ignored at any cost. Many violations of IHRL and IHL are considered criminal offences under the domestic laws of several nations. However, when additional conditions are met, these are also classified as crimes under international law and the individuals responsible are also brought under criminal liability. Such crimes may be prosecuted not only domestically but also internationally. International Tribunals may be established to try genocide, crimes against humanity, etc.

The ICC's 1998 Rome Statute under Article 25 provides that a crime committed within the jurisdiction of the court would, in accordance with the provision of the statute, be criminally liable for prosecution and punishment and then lists a series of criminal behaviour, such as committing the crime, ordering or

¹²³ International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 1(4) 8 June 1977, 1125 UNTS 3

¹²⁴ Id. Art 96(3).

instigating it.¹²⁵ Furthermore, Article 25.3 (f) of the Statute provides that once an individual has ceased the attempt to perpetrate a crime and additionally or alternatively prevents the criminal act from being completed, then he will not be liable to be punished for the attempt to commit such crime, but this provision is only applicable when it has been established that there was a complete and voluntary act on part of such person to withdraw from the criminal intention behind the attempt. This helps the use of the threat of possible international prosecution to influence ongoing events.

Here are some of the most important principles in individual criminal responsibility:

- a. Individuals are criminally responsible for the international crimes that they commit.
- b. Individuals are criminally responsible and liable for punishment for an international crime if the material elements of the crime are committed with intent and knowledge.
- c. Commanders and other superior officers are criminally responsible for international crimes committed pursuant to their direct orders under the principle of command responsibility.
- d. Combatants have a duty to disobey an unlawful order.

Legal Character of the Rules

International Law relating to armed conflict is frequently criticised, especially in the media, for being too routinely flouted in practical situations. This criticism might not be entirely unfair as Cicero had once famously remarked, “*illeges inter arma*,” (when arms speak, the laws are silent).¹²⁶ However, there is a need to appreciate the nature of the rules before passing any premature judgment on this aspect.

Stability

The parties to the Geneva Conventions disallow themselves the liberty to alter their duties by common covenant in so far as any agreement would adversely affect the rights of those protected by the Conventions.¹²⁷ The rules are therefore, of a stable and un-alterable nature. The stability of the rules in this context is at variance with the general ability of parties to vary their obligations under international law by mutual agreement.¹²⁸ While the 1949 Geneva Conventions do reserve to parties the power to withdraw from them, that power is qualified by two limiting factors:-

¹²⁵ UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), Article 25, 17 July 1998, ISBN No. 92-9227-227-6.

¹²⁶ 14 CICERO, PRO T. ANNIO MILONE ORATIO [THE SPEECH ON BEHALF OF TITUS ANNIUS MILO] 11 (G.P. Goold ed. & N.H. Watts trans., Harvard Univ. Press 1992).

¹²⁷ Common Article 6 in GCs I, II and III. Art 7 of GC IV.

¹²⁸ Vienna Convention on the Law of Treaties, Art. 41, 1155 U.N.T.S. 331, 342.

a. If an armed conflict exists, the withdrawal from the conventions cannot take place till a peace has been concluded. Furthermore, operations relating to the protected persons have to be completed.¹²⁹

b. The withdrawal has effect only in respect to the withdrawing state, and even in that case, the obligations imposed upon parties to the armed conflict by international law insofar as the general conduct of warfare in a manner that shuns the use of brutal and disproportionate force is concerned continue to remain obligations because they are the product of customary law as evolved through the course of many years by universally followed state practice and are in consonance with the public morality, conscience and the fundamental law of humanity.¹³⁰

Universality

Under common Article I, the 188 parties¹³¹ undertake not only that they will respect the obligations themselves, but also that they will “ensure respect” for the obligations.¹³² These words are of considerable and undeniable significance.

In the event of a Power failing to fulfill its obligations, each of the other Contracting Parties (neutral, allied or enemy) *should endeavour* to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the States which are parties to it should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that it is respected universally.¹³³

Autonomy

The law applicable during a battle is independent and distinct from any rights or obligations that may arise in the act resorting to the use of force, so the justness or the legitimacy of the *casus belli* has no bearing on the rights and obligations imposed by the law of armed conflict. Accordingly, one party to a conflict cannot claim to be excused from the obligations imposed by this law on the basis that the other party is the aggressor or in some other respect has breached the prohibitions on the use of armed force that are found in the Charter of the United Nations.¹³⁴ The rules are therefore autonomous and independent of the political justifications of the conflict, and applies regardless of which party claims moral ascendancy.

¹²⁹ Geneva Convention I, Art 63.

¹³⁰ Geneva Convention No. III, Art 142.

¹³¹ *Geneva Conventions for the Protection of War Victims of 12 August 1949 and Additional Protocols of 8 June 1977: Ratifications, Accessions and Successions as at 31 December 1997*, 322 INT’L REV. RED CROSS 178, 181 (1998).

¹³² Common Art I.

¹³³ Jean DE Preux ET AL., ICRC Commentary 18 (1960).

¹³⁴ United Nations, Charter of the United Nations, 24 October 1945, Article 2 Paragraph 4, 1 UNTS XVI, available at: <http://www.refworld.org/docid/3ae6b3930.html> [last viewed on 30 March 2017]

Chapter 4: Reparations

After the cessation of hostilities, the process of ensuring that justice is delivered commences. While it may be next to impossible to ensure any kind of substantive justice while both the victim and the perpetrator continue to be in the throes of armed conflict, the cessation of armed conflict brings to the fore the possibility to ensure justice through the payment of reparations.

Reparations are fundamental to ensuring justice after armed conflicts. There has been much discussion of late to determine whether international law provides for the right of reparation, and if yes, whether these are of an individual nature, collective nature, or both. The victims of armed conflicts are both individuals and collective entities, the distinction between the two is often blurred in practical situations and therefore the distinction between individual and collective notwithstanding, to discriminate between the two is often superfluous and counterproductive. This Article therefore examines the issues of both individual and collective reparation. While the question whether there is a right to such a remedy is not yet settled, this chapter argues that responsible state parties should develop robust programmes of reparation.

An established principle of international law is that violations are to be remedied by reparation. Thus the Permanent Court of International Justice (PCIJ) held in the *Chorzow Factory case* that ‘reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation, which would, in all probability, have existed if that act had not been committed’.¹³⁵ Therefore, it is well established that those who have a legal injury in international law are well within their rights to claim reparations. As discussed in previous chapters, the conduct of armed conflict is governed primarily by IHRL and IHL, both branches of public international law. It is hence only a logical conclusion to arrive at that international law provides for reparations for violations that have taken place during the course of an armed conflict.

The two kinds of reparation are individual reparation and collective reparation. **Individual reparations** are given to individual victims, who obtain reparations in the form of restitution and compensation.¹³⁶ This is a right well established in law and has sufficient scholarly backing. The foundations were laid by the PCIJ as early as 1927 in the above mentioned *Chorzow Factory case*. The PCIJ had held: It is a principle of international law and even a general conception of law that any breach of an engagement involves an obligation to make reparation in

¹³⁵ Permanent Court of International Justice, Case Concerning Factory at Cho'rzow, Merits, Series A, No. 17, (1928), p. 47. Deviations from the standard of full reparation are discussed for situations of mass atrocities. See e.g. Ethiopia–Eritrea Claims Commission, Final Award between the State of Eritrea and the Federal Democratic Republic of Ethiopia, Eritrea's Damages Claims, 17 August 2009, para. 22.

¹³⁶ Howard M. Holtzmann and Edda Kristja'nsdo'ttir, *International Mass Claims Processes: Legal and Practical Perspectives*, Oxford University Press, Oxford, 2007.

an adequate form reparation is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.¹³⁷ It further went on to observe: reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution would¹³⁸.

This case dealt with the two primary forms of individual reparation, viz. restitution and compensation. This is because these two constituted the basis of the historical law on reparations. However, it seems an impractical task to enforce total restitution in matters of human rights violations, given the fact that more often than not, it is not a mere property dispute for the preserved property to be restituted. Damage caused to a person is seldom restituted. Hence, compensation is the practical manifestation of individual reparations in most cases. The ICJ has reaffirmed the validity of the Chorzow factory verdict in a range of other cases such as the case Concerning Armed Activities on the Territory of the Congo.¹³⁹

The ILC's Articles on State responsibility adopted in 2001¹⁴⁰ define reparation as consisting of these components:-

- a. Article 30 provides that it includes the guarantees of non-repetition.
- b. Article 34 provides for restitution.
- c. Article 36 provides for compensation.
- d. Article 37 states that the reparation must be to the satisfaction of the injury caused.

When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but only the individuals specifically covered should be considered as the holders of the right and hence the beneficiaries of the same rights under international law.¹⁴¹ Furthermore, the ICJ Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory of 2004 recognises the right of individuals to reparations. The ICJ in that case affirmed the duty of Israel to provide restitution and compensate individuals and any body, whether natural or legal in construction and constitution, that has suffered material

¹³⁷ Factory at Chorz'ow Case (Germany v. Poland), Jurisdiction, 1927, PCIJ, Ser. A, No. 9, p. 21.

¹³⁸ Factory at Chorz'ow Case (Germany v. Poland), Merits, 1928, PCIJ, Ser. A, No. 17, p. 47.

¹³⁹ Armed Activities on the Territory of the Congo Case (Democratic Republic of the Congo v. Uganda), ICJ Report 2005, p. 82, para. 259.

¹⁴⁰ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: <http://www.refworld.org/docid/3ddb8f804.html> [last viewed on 27 March 2017].

¹⁴¹ ILC, Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 33, para. 3.

damage and loss as a consequence of the construction of the Israeli wall dividing Palestinian territories from Jewish ones.¹⁴²

Collective reparations are the benefits conferred on collectives in order to undo or compensate for the injustice and legal harm done to the rights of the collective as a result of an armed conflict, when such an armed conflict led to a consequent violation of international law.¹⁴³ Therefore, the constituents of collective reparations are as follows:

- a. Violation of International Law.
- b. Collective harm as a result of the violation.
- c. Collective benefit.

Firstly, there must have been a violation of international law involved. A systematic regime of liability as a consequence of violation of international law is yet to be completely developed.¹⁴⁴ Rules on collective reparation are hence secondary rules which govern the relationship resulting from the breach of primary rules.¹⁴⁵ In this regard it should be noted that there are several primary norms that require states to act. In particular, there are an increasing number of positive human rights obligations.¹⁴⁶ It is however important to distinguish collective reparation from such primary obligations because positive obligations enjoin all states to act in furtherance of the obligations regardless of a prior violation of international law but the obligation to make reparation presupposes a violation to have taken place in consequence of which the obligation to make reparation arises.

Secondly, a harm that is collective in nature must have been inflicted in consequence of the violation of international law. The undoing of the collective harm is a fundamental concept of reparation.¹⁴⁷ This means that the targeting of a collective entity by virtue of its collective identity in an armed conflict leads to a different kind of harm as compared to the individual targeting of the exactly same amount of individuals from the collective entity without the collective identity having been the motivation for such targeting.

The genocide in Bangladesh in 1971, the Rawandan genocide and the Holocaust are all examples of collective targeting. The systematic extermination of a community causes harm that transcends the harm that results from the extermination of an equal amount of individuals not belonging to the group. A

¹⁴² Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, ICJ Report, paras 145, 152–3.

¹⁴³ Heidi Rombouts, *Victim Organisations and the Politics of Reparation*, Intersentia, Antwerp, 2004, pp. 34f.

¹⁴⁴ Yae'l Ronen, 'Avoid or compensate? Liability for incidental injury to civilians inflicted during armed conflict', in *Vanderbilt Journal of Transnational Law*, Vol. 42, 2009, p. 181, pp. 195ff.

¹⁴⁵ James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, 2002, p.14.

¹⁴⁶ Cordula Droge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention*, Springer, Berlin, 2003.

¹⁴⁷ Paul Dubinsky, 'Justice for the collective: the limits of the human rights class action', in *Michigan Law Review*, Vol. 104, 2004, p. 1182.

Bangladeshi in 1971 being attacked because of his Bengali identity would be differently viewed if he or she was simply attacked as a person instead of a person belonging to a particular collective identity. Hence, the group constitutes a source of identity and a socialisation mechanism whose disruption constitutes collective harm.¹⁴⁸

The fact that ICL penalises the destruction of groups as genocide reaffirms the fact that the harm resulting from a crime targeting a particular group is more than the damage caused by targeting an equivalent number of people not belonging to any particular group as such. It will however be erroneous to limit the ambit of collective harm to the narrow contours of genocide. A mass extermination of individuals belonging to any tribe who do not constitute a group within the scope of Article 6 of the Rome Statute of the International Criminal Court (ICC) still causes collective harm.¹⁴⁹ It is not necessary for collective harm to result only in the event of a violation of collective rights as was the case in Bangladesh or Rwanda. If victims share certain bonds including common cultural, religious, tribal, or ethnic roots, it is sufficient to constitute a collective harm regardless of the violation- or lack thereof - of collective rights.¹⁵⁰

Finally, the third and most definitive element of collective reparation is the accrual of collective benefit to the collective. There is no reparation if the benefit is not transferred, it is the act of concluding the process of reparation and provides remedy to the harm caused. Collective reparation encompasses a wide range of different benefits. Reports of truth and reconciliation commissions around the world are studded with innovative means of benefit transferred to the collective, these include measures such as the construction of schools or hospitals,¹⁵¹ the establishment of memorials,¹⁵² or the renaming of streets.¹⁵³

The collective benefits that accrue to the harmed community has two salient aspects. Firstly, the benefits are multifarious, while the most commonly awarded forms of individual reparation, i.e. compensation and restitution have a clearly delineated constitution, collective reparation can take several forms. Secondly, collective reparations are indivisible and victims who are entitled to collective reparation cannot enjoy collective benefits on their own, but as the meaning of

¹⁴⁸ Chris Dolan, *Social Torture: The Case of Northern Uganda, 1986–2006*, Berghahn, Oxford, 2009, p. 236.

¹⁴⁹ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 of 17 July 1998.

¹⁵⁰ IACtHR, *Moiwana Community v. Suriname*, Judgment of 15 June 2005 (Preliminary Objections, Merits, Reparations and Costs).

¹⁵¹ Peruvian Truth and Reconciliation Commission, *Programa Integral de Reparaciones*, paras. 2.2.3.2 and 2.2.4.3.3, available at: <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20IX/2.2%20PIR.pdf> (last visited 25 Mar 2017).

¹⁵² Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR), *Chega!*, Final Report of the CAVR, para. 10.3.4, available at: <http://www.cavr-timorleste.org/en/chegaReport.htm> (last visited 25 Mar 2017).

¹⁵³ South African Truth and Reconciliation Commission (TRC), *Truth and Reconciliation Commission of South Africa Report*, March 2003, Vol. 6, Section 2, ch. 1, para. 14, available at: <http://www.justice.gov.za/trc/report/index.htm> (last visited 25 Mar 2017).

the term collective benefit adequately conveys, have to share it with the other victims.

The most recent iteration of the international effort to delineate victims' rights to reparation was the adoption by the UN General Assembly on 16 December 2005 of Basic Principles on the Right to a Remedy and Reparation (Basic Principles).¹⁵⁴ Although they are not binding, the basic principles lay down fundamental yardsticks and foundational principles of the right to reparation. Under the Basic Principles, victims are defined as persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of IHRL, or serious violations of IHL.¹⁵⁵ The remedies provided for include adequate, effective, and prompt reparation.¹⁵⁶ The remedies include commemorations and tributes to the victims.¹⁵⁷ These are forms of collective reparation.

In spite of a commitment to protect from collective targeting during, the Basic Principles are ambiguous when it comes to who can claim the compensation. The Van Boven report¹⁵⁸ sheds some light on this as it has made observations about the necessity of groups of victims or collectively victimised communities being entitled to make collective claims for damages and receive collective reparation. This is wide enough in scope to include both collectively targeted groups and a multiplicity of individuals targeted separately. Collective reparation is also mentioned in the Updated Set of Principles to Combat Impunity.¹⁵⁹ Under the provisions of Principle 31, "Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries".¹⁶⁰

Subsequently, Principle 34 elaborates in considerable detail that "measures of restitution, compensation, rehabilitation, and satisfaction as provided by international law". Pertinently, the original draft of Principle 34 contained the term 'individual'¹⁶¹ however this was replaced by 'measures concerning the right to restitution, compensation'. This elaboration made it amply clear that reparations do not only subsist as the right of the affected individual but also

¹⁵⁴ General Assembly Res. 60/147, 16 December 2005, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

¹⁵⁵ Id. Principle 8.

¹⁵⁶ Id. 'IX. Reparation for harm suffered', Principle 22(g).

¹⁵⁷ Id. 'VII. Victims' right to remedies', Principle 11(b).

¹⁵⁸ UN Sub-Commission on the Promotion and Protection of Human Rights, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report, submitted by Mr. Theo van Boven, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993, available at: <http://www.refworld.org/docid/3b00f0b82c.html> [last viewed 25 Mar 2017].

¹⁵⁹ UN Commission on Human Rights, *Report of the independent expert to update the Set of Principles to combat impunity*, 18 February 2005, E/CN.4/2005/102, available at: <http://www.refworld.org/docid/42d66e7a0.html> [last viewed on 28 Mar 2017]

¹⁶⁰ Id., Principle 31, 'Rights and duties arising out of the obligation to make reparation'.

¹⁶¹ Id., Principle 34, 'Scope of the right to reparation'.

extend to the affected community.¹⁶² Insofar as the procedural aspects are concerned, Principle 32 adequately provides for the reparations to be given to individuals and communities both, through relevant measures and programmes. However, there is no attempt to ensure that the legal status of the ‘communities’ is elaborated upon in any substantive measure.¹⁶³

Judicial Decisions

Examples of collective reparation having been awarded as a remedial measure are found in the jurisprudence of bodies such as the Inter-American Court of Human Rights and along with recommendations by truth and reconciliation commissions.

One instance of the same is *Mayagna Awas Tingi Community v. Nicaragua*, where the Court held that Nicaragua was in violation of its obligations under Article 21 of the American Convention on Human Rights by depriving an indigenous community of their property rights.¹⁶⁴ The court held that collective reparations are to be awarded to the entire community to remedy the wrong done. Furthermore, the court held that Nicaragua had to amend its domestic legal framework in order to accommodate the provisions of the Convention, take measures in the nature of “legislative, administrative and any other measures required to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores”.¹⁶⁵ The court held that the Mayagna indigenous community held a collective proprietary right, thus it could be argued that the court in this case has conferred legal personality to the collective entity thereby making reparation to the community as a whole a general legal right.

Another case where remedies of a collective nature were awarded is the *Street Children v. Guatemala case*.¹⁶⁶ The case pertained to officials of the state engaging in abusive practices detrimental to street children. In addition to addressing the question of monetary damages to be paid to the victims, the court looked into the intangible social aspects of the damage inflicted upon the children.¹⁶⁷ The latter was sort to be remedied and the court accordingly directed Guatemala to designate an educational centre with a name referring to the victims. A plaque with the names of the victims was also to be put up in the centre to keep their memory alive. The two reasons given by the court as justifications for the

¹⁶² UN Commission on Human Rights, Report of the independent expert to update the Set of Principles to Combat Impunity, Diane Orentlicher, UN Doc. E/CN.4/2005/102, 18 February 2005.

¹⁶³ UN Commission on Human Rights, Report of the independent expert to update the Set of Principles to combat impunity, 18 February 2005, E/CN.4/2005/102, available at: <http://www.refworld.org/docid/42d66e7a0.html> [last viewed on 28 Mar 2017].

¹⁶⁴ IACtHR, *Mayagna Awas Tingi Community v. Nicaragua*, Judgment of 31 August 2001 (Merits, Reparations and Costs).

¹⁶⁵ Id.

¹⁶⁶ IACtHR, *The ‘Street-Children’ (Villagra’n-Morales et al.) v. Guatemala*, Judgment of 26 May 2001 (Reparations and Costs).

¹⁶⁷ Id.

measure was raising to in order to avoid the repetition of similar criminal activities acts and keeping the memory of the victims alive.¹⁶⁸

Similarly, in *Moiwana v. Suriname*, the survivors of a massacre conducted during a civil war claimed that their rights had been violated.¹⁶⁹ The court could not rule upon the massacre itself because it occurred before Suriname became a party to the American Convention on Human Rights, however it adequately addressed violations that continued after the said convention came into effect in the jurisdiction of Suriname.¹⁷⁰ The court ruled that Suriname had violated Articles 5, 8, 21, 22, and 25 of the American Convention on Human Rights. It went on to add that the collective component of reparations must be used in a manner that it supplements the individual compensation, etc. given to the members of the indigenous N'djuka because the victims of the case were members of that tribe alone.¹⁷¹

The Court granted a wide range of collective reparation reliefs to the aggrieved community including the establishment of a special fund for development and health, adequate housing programmes, educational programmes, proper investigation into the crimes committed, a public apology and the construction of a memorial commemorating the events of the past.¹⁷² Instead of viewing the matter as one of individual reparations to be awarded to a multiplicity of individual victims, the court took into consideration the common cultural heritage and bond within the community and therefore awarded reparations of a collective nature rather than directing the payment of multiple damages to individuals.

Treaties

Treaty law provides for reparation, however for the most part, these are of an individual nature only and collective reparation doesn't find much mention. Even if it is provided for, reparations of a collective nature are, at best, vaguely accommodated in international treaties. For instance, Article 2 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women provides for the submission of complaints by both individuals and groups of individuals with regard to grievances addressed to the committed formed under the provisions of Article 17 of the Optional Protocol.¹⁷³

The European Convention on Human Rights provides the Court with the power to hear applications from any individuals, non-governmental organisations,

¹⁶⁸ Id.

¹⁶⁹ IACtHR, *Moiwana Community v. Suriname*, Judgment of 15 June 2005 (Preliminary Objections, Merits, Reparations and Costs).

¹⁷⁰ Id.

¹⁷¹ Id.

¹⁷² Id.

¹⁷³ Article 2 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, General Assembly Res. 54/4, 15 October 1999.

groups of individuals, etc.¹⁷⁴ It therefore recognises both the right of the individual and the collective group as a whole to seek remedy for legal wrongs done to them. The American Convention on Human Rights, under the provisions of its Article 44, confers the right to both individuals and groups of individuals. They may “lodge petitions with the Commission containing denunciations or complaints of violations of the Convention by a State Party”.¹⁷⁵

The 1998 Rome Statute, which laid the foundation for the ICC, under Article 75, stipulates that *“The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and Rehabilitation”*.¹⁷⁶ The ICC Rules of Procedure and Evidence impart clarity in full measure to the question of distinguishing between individual and collective reparation when it provides,¹⁷⁷ under Rule 97 that *“the Court may award reparations on an individualised basis or, where it deems it appropriate, on a collective basis or both”*. The expression used in Rule 97 is ‘on a collective basis’, this has been given two interpretations, one that it enables the claimants to make claims of reparations to be awarded to the collective or the group, on the other hand it has also been termed as a procedure enabling the application of mass claims by individually aggrieved parties.¹⁷⁸

The interpretation that the ICC Statute enables collective reparation is giving further credence by the provisions of Rule 98 which states, *“The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of victims and the scope, forms and modalities of reparations makes a collective award more appropriate”*.¹⁷⁹ While the structure of Rules 97 and 98 definitely recognise the right to reparation, it remains debated whether they provide recognition to claims for collective reparation. However, in light of the abovementioned interpretation, it seems reasonably evident to the rational observer that these do, at least implicitly, enable collective reparations.

IHL treaties have sufficient provisions for reparations. For instance, Article 3 of the 1907 IV Hague Convention, and Article 91 of the Additional Protocol I to the Geneva Conventions¹⁸⁰ state, *“A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”* The official ICRC Commentary¹⁸¹ elaborates upon the

¹⁷⁴ European Convention on Human Rights, Art. 34.

¹⁷⁵ American Convention on Human Rights, Art. 44.

¹⁷⁶ Rome Statute of the ICC, Art. 75(1).

¹⁷⁷ Rules of Procedure and Evidence of the ICC, Adopted by the Assembly of States Parties, New York, 3–10 September 2002, Official Records ICC-ASP/1/3.

¹⁷⁸ Sarfaraz Ahmed Khan, Rights of the Victims: Reparation by International Criminal Court, APH Publishing, New Delhi, 2007.

¹⁷⁹ Rules of Procedure and Evidence of the ICC, Rule 98(3).

¹⁸⁰ E-C. Gillard, ‘Reparation for Violations of International Humanitarian Law’, International Review of the Red Cross, 85(851) (2003), 529–53.

¹⁸¹ 1977 Protocol Additional I to the Geneva Conventions, ICRC Commentary to Article 91.

interpretation to be given to this Article in some detail. It states that the Article is to be construed in the sense that it will come to be used in the inter-state framework and that this is the presumption to be made while interpreting the Article. However, this commentary sheds no light on the reparation to be made by non-state entities, particularly in relation to non-international armed conflict. This is illustrative of the gap in IHL when it comes to non-international armed conflict. This lacuna has ensured that non-state armed groups effectively have some degree of insulation from making reparations, if not because of anything else, because of the lack of clarity in the law.

It is imperative to note that the Commentary explains that state responsibility are also incurred by omission, and not just acts of commission, in the event of due diligence not being taken to prevent atrocities and, in cases where once such criminal acts have occurred, sufficient measures have not been taken to repress such activities.¹⁸² Likewise, Article 91 particularly provides for coverage of all the provisions of the Geneva Conventions. As mentioned above, there is a gap in the law when it comes to non-international armed conflict, and as a result, the corresponding provision to Article 91 in Additional Protocol II is non-existent. Moreover, the ICRC commentary doesn't explain convincingly why the term compensation, which is generally perceived to be a reference to only monetary forms of redress, is used and not reparation. However, the ICRC commentary does state that in this context, the term compensation encompasses the general obligation to ensure that restitution is made, and it therefore isn't limited to financial compensation.

There has been much debate over the question of whether Article 91 only confers a right only to States to claim compensation, or if it includes individual or group-collective claimants,¹⁸³ a number of different eminent legal scholars, including Kalshoven and Greenwood, have sought to interpret Article 91 in a way that it has a wider scope and ambit so as to not be limited to state parties. These arguments have often been made on the basis of the *travaux préparatoires* of the 1907 Hague Convention IV, which indicate that the provision was not intended to be confined to claims between states, but was to be conceived as creating a direct right to compensation for individuals.¹⁸⁴

The origin of reparations in human rights law lies in the 1948 UDHR. Article 8 of the UDHR states, *"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."* The International Covenant on Civil and Political Rights (ICCPR) similarly provides that the obligation to make reparations is a legally binding norm in Article 2(3a): *"any person whose rights or freedoms as herein recognised are violated shall have an effective remedy"*. Subsequently, Article 9(5)

¹⁸² Id.

¹⁸³ Provost, *International Human Rights and Humanitarian Law*, p. 47–56.

¹⁸⁴ Id.

and Article 14(6) provide the right to compensation in the event of an unlawful arrest, unlawful detention and unlawful conviction. The United Nations Human Rights Committee has, in its decisions, given substantial importance to the concept of 'effective remedy' in cases arising out of a wide variety of petitions.

The adoption of the 2004 General Comment No. 31 by the UN Human Rights Committee regarding 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', followed the ILC's 2001 'Draft Articles on State Responsibility' and the draft Basic Principles on the Right to Reparation for Victims. General Comment No. 31 explicitly demonstrates the nexus between the terms 'remedy' and 'reparation'. Article 2, paragraph 3 requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.¹⁸⁵

Similarly, provisions in many other treaties, for instance Article 14 of the Convention against Torture (CAT), Article 39 of the Convention of the Rights of the Child (CRC), Article 6 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 24(4) of the International Convention for the Protection of All Persons from Enforced Disappearance (CPPED),¹⁸⁶ reaffirm the right to reparation in many of its manifestations. The CPPED has a very comprehensive definition of reparations in its Article 24(4), (5) which states: "*Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.*" The right to obtain reparation covers material and moral damages and, where appropriate, other forms of reparation, such as: (a) restitution, (b) rehabilitation, (c) satisfaction, including restoration of dignity and reputation; (d) guarantees of non-repetition.

Reparations: Conflict?

The two forms of reparations, individual and collective, may not always go hand-in-hand. In fact, collective reparations are awarded in favour of the rights of a group while individual reparations are, as the is evident, given in favour of the rights of an individual. There have been several instances where group rights

¹⁸⁵ UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: <http://www.refworld.org/docid/478b26ae2.html> [last viewed on 25 Mar 2017].

¹⁸⁶ International Convention for the Protection of All Persons from Enforced Disappearance, Article 24(4).

and individual rights have come into conflict.¹⁸⁷ Giving precedence to group rights may result in the encroachment of the rights of the individual and giving precedence to individual rights may result in the group as a whole, being left alienated and denied. The only way to deal with such conflicts is through a process of consultative deliberation by the Courts before the final award giving reparations. The rights and interests of all in question must be dealt with in an even-handed fashion, without prejudice to the rights of society as a whole.

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¹⁸⁷ Allen Buchanan, 'The role of collective rights in the theory of indigenous peoples' rights', in Transnational Law and Contemporary Problems, Vol. 3, 1993.

Chapter 5: War Crimes, Non-International Armed Conflict and Internally Displaced People

War Crimes, Crimes Against Humanity and Genocide

After the end of the Second World War, the allies entered into two agreements. These were the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement) and Charter of the International Military Tribunal (Nuremberg Charter).¹⁸⁸

When the Nuremberg Trials started, the accused, all Nazi Party members who actively participated in the Nazi Regime's activities in various capacities, were charged on four counts¹⁸⁹. These were:-

- a. Conspiracy to commit aggression.
- b. Commission of aggression.
- c. Crimes in the conduct of warfare.
- d. Crimes against humanity.

Not all were convicted, some were acquitted¹⁹⁰ and some were convicted on some charges while acquitted on others. At the same time, a number of people were convicted for all four, including Hitler's right-hand man Hermann Wilhelm Göring.

The Nuremberg Trials showed to the world that perpetrators of heinous war crimes, no matter how powerful they are, would be brought to justice. The first formal codification of international crimes, some of which had been long recognised as forming a part of customary international law, occurred in the Charter of the International Military Tribunal (Nuremberg). Since Nuremberg, these definitions have undergone several changes as a consequence of the changing situation in the international scene with regard to the law of armed conflict. The law knows no social status or political or economic position; it only evaluates on the basis of facts and is equally applicable to all. This fundamental precept is the lynchpin upon which trials for war crimes, crimes against humanity and genocide are conducted.

After the Nuremberg charter, the most important instrument regarding the prosecution of international criminals is the Rome Statute. The Rome Statute has divided the well-defined categories among the international crimes into three broad segments.

¹⁸⁸ Agreement for the Prosecution and Punishment of the Major criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945.

¹⁸⁹ The Nuremberg Trials, United States Holocaust Memorial Museum, <https://www.ushmm.org/outreach/en/article.php?ModuleId=10007722> (last visited Mar 12, 2017).

¹⁹⁰ Id.

The three main categories of crimes under international law are each defined in the Rome Statute of the ICC.¹⁹¹ These are:-

- a. War Crimes.
- b. Genocide.
- c. Crimes against Humanity.

In what follows, the details of the constituents of these three categories will be discussed in greater depth.

War Crimes

The Nuremberg Charter had defined war crimes as *"violations of the laws or customs of war including murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity"*.¹⁹²

The Rome Statute gives the following definition of war crimes, it is quite extensive and covers most of the possibilities and it is applied to persons protected under the Geneva Conventions. The following acts¹⁹³ are covered:-

- a. Willful killing;
- b. Torture or inhuman treatment, including biological experiments;
- c. Willfully causing great suffering, or serious injury to body or health;
- d. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- e. Compelling a prisoner of war or other protected person to serve in the forces of a hostile power;
- f. Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- g. Unlawful deportation or transfer or unlawful confinement;
- h. Taking of hostages.

The contracting parties are to arrest, prosecute or extradite those individuals who commit grave offences under the definition of war crimes as per the Rome Statute. Additionally, war crimes also include the following:-

- a. Any act falling under the category listed in the Rome Statute and thereby constituting a serious violation of the law of armed conflict, of these, there are twenty-six mentioned heads in the Statute under which any such act could fall.¹⁹⁴

¹⁹¹ Rome Statute of the International Criminal Court, opened for signature 17 July 1998 [2002] ATS 15 (entered into force 1 July 2002)

¹⁹² Nuremberg Charter, Art 6(b).

¹⁹³ Rome Statute, Art 8(2)(a).

¹⁹⁴ Rome Statute, Art 8(2)(b).

- b. Serious violations of Common Article 3, against any of the individuals who are not taking an active part in the armed conflict, these violations include:
- i. Cruelty, mutilation of corpses, torture of prisoners, murder or any other form of violence of the physical person of the person under the power of such perpetrator of violence.
 - ii. Humiliating, tormenting, outraging the personal dignity and honour of the captive person or person not taking active part in the armed conflict and treating them in a degrading manner.
 - iii. Holding such people hostage and keeping them for the purpose of use as human shields.
 - iv. Delivering and executing people on the basis of sentences ordered to be carried out without due process of law being followed in a regular court of law and without the basic principles of justice being adhered to by the authorities conducting the trial.¹⁹⁵

Any individual who commits an offence under any of the abovementioned heads is therefore, a war criminal. This definition of war crimes has, however, come in for much criticism because of a lack of express mention of weapons such as nuclear warheads.¹⁹⁶ However, given the political sensitivities of such an inclusion, it was prudent on the part of the drafters to stay away from that topic, so as to ensure more countries become parties to the statute.

Genocide

Genocide is defined in the Rome Statute as a specific act "*committed with intent to destroy, in whole or in part, a national, ethnical, religious or racial group, as such*".¹⁹⁷ The following acts amount to genocide when committed intentionally:-

- a. Assaulting on the life or person of members of a group.
- b. Inflicting such injuries upon the members of a group that bring either bodily or mental harm of a grave variety.
- c. Creating such material conditions and situations of life, with the specific malicious intention to do so, whereby the destruction of the group in question becomes either a likelihood or a possibility, either in part or as a whole.
- d. The use of forcible contraceptive measures or similar techniques that deliberately seek to prevent the women of the group from giving birth to new members of the group.
- e. Using measures ensuring that the children of the group are moved elsewhere and raised as members of another group so as to ensure that the identity of the former group is not preserved into the future.

¹⁹⁵ Rome Statute, Art 8(2)(b).

¹⁹⁶ Timothy McCormack and Sue Robertson, 'Jurisdictional Aspects of the Rome Statute for the New International Criminal Court (1999)' 23 Melbourne University Law Review.

¹⁹⁷ Rome Statute, Art 6.

The definition of genocide in the Rome Statute is similar to the definition provided in the Genocide Convention.¹⁹⁸ The two essential components are therefore the criminal intent to commit the act and the fact that the targeted are all being victimised by virtue of their common membership in a group. These can be explained as follows:-

a. **Intention:** When there is no documentary proof or any evidence of an explicitly direct and coherent nature, then the circumstances can prove to be helpful, as was held in a leading case on the matter, a general situation with regard to the repeated, persistent targeting of a group on a systematic basis just because of the targeted individuals belonged to the group coupled with the scale of the violence and the quantum of damage inflicted is sufficient to prove the intention of an accused towards committing the crime of genocide.¹⁹⁹ A pre-conceived plan and apparent facts on the ground demonstrating the existence of such a plan would be sufficient evidence of genocidal intent.

b. **Group:** Mere intention is not enough and it must be demonstrated that the victims were chosen specifically because they were, by virtue of birth, choice or any other reason, members of a group that the perpetrators intended to destroy. The Yugoslavia tribunal ruled, that for intention of group-targeting to be determined, it is sufficient evidence if it is established that the targeting was done specifically because the said individuals belong to a particular group and to establish this, it is sufficient to be shown that the targeting individuals initiated and carried out the targeting while knowing that all targeted people belong to a specific and distinct group.²⁰⁰ It is the group, as such, that must be the target of genocide and not one or several individuals.²⁰¹ Hence, the same number of people targeted severally would not be amounting to genocide. However, when targeted jointly due to their membership in such a group, the charge of genocide sticks to the accused.

The one major and significant drawback of this definition is that it does not equally protect all human groups as "Its application is confined to national, ethnical, racial or religious groups".²⁰² Therefore, the Rome Statute does not protect from genocide against political²⁰³ or social groups.

¹⁹⁸ Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948 (entered into force 12 January 1951).

¹⁹⁹ Prosecutor v Jelisić, Case No. IT-95-10 (Appeals Chamber), 5 July 2001.

²⁰⁰ Prosecutor v. Krstić, Case No. IT-98-33 (Trial Chamber), 2 August 2001.

²⁰¹ Id.

²⁰² Prosecutor v. Krstić, Case No. IT-98-33 (Trial Chamber), 2 August 2001.

²⁰³ Jelisić Case, refer to note 11.

Crimes Against Humanity

Crimes against humanity are defined in the Rome Statute as any of the following acts *"when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack"*²⁰⁴:-

- a. Murder.
- b. Extermination.
- c. Enslavement.
- d. Deportation or forcible transfer of population.
- e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.
- f. Torture.
- g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity.
- h. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.
- i. Enforced disappearance of persons.
- j. The crime of apartheid.
- k. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Sexual violence is included in the list of crimes against humanity and the Rwanda Tribunal has delivered an important verdict on the inclusion of rape as a crime against humanity in the Akayesu case.²⁰⁵ The Court held that rape is nothing short of an act of aggression because the crime is not to be viewed as made up of its parts, i.e. the physical act of forced sexual intercourse, but rather it must be viewed as the sum of its parts and it is in this context that rape can be understood. It is an act of wanton and unjustified aggression, and used for the purpose of intimidating the victim, degrading her sense of self-worth, punishing her for belonging to a certain group and humiliating her individuality and outraging her basic human dignity, it therefore is not different to torture. Rape is a physical invasion of a sexual variety and an element of coercion is inherent to such a physical act.

War Crimes, Genocide and Crimes Against Humanity are therefore, downright criminal acts which have received attention in International Law, both in the form of the Nuremberg Charter and then in the form of the Rome Statute. Additionally, the charters of the individual tribunals formed after Nuremberg but

²⁰⁴ Rome Statute, Article 7(1).

²⁰⁵ Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Trial Chamber), 2 September 1998.

before the Rome Statute came into force also have adequate provisions to deal with these crimes.²⁰⁶

In spite of the legal framework being in place, crimes against humanity, war crimes, and even genocide continue to take place in our world. The need is for a strong implementation system with the international community taking the lead in ensuring that all states become parties to the Rome Statute.

Non-International Armed Conflict

Let us now turn our focus on to the issue of Non-International Armed Conflict. The fundamental law governing non-international armed conflict is the Common Article 3 of all four Geneva Conventions. However, in addition to it and complementing it, there also exists the Additional Protocol (II).²⁰⁷

Common Article 3 and non-International Armed Conflicts

Article 3 is common to the Geneva Conventions of 1949,²⁰⁸ it is 'bound to apply as a minimum'²⁰⁹ to all non-international armed conflicts. It has often been called a mini-Geneva Convention as it includes the essence of the protection extended to victims by the Conventions in a concise form. The drafters had thought that this Article would apply only to a small number of limited non-international armed conflicts around the world. Little did they know that by the turn of the millennium, non-international armed conflicts had far outstripped international ones by sheer weight of numbers. Since this Article is applicable to all conflicts of the non-international variety, it is equally applicable to situations where government-backed forces clash with non-government ones, or where two non-government forces clash against each other, or factional classes within government forces.

The Article stipulates the humane conduct, without discrimination, while dealing with all who do not actively participate in the hostilities, including members of armed forces (regular or otherwise) who "have laid down their arms" or are *hors de combat* as a consequence of "sickness, wounds, detention, or any other cause". Unlike the provisions for international armed conflict, Article 3 lays down the bare minimum 'humane treatment' standard and doesn't explicitly include terms

²⁰⁶ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994.

²⁰⁷ International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

²⁰⁸ Treaties, States parties, and Commentaries - Geneva Convention (III) on Prisoners of War, 1949 - 3 - Conflicts not of an international character, Treaties, States parties, and Commentaries - Geneva Convention (III) on Prisoners of War, 1949 - 3 - Conflicts not of an international character, <https://ihl-databases.icrc.org/ihl/WebART/375-590006> (last visited Mar 10, 2017).

²⁰⁹ Frits Kalshoven & Liesbeth Zegveld, Constraints on the waging of war an introduction to international humanitarian law (2014).

such as protection, respect or immunity from prosecution for participation in hostilities. It does however require a fair trial to be given. No procedure is laid down for the registration, verification of status, etc. of the injured and hospital personnel. The Article merely provides for the collection and taking care of the wounded and sick.

An issue with regard to implementation is that most of the participants in non-international armed conflicts, be it the Hezbollah in Lebanon, the Houthis in Yemen, the Taliban in Pakistan or the Maoists in India, are not signatories to the conventions. This means that they can claim to not be bound by these provisions and can resort to any kind of wanton impunity as they please. However, officially, many opposition groups say they are following the law of armed conflict and respect the same. Another aspect of the same problem is that governments often do not wish to recognise insurgents as an official 'party to the conflict', or even as a separate entity. They may therefore wish to avoid any statement officially acknowledging that Article 3 is applicable, for fear that this would be read as recognition of the insurgents as an adverse party.²¹⁰

However, Sub-clause (4) of the Article does attempt to assuage such concerns by rendering no legitimacy to the claims of the respective parties, be they state or non-state.

Additional Protocol II

Unlike its widely applied and cited twin, Additional Protocol II, has only 28 articles and many of its provisions are identical to what is already mentioned in Additional Protocol I.

Protocol II deals with non-international armed conflict and, as has been provided in its first article,²¹¹ "develops and supplements Article 3 common to the Conventions of 1949".

The Preamble to the protocol declares that the humanitarian principles enshrined in Article 3 constitute the foundation of respect for the human person in cases of armed conflict not of an international character and international instruments relating to human rights offer a basic protection to the human person. The Preamble goes on to underscore, "*The need to ensure a better protection for the victims' of internal armed conflicts.*" The preamble itself betrays the fact that a proper and complete diplomatic consensus was not reached on this subject between states due to political issues the newly independent, decolonised states, facing armed insurrections internally had with giving a larger scope of application to the Protocol. It therefore says, "*In cases not covered by the*

²¹⁰ Frits Kalshoven & Liesbeth Zegveld, Constraints on the waging of war an introduction to international humanitarian law (2014).

²¹¹ International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 1, 8 June 1977, 1125 UNTS 609.

law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience,” this is an example of the Martens clause.²¹²

Unlike Common Article 3, Protocol II is slightly more limited in its applicability. Article 1(1) of the Protocol define the material field of its application to all internal armed conflicts which take place within the territory of a state party when it is, *“Between the armed forces of the state and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this protocol.”*

Article 1(2), however, provides that the Protocol does not apply to in minor incidents such as rioting, sporadic disturbances of an internal nature, law and order issues of a nature that don’t meet the intensity threshold to constitute an armed conflict within the ambit of the Geneva conventions or its additional protocols. The drafters, however, failed to envisage a situation where the government in a state would completely collapse and fighting would be relegated to conflicts between different groups that jostle for power and control over a piece of land or territory. This has been the case in Somalia²¹³ through out the latter part of the 20th century, in particular the last decade.

The Protocol has a very wide coverage when it comes to the people it protects. The ‘personal field of application’²¹⁴ includes “all persons affected by an armed conflict as defined in Article 1”. It also bars discrimination on basis of religion, race, sex, etc. All people who have ceased to take a part in hostilities, “whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices”. They shall moreover “in all circumstances be treated humanely without any adverse distinction”.²¹⁵

In addition to the acts already prohibited by Article 3, the Additional Protocol II lays down some of its own prohibited acts. These include²¹⁶:-

- a. Acts of Terrorism.
- b. Outrages upon personal dignity.
- c. Rape, enforced prostitution and any form of indecent assault.
- d. Slavery and slave trade.
- e. Corporal punishment.
- f. Threat to commit any of the foregoing acts.

²¹² Helmut Strebel, Martens' Clause, Use of Force · War and Neutrality Peace Treaties (A–M) 252–253, 252-253 (1982).

²¹³ Boudewijn R. A. Bouckaert, Anarchy, State and Somalia, Internationalisierung des Rechts und seine ökonomische Analyse 707–719, 707-719 (2008).

²¹⁴ International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 2(1), 8 June 1977, 1125 UNTS 609.

²¹⁵ Id. Art 4(1).

²¹⁶ Id. Article 4(2).

The Additional Protocol II, therefore, elaborates and expounds upon the general protection already given in Article 3.

Internally Displaced People

Internally Displaced People (IDPs) are among the most vulnerable classes of people in the world. They are to non-international and internal armed conflict, what refugees are to international armed conflict. Although, there may be both IDPs and refugees as a result of both international and non-international armed conflict. IDPs are like refugees, the only difference while the displacement of refugees from their homes has forced them to seek refuge elsewhere, IDPs remain within their country of origin but relocate to a safer place within that country.²¹⁷ An example of this is the Kashmiri Pandit community, which fled to other parts of India in the aftermath of the commencement of militancy in the Kashmir valley.²¹⁸

It is estimated that over 27 million people were displaced worldwide in 2010,²¹⁹ many of them as a result of non-international armed conflicts. A 2009 ICRC survey that interviewed people driven from their homes by a number of conflicts around the world revealed the staggering scale of displacement – more than half of all people affected by armed hostilities are forced to flee²²⁰. In the past few years, more displacements have occurred because of internal armed conflict rather than international armed conflict. Today, over half of the world's IDPs are to be found in five countries affected by such strife: Sudan, Colombia, Iraq, the Democratic Republic of the Congo and Somalia.²²¹

The majority of IDPs are victims of armed conflict, and it is therefore important to look at this pressing social issue to appreciate the importance for the continued strengthening of the law of armed conflict.

Issues faced by IDPs

The following are some of the issues that are faced by IDPs in today's world:-

- a. Displacement of Families: Additional Protocol II guarantees the freedom against forced dislocation. No person can be compelled without justification to leave one's place of residence.²²² However, unfortunately, the violation of this provision by armed combatants engaged in hostilities

²¹⁷ Jim Ryan & David Childs, *Refugees and Internally Displaced People*, Conflict and Catastrophe Medicine 49–53, 49-53 (2002).

²¹⁸ Shailendra Kumar, *Internally Displaced People and Internal Conflict in India*, SSRN Electronic Journal.

²¹⁹ Our world. Views from the field, IPSOS/ICRC, 2009.

²²⁰ Internal Displacement in Armed Conflict – Facing up to the Challenges, ICRC Report, November 2009.

²²¹ 2016 Global Report on Internal Displacement (GRID 2016,, <http://www.bing.com/cr?IG=DE3341B14D414A4BBCE5B0E42E21D7EC&CID=04E8FA8DBB676615263BF0D8BA566782&rd=1&h=gsBbhRgGLMFSAJO7BHUFmnX2JAYhKOLoo4XmuvWxMq4&v=1&r=http%3a%2f%2freliefweb.int%2freport%2fworld%2f2016-global-report-internal-displacement-grid-2016&p=DevEx,5034.1> (last visited Mar 14, 2017).

²²² Additional Protocol II, Article 17.

has made people leave their homes and in many cases, become separated from their families.

b. Return and Resettlement: The fear of facing violence on return, the inadequacy of money to start a new life are all impediments in the IDP' road to eventually returning to their homes or being resettled.

c. Inadequate Documentation: Displaced persons often do not have or have lost certain papers. This can lead to all sorts of problems because they cannot prove their identity or claim property.

These are just a fraction of the issues faced by IDPs, the provisions of IHL are clearly inadequate in this regard. The ICRC and the UN must look into enhancing the legal protection available to IDPs, so that they have the freedom of movement, the financial rights to get compensation and thereby afford resettlement and procedural laws should be made flexible for IDPs to ensure that they don't suffer because of inadequate documentation.

Chapter 6: International Mechanisms and Protection of the Natural Environment

Strengthening with time

The edifice on which the structure of international law governing armed conflict is built is the international arena. The efficacy of any law must be judged by the manner in which it has been implemented and enforced and so in this case, it is the international mechanisms for the implementation of the international law on armed conflict which is vital to ensure that the law isn't violated.

Over the past century, there have been numerous instances of the laws established with regard to armed conflict, both international and non-international being flouted and violated with impunity. There was a high incidence of extremely violent and destructive armed conflict, be it in the erstwhile Yugoslavia,²²³ Ethiopia²²⁴ or Rwanda.²²⁵ However, the course of history had taken a positive turn with the progression of time. While little was done in the early years of Hitler and Mussolini to prevent their rampage across Europe, once the justice of Nuremberg established certain principles; which could not be allowed to be circumvented, the consensus against the violation of rights of victims of armed conflict grew.

In the early part of the second half of the 20th century, this consensus only manifested itself in the form of protest movements, intellectual condemnation, documentary films, and so on, as was the case of the 1971 Genocide²²⁶ in Bangladesh, the war crimes in Cambodia²²⁷ and Indonesia.²²⁸ By the end of the 20th century, however, the situation began to change and tribunals to bring the perpetrators of atrocities to justice were established in many cases such as that of Yugoslavia and Rwanda.

The United Nations Charter²²⁹ promotes respect for human rights and fundamental freedoms without discrimination and addressing and preventing armed conflict has been one of the principle challenges faced by the United Nations since its inception. The United Nations has been playing an active role in the enforcement of the law in this regard the UN Secretariat and a number of specialised agencies have used the bodies of law available, viz. IHRL and IHL to

²²³ Bill Frelick, *Yugoslavia torn asunder: lessons for protecting refugees from civil war*, U.S. Committee for Refugees, 1992, p. 65.

²²⁴ Sean D. Murphy, Won Kidane & Thomas R. Snider, *Litigating war: arbitration of civil injury by the Eritrea-Ethiopia Claims Commission*, Oxford University Press, 2013, p.39.

²²⁵ Christina Fisanick, *The Rwanda genocide*, Greenhaven Press, 2004, p.21.

²²⁶ Mohammad Gholam Rabbani & Kabira Šahariyāra, *Necessity and challenges to the trial of crimes against humanity, genocide & war crimes of 1971 in Bangladesh*, Dhaka: Forum For Secular Bangladesh and Trial of War Criminals, 2012, p. 84.

²²⁷ Loung Ung, *First they killed my father: a daughter of Cambodia remembers*, HarperCollins, 2000, p.67.

²²⁸ Andre Vltchek & Noam Chomsky, *Indonesia archipelago of fear*, Pluto Press, 2012, p. 45.

²²⁹ Article 1.3 of the UN Charter.

develop the objectives and activities necessary to enhance capability, methodology and practice in this field. Within the UN, the role of the General Assembly, Human Rights Council and the Security Council have been of particular importance in this regard in the context of conducting analysis, investigations, monitoring procedures, drafting resolutions, and guiding reports by the specialised agencies and the UN Secretariat. This has helped in working on the protection of various types of vulnerable people ranging from civilians, woman and children and Internally Displaced People (IDPs).

It has been long argued that the work of the UN was insufficient, and it was criticised on the grounds that its commitment to the development of the law of armed conflict was mainly rhetoric and that the General Assembly's resolutions were an exercise in vain without proper implementation available at the ground level.²³⁰ Transformations in the political landscape progressively led to more active UN participation. This was movement was led by the United Nations Security Council.²³¹ Acting under its Charter mandate, the UN Security Council was the first to speak out against situations of gross violations of human rights and humanitarian law. More importantly, it made little distinction between international and non-international armed conflict. However, there was a lack of clarity and the rules of humanitarian law were not dealt with in a specific manner and only general comments about civilian protection being included.²³²

In addition to making statements and passing resolutions regarding situations that may arise from time to time, the Security Council occasionally holds general debates on particular issues, based on reports by the Secretary-General. Thus, the Council has repeatedly held debates on the fate of the civilian population in armed conflicts. In addition to adopting resolutions and holding thematic debates, the Security Council has also developed a practice of more specific action. Thus, in the war between Iraq and Iran, in 1980-1988, the Secretary-General, on the instructions of the Council, repeatedly sent missions to the field to verify whether chemical weapons had been used, and the successive reports that confirmed these allegations each time led to sharp rebukes from the Council for such use which, unfortunately, were not enough to bring about a change in the policy of the accused party.²³³

The principle of individual criminal liability was used as the basis by the Security Council to establish the Yugoslavia and Rwanda tribunals; the same principle was extended to the case of the ICC, which was established as per the provisions

²³⁰ Frits Kalshoven & Liesbeth Zegveld, *Constraints on the waging of war an introduction to international humanitarian law* (2014).

²³¹ UN Security Council, Security Council resolution 259 (1968) [Middle East], 27 September 1968, S/RES/259 (1968), available at: <http://www.refworld.org/docid/3b00f20ec.html> [last viewed on 30 March 2017].

²³² UN Security Council, Security Council resolution 1493 (2003) [on extension of the mandate of the UN Organisation Mission in the Democratic Republic of the Congo (MONUC)], 28 July 2003, S/RES/1493 (2003), available at: <http://www.refworld.org/docid/3f45dbee0.html> [last viewed on 30 March 2017].

²³³ Frits Kalshoven & Liesbeth Zegveld, *Constraints on the waging of war an introduction to international humanitarian law* (2014).

of the 1998 Rome Statute. These Tribunals, including the ICC are inspired by the Nuremberg Trials and have been established to serve the following purposes²³⁴:-

- a. Bringing war criminals to justice.
- b. Encourage states to investigate crimes and bring offenders before their national courts.
- c. Contribute to the prevention of international crimes.
- d. Enhance international peace and security by promoting the rule of law in countries suffering from conflicts and war crimes.

The major criticism of these tribunals has been that they have only selectively targeted war criminals from the poorer, less developed countries while turning a blind eye to the war crimes by major powers such as the United States and Russia in their campaigns of military aggression on foreign territories over the years. Several African leaders have also alleged that there is a bias in these tribunals, in particular the ICC, against African leaders and they attribute this to racial prejudice.²³⁵ Such criticism however, needs to be taken with a pinch of salt as it is more often than not dictators and their backers trying to appeal to nationalist and racial sentiment to whip up hysteria and public support so as to protect them for prosecution for their crimes. Nationalism, as was famously said, is the “last refuge” of a certain kind of vile person.²³⁶ Another issue is the fact that even if individual war criminals are prosecuted and brought to justice, the policy of a state which is in contravention to the laws of armed conflict may still continue, this policy cannot be changed until and unless there is a broad based consensus within the international community against such policies and the same is actively pursued with the erring state.

After this introductory look into the mechanisms, this Chapter will now touch upon the various institutions that form a part of this mechanism in more detail and then proceed to looking at the environmental consequences of armed conflict.

Institutions

United Nations Security Council

As per the provisions of the Chapters 6 and 7 of the United Nations Charter, it is incumbent upon the comity of nations to take all necessary humanitarian, economic, diplomatic and other steps within the realm of peaceful action, to ensure that those who are faced with the prospect of a calamity of genocidal proportions or are being abused by war criminals and crimes against humanity, are adequately protected from these evils. It is for such action that Chapter 7 of

²³⁴ Id.

²³⁵ Simon Allison, African revolt threatens international criminal court's legitimacy *The Guardian* (2016), <https://www.theguardian.com/law/2016/oct/27/african-revolt-international-criminal-court-gambia> (last visited Mar 30, 2017).

²³⁶ The Samuel Johnson Sound Bite Page: Quotes on Patriotism, *The Samuel Johnson Sound Bite Page: Quotes on Patriotism*, <http://www.samueljohnson.com/patrioti.html> (last visited Mar 30, 2017).

the UN Charter has empowered the United Nations to take, on behalf of the member states, collective decisions for collective action, either in cooperation with regional organisations or regional states as deemed appropriate on a case-to-case level. Such action has to be the last resort when all other peaceful means have been exhausted and the authority of the State(s) in question is unable or unwilling to be exercised to prevent crimes against humanity, ethnic cleansing, genocide, war crimes, etc.²³⁷

The Security Council has a tradition of adopting resolutions in response to global situations that may arise on an emergency basis where international peace and security have been threatened by the commencement of armed conflict. These resolutions have frequently called upon all parties to respect the laws of armed conflict and treat civilians with all their rights under international law. For instance, in 1967, the UNSC resolved that the undividable and inalienable rights of all human beings must in all cases be respected even if there is a situation of armed conflict and the vicissitudes that accompany it are prevalent.²³⁸ The Security Council has also developed a tradition of mentioning human rights considerations in resolutions on situations pertaining to armed conflict. For instance, in the 1990s, it demanded all warring sides in the Civil War in the West African State of Sierra Leone to adhere to all relevant laws of armed conflict and foster respect for IHRL and IHL.²³⁹

Furthermore, in its resolution regarding the civil war in the Democratic Republic of the Congo, it reaffirmed the need for all warring sides to fulfill the obligations that they have in relation to the law of armed conflict to respect and uphold the principles of IHRL and IHL, and ensure that the civilians are not subjected to cruelty or unnecessary hardships.²⁴⁰ This was a clear and stern message to both the government militias and the opposition groups. The Security Council has also called upon all sides to similarly follow what they are obligated to follow under the law of armed conflict, with respect to the “War on Terror” being fought in different parts of Afghanistan.²⁴¹

The Security Council has on many instances denounced violations of IHL and IHRL in armed conflicts and demanded more accountability.²⁴² For example, it has denounced, justice to be brought to the victims of armed conflict in Somalia and for the perpetrators of war crimes and crimes against humanity or violators of any of the provisions of IHL or IHRL to be made to face justice.²⁴³ With regard to the situation in Darfur and the crimes being perpetrated by the regime of

²³⁷ UN General Assembly, 2005 *World Summit Outcome : resolution / adopted by the General Assembly*, 24 October 2005, Para 139, A/RES/60/1, available at: <http://www.refworld.org/docid/44168a910.html> (last viewed on 20 March 2017).

²³⁸ Refer to note 9

²³⁹ Resolution 1181 (1998).

²⁴⁰ Resolution 1493 (2003).

²⁴¹ Resolution 1746 (2007).

²⁴² Resolution 1019 (1995)

²⁴³ Resolution 1814 (2008).

President Omar al Bashir, the Security Council declared that Sudan has to bring about justice to the victims of armed conflict in Darfur and to bring to a conclusion, all activities that have seen the arbitrary use of the force of arms with impunity to wreck havoc in Darfur resulting in violations of the international law on armed conflict.²⁴⁴

The Security Council has, over the course of several years, established a practice of adopting recurring in spirit but varying in theme resolutions on the protection of specific categories of individuals in armed conflicts, such as children, civilians and women. For instance, in a resolution²⁴⁵, it called upon parties to adhere to, absolutely and unqualifiedly, all the obligations that rest upon them with regard to the laws of armed conflict and international refugee law. Furthermore, it has demanded that the participants in hostilities have to be in complete and absolute compliance with such obligations and duties, as may have been placed upon them by the provisions of the international law relating to armed conflict.

In all these instruments, the Security Council increasingly requires the United Nations to take action to implement and protect standards of both IHRL and IHL.²⁴⁶ Another resolution²⁴⁷ directed the Secretary General to establish a scrutinising and reporting mechanism on the rights of children affected by armed conflict. It deals with the following cases:-

- a. Assault on the life or person of a child resulting in death or grievous injury.
- b. Using children as weapons of war and soliciting their service in armed conflict.
- c. Militarily targeting structures of humanitarian and developmental importance, viz. hospitals and schools.
- d. Subjecting children to any form of sexual atrocity and abuse.
- e. Kidnapping.
- f. Depriving children of their right to receive aid and assistance of a humanitarian nature.

The role of this mechanism is to study these rights violations and make adequate recommendation to the Security Council in the form of reports on the situation of children in armed conflicts around the world. Unfortunately, a similar mechanism is yet to be put in place by the Security Council for crimes that affect women.

In another resolution²⁴⁸ it observed that a grave and significant threat to international peace is caused when there are violations of IHL in a reckless and

²⁴⁴ Resolution 1564 (2004).

²⁴⁵ Resolution 1265 (1999)

²⁴⁶ International Legal Protection of Human Rights in Armed Conflict, (2011).

²⁴⁷ Resolution 1612 (2005)

²⁴⁸ Resolution 1674 (2006).

flagrant manner spread across the world. In a subsequent resolution²⁴⁹ the Security Council went on to make an observation on situations where civilian populations and population centres have been the focus of military operations resulting in flagrant and reckless violations of the human rights of civilians, in complete contravention of the provisions of the international law on armed conflict, IHL and IHRL. This posed a threat to the safety of the world and the Security Council has stated several times that it is ready to take all such steps and adopt all means necessary to appropriately address these issues.

The Rome Statute states that the Security Council has the authority to exercise its Chapter VII powers from the UN Charter to refer matters relating to crimes against humanity, genocide, war crimes, etc. to the attention of the ICC. This is a major provision as it would mean the Security Council would harness its UN-derive legitimacy among the overwhelming majority of the world's countries to ensure that they are subjected to the ICC's justice, which otherwise would remain elusive because of several states having neither signed nor ratified the Rome Statute. Security Council referred to the Prosecutor the Sudan (Darfur) situation in a resolution²⁵⁰ in which it affirmed that justice and accountability were paramount to achieving an enduring peace and security in Sudan.

Whenever there is a war crime, a breach of peace or an act of aggression, it is clearly the role of the Security Council to undertake all its executive functions effectively to bring the perpetrators of international law breaches to justice and ensure that the rights of the victims of violence and aggression in armed conflict are adequately satisfied. The Security Council's coercive measures don't exist in thin air and it draws these from widespread agreement among states on an international and multilateral level. Besides, a timely intervention by the Security Council can be an effective process to ensure that all states follow their obligations under international law and human rights violations, crimes against humanity, genocide, and so on, are targeted on an international level without prejudice to the identity of the perpetrators or the victims.

Office of the Secretary General

The Secretary General of the United Nations is the public and individual face of the UN in the wider world. He therefore has a great degree of responsibility attached on his shoulders to bring to the fore violations of human rights and to raise the voice of the voiceless in furtherance of the cause of justice. He has, by virtue of his office, tremendous moral authority and the world listens to him when he speaks on an issue. It is also the role of the office of the Secretary General to present reports on situations in and arising out of armed conflicts around the world, which is done periodically, as per the prevalent situation in the world.

²⁴⁹ Resolution 1761 (2009).

²⁵⁰ Resolution 1593 (2005) .

In a 1969 report,²⁵¹ the Secretary General stated unequivocally that when it comes to the application of the United Nation's resolutions on human rights, there could be no fetters imposed along the line dividing armed conflict from peace time, therefore the UN human rights resolutions and provisions of human rights law are to apply both in times of peace and in armed conflict. In the same report, the Secretary General went on to add that the distinguishing line between a civilian person in authority and the soldiers or officers of an armed force does not apply to the application of the Charter of the United Nation on the activities of such people in relation to human rights. The fact that someone is under the occupation of a foreign power or living under the authority of the State of which he is a national is not relevant as the UN Charter continues to be applicable in both the cases.

The Secretary General further went on to shed light on the UDHR and its use of all-encompassing terminology such as “everyone” and “all” are entitled to certain basic human rights which are indivisible, inalienable and absolute, similarly how it uses “no one” to assert the negative right that every individual as against the invasive acts of other individuals or states. This use of all-encompassing terminology, in the opinion of the Secretary General in this report, amply illustrated the fact that the provisions of the UDHR are applicable in equal measure to both situations of war and situations of peace, without discrimination.

The role of the Secretary General with respect to the various mechanisms is to delve into the details of the law and the resolutions and conventions that make the laws. He is to report on the applicability and implementation of these provisions through these reports; this is a major mechanism for the law to constantly evolve to face evolving situations globally. Similar reports were prepared at many instances through the years, including in 1970,²⁵² 2005²⁵³ and so on. The role of the Secretary General has also been criticised for being ineffective and being a rubber stamp for the Security Council and the political and geo-strategic interests that the UNSC often falls prey to. In spite of his great moral authority, the repeated reports have so far not yielded any tangible results.

UN General Assembly

From the UDHR, the ICCPR to the ICESCR, the United Nations General Assembly (UNGA) has played a direct role in the creation of many instruments that have gone on to serve as the benchmarks and the citadels for the protection of human rights in the world. The General Assembly is the primary norm making body of the UN organisation. It has adopted a number of principles on the protection of

²⁵¹ UN General Assembly, *Respect for human rights in armed conflicts*, 20 December 1971, A/RES/2852, available at: <http://www.refworld.org/docid/3b00f1c010.html> [last viewed on 30 March 2017].

²⁵² UN Secretary General's report A/7720.

²⁵³ UN Secretary General's report A/8052.

groups that are especially vulnerable and are therefore accorded special protection.

The General Assembly has laid down guiding principles on matters such as the detention, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.²⁵⁴ It has passed a number of resolutions on the importance and the need to secure the guarantees of human rights being respected in armed conflicts. In one of its resolutions²⁵⁵ the UNGA elaborated upon the need to ensure that IHL isn't construed as the only law applicable to situations of armed conflict, and declared that other international instruments pertaining to the rights of the victims of armed conflict have equal merit in application.

The General Assembly has stressed upon the paramount nature of refugee camps, housings and hospital zones used by civilians have and that they should not be the targets of any kind of military attack. The civilians should not be victimised through mass transfers, assaults or acts of reprisal. It has stated the importance of providing international relief to civilian populations and that this is in conjunction with the UDHR, UN Charter and the treaties and conventions. The General Assembly has also sought to link the Millennium Development Goals with the respect for IHRL and IHL and has, in a resolution, called upon all states to respect the same as part of their millennium development commitments.²⁵⁶ Another resolution²⁵⁷ committed to establishing a system that could provide early warning to humanitarian crises with international collaboration to such states with inadequate means to establish such a system. This resolution only served to reiterate the commitment to address all forms of violence during armed conflict and to punish perpetrators of war crimes, genocides and protect the rights of the victims, the same resolution also called upon states to end incitement to such acts of violence, thereby not just condemning the crime but also the incitement to the commit the crime.

Although the General Assembly is not responsible for directly enforcing or carrying out the measures or implementing the principles it enshrines through its resolutions and declarations, it's job is like that of the legislature in domestic and municipal law. It creates norms, principles and standards and is fundamental for the effective protection of human rights, in general, and of the victims of armed conflict in particular. Furthermore, its resolutions are the

²⁵⁴ UN General Assembly, *Measures to be taken against Nazi, Fascist and neo-Fascist activities and all other forms of totalitarian ideologies and practices based on racial intolerance, hatred and terror : resolution / adopted by the General Assembly.*, 4 December 1986, A/RES/41/160, available at: <http://www.refworld.org/docid/3b00efff4b.html> [last viewed on 10 March 2017].

²⁵⁵ Resolution 2675 (XXV).

²⁵⁶ UN General Assembly, *United Nations Millennium Declaration, Resolution Adopted by the General Assembly*, 18 September 2000, A/RES/55/2.

²⁵⁷ UN General Assembly, *2005 World Summit Outcome : resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1.

manifestations of the States' *opinio iuris* on any principle of law and the fact that it is universally accepted adds credence to any assertion that such a principle laid down by the UN General Assembly, through the course of time, become part of customary international law and thereby binds even the most reluctant states to adhere to it.

Hence, the work of the UN General Assembly is extremely relevant and it is an important international mechanism to ensure that international law with respect to the victims of armed conflict is strengthened.

United Nations Human Rights Council

When the General Assembly adopted the resolution²⁵⁸ 60/251 to create the United Nations Human Rights Council (UNHRC), it gave the Council two fundamental responsibilities:-

- a. Promotion of universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.
- b. Addressing situations of violations of human rights, including gross and systematic violations, and make recommendations to resolve them.

Ever since its inception, the Council has therefore been at the forefront of researching the practical and legal doctrinal aspects of human rights around the world, including in situations of armed conflict. It has also been a leading advocate for the cause of human rights and has from time to time, impressed upon both the General Assembly and the Security Council to take strong measures to support human rights and protect victims of the abuse of power. The Human Rights Council has stated its resolve to take IHL and the international law governing armed conflict, including IHRL within its mandate and ambit, by declaring that "given the complementary and mutually interrelated nature of IHRL and IHL, the universal periodic review shall take into account applicable IHL."²⁵⁹

Even prior to the formation of the council, the matter of human rights in armed conflict was looked at by the human rights commission, the predecessor body, which studied the situation in Rwanda and adopted a resolution calling upon the parties to the hostilities to take such measures as needed to ensure that the respect for human rights, freedom and international law is re-established in Rwanda and condemned the genocide being perpetrated there, and most importantly, calling the parties to put an end to the violence.²⁶⁰ The Commission

²⁵⁸ UN General Assembly, *Human Rights Council : resolution / adopted by the General Assembly*, 3 April 2006, A/RES/60/251.

²⁵⁹ UN Human Rights Council, *Institution-building of the United Nations Human Rights Council*, 18 June 2007, A/HRC/RES/5/1.

²⁶⁰ UN Human Rights Council, *Resolution S-3/1: Human rights violations emanating from Israeli military incursions in the Occupied Palestinian Territory, including the recent one in northern Gaza and the assault on Beit Hanoun*, 15 November 2006, Resolution S-3/1.

also adopted several resolutions condemning the abuses of IHRL and IHL in the armed conflict in Uganda, Burundi, Afghanistan, Colombia and Palestine. Once the Human Rights Council came into existence, it too followed an active approach like its predecessor body. In a major resolution on the rights of civilian victims of armed conflict, it declared that civilians under belligerent occupation or otherwise victims of armed conflict should be provided with protection from any acts violating their inalienable universal human rights and that measures guaranteeing the same should be implemented along with measures to monitor the implementation of human rights insofar as these civilians are concerned.²⁶¹

All these bodies of the United Nations are the only international bodies, which are universally accepted, i.e. by members of the UN, unlike the ICC established by the Rome Statute, to which many states are not parties. Therefore these institutions form the bedrock, the backbone of international law with regard to the victims of armed conflict. They must therefore be continuously strengthened and enriched at all times in order to protect human rights around the world.

Protection of Natural Environment

Once facet of armed conflicts hitherto ignored, is the environmental damage caused as a result of the fighting. This damage in turn affects the ecosystem and the economies of primitive agricultural and proto-industrial societies, which are usually already reeling from the ill effects of armed conflict. A recent trend in international law has therefore emerged, focusing on the environment and the ecological consequences of armed conflict and the remedies to the damage caused to the environment by armed conflict.

The 'International Day for Preventing the Exploitation of the Environment in War and Armed Conflict' is commemorated every year on November 6.²⁶² This day is used to generate awareness about this pressing issue and to prevent the exploitation of the environment during armed conflict. The idea of conserving the environment and natural resources isn't a new one; in fact it has existed in some way, shape or form, for centuries, as ancient civilisations are known to have tabulated rules to preserve water during armed conflict.²⁶³

Ever since the industrial revolution in the early part of the 20th century, technology has constantly evolved to make war a more and more risky business, not just for combatants and civilians but also for the environment. The radiation-related ill effects of nuclear explosions are well known, and this has been documented from scientific studies conducted in areas where nuclear explosions

²⁶¹ UN Human Rights Council, Resolution 9/9: Protection of the human rights of civilians in armed conflict, available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_9.pdf (last viewed on 11 March 2017).

²⁶² UN Environment, Working to Protect the Environment in Armed Conflict Medium (2016), <https://medium.com/@UNEP/working-to-protect-the-environment-in-armed-conflict-ce9aff1aa479> (last visited Mar 30, 2017).

²⁶³ Id.

have taken place.²⁶⁴ From the use of agent orange and napalm in Vietnam, to the burning of Kuwait's oil fields by Saddam's retreating forces in the First Gulf War and then Iraq's own oil fields in the Second Gulf War, even conventional warfare has taken its toll on the environment.

The concern for the environmental consequences of war started soon after the 1972 Stockholm Declaration marked the birth of environmental law. Soon after, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD, 1976)²⁶⁵ came into force as a measure preempting the future development of techniques that could be used to modify the environment, and thereby cause irreparable damage to the natural environment in other states, with which the violating party might be engaged in hostilities. While the four main Geneva Conventions do not provide for any specific protection of the natural environment, this concern has been reflected in the subsequent additional protocol I of 1977. Additional Protocol I²⁶⁶ includes two provisions which are meant to exclusively and directly deal with the dangers that are posed to the ecological balance and the environment by the usage of modern weaponry that is becoming increasingly dangerous and deadly for the environment.

The provisions are as follows:-

- a. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.²⁶⁷
- b. Protection of the natural environment Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.²⁶⁸

Article 35 sets a general rule applicable to all warfare to protect the environment while the provisions of Article 55 deals specifically with the adverse damage that could be caused to civilian population centres in the event of an armed conflict-induced environmental calamity. Other provisions of Protocol I touch incidentally on protection of the environment in armed conflict. One article²⁶⁹

²⁶⁴ Catherine MacKenzie, *The Use of Nuclear Weapons and the Protection of the Environment during International Armed Conflict*. By E. KOPPE *Journal of Environmental Law* (2009), <https://academic.oup.com/jel/article-abstract/21/3/518/462199/The-Use-of-Nuclear-Weapons-and-the-Protection-of> (last visited Mar 20, 2017).

²⁶⁵ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) – UNODA, United Nations, <https://www.un.org/disarmament/geneva/enmod/> (last visited Mar 15, 2017).

²⁶⁶ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: <http://www.refworld.org/docid/3ae6b36b4.html> [accessed 30 March 2017].

²⁶⁷ Art 35.

²⁶⁸ Art 55.

²⁶⁹ Art 36.

makes it mandatory for states to consider the position in international law before acquiring or developing a new weapon system. Since international environmental law an essential part of the system of international law, this Article would also cover international environmental law. The 'General protection of civilian objects' article²⁷⁰ also has relevance with regard to the environment along with the provision for precautions to be taken before launching an attack.²⁷¹ Perhaps most pertinently, 'Protection of objects indispensable to the survival of the civilian population' article²⁷² prohibits the destruction of dams, etc. While another article²⁷³ protects irrigation works and agricultural facilities, thereby also having environmental consequences.

The use of chemical and biological weapons poses a grave threat to our natural environment.²⁷⁴ They relatively easier to develop compared to nuclear weapons because of the advancement in fields such as fertiliser technology in most developing countries, owing to the close relationship between the manufacture of chemical fertilisers and chemical weapons.²⁷⁵ One example of the devastating use of chemical weapons in human history is the employment of Agent Orange in Vietnam by the United States. The United States violated the guidelines that it set for the use of the chemical by over 25 times and it has been established that the effects of the use of Agent Orange continue to bedevil the lives of the common person in Vietnam to this day. The killing power of its contaminant dioxin has adversely affected the soil and destroyed the lives of many in Vietnam.²⁷⁶ More recently, in April 2017, an alleged chemical attack by Syrian government forces on opposition groups in northern Syria sparked global outrage and condemnation.²⁷⁷

International Law has sought to preempt the damage that can be caused by the use of these lethal weapon systems by prohibiting their usage. The first step in this direction was taken in 1925, when the Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare was adopted.²⁷⁸ Subsequently, the 1972 Biological Weapons Convention (BWC) and the 1993 Chemical Weapons Convention (1993) have sought to expand the scope of legal protection to cover this area

²⁷⁰ Art 52.

²⁷¹ Art 57.

²⁷² Art 56.

²⁷³ Art 54.

²⁷⁴ Terry Gander, Nuclear, biological and nuclear warfare (1987).

²⁷⁵ Brad Haire 2 | Apr 22, 2014, The man who pioneered modern fertilizer and chemical warfare southeast FarmPress (2014), <http://www.southeastfarmpress.com/blog/man-who-pioneered-modern-fertilizer-and-chemical-warfare> (last visited Apr 5, 2017).

²⁷⁶ Adrian Levy & Cathy Scott-Clark, A chemical weapon used by the US in the Vietnam war is still damaging new generations The Guardian (2003), <https://www.theguardian.com/world/2003/mar/29/usa.adrianlevy> (last visited Apr 5, 2017).

²⁷⁷ Syria chemical 'attack': Russia blames rebel weapons, BBC News (2017), <http://www.bbc.com/news/world-middle-east-39500319> (last visited Apr 5, 2017).

²⁷⁸ United Nations, Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, available at: <http://www.refworld.org/docid/4a54bc07d.html> (last viewed on 5 April 2017).

of warfare that has potentially catastrophic consequences for the environment.²⁷⁹

As is evident from the discussion above, the law relating to the protection of the environment during armed conflict is still in a nascent stage of development, particularly because the lack of any case law. However, given the ever-present dangers of climate change and environmental degradation, it is time for the world to establish the necessary structures to combat this danger that threatens our natural environment.

²⁷⁹ Edward M. Spiers, *A history of chemical and biological weapons*, Reaktion Books, 2010, p. 127.

Chapter 7: Conclusion

International law does, in its current state, provide a suitable legal framework for regulating the conduct of parties to armed conflict. The question that naturally follows is if the law is adequate to deal with the existing challenges then why has it been unable to prevent war crimes from taking place? Where does the system fall short?

Part of the answer to these questions is that the need in almost all cases is to improve the victims' situation with a stricter compliance with the legal framework already in existence, rather than the adoption of new rules and regulations, which would only serve to muddle the picture further. The rule of law and accountability, by its very nature is meant to impose fetters and constraints on the arbitrary and unjust exercise of executive power. The rule of law must play a similar role when it comes to armed conflicts.

If all parties concerned in an armed conflict showed regard for IHL, and IHRL, current humanitarian issues wouldn't exist and the world would not have known crises such as Syria, Yemen, South Sudan, Bosnia, etc. The millions of people displaced, thousands murdered in cold blood, maimed, raped, wouldn't have to go through the same fate. The need, therefore, is to build on the existing legal framework by enhancing implementation and enforcement of the law. It is here that international institutions such as the United Nations, the P5 countries, and aspiring Great Powers such as India should play a role to make sure that the implementation of the law takes place.

The existing rules are sufficient and there is no need to open the rules of long-established validity. The opening of the rulebook would, by and large, be a long drawn-out, time consuming and a vexatious exercise in futility. The basics of improving the situation lie in implementation alone and it is implementation of the law that is of paramount importance in today's day and age. We are at a day and age in human history, where the laws regulating conduct of humans, society and states on an international level are advanced due to their evolution over a period spanning over two centuries. Given the present level of human social, technological development, there is not much room for any ground-breaking legal innovations to strengthen protection for victims of armed conflict. It is institutions and the implementation of existing laws that are of particular significance.

Institutions must be strengthened. States must accord much greater respect to international institutions and their decisions. Cynical efforts such as those made by some countries to discredit bodies such as the ICC are unproductive, no matter what the merits of such arguments. The solution lay in greater participating and improving the institutions from the inside rather than levelling

unproductive allegations from the outside. Academia, both students and teachers, have an important role to play. It must stimulate discussion and provide the right theoretical and empirical perspective for society to make informed decisions through consensus. Equally important is the role of the ICRC, which as the guardian of IHL must continue and redouble its efforts.

Ultimately, human society as a whole must come together and decide that it will not tolerate the violation of human rights on any pretext, even those hark back to notions of historical grievances as a pretext to take revenge against a group in the name of nationalism must be condemned and brought to justice. As long as there accountability isn't introduced on an international level, innumerable victims of armed conflict will continue to suffer around the world.

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