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Case Material

LB-4035 HUMANITARIAN LAW AND REFUGEE LAW

Core course for IV TERM Semester Students

Cases selected and edited by

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HUMANITARIAN LAW AND REFUGEE LAW

COURSE CONTENT:

Course Objective:

This course is divided into two parts - Part A and Part B. Part A dealing with Humanitarian Law consists of five topics, its aim remains on the development of International Humanitarian law and protection of victims of armed conflict. Further, it discusses the rules on legality of warfare (jus ad bellum), but the main emphasis is on the rules that are to be followed when the armed conflict is going on (jus in bello). Apart from this, an analysis of the jurisprudence developed by the international criminal tribunal leading to the development of principles of IHL and its ability to cope up with upcoming challenges has been undertaken.

Part –B relating to Refugee law divided into five topics, delineates the conceptual dimensions of refugees and various international instruments relating to the status of refugees including the United Nations 1951 Refugee Convention, the 1967 Protocol and the UN High Commission for Refugees (UNHCR). This apart, an analysis of the standard treatment of refugees in India and the role of National Human Rights Commission and Judiciary in interpreting and protecting the rights of refugees in India.

Part A

(Humanitarian Law)

Topic I : Introduction

1. Origin and Development of International Humanitarian Law
2. Geneva Conventions and Additional Protocols
3. Meaning of "armed conflict" – Common Article 2
4. Non-international armed conflict - Common Article 3 and Additional Protocol II of the Geneva Convention
5. *Jus ad bellum* and *jus in bello*
6. *Martens* Clause
7. Interface between International Humanitarian Law (IHL) and International Human Rights Law (IHRL)
8. Indian Perspectives with regard to Geneva Conventions and its Additional Protocols-The Geneva Conventions Act, 1960

Topic II : Protection of Defenceless

1. *Hors de combat*, wounded, sick (both in field and sea) and Shipwrecked Members of Armed Forces
2. Prisoners of War (POW)

i. Who are Prisoners of War?
ii. Protection of Prisoners of War
iii. Repatriation and Release of POW

3. Protection of Civilian Person in Times of war

Topic III : Methods and Means of Warfare

1. General Limitations on the Conduct of War— Limits on the Choice of Methods and Means of Warfare

i. The principle of prohibition on causing unnecessary suffering, Military Necessity
ii. Rule of Proportionality
iii. Principle of Distinction
iv. Prohibition on the Use of Certain Weapons- Conventional, Chemical, Biological Weapons and Land Mines

2. Contemporary Challenges in IHL

Topic IV: Criminal Tribunals

1. International Military Tribunal at Nuremberg
2. International Military Tribunal for the Far East (Tokyo)
3. International Criminal Tribunal for the Former Yugoslavia (ICTY)
4. International Criminal Tribunal for Rwanda (ICTR)
5. Special Court for Sierra Leone
6. Proposed *Ad hoc* Hybrid Special Court for Sri Lanka

Topic V: International Criminal Court (ICC)

1. International Criminal Court (ICC): Overview

i. Jurisdiction with respect to Crimes – (i) Genocide; (ii) Crimes against Humanity; (iii) War Crimes; (iv) Aggression
ii. Basis of Jurisdiction – (i) Jurisdiction *ratione materiae*; (ii) Jurisdiction *ratione temporis*; (iii) Jurisdiction *ratione loci*; (iv) Jurisdiction *ratione personae*
iii. General Principles of Criminal Law - (i) *Nullum crimen sine lege*; (ii) *Nulla poena sine lege*; (iii) Non-retroactivity *ratione personae*; (iv) Individual criminal responsibility; (v) Exclusion of jurisdiction over persons under eighteen; (vi) Irrelevance of official capacity; (vii) Responsibility of

commanders and other superiors; (viii) Non-applicability of statute of limitations; (ix) Mental element

iv. Defences/Grounds for excluding criminal responsibility - (i) Mental incapacity; (ii) Intoxication; (iii) Self-defence; (iv) Duress and necessity; (v) Mistake of fact or mistake of law; (vi) Superior orders and prescription of law.

2. India's Stand on the ICC

Part B

(Refugee Law)

Topic I: Introduction

1. Historical Background and development of Refugee Law
2. Meaning of Refugee under various International Instruments - Convention relating to the Status of Refugees, 1951 and Protocol Relating to the Status of Refugees, 1967; Bangkok Principles on the Status and Treatment of Refugees 1966; Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969; Cartagena Declaration, 1984
3. Refugee Law, Human Rights and Humanitarian Law: Co-relation
4. Contemporary Challenges in Refugee Law- Asylum-Seekers, Migrants, Stateless persons, Internally Displaced Persons, Exclusion of Refugee status.
5. Principle of Non-refoulement

Topic II: Protection of Refugees under 1951 Convention

1. Rights and Duties of Refugees
2. Welfare measures for Refugees
3. Administrative measures for the benefits of Refugee

Topic III: Solution to Refugee's Problem

1. Burden Sharing
2. Extradition of Refugee
3. Voluntary Repatriation,
4. Naturalization
5. Re-settlement in Third Country

Topic IV: Role of UNHCR

1. Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR), 1950
2. Role of UNHCR

Topic V: Refugee Protection in India

1. Constitution of India

2. Registration of Foreigners Act, 1939, the Foreigners Act, 1946, and the Foreigners Order, 1948
3. Role of National Human Rights Commission (NHRC)
4. Judicial decisions interpreting rights of refugees in India
5. India's Position regarding 1951 Convention on Refugees

15.	Advisory Opinion of ICJ on the Legality of the Threat or Use of Nuclear Weapons, 35 International Legal Materials 809 (1996)	209
16.	Ukraine v. Russian federation, Provisional Measures, 16 March 2022, ICJ	211
	Case Laws 1. Nicaragua v. United States of America) [1986] ICJ 2. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) 2004 **3.** The Prosecutor v Duško Tadić (Jurisdiction) International Criminal Tribunal for the Former Yugoslavia (ICTY) [1995] 4. Rev. Mons. Sebastian Francisco Zavier Dos Remedious Monterio v. State of Goa reported in MANU/SC/0140/[1969]. 5. National Human Rights Commission v. State Of Arunachal Pradesh & Another, 1996 AIR 1234, 1996 SCC (1) 742 6. State Of Arunachal Pradesh v. Khudiram Chakma, 1994 AIR 1461, 1993 SCR 7. Sarbananda Sonowal v. Union of India (2005) SCC 665 8. The Gambia v. Myanmar, Provisional Measures, Order of 23 January 2020, I.C.J UN Resolution United Nations Security Council resolution (UNSC Res 1540), 'Non-proliferation of weapons of mass destruction' (28 April 2004) UN Doc S/RES/1540 (2004).	

Suggested Readings

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3. Anupam Jha, First Anatomy of the Rome Statute during Kampala Conference: A Critical Evaluation, ISIL Yearbook on International Humanitarian & Refugee Law, p. 161-188, (ISIL and ICRC Publication, 2011).
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5. Marco Sassòli, et al, How does law protect in war? Outline of International Humanitarian Law, Vol. I, 3rd ed. ICRC.
6. ICRC, Summary of the Geneva Conventions of 12 August 1949 and their Additional Protocols, (Second Edition, 2012).
7. Andrew Clapham and Paola Gaeta, The Oxford Handbook of International Law in Armed Conflict, Oxford University Press (2014).
8. Robert Kolb, Advanced Introduction to International Humanitarian Law, [chapter on International Armed Conflict and Non- International Armed Conflict] (Edward Elgar 2014) pp 22 to 47.

9. Theodor Meron, The Martens Clause, Principles of Humanity, and Dictates of Public Conscience , The American Journal of International Law, Vol. 94, No. 1 (Jan., 2000), pp. 78-89.
10. Lindsay Moir, "The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949", Vol. 47 International and Comparative Law Quarterly 337-61 (1998).
11. Neeru Chadha, Protection of Cultural Property During Armed Conflict: Recent Developments, ISIL Yearbook of International Humanitarian & Refugee Laws, vol. 1, (2001).
12. Manoj Kumar Sinha, "Protection of Environment During Armed Conflicts: A Case Study of Kosovo" ISIL Yearbook of International Humanitarian & Refugee Laws, vol. 1, 2001, pp. 230-250.
13. Francis Grimal and Jae Sundaram, Combat Drones: Hives, Swarms, and Autonomous Action? Journal of Conflict & Security Law, Oxford University Press page 105 to 135 (2018).
14. Parvathi Menon, International Crimes Tribunal in Bangladesh, Max Planck Institute Luxembourg. Department of International Law and Dispute Resolution, p 1 to 15 (2016).
15. Benarji Chakka, Evolving International Criminal Jurisprudence through Ad hoc International Criminal Tribunals: A case study of ICTY ISIL Yearbook of International Humanitarian and Refugee Law.
16. V.S Mani, 'Effectuation of International Law in the Municipal Legal Order : The Law and Practice in India' (1997) 5 Asian Yearbook of International Law
17. Antonio Cassese et al., The Rome Statute of the International Criminal Court: A commentary, Oxford University Press (2002).
18. B.S Chimni, ed. International Refugee Law: A Reader (2000)
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20. Usha Ramanathan, Combating Impunity, A compilation of the Articles on the International Criminal court and its relevance to India, Women's Research & Action Group, April (2003).
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22. Guy Goodwin-Gill and Jane McAdam, The Refugee in International Law (2007).
23. James C. Hathaway, The Rights of Refugees Under International Law (2005).
24. Dr. Anita Yadav, "Understanding the Rohingya Refugee crisis in light of Mohammad Salimullah v. Union of India (decided on 08.04.2021)" NIU International Journal of Human Rights Volume 8, November 2021 ISSN: 2394- 0298 UGC CARE listed https://niu.edu.in/niuijhr/

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CHAPTER 9

Humanitarian law

I. The legal foundations

The origin of humanitarian law

~~The origins of humanitarian law were outlined in Chapter 1~~, where we noted various developments during the nineteenth century relating to the first matters of concern to the Red Cross: the condition of the sick and wounded in the field, the condition of the sick and wounded and shipwrecked at sea, and the care and exchange of prisoners of war. These early measures culminated in the international recognition given to the Red Cross in 1919 by Article 25 of the Covenant of the League of Nations. During the decade which followed various steps were taken to establish a constitutional structure for the Red Cross. The League of Red Cross Societies was founded in 1919 as the 'parent body' of the various national societies. And not long afterwards the eighteenth international conference of the Red Cross, meeting at The Hague in 1928, approved statutes which established the following structure: the International Committee of the Red Cross (ICRC) in Geneva, the League of Red Cross Societies, originally in Paris, but transferred to Geneva during the Second World War, and the national societies themselves. The last took the title of the Red Crescent in Moslem countries, and the Red Lion in Iran.[2]

A further strand in the development of humanitarian law concerns the rules which regulate the weapons which may be used in warfare. At the Hague Peace Conference in 1899, a declaration concerning asphyxiating gases was adopted which contained an undertaking not to use projectiles for the diffusion of such substances. The Hague Convention of 1907 went further and contained a general prohibition on the use of poison or poisonous weapons in land warfare. This, however, did not

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prevent the extensive use of poisonous gases on the western front during the war of 1914–18. Matters were taken a stage further by the Geneva Protocol of 1925, which prohibited the use in war of asphyxiating, poisonous or other gases and also extended the prohibition to the use of bacteriological methods of warfare, prohibitions which were respected during the Second World War.

How far is it possible to employ humanitarian law to limit the use of weapons in a situation which is itself in flat contradiction of the basic concepts of humanity? Or, as Professor Draper once put it, how is an essentially inhumane activity to be conducted, even in part, in a humane manner?[3] The problem which arose earlier this century in relation to poisonous gases and bacteria became much more acute in 1940 with the indiscriminate bombing of cities, and in 1945 with the development of atomic weapons. These developments show how the horizons of humanitarian law have widened during the course of this century. A hundred years ago humanitarian law was concerned with combatants who, through sickness or injury, could no longer take part in the combat. It was extended to prisoners of war, that is, combatants who, on account of their capture, can no longer fight. It is now concerned with whole sectors of the population consisting of persons, including women, children and the aged, who are not and cannot be combatants, but are plainly threatened by the methods of warfare now available.

This leads us to another concern of humanitarian law: the protection of the civilian population. Until recent times a clear distinction could be, and usually was, made between the armed forces and the civilian population, although the latter was often the victim of appalling atrocities, as in the religious wars of the sixteenth and seventeenth centuries. But the distinction was easy to make, even if the proper conclusion was not always drawn. Consequently, in the eighteenth century it was not unknown for civilians to travel without difficulty in countries with which their own State was at war because, being civilians, they were not concerned with the hostilities and their status as non-combatants was respected.

In the twentieth century things have changed for the worse. Quite apart from the question of weapons of mass destruction, the concept of total war involves the fate of the civilian population as never before. This applies with particular force in occupied territories. The taking of hostages, reprisals on the civilian population, the treatment of resistance groups ('patriots' to one side, 'terrorists' to the other), the conscription of labour, and many other problems present themselves. These matters were largely outside the treaty framework of humanitarian law in its early years, but formed the subject of one of the Geneva Conventions in 1949.

The cataclysm of the Second World War led to a fundamental reappraisal of humanitarian law. The War had produced suffering and desolation on a scale never before imagined. It is estimated that the First World War was responsible for 10 million deaths, but the Second for 50 million. This included 26 million combatants and 24 million civilians, of whom 1½ million were civilians killed in air raids.[4] Appalled by this calamity, the League of Red Cross Societies, the International Committee and the national governments agreed to undertake a revision of humanitarian law. The result was the four Geneva Conventions of 1949, which amount to a codification of existing law, plus a marked development in the light of recent history.

The Geneva Conventions of 1949 relate to:

1 the amelioration of the condition of the sick and wounded in the field;
2 the amelioration of the condition of the wounded, sick and shipwrecked members of armed forces at sea;
3 the treatment of prisoners of war;
4 the protection of the civilian population in time of war.

The first three Conventions deal with what might be called the traditional functions of the Red Cross. The fourth was quite new and represents the first attempt to draw up a treaty to deal with the problems mentioned earlier. The question of chemical and bacteriological warfare remained regulated by the Geneva Protocol of 1925.

At the time of writing the Geneva Conventions of 1949 have been ratified by more than 180 States.[5] While it is beyond the scope of this chapter to analyse them in detail, particular topics will be discussed in the following section. The following general points may also be noted. Article 1, common to all four Conventions, provides that the parties 'undertake to respect and to ensure respect for the present Convention in all circumstances'.

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In other words, the obligation is general and absolute and does not depend upon reciprocal respect for its obligations by the other party or parties to the conflict. Article 1, in addition, requires States to use their best endeavours to secure respect for the Conventions by non-governmental organisations under their control and also, significantly, by other contracting States.

Article 2 of all four Conventions lays down that they shall apply to 'all cases of declared war or of any other armed conflict', so that a legal state of war is no longer essential for the application of humanitarian rules.

Article 7 of the first three Conventions, and Article 8 of the fourth, provide that a beneficiary of their provisions may in no circumstances renounce his or her rights. In other words, the rules established by the humanitarian conventions are rules of *ordre public*. Offenders who violate their provisions incur obligations under international law, although the obligations concerned must be enforced by the national courts to whose jurisdiction the offenders are subject. Should there also be an international organ before which they are responsible? Likewise, should the individual beneficiary have an international remedy if his or her rights are violated? As yet there is no international body to enforce the Conventions and no corresponding remedy for the individual. As we shall see, however, this is a matter on which there have been important recent developments.

II. The Geneva Protocols

In 1977 two protocols to the Geneva Conventions of 1949 were concluded, representing a significant further step in the development of humanitarian law. To see why they are important a word or two is needed about two problems which have been the subject of a great deal of discussion since 1949: the situation which arises in cases of undeclared war or civil strife, and the problem of the use of weapons of mass destruction.[6]

1. *Undeclared war or civil strife*

The typical situation which gave rise to the application of the rules of humanitarian law in the past was a war as generally understood, that is, an international conflict between two or more States. Traditionally this occurred after a declaration of war, although, especially today, international conflicts can and do take place without such a declaration. Even so, there is normally no difficulty in establishing the existence of a conflict of an international character. Article 2 of the Conventions of 1949, as we have seen, makes it clear that they apply to 'all cases of declared war or of any other armed conflict'.

In the twentieth century, however, there has been an increasing number of conflicts of a very different nature. Do the rules of humanitarian law apply when the conflict is national rather than international? How is such a situation to be defined? There are marked differences between a full-scale civil war, such as those in Spain between 1936 and 1939, in the Congo in the early 1960s, in the Yemen in 1965, or in Nigeria in 1968–69, on the one hand, and, on the other, various situations of rebellion or civil strife in which an established government maintains that it is simply suppressing a local insurrection, but other States give support to the insurgents on the ground that they are a national liberation movement. Such situations, moreover, arouse particularly strong feelings and, as the disintegration of Yugoslavia has recently demonstrated, can lead to appalling atrocities. While most soldiers will respect the integrity, and therefore the human rights, of a member of the armed forces of an enemy State, they may feel and behave very differently to one whom they consider a traitor or murderous criminal. Thus, the application of humanitarian law becomes particularly difficult in situations of civil strife, especially when insurgents receive assistance from a sympathetic foreign power, with the result that the conflict is in some respects international, even though the armed forces of two countries are not directly involved.

Article 3 of the four Conventions of 1949 represents the first attempt to deal with this problem. It sets out rules which apply to 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'. In such cases 'persons taking no part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds or any other means ... are, in all circumstances, to be treated humanely, without any distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria'. Article 3 also prohibits specifically:

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(a) Violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture.
(b) Taking of hostages.
(c) Outrages upon personal dignity, in particular, humiliating and degrading treatment.
(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Article 3 marked an important advance in international humanitarian law and has aptly been described as 'an audacious and paradoxical provision which aims at applying international law to a national phenomenon'.[7] Nevertheless, there has been considerable difficulty in ensuring its effective application. This is largely because States are reluctant to admit the existence of 'an armed conflict not of an international character', perhaps through fear of the construction that may be put on such an admission, even though the same article states that 'the application of the preceding provisions shall not affect the legal status of the parties to the conflict'.

An illustration of the problem is provided by the Algerian war, in which France had about 400,000 troops engaged and the insurgent National Liberation Front had a well developed organisation of its own. It was, however only at a late stage in the fighting that the French government admitted that Article 3 was applicable. Indeed, the applicability of Article 3 has been recognised in only a few of the cases of internal conflict which have occurred since 1949. The need for further international action on this subject was therefore plain.

2. *Weapons of mass destruction*

The problem raised by modern methods of mass destruction, whether bombing with conventional weapons, as in the Second World War, or by nuclear devices, is obvious. Whereas humanitarian law as it has developed over the last hundred years has sought to distinguish between combatants and non-combatants, such methods of warfare by their very nature do not, and cannot, make such a distinction.

In 1965 the twentieth Red Cross conference at Vienna attempted to tackle this problem, and adopted its Resolution XXVIII, which contained the following declaration:

> The Conference,
> ... solemnly declares that all Governments and other authorities responsible for action in armed conflicts should conform at least to the following principles:
> that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
> that it is prohibited to launch attacks against the civilian populations as such;
> that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible;
> that the general principles of the law of war apply to nuclear and similar weapons.

The same matter was discussed, together with other aspects of humanitarian law, by the International Conference on Human Rights at Tehran in 1968. In its Resolution XXIII the Conference noted that the provisions of the Geneva Protocol of 1925 had not been universally accepted or applied and might need revision in the light of modern developments. Then, in the operative part of the Resolution, the Conference requested the UN General Assembly to invite the Secretary-General to study:

(a) Steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts.
(b) The need for additional humanitarian international Conventions or for possible revision of existing Conventions to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare.

The Conference also requested the Secretary-General, in consultation with the International Committee of the Red Cross, to take steps to bring the subject to the attention of all members of the United Nations.

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There was a great deal of discussion of these problems during the next few years, both in the General Assembly[8] and at the twenty-first international conference of the Red Cross at Istanbul in 1969. Resolution XIV of the Istanbul conference related to weapons of mass destruction, and read in part as follows:

> The twenty-first International Conference of the Red Cross,
> Considering that the first and basic aim of the Red Cross is to protect mankind from the terrible suffering caused by armed conflicts, Taking into account the danger threatening mankind in the form of new techniques of warfare, particularly weapons of mass destruction, ... Requests the United Nations to pursue its efforts in this field, Requests the International Committee of the Red Cross to continue to devote great attention to this question, consistent with its work for the reaffirmation and development of humanitarian law and to take every step it deems possible,
>
> Renews its appeal to the Governments of States which have not yet done so to accede to the 1925 Geneva Protocol and to comply strictly with its provisions,
>
> Urges Governments to conclude as rapidly as possible an agreement banning the production and stock-piling of chemical and bacteriological weapons.

In addition, the conference, in its Resolution XIII, encouraged the ICRC to maintain and develop its co-operation with the United Nations and to pursue its efforts with a view to proposing rules to supplement existing humanitarian law and arranging a diplomatic conference for the purpose.

As a result of these and other developments the Swiss government convened the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. This held four sessions in Geneva from 1974 to 1977, which were attended by the representatives of more than a hundred governments, and produced two protocols to the Geneva Conventions of 1949. The success of international conferences often depends on proper preparation, and the groundwork for this Conference was laid by two sessions of a Conference of Government Experts in 1971 and 1972. Thus, when the protocols finally emerged, they were the result of seven years' work by some of the world's leading specialists on the subject of humanitarian law.

3. *The Protocols of 1977*

The First Protocol relates to the protection of victims of international armed conflicts and was intended to bring the provisions of the 1949 Conventions up to date, especially as regards the use of weapons of mass destruction and the protection of the civilian population. The Second Protocol relates to the protection of victims of non-international armed conflicts and develops the rules in Article 3 of the four Geneva Conventions, which has already been quoted.[9]

Before agreement was reached on the Protocols there was a sharp difference of opinion as to whether humanitarian law can properly equate what is essentially an internal, national conflict with an international conflict. As already noted, since 1945 there has been an increasing number of conflicts which involve national liberation movements but which are not wars in the traditional sense. When discussing these conflicts at the United Nations many developing countries advocated the recognition of what they saw as struggles against colonial and alien domination and racist regimes, in pursuit of the right to self-determination and independence. Moreover, in December 1973, on the eve of the Diplomatic Conference, the General Assembly adopted a resolution in which it declared that such conflicts should be regarded as international armed conflicts in the sense of the Geneva Conventions of 1949 and that the participants in such conflicts should be accorded the same legal status as that granted to participants in international conflicts by the Conventions of 1949. Whether the Protocols should reflect this policy was then the subject of intense debate by the Diplomatic Conference in 1974. There, as in the UN General Assembly, there was a majority in favour, and as a result paragraph 4 of Article 1 of the First Protocol states explicitly that it applies to 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination...'. The principle is thus expressly recognised in the text, but it raises numerous problems,[10] and may account for the fact that many governments have still to ratify this Protocol.

Other important provisions of the First Protocol are to be found in Part III, section 1 (Articles 35–42), concerning 'Methods

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and Means of Warfare', and Part IV (Articles 48–79), relating to the civilian population. Both concern the problems raised by modern weapons of mass destruction. Article 35 sets out three basic rules:

1 In any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited.
2 It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3 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.[11]

The next article relates to the development of new weapons and provides that in developing or acquiring them contracting parties are under an obligation to determine whether their use would violate the Protocol or any other rule of international law. The remaining articles of this section deal with other rules of general application, including the prohibition of killing, injuring or capturing an adversary by resort to perfidy; the prohibition of the improper use of the emblems of the Red Cross and the United Nations, the prohibition of giving no quarter, and the prohibition of attacking a person *hors de combat*. Section 2 of Part III then sets out a number of rules on combatant and prisoner-of-war status.

Part IV of the First Protocol contains more than thirty articles on the protection of the civilian population during hostilities, which are designed to develop and bring up to date the principles established in the Fourth Convention of 1949. Article 48 sets out the basic rule requiring that the parties to a conflict 'shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives'. Article 51 takes this further by providing that 'the civilian population as such, as well as individual civilians, shall not be the object of the attack' and by prohibiting indiscriminate attacks, including indiscriminate bombardment of a city, town or village, even if it contains a military objective.

Many other prohibitions are set out in the following articles, including prohibitions of attacks on civilian objects, on historic

monuments and works of art; of the starvation of civilians or destruction of their food supplies; and of attacks on the natural environment. Reprisals against the civilian population are also prohibited. There are separate and detailed provisions (Articles 61–7) about respect for civil defence organisations and services and about humanitarian relief measures (Articles 68–71). It is plain that these provisions are based on humane considerations and, to the extent that they are observed in practice, go far towards mitigating the effect of hostilities on the non-combatant population.

The Second Protocol of 1977 relates to the protection of victims of non-international armed conflicts.[12] It must be remembered, however, that wars of national liberation and armed struggle against racist regimes, as already explained, have been promoted by the First Protocol to the status of international conflicts. The Second Protocol is therefore concerned with other forms of internal conflict, that is to say, with civil wars as generally understood.

The main object of this Protocol is to secure the humane treatment of those threatened by, but not directly involved in, such conflicts. This is stated in Article 4, of Part II, which is devoted to 'Humane Treatment':

1. All persons who do not take a direct part or who have ceased to take 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 in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.
2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:
(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
(b) collective punishments;
(c) taking hostages;
(d) acts of terrorism;
(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
(f) slavery and the slave trade in all their forms;

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(g) pillage;
(h) threats to commit any of the foregoing acts.

The Second Protocol, with twenty-eight articles, is much shorter than the First Protocol (102 articles). Part III contains five articles on the treatment of the wounded, sick and shipwrecked, which recall the first two Conventions of 1949. Part IV then sets out in Articles 13–18 provisions concerning the protection of the civilian population. These rules are broadly similar to, though less detailed than, the corresponding provisions of the First Protocol. They prohibit attacks on the civilian population, starvation and destruction of food stocks, attacks on historic monuments and works of art, and the displacement of the civilian population, and also contain rules protecting the personnel of relief organisations. The last ten articles are Final Provisions of a technical nature.

The two Protocols of 1977 represent the culmination of many years' work by the representatives of more than a hundred governments. It was especially significant that many States from the Third World, which were not independent when the Conventions of 1949 were drafted, were able to play their part in the development of humanitarian law nearly thirty years later. There is no doubt that the substantive provisions of the Protocols were conceived in a liberal and humanitarian spirit which is to be encouraged. The Protocols, which were opened for signature in June 1977, both came into force in December 1978. Although not yet as widely accepted as the 1949 Conventions, both Protocols now have well over a hundred ratifications.[13]

III. Human rights and humanitarian law

Having considered the evolution of humanitarian law, this seems a convenient point to raise a general issue which for the human rights lawyer is the heart of the matter: the relationship between human rights and humanitarian law.[14]

M. Jean Pictet has written: 'Humanitarian law comprises two branches: the law of war and the law of human rights.'[15] While recognising the force of this view, the approach we have adopted is quite different. The contention of this book is that humanitarian law is one branch of the law of human rights, and that human rights provide the basis and underlying rationale for humanitarian law.

It is not difficult to see why the opposite view is held. Humanitarian law was conceived before human rights law: the former has developed over more than a hundred years, while the latter has been the concern of international law for only half a century. The United Nations Charter in 1945 contained brief, if numerous, references to human rights and it was only in 1948 that the Universal Declaration was adopted in Paris, just a year before humanitarian law, already highly developed, was codified in the Geneva Conventions of 1949.

When we look at the substance of the two disciplines, however, it is apparent that human rights law is the genus of which humanitarian law is a species. The basic texts relating to human rights, notably the Universal Declaration and the United Nations Covenants, lay down standards of general application to all human beings, by reason of their humanity. Those standards ideally should apply at all times and in all circumstances. Unfortunately, some of them are suspended in time of war, which is in many ways a contradiction of the whole idea of human rights. But even in time of war certain rights must be respected by combatants towards their enemies and, precisely because war is a time when many rights are suspended, it becomes all the more necessary to define and protect those rights which must still be respected. They constitute what might be called 'core human rights', from which no derogation is permitted, even in times of armed conflict.

Thus the major human rights treaties are all based on the principle that some human rights are so fundamental that they must be respected at all times, even in periods of armed conflict. This, of course, is one of the foundations of humanitarian law. But it is not sufficient. The effective protection of the victims of armed conflict requires not only that they should enjoy certain of the basic rights which belong to everyone, but also that they should benefit from certain supplementary rights which are necessary precisely because they are victims of armed conflict, such as medical care, the right of prisoners to correspond with their families, the right of repatriation in certain circumstances, and so on. These are the matters on which the provisions of humanitarian law for the particular situation of armed conflict go beyond the requirements of human rights law. It is evident nevertheless that a number of the rights which humanitarian law

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seeks to guarantee to the victims of armed conflict are also included in human rights treaties as rights which should be guaranteed to everyone. To see this interaction more clearly, it is worth looking at these non-derogable standards in a little more detail.[16] Which humanitarian rights are secured by the UN Covenant on Civil and Political Rights even in times of war?

The first of the rights from which no derogation may be made is the right to life (Article 6). The text permitting derogations (Article 4) does not indicate that any are permissible in time of war, no doubt on account of the reluctance of the General Assembly to admit that war can ever be lawful, but the phrase 'in time of public emergency which threatens the life of the nation' is clearly wide enough to include a time of war. It should be noted, however, that in order for a derogation to be lawful, the public emergency must be 'officially proclaimed'. This means that in situations of undeclared war or civil strife no derogation is permissible in the absence of an official proclamation of a state of emergency, with the result that in this kind of situation all the rights proclaimed in the Covenant must continue to be respected.

The special protection of the right to life means that even in time of armed conflict acts such as the killing of prisoners and the execution of hostages are unlawful. Article 15 of the European Convention also treats the right to life as sacrosanct, but adds the limitation 'except in respect of deaths resulting from lawful acts of war'. However, acts such as the killing of prisoners and the execution of hostages are never 'lawful acts of war', so the result is the same. Does this article also prohibit the killing of civilians by weapons of mass destruction? It would seem difficult to maintain that it does not.

The second sacrosanct article in the UN Covenant is of supreme importance: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation' (Article 7). This prohibition of inhuman treatment is far reaching and covers many of the rights protected by humanitarian law. Admittedly, it would be better to have a positive formulation, such as 'all persons shall be treated with humanity and with respect for the inherent dignity of the human person'. Such a positive formulation is to be found in Article 10 of the Covenant, where it relates to 'all persons

deprived of their liberty', which would, of course, include prisoners of war. But this is a less effective guarantee, because Article 10 is not one of the articles from which no derogation may be made.

Article 8 is also important in the present context. Its first two paragraphs prohibit slavery and servitude and are not subject to derogation. Unfortunately, paragraph 3, containing the prohibition of forced or compulsory labour, is subject to derogation, with the result that this guarantee does not necessarily apply at a time of public emergency which is officially proclaimed. Nevertheless, the right of derogation is not absolute. Article 4 permits States to take measures derogating from their obligations under the Covenant only 'to the extent strictly required by the exigencies of the situation' and 'provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination'. Consequently, there are many circumstances in which the prohibition of forced or compulsory labour will still apply, and so it seems fair to regard this also as a humanitarian right which is, as a general rule, protected by Article 8(3).

Four other rights protected by the Covenant are specially protected and not subject to derogation. These are: freedom from imprisonment for debt, prohibition of retrospective criminal law, the right to recognition as a person before the law, and freedom of thought, conscience and religion. However, these are perhaps less relevant to our present investigation of the relationship between humanitarian law and the law of human rights.

Drawing attention to the fact that a number of important humanitarian rights are protected by the UN Covenant, and also of course by the various regional conventions, is not meant in any way to disparage or to undervalue the humanitarian conventions. Our object is simply to show that the two disciplines share a number of areas of common concern and that although humanitarian law was developed earlier, human rights law already covers some of the same ground and is likely to continue to expand. This has consequences we shall consider below.

That there is now a growing measure of convergence between the two subjects has been amply demonstrated at international conferences. One of the more important texts adopted by the 1968 World Conference on Human Rights was its Resolution

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XXIII, which carried the title 'Human Rights in Armed Conflict'. This was based on the fundamental precept that 'peace is the underlying condition for the full observance of human rights and war is their negation'. Resolution 2444(XXIII) of the General Assembly, adopted later in the same year, is a resolution 'on respect for human rights in armed conflicts', and the same title was given to the report prepared by the Secretary-General following the adoption of this resolution. There are likewise numerous references to international humanitarian law in the Vienna Declaration and Programme of Action of the 1993 World Conference.[17] Even more significant is the fact that at its special sessions on former Yugoslavia in 1992 and on Rwanda in 1994 the Commission on Human Rights treated issues of human rights and humanitarian law together and gave its special rapporteurs mandates covering both. It is therefore clear that humanitarian law is now increasingly recognised as the particular branch of human rights law applicable in times of armed conflict.

What is the practical effect of this convergence and inter-penetration of the two disciplines? The Covenant on Civil and Political Rights, as we have seen, provides a new legal basis for the protection of several humanitarian rights. Moreover, it has a number of other important consequences. The widespread ratification of the Covenant means that over a hundred States are now under an obligation to report to the United Nations on the measures they have adopted to give effect to the rights which the Covenant guarantees. As noted earlier, in accordance with Article 40 the procedure involves examination by the Human Rights Committee of the reports of governments, comments on each report by the Committee and, under Article 45, an annual report by the Human Rights Committee to the General Assembly, via ECOSOC, on the work it has accomplished. This therefore establishes a modest system of international supervision as regards certain humanitarian rights.

Another consequence is that if the States concerned have accepted the optional procedure for inter-State complaints under Article 41 of the Covenant, other States may bring a violation before the UN Committee. Moreover, it will be recalled that if they are parties to the Optional Protocol to the Covenant, they accept that the Human Rights Committee can 'receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation of any of the rights set forth in the Covenant'. This clearly amounts to a further step in the direction of international supervision.

A final consequence is that acceptance of the Covenant, with or without the optional arrangements, involves accepting that respect for its provisions is a matter of concern to international law and the international community. It follows that a party to the Covenant cannot properly object that the question of respect for the rights protected is a matter 'essentially within the domestic jurisdiction of the State' within the meaning of Article 2(7) of the Charter. It can therefore be seen that the inclusion of certain humanitarian rights in the UN Covenant is extremely significant because as part of the Covenant they are subject to a greater measure of international control than under the specific humanitarian conventions.

IV. Recent developments

1. *Means and methods of warfare*

Humanitarian restrictions upon the means and methods of warfare were, as we have seen, addressed at the Hague Peace Conferences in 1899 and 1907 and subsequently developed, first in the 1925 Geneva Protocol, and then in the First Geneva Protocol of 1977. These measures alone would justify the conclusion that such restrictions occupy a significant place in international humanitarian law, but are by no means the end of story. To bring our treatment of this topic up-to date three further conventions must now be mentioned, dealing with matters inadequately covered in earlier instruments.

The first convention is the 1977 UN Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.[18] As the title indicates, this convention is concerned with environmental modification as a method of warfare, an issue which aroused particular concern in the early 1970s, following the extensive use of defoliant agents by the United States in Vietnam. Although attacks upon the environment are partly covered by the First Geneva Protocol of 1977, the new convention is more comprehensive, providing as it does both a wide-ranging definition of 'environmental modification techniques', and a prohibition on the military or hostile use of

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such techniques 'having widespread, long lasting or severe effects' on another party (Article 1). This convention, which is the first to be exclusively concerned with environmental modification, has been widely accepted, and both the United States and Russia are parties to it.

The second convention is the 1981 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects.[19] This was originally intended to form part of the 1977 Geneva Protocols, but when inclusion proved impossible owing to lack of time, it emerged as a separate convention. The 1981 Weapons Convention is essentially an application of the principle that the right to choose means and methods of warfare is not unlimited, and the principle that weapons which cause superfluous injury or unnecessary suffering are prohibited. As already noted, these principles of customary law are set out in Article 35 of the 1977 First Protocol. The 1981 Convention in its three substantive protocols shows their effect in three contexts.

Protocol I, which is mainly directed at plastic land mines, prohibits the use of any weapon 'the primary effect of which is to injure by fragments which in the human body escape detection by x-rays'. Protocol II contains an elaborate series of prohibitions or restrictions on the use of mines, booby traps and certain other devices; and Protocol III is concerned with incendiary weapons. It should be noted that while Protocol I contains a complete prohibition, Protocols II and III are concerned with the protection of civilians rather than combatants, attempts to negotiate a ban on the use of specific weapons in combat having been unsuccessful. As an extension of the 1977 Geneva Protocols, the 1981 Convention is, however, a useful step forward.

The third, and most recent, convention is the 1993 Chemical Weapons Convention.[20] The problem of chemical weapons was under discussion for a long time, but it was only with the collapse of the Warsaw Pact and the end of Soviet hegemony in Eastern Europe that the political obstacles to agreement were removed. The new convention is a complex document which cannot be examined in detail here. Its main features are that it contains a comprehensive prohibition on the production, development, transfer or use of chemical weapons, accompanied by an obligation to destroy any weapons the parties already possess and the facilities for their production. The use of riot control agents is permitted, though not in warfare, and there is an extremely comprehensive system of verification and control to monitor compliance.

To be fully effective the 1993 Convention must be supported not only by the industrialised countries of the northern hemisphere, but also by every State with the capacity to make chemical weapons. Although the new convention is a relatively recent instrument, a large number of States have already signed it. If the momentum can be maintained and general ratification achieved, an issue which humanitarian law has had on its agenda for most of the twentieth century will at last have been resolved.

2. *Security Council initiatives*

The United Nations Charter lays down that the Security Council has primary responsibility for the maintenance of international peace and security (Article 24) and to that end invests the Council with certain powers with regard to both the pacific settlement of disputes (Chapter VI) and action with respect to threats to the peace, breaches of the peace and acts of aggression (Chapter VII). As is well known, for the first forty years of the UN's existence the exercise of these powers was always inhibited, and often actually prevented, by the Soviet–American rivalry which was the defining feature of the Cold War. With the collapse of communism, however, the situation changed and in the new and more constructive atmosphere which has ensued, a reinvigorated Security Council has been able to adopt measures which would have been unthinkable only a few years ago.

Most of the Security Council's recent activity is, of course, concerned with issues of peace and security rather than with human rights and therefore outside the scope of this book. On some occasions, however, the Council has found itself dealing with humanitarian issues as part of its wider functions. An illustration, which will be examined in the next section, is its creation of special tribunals in order that those who offend against humanitarian law can be prosecuted. Other examples are discussed below. As many of the conflicts in which the Security Council is called upon to act, including civil conflicts, have a

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humanitarian dimension, this kind of involvement is likely to continue.[21]

What activities of this type have been undertaken? In 1991, following Iraq's ejection from Kuwait, there were rebellions in Iraq by the Kurds in the north and the Shias in the south, which the government sought to suppress. In Resolution 688 the Security Council characterised Iraq's measures as a threat to international peace and security and this resolution was relied on by Western States to justify the despatch of a large military force to northern Iraq to prevent further repression and ensure the distribution of humanitarian aid.[22] At about the same time Iraq agreed to a permanent cease-fire, in Resolution 687, and as a consequence became subject to elaborate UN fact-finding missions intended *inter alia* to monitor the destruction of its chemical weapons capability.[23]

In 1992 the Security Council became involved in humanitarian activities in Somalia. In Resolution 751 it established the UN Operation in Somalia (UNOSOM), which was later expanded and had as one of its main tasks the provision of humanitarian assistance to the starving population.[24] This also became one of the major functions performed by the UN Protection Force (UNPROFOR) in Bosnia, created by Security Council Resolution 743 in February 1992 and subsequently expanded. A further task assigned to UNPROFOR was the supervision of the 'safe areas' in Bosnia, which were created by Resolutions 819, 824, 836 and 844 between April and June 1993.[25] These resolutions, unlike Resolutions 743 and 751, were all adopted under Chapter VII of the Charter.

No doubt there is an element of artificiality in discussing resolutions in which the Security Council addressed humanitarian issues in isolation from the numerous resolutions which were passed dealing with other aspects of these situations. Likewise, it would be wholly wrong to mention these humanitarian resolutions without at the same time referring to the wider political context and pointing out that, of the various resolutions cited, only Resolution 687 can be said to have fully achieved its objective. Since Security Council action was never directed to the overthrow of Sadam Hussein, attempts to deal with repression in Iraq could be no more than a palliative, while the UN's inability to [illegible]

Security Council resolutions promised more than they ultimately achieved. But if the measures in question were limited in their effects, all represented attempts to use the new situation in the Security Council for humanitarian ends. As such they hold many lessons for the future and consequently deserve attention in a review of recent developments.

3. *International prosecution of offenders*

In May 1993 the Security Council created an international tribunal to prosecute persons responsible for violations of international humanitarian law in former Yugoslavia. This is the first time since the Nuremberg and Tokyo tribunals that an international tribunal has been established to enforce international humanitarian law and its creation reflected mounting alarm in both the Security Council and the United Nations as a whole at reports of mass killings, so-called 'ethnic cleansing' and other outrages in the chaos of Yugoslavia's disintegration. In Resolution 780 (1992) the Council had established a Commission of Experts to investigate such violations[26] and in Resolution 808 (1993) approved in principle the idea of a tribunal to oversee prosecutions. The Secretary-General was asked to report on how this might be established and it was his report, containing a draft statute for the tribunal, which the Council adopted in May 1993 by Resolution 827.[27]

In 1994 the Security Council used a very similar procedure to create an international criminal tribunal for Rwanda. Again the move was prompted by alarming reports of widespread atrocities from, among others, the special rapporteur for Rwanda appointed by the UN Commission on Human Rights, and again the Council by Resolution 935 (1994) had earlier appointed a Commission of Experts on the country. The tribunal for Rwanda was created by Resolution 955 (1994),[28] which not surprisingly is modelled on Resolution 827. Thus, while there are certain differences between the two tribunals which reflect their particular functions, for present purposes they can be discussed together.

The new tribunals are now beginning to function[29] and have already been the subject of detailed analysis. It would not be appropriate to repeat that exercise here but it is perhaps worth [illegible]

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place, it should be noted that in both cases the Security Council was acting under Chapter VII of the Charter, having determined that the situation in the territory concerned constituted a threat to international peace and security and that an international tribunal would contribute to the restoration of peace. These decisions clearly provide a precedent for taking similar action in the future. Secondly, the Statutes of the two tribunals support the view that important components of humanitarian law have become part of custom and as such are binding on all States. Likewise, when the tribunals begin to decide cases their application of the law will have significant weight as precedents, particularly as regards common Article 3 of the Geneva Conventions.[31] Thirdly, and finally, it is worth noting that both Statutes contain due process provisions which follow Article 14 of the Covenant on Civil and Political Rights and are designed to safeguard the rights of the accused. These are a reminder that enforcing the law is not just about securing convictions, but itself requires respect for human rights, if the trial process is to be legitimate.[32]

The creation of tribunals to deal with criminal behaviour in particular places is one way of trying to make humanitarian law effective and is not inappropriate in situations, like those in Rwanda and former Yugoslavia, where widespread atrocities have occurred and there is a general desire to bring the perpetrators to account. However, an alternative and possibly more satisfactory approach would be to set up an international criminal court with general jurisdiction to which such cases could be referred. This would remove the need to set up special tribunals, which may not always be politically feasible, and at the same time would enhance the status of humanitarian law by providing it with a permanent tribunal comparable to the International Court of Justice. There is, of course, no international criminal court at present, but as one has recently been proposed by the International Law Commission (ILC), it is worth considering what the creation of such a tribunal would entail.

In the draft statute which the ILC finalised in 1994[33] it proposed that a court of eighteen judges be created by treaty and that it should have jurisdiction in two subject areas. The first covers crimes under general international law, which are listed as: genocide; aggression; serious violations of the laws and customs applicable in armed conflict; and crimes against humanity. Before

there could be a prosecution in relation to aggression, however, the Security Council would first have to determine that an act of aggression had been committed by a State. The second area consists of crimes under treaties. The latter are listed and include, for example, conventions dealing with hijacking and trafficking in drugs, as well as the 1984 UN Convention against Torture, which was outlined in Chapter 3.

The detailed arrangements on the new court's jurisdiction are rather complex and cannot be examined here. It should be noted, however, that proceedings would be initiated through a 'complaint', which could be brought only by States which had accepted the court's jurisdiction, or by the Security Council. Unlike the special tribunals considered earlier, there would thus be no independent power in the prosecutor to initiate proceedings. A particularly difficult problem arises over the surrender of the accused, as it is unlikely that all States will accept the jurisdiction of the court, and many, in any case, have constitutional provisions which prevent the extradition of nationals. The ILC draft deals with this by somewhat technical provisions which require surrender in certain circumstances, unless the accused is already being prosecuted before the national courts. But a State which does not accept the court's jurisdiction would merely be under an obligation to co-operate and consult.

Once it is accepted that humanitarian law should, as a matter of principle, be enforceable in international courts, the choice is effectively between *ad hoc* tribunals, like those created for Yugoslavia and Rwanda, and a court of general jurisdiction, as proposed by the ILC. It is clearly not possible at this early stage to predict which, if either, model will be preferred in the future, but it seems safe to predict that when deciding their reactions to the ILC's proposal, governments will be influenced by the record which the two special tribunals are already beginning to develop. As that record will also be influential if decisions have to be made about the creation of further *ad hoc* tribunals, the experience of the next few years is likely to be crucial for humanitarian law and the prospects of international enforcement.

Notes

1 Of the many works dealing with humanitarian law and the Red Cross the following merit particular attention: G. I. A. D. Draper, 'The Geneva

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Conventions of 1949', *Hague Recueil des Cours*, 114, 1965, p. 63, and *idem*, 'The implementation and enforcement of the Geneva Conventions of 1949 and of the two additional Protocols of 1978', *Hague Recueil des Cours*, 164, 1979, p. 1; H. McCoubrey, *International Humanitarian Law*, Aldershot, 1990; G. Best, *Humanity in Warfare*, London, 1980, and *idem*, *War and Law since 1945*, Oxford, 1994.

2 See S. Rosenne, 'The Red Cross, Red Crescent, Red Lion and Sun and the Red Shield of David', *Israel Yearbook of Human Rights*, V, 1975, p. 9.

3 Draper, 'The Geneva Conventions', p. 66.

4 The figures are from J. S. Pictet, 'Armed conflicts – laws and customs', *ICJ Review*, 1969, p. 30.

5 On 1 January 1995 all four Conventions had been ratified by 185 States. For discussion of the effects of such widespread adherence, see T. Meron 'The Geneva Conventions as customary international law', *American Journal of International Law*, LXXXI, 1987, p. 348.

6 Another issue which was considered in 1977 was the role of the protecting power, addressed in Article 5 of the First Protocol. For discussion of this issue see the third edition of this book at pp. 274–6.

7 J. S. Pictet, 'The twentieth International Conference of the Red Cross', *ICJ Journal*, VII, 1966, p. 15.

8 See particularly Resolution 2444(XXIII) of 1968, reaffirming that it is prohibited to launch attacks against the civilian population as such; the Secretary-General's report on *Respect for Human Rights in Armed Conflict*, UN document A/7720, 1969; Resolution 2597(XXIV) of 1969, requesting the Secretary-General to consult the International Committee of the Red Cross about further action; Resolution 2603(XXIV) of 1969, declaring the use of chemical and bacteriological weapons contrary to international law; and the discussions in the Commission on Human Rights in 1970, document E/CN 4/1039, pp. 24–6.

9 For the text of the two Protocols see A. Roberts and R. Guelff, *Documents on the Laws of War*, second edition, Oxford, 1989, pp. 387 and 447. For discussion in addition to the references in note 1, see G. H. Aldrich, 'New life for the laws of war', *American Journal of International Law*, LXXV, 1981, p. 764, and B. A. Wortley, 'Observations on the revision of the 1949 Geneva "Red Cross" Conventions', *British Year Book of International Law*, LIV, 1983, p. 143.

10 See further W. V. O'Brien, 'The *jus in bello* in revolutionary war and counterinsurgency', *Virginia Journal of International Law*, XVIII, 1977–78, p. 193; D. Schindler, 'The different types of armed conflicts according to the Geneva Conventions and Protocols', *Hague Recueil des Cours*, 163, 1979, p. 117; and G. Abi-Saab, 'Wars of national liberation in the Geneva Conventions and Protocols', *Hague Recueil des Cours*, 165, 1979, p. 353.

11 When signing the Protocols the United Kingdom and the United States declared that they interpreted the First Protocol as not relating to the prohibition or use of nuclear weapons. Their view was (and is) that such questions should be settled at other meetings and not in the framework of humanitarian law. In 1993 the World Health Organisation and the UN General Assembly both asked the International Court of Justice for advisory opinions on the legality of nuclear weapons.

12 For discussion of this Protocol, see D. P. Forsythe, 'Legal management of internal war: the 1977 Protocol on Non-International Armed Conflict', *American Journal of International Law*, LXXII, 1978, p. 272; A. Cassese, 'The status of rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts', *International and Comparative Law Quarterly*, XXX, 1981, p. 416; and D. P. Forsythe, 'Human rights and internal conflicts: trends and recent developments', *California Western Journal of International Law*, XII, 1982, p. 287.

13 On 1 January 1995 the First Protocol had been ratified by 135 States and the Second Protocol by 125 States.

14 On this subject in addition to the references in note 1, see Pictet, 'Conference of the Red Cross', and M. Mushkat, 'The development of international humanitarian law and the law of human rights', *German Yearbook of International Law*, XXI, 1978, p. 150.

15 Pictet, 'Conference of the Red Cross', p. 22.

16 See also on this issue the 1994 decision of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities to transmit to the Commission on Human Rights a Declaration of International Minimum Standards. See A. Eide, A. Rosas and T. Meron, 'Combating lawlessness in gray zone conflicts through minimum humanitarian standards', *American Journal of International Law*, LXXXIX, 1995, p. 215.

17 For the text of the Declaration see *International Human Rights Reports*, I(1), 1994, p. 240.

18 Text in *International Legal Materials*, XVI, 1977, p. 88, and Roberts and Guelff, *Documents*, p. 379. See also McCoubrey, *International Humanitarian Law*, pp. 162–4.

19 Text in *International Legal Materials*, XIX, 1980, p. 1523, and Roberts and Guelff, *Documents*, p. 473. See also F. Kalshoven, 'Conventional weaponry: the law from St. Petersburg to Lucerne and beyond', in M. A. Meyer (ed.), *Armed Conflict and the New Law*, London, 1989, p. 251.

20 Text in *International Legal Materials*, XXXII, 1993, p. 800. See also T. Taylor, 'The Chemical Weapons Convention and prospects for implementation', *International and Comparative Law Quarterly*, XXXXII, 1993, p. 912.

21 For a good general survey see P. Taylor, 'The role of the United Nations in the provision of humanitarian assistance: new problems and new responses', in J. T. H. Tang (ed.), *Human Rights and International Relations in the Asia Pacific Region*, London, 1995, p. 139, and for more detailed treatment of particular issues, N. S. Rodley (ed.), *To Loose the Bands of Wickedness: International Intervention in Defence of Human Rights*, London, 1992.

22 See L. Freedman and D. Boren, '"Safe havens" for Kurds in post-war Iraq', in Rodley, *To Loose the Bands of Wickedness*, pp. 43–99.

23 See H. McCoubrey and N. D. White, *International Organizations and Civil Wars*, Aldershot, 1995, p. 84.

24 *Ibid.*, pp. 242–5.

25 *Ibid.*, pp. 180–3.

26 See M. C. Bassiouni, 'The United Nations Commission of Experts established pursuant to Security Council resolution 780 (1992)', *American Journal of International Law*, LXXXVIII, 1994, p. 784.

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27 Text in *International Legal Materials*, XXXII, 1993, p. 1203. The report of the Secretary-General is *ibid.*, p. 1159. The Statute of the International Tribunal can also be found in *International Human Rights Reports*, II, 1995, p. 510. For general discussion see J. C. O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia', *American Journal of International Law*, LXXXVII, 1993, p. 639.

28 Text in *International Legal Materials*, XXXIII, 1994, p. 1598, and *International Human Rights Reports*, II, 1995, p. 521.

29 For relevant documentation see *International Legal Materials*, XXXIII, 1994, pp. 484, 1576 and 1590.

30 See further O'Brien, 'The International Tribunal', T. Meron, 'War crimes in Yugoslavia and the development of international law', *American Journal of International Law*, LXXXVIII, 1994, p. 78, and *idem.*, 'International criminalization of internal atrocities', *American Journal of International Law*, LXXXIX, 1995, p. 554.

31 See Meron, 'War crimes', pp. 80–3.

32 It is interesting to note that the ILC revised its statute for a proposed international criminal court to provide greater safeguards for the accused, using the statutes of the two special tribunals as a model. See the latest article by J. Crawford, 'The ILC adopts a Statute for an International Criminal Court', *American Journal of International Law*, LXXXIX, 1995, p. 404.

33 See Crawford, *ibid.*, and *idem.*, 'The ILC's draft statute for an international criminal tribunal', *American Journal of International Law*, LXXXVIII, 1994, p. 140.

Md. Tahid Hussain Bhuiyan, Louis Doswald Beck, International Humanitarian Law: An Anthology (2009)

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In conclusion, it may be stated that despite some flaws and contradictions, the Court's Advisory Opinion of 8 July 1996 would represent a triumph for the rule of law in international relations. The court took a stand on one of the most burning legal and political questions of our time, and its response was, in essence, a negative one. Even though such Advisory Opinions are not binding, they nonetheless carry very high authority. The impressive structure of this opinion places it among the ranks of earlier, 'famous' opinions handed down by the court which have substantially influenced the development of international law.

(4) Conclusion

From what has been said here it is clear that since earliest times there has been recognition that humanity and the future survival of society demand that limitations be placed upon the means and methods of warfare; this remains the case today, whether the hostilities take place in international or non-international conflicts. As is made clear by the Martens Clause, which the ICJ has indicated is just as significant today as when Martens introduced it, when seeking the Law of War it is not enough to look merely at the written documents drawn up and accepted by states as treaties. These reflect what has developed in practice, representing which restrictions states are prepared to impose upon their armed forces. Although it may not always be easy to ascertain what are claimed, to be the customary rules in this regard, the principles of humanity and the dictates of public conscience, along with considerations of the accepted practices of the most significant military forces, are probably sufficiently well known and accepted to provide the necessary guidance. Despite the fact that modern tribal wars seem to suggest that what was regarded as almost universally accepted behaviour cannot now be so considered, it may be that the principles referred to are no more nor less than what art 38 of the Statute of the ICJ refers to as general principles of law recognised by civilised nations- though they may be nothing more than the principles that 'we and our friends, all of whom are civilised', generally recognise as principles of law and, as such, binding.

Chapter 5

Protection of Civilians, Wounded, Sick and Shipwrecked, Prisoners of War

Michelo Hansungule[1]

(1) Introduction

A cursory look at State practice in conflict and war situations displays a very disturbing picture of International Humanitarian Law (IHL) all around the world. For instance, Israel, disregards IHL and also has no intention of complying with IHL. It is distinctly clear that at best IHL is *de lege ferenda*. IHL does not bite its fraudsters as it should and if it does, then it does so meekly and only selectively. Most victims of violation of IHL regard it this way. Politics and not law decides its implementation which in any case rarely happens. Also known as the laws of war, IHL is part and parcel of international law. It is however a very detailed branch of international law which if scrupulously applied would contribute immensely towards strengthening peace, security and stability in the world. But IHL is no more than a timorous branch of international law. Most victims of violations of IHL in Africa have very little or nothing good to say about it. This is in spite of the establishment recently of the International Criminal Court (ICC) and before it the two *ad-hoc* tribunals on the former Yugoslavia and Rwanda. These are important initiatives in the fight against impunity.

1 Professor of law, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa. The views in this chapter are those of the author and do not necessarily reflect the views of organisations he

however, apart from the fact that to the majority of victimthe initiative come too late to be of any practical benefit to the victim. Though conferred with unprecedented powers to investigate and prosecute serious breaches of IHL, the initiative can unfortunately be likened to 'closing the stables after the horse'.

Besides, it has recently become standard practice for countries coming out of conflict to circumvet international justice by establishing quasj-judicial toothless commissions to deal with violations during the conflict. Truth or Reconciliation Commissions have easily replaced punitive justice as a way to settle grave breaches of IHL. This has significantly added to the disrepute IHL is already regarded with in society. Consequently, due to this soft approach in the enforcement of IHL, it has even been suggested by authorities in Ugandan that instead of taking rebel leader Joseph Kony and his four colleagues to the ICC at the Hague to stand trial for the violations of war and other crimes, they instead must be taken to local traditional justice mechanisms.[2] There can be no better way of mocking IHL than this. Apart from their own,

2 Authorities in Uganda are currently negotiating a peace deal to end two-decades old war with the Lord's Resistance Army (LRA) rebel group led by Joseph Kony. However, one difficulty they are faced with is whether to yield to rebel demands to resort to traditional justice to try the IHL crimes instead of the ICC that Kony and his four top generals are accused of perpetrating against mostly civilian population, in fact, his own tribe the Acholi people. Kony and his colleagues have made this a condition for the successful conclusion of the peace talks. They are dictating the talks ordering government under which justice system they should be punished. The rebels have demanded that in order for them to smoke the peace pipe, and sign the peace deal government and the ICC must first denounce the warrants of arrest the ICC have issued against the five on the basis of information received from the government of Uganda in particular President Yoweri Museveni, against the five rebels. Of course it is unacceptable that a perpetrator and not the State or the international community should be allowed to dictate how he should be punished for his conduct which constitutes violation of IHL. Kony and his colleagues 'want' to be punished under Acholi Tribal Code of Mato Oput rituals and not under the ICC nor even under Uganda Criminal Code for the war and other IHL crimes and authorities are seemingly open to this. Mato Oput was introduced by local people in northern Uganda not for the atrocities Kony and his co-accused face. Locals decided in good faith to introduce 'ritual-based' sanmction method to prepare for the reintegration of the returning young men, women and families; to cleanse and accept the returnees into family structures. On its own, it is a good method because it allows for the community and families to come to grips with what happened and perpetrators to reflect on their misdeeds and if forgiven, start afresh. Mato Oput is a method by which the victim and perpetrator go through a series of rituals culminating in the 'drinking' of bitter medicine from the roots of the Mato oput tree named after it to cleanse the bitterness in both of them and also cleanse the spirit of the deceased in instances where one of the parties was killed which marks the beginning of a new life. Clearly, this can relate to 'foot-soldiers' who may have been used to commit these crimes but not to the 'authors' of the crimes who embarked on

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Kony and his men simply have no sense of value of human life and it is regrettable someone must be talking about taking them to ancient rituals. On a different score the United States' (US) war on terror in particular has been such a great reversal of humanity's accomplishments in humanitarian law over the centuries. While for hundreds of years, the international community including the US has been working towards perfecting the current state of IHL, the US has suddenly made a u-turn that at a stroke of the pen made all these accomplishments otios.

Unilateral actions by US President George Bush's administration after 11 September 2001 saw scores of people from all over the world getting arrested and held in secret and illegal detentions in African, European and other countries before being flown to Guantanamo Bay in Cuba where they are being held without the benefit of the law. The US Constitution itself states very clearly that no one can be held without the benefit of a trial. Similarly, the Geneva Conventions of which the US is party to states in very clear and concise terms what should be done to such people.[3] Most of the US's detainees in fact are innocent people being held by the US because it must hold them. In any case, whether innocent or not, they

these missions with *mens rea* and fully aware of the consequences of their actions. It would be a pity if the international community allows this. Kony and his colleagues must answer at the ICC for the violation of IHL.

Rwanda introduced *Gacaca* justice-also traditional justice - but in this particular case genuinely so. After holding more than 100, 000 genocide suspects behind bars for years without trial due to the inadequate legal system, Rwanda decided to resort to the *Gacaca* traditional system of restorative justice but which it tempered with aspects of modern justice including imprisonment to a maximum term of twenty-five years for those that are found to be guilty in addition to community under the *Gacaca* traditional justice system, accused people appear before their community courts comprising not of modern western trained judges but of Myanga Hugayo or honest Rwanda. Truth and Reconciliation Commissions, *Mato Oput* and other forms of traditional justice on the other hand generally mock the IHL.

3 See, www.search.yahoo.com/search?p=US+Terror+Detainees + at Guantanamo; web.amnesty.org/pages/guantanamobay=bacground.org . With regards the former website can be found several articles by various human rights organisations on the United States' actions at Guantanamo Bay. On the latter web, Amnesty International has published an interesting article appropriately entitled 'Guantanamo Bay – a Human Rights Scandal'. The article explains how President George Bush has defied international outcry and expert condemnation against the goings on at Guantanamo Bay. Several mostly foreign Moslem men suspected of terrorism have been held in secret locations run by the Central Intelligence Agancy (CIA) around the world and later flown to the United States and held at the Bay in indefinite detentions. In November 2001, George Bush signed a Military Order establishing trials by military commission which has the power to hand down death sentences and from which there is no right of appeal. The Act, which was formally made law after sanction by Congress in October 2006, offers lower standards for trials of foreigners than citizens. On June 2006, the US Supreme Court, in the case of Sami Ahmed

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should at least have the benefit of being brought to trial pursuant to the US Constitution itself which is echoed in the IHL. It is dangerous to the cause of IHL for the US administration to hold innocent people without trial. The damage done to the status of IHL as a result of the United State's actions is incalcurable. Due to this intransigence, dictators around the world feel justified in their misdeeds against their people.

Similarly, by refusing to join it, the US has stabbed the ICC at its back. Though she participated and in fact was one of the States that originated the idea of an international criminal court, the US finally wavered and declined to ratify the Rome Statute that established the International Criminal Court. The message from this clearly is that in so doing, the US is siding with impunity, which is such a pity. Not only did she decide to remain outside the court as it were, US officials have unashamedly being going round the world to 'fix' agreements from weaker States Parties pursuant to art 98[4] of the Statute to the effect that those States will not handover

Hamdan, a 36-year old Yemen national who spent four years at the Guantanamo US detention Centre, ruled that President George Bush had overstepped his authority by ordering military commission trials and stated that the proposed commissions violated US law and the Geneva Conventions. The good news is that the new in coming government of President Barack Obama, the first African–American to be elected as the president of the United States has indicate that president Obama would close the Guantanamo Bay conciliations camps and either free the inmates or they them.

4 In part, art 98 provides:

1. Requests for assistance shall be executed in accordance with relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.
2. In the case of an urgent request, the documents or evidence produced shall, at the request of the Court, be sent urgently.
3. Replies from the requested State shall be transmitted in their original language and form.
4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:
   (a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;
   (b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

American citizens to the ICC to stand trial for international crimes even where there is evidence of their guilty. Several African States and States from outside the continent have 'cooperated' with the US in this endeavor practically puncturing the international community's efforts to fight impunity.

As a matter of fact, IHL has had a long history of impotence. Just like international law in general, IHL has easily been defied throughout the ages. Take, for instance, during the wars of liberation in Africa and other third world countries, colonisers did not feel themselves obliged to prosecute their wars against freedom fighters in accordance with the basic tenets of IHL. Motivated by racism and the ideology of superiority, colonial regimes disregarded IHL during their wars against freedom fighters. Former President of Namibia, Sam Nujoma recalled the barbarism with which the apartheid State prosecuted its war against his South-West Africa Peoples' Liberation Army (PLAN) and civilians in the following terms: [5]

> Our casualties included many who were captured and simply shot at point blank in the back of their necks. This was revealed by a reporter and photographer from the London Sunday Telegraph who climbed a wall to photograph a mass grave near Oshakati and identified 19 such bodies. Forensic experts later wrote that the photographs proved that they had been killed in cold-blood. Apartheid South Africa had never observed the Geneva Convention in its treatment of PLAN war

5 Sam Nujoma, *Where others wavered. The Autobiography of Sam Nujoma*, London: Panaf Books, 2001, p 398. Unfortunately, some of the ex-SWAPO freedom fighters during Namibia's liberation war in the seventees and eightees have accused their leaders more especially retired President Sam Nujoma of perpetrating the same crimes on them. This author has met with more than twenty such ex-SWAPO fighters at a workshop they organised in the Namibian city Windhoek under the auspices of the organisation 'Breaking the Wall of Silence' (BWS) which they established to advocate for their rights. At the Saturday, 24 November 2007 workshop specifically called to explore how they can bring their plight to the attention of the international community, the ex-fighters related harrowing personal stories of mistreatments metted out against them by the SWAPO leadership, including banishments into grave-like dangeons in Angola and Zambia, torture, rapes, disappearances, etc, all on the ground that they were traitors and spies sent by the then apartheid South African government which was fighting SWAPO. Some of the participants claimed that they represented their relatives including children, brothers and sisters that either disappeared while with SWAPO or were killed by the organisation. Among their demands include recognition by the government of their plight and the treatment they or their relatives received while in SWAPO ranks and to search for justice including international justice against perpetrators of these international crimes against them. A local human rights organisation has submitted a complaint to this effect to the International Criminal Court (ICC) in the The Hague, The Nertherlands.

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prisoners, though SWAPO had adhered strictly to it on all the ocassions when we captured their soldiers. It must be said that the extreme cruelty of the minority white soldiers was based on racial hatred, and horriffic crimes were committed by them against the masses during the war of liberation. I must also put on record that white South African commanders often killed wounded PLAN fighters and even overan civilian homesteads with combat vehicles such as Casspirs in their attempts to reduce SWAPO popularity. Both SWATF and Koevoet insurgency puppet units were guilty of these crimes.

More recently, serious breaches of IHL have taken place in several countries including Burma, Bosnia, former Yugoslavia, Rwanda, Sierra Leone, Afghanistan, etc. This is what led to the establishment of the *ad hoc* international tribunals for the former Yugoslavia and Rwanda and special courts in Sierra Leone and now Burma. Breaches of IHL are currently taking place in Palistine by Israel Afghanistan, the Democratic Republic of the Congo (DRC), Chad, Somalia, Sudan, Iraq, Uganda, to mention a few. Even though some of the perpetrators of crimes against IHL in some of these countries have been prosecuted and even jailed while others such as former President of Liberia Charles Tailor are still undergoing trial, violations of IHL nevertheless continue unabated. Naturally, civilian populations are the worst victims.

The few international prosecutions that, as indicated above, are in the nature of 'grandstanding' and are still to prove their worthy. International justice against perpetrators moves too slowly to be felt and as indicated often is selective. States do not feel obliged to enforce IHL with the force it requires whether at local or international levels. After its freedom, South Africa literary turned its back against international law which binds States to prosecute individuals accused of perpetrating breaches of the laws of war and particularly apartheid.[6] Instead of punishing perpetrators as she is obliged to under international law, South Africa established the Truth and Reconciliation Commission (TRC) headed by former Anglican Achibishop Desmond Tutu to which it invited perpetrators to come and, just like in

6 It should be recalled that like SWAPO in Namibia, the ruling African National Congress (ANC) in South Africa, was accused of committing gross violations of human rights including IHL while in exile in neighboring African countries during the liberation struggle. In response, a Commission was appoiinted by then ANC President Nelson Mandela headed by Prof SM Motsuenyane. The Commission's findings confirmed the allegations forcing the ANC to issue an unprecedented response which acknowleged that violations had taken place, see www.anc.org.za/ancdocs/pr/1993/pr0829.html .

church, confess their crimes in return for forgiveness.[7] However, former apartheid President PW Botha defied even this form of elementary justice and refused to appear. Botha dismissed the TRC as nothing but a Kangaroo court.[8] On the other hand, Botha's successor ex-President FW de Klerk appeared but vehemently denied torture and murder were his government's official policy.[9] However, some, especially low-ranking operatives appeared, confessed and were instantly forgiven. This, however, has not gone down well with most victims who needed nothing but justice. Most of them feel short-changed by the 'freedom government' that it could just let murderors and torturers just walk free with their pensions and ill-gotten wealth intact. Up to now, victims of violations of IHL during apartheid in South Africa are still languishing in poverty without adequate compensation in terms of recognition that what was done against them was wrong. There has been no official public apology from the leaders of the former apartheid regime on what they did to the poor black people that were only defending their dignity.

Consequently, a group of victims of violations of IHL have instructed lawyers to take up their cases to the United States local courts in the hope to try and seek recourse there under the Federal Alien Torts Act.[10] Recently,

7 The Promotion of Unity and Reconciliation Act, No 34 of 1995. See particularly on this score on amnesties (forgiveness) a Government Notice posted by the Department of Justice and Constitutional Development No R 451 dated 25 May 2007 in which Justice Minister Brigitte Sylvia Mabandla gives notice that in terms of s 47A(6) of the Promotion of National Unity & Reconciliation Act 1995 that amnesty was granted on 29 August 2005 by a subcommittee on amnesty in terms of s 47A(1) of the said Act to (a) Whybrand Andreas Lodeloicus Du Toit & (b) Marthinus David Ras in respect of the murders of Mr Mbala Glein Mgoduka, Mr Amos Temba Faku, Mr Desmond Dalumonga Mapapa and Mr Xolile Shepard Sakati committed in Port Elizabeth on 14 August 1989.

8 See New York Times, Monday, 22 August 1998. Botha was prosecuted and found guilty of contempt for refusing to testify, www.topics.nytimes.com/top/reference/timestopics/people/b/p-w .

9 Ibid, 6 September 1997.

10 Federal Alien Torts Act 1789, 38 USC Chapter 171, TRC No 34 of 1995 also known as Personal Injury Law. Khulumani, a South African non-profit making organisation representing interests of hundreds of victims of apartheid is among scores of foreign plaintiffs that have filed lawsuits in US federal courts based on this law. Khulumani has filed a multibillion dollar claim against US corporations that did business in South Africa during apartheid accusing business of sustaining and benefiting from apartheid. Recent reports suggest the case has been declared admissible despite resistance from the South African Government which even filed an affidavit in opposition (Mail & Guardian on line). www.mg.co.za; www.maurice-ostroft.tripod.com/di56.html. President Thabo Mbeki of South Africa is on record as telling his Parliament that the proper forum for such claims is not a foreign United States court but South Africa. Cited at www.usaengage.org.

after pressure from the public, the South African Government decided to prosecute then apartheid Minister of Police Adrian Vlok together with a handful of his senior security officials including the head of police. Vlok and his company were charged with attempted murder of then political activist now senior civil servant Frank Chikane, South African President Thabo Mbeki's head of the presidency. The case was a farce. It lasted no more than a few minutes in court. Government quickly struck a plea bargain with the accused who pleaded guilty in exchange for a suspended nonsensical non-custodial sentence. All the accused were let free as if the offence they had been accused of was not as serious as attempted murder.

(2) Origins And Objectives Of IHL

International law is premised on a number of objectives. In particular, IHL is based on two primary objectives, namely:[11]

(a) To prescribe laws governing when and how to resort to the use of force; and

(b) To regulate the conduct of hostilities in the course of war or conflict

The laws against war is a set of rules which are established and developed by treaty or over time by custom. The primary objective is to solve humanitarian problems or problems directly arising from either international or non-international war or armed conflict. In theory, IHL protects and guarantees persons and their property during a conflict. Consequently, IHL is seen as the bill of rights of prisoners of war (PoW), civilians, wounded, sick and shipwrecked combatants.[12] As a bill of rights, IHL limits or restricts what parties to the conflicts take as their right during war to resort to means and methods at their discretion to prosecute the war. During war, constitutions are usually suspended and even parts of

11 See Geoffrey Best, *Humanity in Warfare*, London: Weidenfeld and Nicolson, 1980, and War and Law since 1945, Christian Swinarski, ed, *Studies and Essays on International Humanitarian Law*, Dordrecht: Martinus Nijhoff Publishers, 1984; *The New Humanitarian Law of Armed Conflict*, Antonio Cassese, edn, Naples: Editoriale Scientifica, 1979; GIAD Draper, 'The Geneva Convention of 1949,' *HR*, Vol 114, p 59; and GIAD Draper, 'Implementation and Enforcement of the Geneva Conventions and of the Two Additional Protocols,' *HR*, Vol 164, p 1; F Karishoven, *The Law of Warfare*, Leiden, 1973; Michael Bothe, Karl Josef Patisch, and Waldemar A Solf, *New Rules for Victims of Armed Conflict*, The Hague: Martinus Nijhoff Publishers, 1982; Ingrid Detter De Lupis, *The Law of War*, Cambridge: Cambridge University Press, 1987, etc.

12 Some of the most interesting literatures on the subject from the African perspective include two outstanding works by Michael Wlker, *'Of the Far South' 2006. 'Forgotten Shipwrecks of the Western Cape,'* 2007.

bills of rights guaranteeing such sacred principles including human dignity often are set aside to give the combatants 'free' reign in the prosecution of the war. In instances where parts of the bill of rights or the constitution remain in force, this often is only on paper. This makes the IHL protections fundamental as without it, man is left to the mercy of man.

It was precisely due to this that it became necessary to develop the structure of the IHL as it is known today. The European approach to IHL is to trace it down to the activities of one man Swiss imperialist, businessman and social activist Henry Dunant. The current concept of IHL is heavily influenced by European ideas which started as the pipedream of this one man. While on a business trip to modern day Italy in 1859, Henry Dunant, was overwhelmed with the atrocities and the extent of the human suffering he saw and came face to face with during the infamous Battle of Solferino in Italy. Dunant saw well over 200,000 people lying about on the battlefield injured, dying and dead without anyone bothering to provide them with basic assistance. At the time, there was nothing in the nature of a universal law to protect civilians, the wounded, sick, as well as prisoners of war. Combatants intent on revenging or simply punishing their opponents were left free to do as such. In order to alleviate the suffering of the injured, and protect the dignity of the dead, Dunant mobilised the civilian population around him especially women and children to provide basic care to the injured thereby alleviate their suffering. He recorded this incident a book he called 'A Memory of Solferino'. The book later became the inspiration for the creation of the International Committee of the Red Cross (ICRC) in 1863. The following year, the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was adopted substantially based on Dunant's ideas. This is what led to the development of IHL.

International Humanitarian Law is a universal concept that is widely acknowledged in societies across the world. Therefore, emphasis on the European origins of the current concept of IHL signifies nothing other than Europe had a concept of humanitarian law and that in many ways it forms the basis of the current concept of IHL. Otherwise, it is true that each civilisation has its own notion of humanitarian laws and values applicable during conflict or war dating back centuries ago. African society, for example, did have its own notion of 'law of war'. For instance, Peter Becker,[13] demonstrated how King Shaka of the Zulu people of South Africa prohibited his warriors from killing captured children and women during wars with neighboring tribes. Instead of being slaughtered, civilians

13 Peter, Becker, *Rule of Fear. The bloody story of Dingane, King of the Zulu*, 1972.

especially women and children would be captured and delivered to the King's palace for children to become future soldiers while women would be married to titled men and worriers under the flexible system of marriage through the institution of polygamy. This is strikingly similar to what used to happen to captured civilians especially women and children in other communities in Africa. A Paramount Acholi Chief[14] in war-weary northern Uganda, for instance, has reiterated this same concept in his explanation of the Acholi traditional justice system already referred to above. According to the Paramount Chief, some of the guiding principles of the Acholi culture include reconciliation and harmony, respect, sincerity, forgiveness, problem solving through discussion, and the principle that 'children, women, and the disabled are not to be harmed in war'. Again, by the Acholi tribal code, civilians, women, children and the disabled are not to be harmed in war but in fact should be protected by fighters or enemy combatants. This should at least clarify the grossly mistaken view among scholars that principles of IHL have European origins only.

In Asia, Chairman Mao Zedong of China is reported to have said 'while a revolution is not a dinner party, or writing an essay, or painting a picture or doing embroidery, it must be conducted within parameters'. Mao issued his famour 'Three Main Rules of Discipline' and 'Eight Points for Attention of Peoples Liberation Army (PLA)', including the following:[15]

(a) Do not steal a single needle or piece of thread from the masses',
(b) Do not take liberties'; and
(c) Do not ill-treat Captives'

Chairman Mao's instructions are quite clearly equivocal than the western concept on the absolute need by combatants to fight their war hased on what are today known as the four Geneva Conventions, together with their protocols.

Nevertheless, a series of laws on war were enacted in subsequent years particularly during what became known as the Hague Conferences held between 1899 and 1907. The Hague Conferences were significant towards the evolution and development of IHL. Several conventions regulating both land and naval warfare were adopted during the Hague Conferences and these form the basis of the existing regulatory legal framework in force today. Consequently, IHL has developed over time and in series, and not as

14 Patrick, Tom, *The Acholi Traditional Approach to Justice and the War in Northern Uganda, Annotated Conflict Cases, Beyond Intractability.org*, This was said by Paramount Chief Rwot David Onen Acana 11 cited in USID (2005) report on *'Acholi Youths and Chiefs Addressing Practices of the Acholi Culture of Reconciliation'*, see www.nupi.or.ug/pdf/Youth_ChiefConferenceReport, 15 June 2005.

15 See on www.icbt.org/wg/nsa/library/iccblgrt.html.

a single act with the most latest instrument, as explained below being the 2005 Protocol also known as the Additional Distinctive Emblem (Protocol III) adopted on 8 December 2005.

An important point to note is that with the adoption of the laws of war, belligerents were no longer free to do as they liked during conflict. In particular, a duty was imposed on combatants to assist the defenceless including enemy solders. This, in fact, is nothing new. Police in national jurisdiction more or less have the same obligation. As a matter of law, police are required to render whatever assistance is due to suspected criminals who a while ago may have been shooting at them but whom they capture, injure or wound in the exchange of crossfire that ensues. A normal police operation in responding to a call from members of the public would include medical personnel not only in order to nurse police when injured but also to extend the same service to suspected criminals. With minor variations, this same principle applies in international armed conflicts and war. Through the laws of war, the international community regulates the conduct of war ie, it directs how to execute the mechanics of combat. Though it still happens today, indiscriminate use of force against undefended villages and towns particularly the wanton killings or targeting of civilians as happened in Rwanda during genocide and in most other countries in war was absolutely forbidden. Consequently, internationally sanctioned rules of humanitarian law have been enacted to define and categorise all those entitled to protection. In 1929, new conventions were introduced which revised both the 1864 and 1906 conventions concerning wounded and sick persons as well as dictating conditions for the treatment of PoW. It no longer was a discretion of the authorities responsible for the custody of the prisoner to determine how such a prisoner should be treated. This became a joint responsibility of both the international community and the holding State. This is what led in 1949 to the adoption of the Geneva 'Red Cross' Conventions.

One of the main problems of the IHL has to do with the structuring of the Conventions. The division of the Conventions into four separate instruments poses a serious challenge especially to implementation. While the objective of the concept is the same ie, protection of both civilians and combatants in situations of war and conflict, it was decided, however, to spread the Conventions into four which makes implementation and monitoring such a big challenge. First, the mere fact of dividing the Conventions into four poses a severe challenge to States and others expected to comply with the obligations flowing from the treaties. This requires a high level of technical competence to know which Convention applies in a given case and not the other. Most parties are bound to confuse the

Conventions more especially that this would be a war and not normal situation.

The second challenge of course is how to get parties other than States Parties to a conflict bound to the basic tenets of the Convention obligations. According to international law, only States are entitled to ratify or accede to the Treaties. A total of 191 States have ratified or acceded to the four Geneva Conventions while 161 and 156 States ratified Protocols I and II respectively.[16] movement of national liberation and armed insussectional movements or insurgency, on the other hand, are not expected to follow suit and join treaties. General Laurent Nkunda leading a breakaway faction in eastern DRC or Joseph Kony in northern Uganda or rebels in Darfur, are not signatory to the Geneva Conventions. This is a privilege only of States which they exercise by virtue of their sovereignity. However, IHL expects non-State parties to comply with the Conventions and other treaties relevant to war. While not being party, IHL holds that its obligations extend to non-State parties taking part in conflict or war because they constitute Customary International Law. Hence, IHL applies to both States and non-State parties alike.

This, however, is not to suggest that States Parties to the Conventions comply with their treaty obligations. This chapter would be unnecessary were this the case. Quite the contrary, breaches of IHL follow from State Parties as from non-state parties alike. In other words, it is a major challenge for the international community to get parties to a conflict comply with the Geneva Convention obligations whether or not they are party to in the technical legal sense. The mere fact of a State having ratified a Convention does not follow that it will comply.

Third, the lack of a clear mechanism both in international and national law to implement the Conventions has until now severely limited the capacity of the Conventions to force their obligations. In spite of the requirement to do so, most States have not domesticated IHL in their local criminal or penal regimes. In the absence of implementing legislation, a Convention whether ratified or not is as good as useless in getting it enforced locally. Non-domestication of an international treaty makes implementation in domestic terrain of the State highly unlikely. In most countries, there is no proper machinery in terms of law and appropriate bodies to assist in the difficult task of implementation. Therefore, IHL is viewed in most countries as 'foreign law' which has no relevance to the local jurisdiction.

Until recently with the establishment of both the ICC and *ad hoc* tribunals, the international community lacked definite teeth with which to bite violators of of the Geneva Conventions. Therefore, due to a lack of a

16 This is as at December 2003. See, www.icrc.org/Web/eng/Steering/O.nsf/htm.

positive machinery to enforce and punish breachers of international criminal law including those who violated the Geneva Conventions, impunity was the norm. Violations of IHL were punished after the First World War by means of tribunals at Nuremberg and Tokyo. These, however, were criticised for being largely made up of States from one part of the world who were also the victorious. In any case, just like the International Criminal Tribunals for the former Yugoslavia and Rwanda, post-First World War tribunals were temporary. Therefore, in spite of its jurisdictional limitations, the establishment of the ICC has somewhat eased the extent to which breaches of the laws of war can go unpunished. In the absence of an international positive mechanism like the ICC, the international community was forced either to rely on the vague notion of universal jurisdiction in Customary International Law which is, however, is hardly understood by States in respect of their obligations.

Nevertheless, the laws of war and in particular the Geneva Conventions set out a comprehensive legal framework which aims to protect combatants and civilians during armed conflict. Again, it is true that the Conventions and Protocols bind only State Parties to them and therefore do not bind States that have not acceded to or ratified the said treaties.[17] Similarly, not being States, militia or rebel groups cannot ratify the Conventions as to become parties like States. However, many of the provisions of the four Geneva Conventions and Protocols are indicative of Customary International Law and therefore have binding legal effect both on non-State actors as well as on States that may not have ratified them.

Finally, there are international legal instruments outside the framework of the four Geneva Conventions that though outside of this framework nevertheless are relevant to the protection of combatants and civilians during armed conflict. In other words, the notion of International Humanitarian Law frequently dovetails often beyond the confines of the Geneva Conventions to include typically human rights instruments including the International Covenant on Civil and Political Rights (ICCPR), Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), etc. While Geneva Conventions are activated only during conflict, these human rights instruments are in force throughout and not only during war. Certain aspects of the general human rights instruments are relevant to the protection of combatants and civilians during war. For instance, art 7 of the ICCPR forbids the use of torture on detainees and others which is also the principle that is subject of the CAT. Also the UN Standard Minimum Rules on the Treatment of Prisoners outlaws the

17 Vienna Convention on the Law of Treaties, 1969, art 1(f).

use of torture on prisoners including the PoW. In other words, it is necessary to adopt a generous and purposiful reading of the protection due to combatants and civilians during conflict.

(3) General Analysis Of The Geneva 'Red Cross' Conventions & Protocols

With the above, it is now necessary to try and gain a basic understanding of what constitutes the Geneva Conventions? In other words, basic understanding of the conventions is critical towards obtaining an equally basic sense of what rights and obligations pertain to each of the four conventions. Most importantly, however, is the question alluded to above, namely, what role(s) the Conventions play not only in regulating how war should be fought but in protecting people during war? In spite of the lessons from previous wars and conflicts, a fair question why it is necessary if at all to have the conventions? Is it realistic to have laws and rules to govern the conduct and execution of war? This is particularly important because by its very nature, war entails disregard of law. How can people that have disregarded the law by 'choosing' to settle their differences through war ever be expected to abide by law? These and similar questions are bound to come up in a discussion such as this. Most people cannot easily comprehend the basic theme here, namely, that war and law can coexist. Through international law, the international community is expressing its determination to see the co-existence of war and law.

Therefore, the response to the second question whether it was necessary to have the Conventions simply is *it was* and the justification for this is in order to save man from his path to self-destruction. The Geneva Conventions are necessary in order to fill-up the gaps which existed at the time and to use them as standard minimum yardsticks to protect the wounded, sick, shipwrecked, civilians and PoW. This is the core principle underlying the Geneva or Red Cross Conventions so familiar today if not in war zones then at least in law schools around the world. The Conventions prohibit a number of practices such as those witnessed by Dunant at the Battle of Solferino. It is a pity though that more than hundred years later, we still witness even worse human tragedies.

During the 1994 Rwanda genocide, for instance, several women were killed by Hutu extremists who would first rape them and then insert objects like sticks or metal bars into the private parts of their victims until the instrument came out through the mouth. Several Hutu men married to Tutsi women who were pregnant at the time of the war would be forced,

by militia groups calling themselves *Interahamwe* (men who fight together) which was fighting on the side of the then government forces, literary to cut off the wombs of their pregnant Tutsi wives to 'save' them the agony of watching while their wives were being killed by militia. A Hutu woman confessed to participating in genocide but 'defended' herself saying ' I did not kill anyone during the genocide as I was only killing children'. Another woman said she too was not guilty of genocide as she was merely 'finishing those that did not die from the first machete wounds'.[18]

Geneva Conventions are intended to forbid and criminalise the above practices. In 1977, two Additional Protocols[19] were added to the 1949 Conventions. As in the word 'protocol', the objective behind the two protocols, and now the third protocol, is to add to and strengthen the 1949 Conventions.

The following are the four Geneva Conventions:

(1) Geneva Conventon on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;
(2) Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea;
(3) Geneva Convention relative to the Treatment of Prisoners of War; and

18 As indicated above, not even the notorious Shaka Zulu of the Zulu people of South Africa in those old days would indulge in this type of barbarism. Peter Becker reports that Shaka Zulu and later his brother Dingane who assasinated him and took over the throne would never kill women and children. Even married men whom Shaka contemptuously called 'women' would be spared of his wrath. Women captives were required to be brought to Shaka's Kraal—the royal household to be married or made Shaka's concubines or those of councillors or warriors. Becker, *Rule of Fear*, op cit (note 12). What happened in Rwanda is simply beyond imagination. In fact what happens in all cases where such dastard crimes as war crimes are committed is impossible to undertstand. Recent developments in Africa more than justify not only the need to have IHL but also a strong political will, system and machniery to enforce it and protect people.

19 Protocol Additional to the General Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable to Armed Conflicts; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed conflicts (Protocol II), adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts. In relation to the Geneva Conventions, art 1 of Protocol II states quite clearly that it does not seek to 'modify its existing conditions of application'. But Protocol II states that it 'shall apply to all armed conflicts which are not covered by art 1 of Protocol I'. While this is not modifying the other protocol, it implicitly may just amount to that in specific situations.

(4) Geneva Convention relative to the Protection of Civilian Persons in Time of War

The essence of all the four Geneva Conventions is the sacred principle that any person whether foe or friend, soldier or civilian, official or unofficial fighter ,who is not actively engaged in warfare is entitled to be treated humanely. Therefore, a number of often 'normal' practices to a combatant in war such as the taking of hostages among the foes and torturing them either in order to extract information or simply to punish are forbidden. Similarlily forbidden is the carrying out of illegal executions or mounting reprisal attacks against the enemy. Because they contradict the sacred principle of humane treatment, such actions are prohibited.

The Geneva Conventions enshrine very detailed provisions, for instance, defining the standard of care due to the PoW, prohibition of deportations as well as indiscriminate destruction of property in occupied territories, etc. In order to build upon and develop the Conventions, it was decided to adopt two Additional Protocols which have since been joined by a new one adopted only in 2005. All this is discussed elsewhere in this chapter. Besides the four Conventions and now three protocols are related covenants and conventions including the 'Law of the Hague' and the 'Law of Geneva' which deal primarlily with interstate rules or rules between States on the question of use of force and the protection of persons from the effects of armed conflicts respectively.[20]

In seeking to offer protection to a wide range of persons, International Humanitarian Law draws a basic but fundamental distinction between combatants and defenceless persons unengaged in hostilities. As noted elsewhere in this chapter, the Geneva Conventions are intended to protect the wounded and sick in land warfare, shipwrecked in warfare at sea, PoW and civilians. In each of these categories, the wounded and sick are entitled to Convention protection. Besides the wounded and the sick, medical personnel and personnel from the establishment are covered under the first Convention while the second Convention is solely devoted to the happenings at the sea including hospital ships. On the other hand, the third Geneva Convention is solely devoted to the problems of the PoWs. The PoW Convention is a comprehensive set of legally-binding rules and principles governihg the whole issue of humane treatment to PoWs at every instance. Of particular significance in this respect is the definition accorded to the PoW in art 4 of the Convention. In its elementary sense, a PoW

20 In the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICL Reports, 1969, para 75, the World Court described International Humanitarian Law as 'one single complex system'.

covers members of armed forces of a party to a conflict which term includes volunteer corps such as resistance movements but more importantly it includes members of militia provided they have some semblace of organisation. As explained further in the chapter, militia and other non-governmental forces nevertheless must have some kind of 'command structure' ie, someone responsible for his or her subordinates. This is besides the requirement that fighters must always distinguish themselves with 'fixed distinctive sign which is easily recognisable from a distance'. They must carry arms openly and should have capability to conduct operations pursuant to the laws and customs of war. Most of these requirements now part of the IHL and resulted from the experiences of the Second World War. During the Second World War, combatants experienced severe difficulties in trying to distinguish between a combatant and one who was not as there were no easily recognisable signs and neither did fighters openly display their weapons. Similarly, in most cases, there were no clear command structures to guide rank and file as to what should be done, where, when and by whom.

Over time, the need to amend the 1949 Conventions became obvious particularly with the emerging situations in the Third World and more especially with the emergence of guerrilla movements in African countries. This inevitably led to pressure to define 'combatant' more broadly in order to include guerrillas. Articles 43 and 44 of Additional Protocol I addressed this particular issue. This problem was fixed by inserting the following definition, namely, a combatant is:

> a member of the armed forces of a party to an international armed conflict. But the requirement for an organised armed unit under effective command structure survived the Protocol. Similarly, the duty of combatant to distinguish themselves from civilians prior to and during an attack also survived the Protocol.

In other words, status of PoW depended more on fulfilment of post-Second World War conditions.

What does it mean that PoW must be treated humanely and that they must be protected? Among other things, such prisoners must not be displayed on television, for example, and be made to confess their sins as ironically happens in most countries during war. Again, they must not be tortured and can only be questioned as to their biodata and other minor information intended to understand their status. They cannot be insulted, threatenined or in any way made to suffer disadvantage. For example, they cannot suffer disadvantage only owing to the fact that they have not cooperated with authorities. In fact, upon their capture, PoW must be

evacuated from the combat zone(s) and taken to places out of reach of fire. Pursuant to art 23 of the Convention, it is prohibited to expose PoW to fire or to deliberately locate them near the combat zone. Similarly, under this same clause, it is prohibited to use PoW as human shields, as often happens in war. They cannot be sent on surveillance missions intended to detect where and how far the enemy forces are. If it is intended to punish them, PoW are subject to the law of the holding State and efforts should be made to punish them in the normal way such as for breaching their disciplinary codes or for war crimes.

The fourth of the four Geneva Conventions specifically deals with the subject of civilian population 'in time of war'. This is a major problem in Africa as can be imagined and in virtually other conflict situations around the world. Even though by art 4 the terms of this protection are limited only to what the Convention describes as those 'who at a given moment and in any manner whatsoever, find themselves, in case of conflict or occupying party in the hands of a party to the conflict or occupying power of which they are not nationals', nevertheless, the intention is clear *ie*, to extend protection to civilian population and to all those really affected by war but not to all civilians in the country. Article 4 protection does not attach automatically on merely being civilian but only on fulfilling the anticipated conditions above so that if country *A*, for instance, is at war against country *B*, not all civilians in the two countries are automatically entitled to the Fourth Geneva Convention protection. Only those who happen to fulfill the strict criteria laid down in the Convention would be entitled to protection.

However, in spite of this, the Fourth Geneva Convention offers a very superior form of protection to members of the civilian population that are caught up in an armed conflict. Pursuant to arts 27 to 34, civilians, collectively and individually, enjoy a wide range of Convention protection. Some of these protection include respect to person which is very important to people in that situation. It is the case that in a war situation, people are treated worse than animals by combatants. For instance, occupying forces would not allow them normal activities like attending to their chores, going for work, visiting each other, etc. Usually, such persons would be subjected to degrading and other forms of diabolical treatment like arbitrary searches, restricted movements, denials of associations even with family members and so on and so forth. Members of the civilian population are entitled to protection of their honor, convictions, religious practices, etc. They must not be subjected to torture or to inhuman and degrading treatment. It is forbidden to take hostage of civilians or to subject them to reprisals. Even though the term 'occupied territories' is controversial, s 111 of the Convention specifically addresses the controversial issue of civilians in

occupied territories. This, as can be imagined, has been very difficult area to deal with in most conflict situations. The Palestinian case under the occupation of invading Israeli forces is a case in point which needs more concerted efforts by the international community to get the Convention standards apply which is not easy.

Article 48 of Protocol I provides a basic but fundamental rule of warfare, namely, that during a conflict, warring parties have a duty to distinguish between civilians and combatants. We have already alluded to this principle. This is in order to make practical the requirements of art 51 which forbids turning civilians into objects of attacks. In practice, the rule has been very difficult to comply with. Parties to conflict often target civilians with deadily consequences. This perhaps is the 'softest' part of the Convention which is often disregarded. Similarly, it is forbidden to threaten violence among civilians ie, if you don't reveal the enemy or where they are, you will pay with your lives. This is contrary to the Convention. The Convention forbids such utterances and of course actual violence against civilian population. Terrorising civilian population as often is the case in most conflict situations is prohibited. Again, art 52 states forbids the perpetration of reprisals among civilian population. Warring parties are forbidden from taking their war into civilian population.

(4) Methods Of Warfare

The principle of protecting victims of conflict does not only end at the four Geneva Conventions' concept but more crucially, it extends to critical issues such as the method of fighting itself as well as the weapon(s) combatants may and may not use. By a series of international interventions including the 1868 Petersberg Declaration, certain methods of war as well as particular weapons are absolutely prohibited. The Petersberg Declaration's main accomplishment was the dramatic decision to outlaw use of explosives during conflict. Due to their ability to cause immense damage with grave consequences to civilians and others, besides weakening the military forces of the enemy, use of explosives has been severely regulated. Consequently, in a later instrument , The 1907 Hague Convention, art 22 of its Regulations as annexed stipulated that 'the right of belligerants to adopt means of injuring the enemy is not unlimited'. Also, it is prohibited to use or 'employ arms projectiles or material calculated to cause unnecessary suffering'.[21] This particular issue brings into play the problem of finding

21 Article 35(2) of Protocol I and the Preamble to the 1980 Convention on Conventional Weapons. Consequently, employment of poisonous weapons as well as similar weapons which cause unnecessary suffering is termed as grave breach of the laws and customs of war in art 3(a) of the Statute of the International Criminal Tribunal for Rwanda (ICTR).

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the necessary balance between military necessity and humanitarian considerations – a problem not easy to settle. In a ground breaking Opinion, the International Court of Justice (ICJ) explained that the:[22]

> ....first rule is aimed at the protection of the civilian population and civilian objects and it establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to use weapons which cause unnecessary suffering to combatants...States do not have unlimited choice of means in the weapons they use.

But the most important rule the Court touched upon is that all States were bound both by the Hague and Geneva Conventions regardless of whether they had ratified the two sets of regimes or not. The Hague and Geneva Conventions and therefore their principles have this effect because the Court declared 'they constituted intrasgressible principles of Customary International Law'.[23] At the heart of these rules, of course, is the important issue of respect for humanity.

An important dimension is that though the 1949 Geneva Conventions were aimed at international armed conflicts *per se*, Common Article 3 nevertheless went on to provide also in cases of non-international armed conflicts or civil wars which occur in the territory of one of the parties. Here too, minimum guarantees to protect those who are not taking an active part in hostilities, notably the sick and wounded, were recognised. Significantly, the ICJ in the *Nicaragua* case[24] took up this point in its interesting declaration to the effect that, 'Common Article 3 also applied to international armed conflicts as *minimum yardstick*....'.

Of course, there is no agreement on the definition of *non-international armed conflict* particularly whether it means only full-scale civil war or also extends to political and social disturbances. One thing clear though is that determination of this is more of a political than legal game. On the table, however, is the sole question whether absence of another State jeopardises the application of the Geneva Conventions only on that account and therefore not necesarily owing to verocity of the conflict. Common Article 3 provides the following:

22 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports, 1996, para 78.
23 Ibid, para 79.
24 ICJ Reports, 1986, pp 3, 114.

(1) Persons taking no active part in hostilities to be treated humanely without any adverse distinction based on race, colour, religion or faith, sex, birth or wealth. To this end, the following are prohibited:
(a) violence to life and person, in particular murder, cruel treatment and turture;
(b) hostage taking;
(c) outrages upon human dignity, in particular, humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions in the absence of due process.
(2) The wounded and the sick are to be cared for.

Protocol II of 1977 was brought in precisely to develop Common Article 3. The Protocol represents the international community's resolve to regulate all non-international armed conflicts the same as so-called international conflicts. Besides the requirement that the non-state group should be subject to 'command responsibility' rule, it should exercise *de facto* control over a part of its territory in order to be covered by Common Aticle 3 regime as read with Protocol II. It is almost like encouraging the group to seize as much territory as possible which in plain terms means increasing the verocity of war if it should enjoy both Convention and Protocol recognition. Though the term 'non-international armed conflict' is controversial, it is generally accepted that it does not include riots, internal disturbances and tensions, isolated and sporadic acts of violence not amountng to an armed conflict. Suffice it to say this does not make sense to rights organisations. It does not make sense to victims also who do not care less provided someone comes in to stop the rot. But this is law as defined in both Protocol II and Common Article 3.

Protocol II stipulates a set of fundamental guarantees as well as other provisions which aim to protect non-combatants. Key among these are protections against violence to the life and torture; the practice of collective punishment; turning non-combatants and combatants alike into hostages; terrorising non-combatants; practising outrages on personal dignity of non-combatants, including rape and enforced prostitution; and the crime of pillage.[25] The Protocol protects children and civilians and specifically forbids attacks against works or those installations which contain dangerous forces likely to result in severe losses to civilians.[26] Other entitlements include

25 Article 15 of Additional Protocol II of 1977.
26 Ibid, arts 4 and 6.

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protection from displacements of civilians, mistreatment of prisoners, detainees, wounded and the sick.[27]

As can be imagined, there are several non-armed conflicts around the world. Naturally, these are difficult to determine as to whether or not they fall under IHL. Some of their features at times may fall under IHL at other times not. The principle is if a civil conflict falls below the necessary minimum threshold anticipated in Common Article 3 and Protocol II, it can't be covered by International Humanitarian Law. As indicated above, most civil conflicts fail to fit the jurisdiction of International Humanitarian Law. Zimbabwe is one such situation. Though it has been argued that Zimbabwe may be an International Humanitarian Law issue, the general view is that it falls less than the minimum standard.

In regard to this problem where International Humantarian Law does not apply, there are efforts to try and come up with own regulatory framework. Among those trying to address this situation outside of classical IHL includes the International Committee of the Red Cross (ICRC). The ICRC has been trying to elaborate a declaration specific to internal strifes less than International Humanitarian Law situations. Similarly, the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (now Commission on Human Rights) has even gone as far as adopting a Declaration on Humanitarian Standards,[28] and, though not implemented, nevertheless has been under consideration[29] for a period of time now. Basically, the Declaration reiterates Common Article 3 and Protocol II principles and offences including prohibition of violence to life, health and physical and mental well-being of persons including murder, torture and rape, collective punishment, hostage taking, practising involuntary disappearance of individuals, deliberate deprivation of access to necessary food, drinking water and medicine, right to liberty of detained persons, protection from threats of violence to spread terror, etc.

(5) Enforcement Of Humanitarian Law

Elsewhere in this chapter, we have recounted the fact that International Humanitarian Law is weakly enforced. This is a major international challenge to the international community. Victims of conflicts, both international and non-international, have often not enjoyed protection set out in the four Geneval Conventions and Additional Protocols in particular and in general International Humanitarian Law. International Humanitarian Law

27 Articles 17, 5 and 10.

28 E/CN4/Sub2/1991/55.

29 See Sub-Commission Resolution 1994/26, UN Commission on Human Rights Resolution 1995/29 and E/CN4/1995/81.

is an important branch of international law which seeks to protect human dignity. However, more than fifty years later, most of its aims and objectives remain unachieved.

Nevertheless, like in any other situation, States on becoming parties to Conventions, automatically assume certain binding legal obligations due from those instruments. The four Geneva Conventions enshrine a number of methods for their enforcement. But one that is expressly prohibited is use of reprisal.[30] An innovative means of implementing the Geneva Conventions is the notion of 'Protecting Power'. Under this method, a party to a conflict appoints a State not involved in the conflict to look after and take care of the interests of its nationals from the results of war. The interests needing protecting courtesy of the Protecting Power may include securing the rights of PoW, civilians or non-combatants during the conflict. Some of the States that played this role include Sweden and Switzerland during the Second World War. In the absence of a supranational system of monitoring and control, Protecting Powers would act as a form of guarantee for ensuring the application by conflicting or warring parties of the Convention protections.

But this system has its own weaknesses, notable among these is that it really depends on the parties involved. First, the State proposed as Protecting Power should agree to play that role and not only must it agree, it must possess the necessary capacity to play that role. Second, both the Protecting State or Power and the State that has jurisdiction of over the person or persons whose protection is being sought must consent to the arrangement. This, therefore, implies that failure of the holding State to co-operate, means protection would not be forthcoming. China is on record to have declined the appointment of a Protecting Power in regard to its conflict with India in 1962. Similarly, India declined a Protecting Power proposal in its 1971 dispute with its neighbor Pakistan in regard to Pakistan prisoners of war at the time under the jurisdiction of India.

Besides the above system, Additional Protocol I provides for International Fact Finding Commissions.[31] The Protocol mandates the Commissions to inquire into grave breaches[32] of the Geneva Conventions as well as violations of the Protocol. Also, both the Conventions and Protocol provides for such facilities as 'good offices' meant to ensure the restoration of an attitude of respect for the instruments'.[33] In addition, the ICRC has played pivotal roles in trying to ensure the implementation of International Humanitarian

30 See particularly arts 20 and 51(6) as well as Protocol I.

31 See arts 50, 51, 130 and 147 of the four 1949 Geneva Conventions respectively as well as art 85 of Protocol I, 1977.

32 Article 90 of Protocol I, 1977.

33 Ibid.

Law. In the absence (till now with the ICC) of definite international implementing system, the ICRC applied and implemented the Geneva Conventions particularly but not only in natural and related disasters. In other words, the ICRC conducts PoW visits, monitors the conduct of combatants to try and see to the protection of civilians and others including the sick and wounded. But in so doing, the ICRC does not prosecute violators of IHL. Due to the principle of neutrality, ICRC cannot take up violations to court to testify because this would compromise their neutrality, which is a pity. Finally, the establishment in the 1990s of *ad hoc* international criminal tribunals on former Yugoslavia and Rwanda, and in 1998 of the ICC in order to fight impunity, is the most eloquent collective testimony of international community's desire to implement International Humanitarian Law. More adequately dealt with elsewhere in this chapter, sanction though relatively recent has potential to ensure effective implementation.

Again, the first two Conventions seek to protect members of the armed forces involved in a conflict but who are no longer able to fight legally known as *hors de combat*. Technically, a detained soldier is *hors de combat*. Similarly, a wounded and sick soldier is *hors de combat*. Soldiers in shipwreck are *hors de combat*. All these are entitled to recognition protection precisely because, they are defenceless and cannot fight any longer. It is barbaric to fight a person who owing to a condition is not able to put up a fight or retaliate proportionatly with you. Similarly, torturing someone who is already in your custody and whom you have disarmed is simply uncalled for. Under International Humanitarian Law, it is forbidden to deny such a person food, medical treatment or to subject him or her to any form of abuse. But the first and second Conventions offer explicit protection to *hors de combat* while the third addresses itself only to PoW. On the other hand, the fourth Convention introduces roles germane to the treatment of civilians during war, including those in occupied territories.

To reiterate the point, IHL protects people who cannot take part in the fighting. Particularly but not only, it protects civilians but also medical personnel, chaplains, and humanitarian workers, etc. International Humanitarian Law seeks to protect those individual combatants that even though they had been fighting nevertheles can longer fight. In other words, IHL forbids 'revenge fighting'. It protects the sick, you can't go into hospital and kill sick combatants simply because they killed your friends or people close to you. Due to their vulnerability, shipwrecked combatants were also identified for particular protection. If their ship is wrecked or cannot normally sail, for example, because it has hit a rock, then IHL protection comes to their aid even if they themselves are fine. The law comes to their

aid to ensure no one takes advantage and kills them because of their situation. They may be 'able' and 'fit' to fight but the condition of their ship renders them *hors de combat* and therefore entitled to protection. Finally, once in your custody, PoW, like all detainees are entitled to protection and not as often the case to be taken advantage of and abused, tortured, held as hostages, or even worse, killed. They should not have their honor and integrity compromised while in your custody.

(6) August 1949 Convention Relative To The Protection Of Civilian Persons In Time Of War

According to the above Convention, a civilian is defined as:

> a person who is not a member of of his or her country's armed forces.[34] Similarly, a civilian is one who is not member of militia units and therefore is not a combatant which means he does not carry arms, is not identifiable by insignias or military signs such as the military uniform, etc.

Consequently, based on art 13 of this same (Civilian) Convention, civilian population in conflict are entitled to the following protections:

(1) The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
(2) The civilian population as such as well as the individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
(3) Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

Similarly, art 8(2)(b)(1) of the Rome Statute of the International Criminal Court (ICC) also prohibits attacks directed against civilians.

We have already noted the fact that the Fourth Geneva Convention is a direct result of the Second World War. As indicated above, art 2 of this Convention deals with the issue of applicability. First, the Convention applies to 'declared war' or to 'any other armed conflict which may arise between two or more of the High Contracting Parties'. This applies 'even if

34 *Commentary IV Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Jean Pictet, edn, Geneva: ICRC, 1958, reprint 1994.

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the State of War is not recognised by one of them'. Also it 'applies to cases of partial or total occupation of the territory of High Contracting Parties even if the said occupation meets no armed resistence'. Of course, as noted before, the Convention applies to parties but also to non-parties as long as they 'accept and apply the provisions', thereby invoking an old rule of Customary International Law.

Article 3 states that 'in the case of armed conflict not of international character occuring in the territory of a State party, Parties shall, as a minimum, be bound to provide or extend protection to the 'persons taking no active part in hostilities, including members' forces that owing to sickness, wound or are in detention, have laid down their arms. In all circumstances, such people 'shall be treated humanely, drawing no adverse distinction against them based on race, color, religion or faith, sex, birth or wealth'.

The list of prohibited acts stated in the Convention is long and the acts themselves many and comprehensive. These include virtually all conceivable situations that compromise life and dignity. According to the Convention, a combatant shall refrain from actions which, among other things, cause violence to life and person in particular murder, cruel treatment and torture. It is prohibited to take hostages among civilian population. Similarly, perpetrating outrages against personal dignity is forbidden. But executions carried out if based on a regularly constituted court affording all judicial guarantees which are recognised as indispensable by civilised people are not illegal. On the other hand, the wounded and sick among the civilian population are entitled to be cared for. It is stipulated that an impartial humanitarian body eg, ICRC may offer its services to the parties, which, as indicated above, it does.

Article 5 empowers a party to a conflict that is satisfied that an individual who *prima facie* is a protected person is nevertheless actively engaged in activities hostile to the security of State to not rely on the Convention protection. However, such a person shall be treated humanely. He is not to be mistreated only because he has been proven to be engaged in combat. When caught, he is entitled to be afforded fair trial, in case of trial, and shall be granted full rights and privileges of a protected person under the Convention. This raises an important issue which needs further elaboration. If a person normally entitled for protection under one of the Conventions nevertheless may be entitled under another. Therefore, an individual determination in each case is essential. If based on an individual determination, a militia is deemed not to be entitled to protection as PoW, for instance, because he does not fulfill the PoW criteria, his case should nevertheless be assessed against the Fourth Geneva Convention on the protection of civilians under which he may just be entitled. All this including

the fact that he does not fulfill the criteria for PoW status or that he engaged in direct combat requires individual determination and not be based on generalisations.

It is contrary to the Fourth Geneva Convention to attack civilians save those that are engaged in combat. What is the meaning of 'attack', however, is not easy to define. Generally, it is an accepted rule of international law to seek to establish not just that an attack had taken place against the civilian population but more so that there was an active intention on the part of the attacker which was encouraged by his Government or Organisation (in the event of a rebel group) to deliberately target the attack against civilians. This is captured in art 7(2)(a) of the Rome Statute to the ICC which is dicussed below. Under this article, it would appear that in order to commit a crime against humanity ie, directing attacks against civilians, it is necessary for the prosecutor to go beyond mere proof that the attack took place and that it was condoned or tolerated either by the State or Oganisation of the fighter to proving that the attack took place with active support of the State or the Organisation of the combatant(s).

This rule is intended to protect parties from responsibility for war crimes in respect of acts that may have been committed without proof of intention. For the war crime against the civilian population to stick, there must be evidence that it was committed with knowledge that the attack will hit civilians. Also, it is important that evidence is led showing that the attack took place within a definite time-frame and in the context and in association with conflict. In other words, it is not a war crime but probably murder or other criminal offence if the facts do not disclose the fact that the attack was orchestrated deliberately and intentionally. Similarly, commission of the offence *rationale temporis* or outside the prescribed time-limit does not constitute a crime. It is a political decision which time of the conflict is covered and which is not. Conflicts may take very long. Authorities have to decide the time-limit.

What constitutes an 'armed conflict' for the purposes of a war crime against civilian population? In one sense, an armed conflict is a confrontation between governmental authorities and organised armed group on the other. Below, we discuss the difficulties pertaining to determining controversial terms such as 'organised' when we look at groups such as the *Mai Mai* fighters. This, however, is what the International Criminal Tribunal for the Former Yugoslavia (ICTY) hold in the *Kadic* case.[35] Again, it is not a war crime in instances where though people have been attacked or women raped at the instance of a party, it happened in a unilateral act without an

35 ICTY: *Prosecutor v Kadic* (Trial Chamber) Decision of 14 November 1997, www.icc.org.

opposite party. This would happen, for example, in isolated act of violence but due to the absence of another party, the attack falls less than an armed conflict. For an 'armed conflict' in the context of the Convention to take place, there must be two distinct parts to the conflict who must be armed.

Therefore, civilian protection is conditional and not absolute. Civilians who at the same time directly take part in conflict lose their protection. It is important to appreciate this point that one cannot be 'protected person' and at the same time engage in activities contrary to that protection.

To return to the earlier point, it will be recalled that for nearly thirty years since 1949, the Conventions applied only to 'declared wars'. This means that protection due from the Conventions extended to subjects as defined in the Conventions but only those who find themselves in situations amounting to so-called 'declared wars'. This excluded from the ambit of protections all those persons practically in similar situations but whose situations nevertheless did not qualify for 'convention protection' because the war in which they found themselves in was technically not 'declared'. This has had the effect of severely limiting the scope of application of the Conventions. Therefore, the 1977 Protocols I and II seek to elaborate on and expand this concept. Instead of only protecting people that fall under wars that are 'declared', the Protocols extend protection simply to people in 'armed conflicts' without the necessity of the conflict or war being declared. The second important development brought about by the addition of the two protocols is that they extended protection from international conflicts proper to 'non-international conflicts'. Previously, only international conflicts or conflicts between two or more nations would be covered under the Conventions leaving out so-called 'internal conflicts' otherwise known as 'civil wars'. Civil wars were subject to the principle of non-intervention in domestic affairs. The principle excluded the international community from seeking to intervene to insist on observance of minimum standards of the law of war.

(7) Prisoners Of War (POW)

The term PoW is quite controversial. The Third 1949 Geneva Convention defines PoW as:

'members of the armed forces captured during a conflict...'.

At first sight this seems straightforward. However, it extends also to what it calls 'or Members of other militias and members of other volunteer corps provided that such militias or volunteer corps fulfil the following conditions:

(a) Are commanded by a person responsible for his subordinates;
(b) Have a fixed distinctive sign recognisable at a distance;
(c) Carry arms openly; and
(d) Conduct their operations in accordance with the laws and customs of war.

This characterisation raises several questions. In particular, the question is where to place those combatants not fulfilling the above criteria? Though in every respect engaged in combat, should a combatant not be dealt with as PoW only because of a lack of distinctive sign or sign that is recognisable from a distance? Similarly, is failure to carry arms openly a sign that if caught, the combatant should not be entitled to PoW status? As indicated below, most non-State combatants do not fulfill this criteria. Instead of a distinctive sign as required under the Convention, fighters normally would be recognisable and distiguishable under different customs and conventions of the community concerned. People know which of their sons have turned into fighters and contrary to this aspect of international law would not like this to be openly known. This is how freedom struggles in Africa, for example, were fought. Rarely did communities encourage fighters to wear combat uniforms which distinguished them from the rest of the people as this was dangerous both to the combatant and to his or her family and community. Similarly, combatants rarely carried arms openly as this too was dangerous. Instead, arms would be hidden in bags or on the body covered by clothes till they are required for use. Even the term 'commanding' is controversial. A commander in the ordinary sense may not exist in all situations of conflict where communities are involved. Instead of one person, a whole village may for this purpose be classified 'commander'. In fact, most fighters would go to war and engage in direct combat without knowing who their commander or one who has commanded their action is. But as indicated in the introduction, fighters in most civilisation comply with the latter requirement. Except in extreme situations as seen in colonial wars, the laws and customs of war are generally recognised and respected. Recently, the United States introduced an interesting concept of 'unlawful combatant'.

7.1 PoW or Unlawful Combatant?

Attacks by suspected members of *Al-Qaeda* on 11 September 2000 caused a world-wide condemnation. For its part, the United States reacted by refusing to extend the notion of PoW to the captured *Al-Qaeda* suspects which would have enabled them to benefit from certain entitlements under

the Geneva Conventions. President Bush and his government argued that captured *Al-Qaeda* operatives were not PoW but 'unlawful combatants' which term denied them the Third Geneva Convention protection. This had the effect of reversing the entite IHL to the pre 1949 period or even beyond. Former President of Ireland who later served as UN High Commissioner on Human Rights Mary Robinson[36] provoked the ire of Washington when she insisted that *Al-Qaeda* captives in fact were PoW who should be considered as such and should benefit from the protection due under the Third Geneva Convention. But powerful Pentagon polticians such as former US Secretary of Defence Donald Rumsfeld and other military offcials opted to call them 'detainee' or 'unlawful combatants'. Among the reasons used for this include the fact *Al-Qaeda* operatives did not have fixed distinctive signs. This simple act expunged from American jurisdiction the entire IHL.

Later, in response to growing criticisms against the administration's treatment of captured prisoners in Iraq, Rumsfeld,[37] who has since been dismissed, sought to expand on his notion. While he conceded that prisoners in Iraq were covered by the Conventions, those of *Al-Qaeda* were not, he argued. He said: 'terrorists don't comply with the laws of war. They cannot be covered by the Conventions while 'they go round killing innocent civilians', he lamely argued. As indicated, the US government argued that since *Al-Qaeda* do not wear uniforms ('fixed distinctive sign') or obey the laws of war, they were unlawful combatants who fell outside the four Geneva Conventions.

In further justification, the Bush administration prepared a military pamphlet[38] addressing most of the controversial issues on the law of war. In the pamphlet, the US military suggested the following definition of an unlawful combatant:

36 See 'Pressure on US to close Guantanamo Camp, Friday, 15 February 2006, www.rte.ie/camp/news/2006/0217/guantanamo/htm; But see bitter counter-criticisms from those who support the US. On the Guantanamo Bay case through the 'Yellow Line', www.the yellowline.blogsport.com/2005/05/ai. The criticisms are directed at both Amnesty International (AI) for describing Guantanamo as a 'gulag' and to Mary Robinson for calling on Washington to close the camp saying it was in its interests to do so.

37 See 'Ramsfeld defends Guantanamo Bay' saying 'terrorists do not deserve IHL protection', in the famous case of *United States of America v Omar Ahmed Khadr* CMCR 07-001, 24 September 2007; Also Scott Reid, *Terrorists as Enemy Combatants. An Analysis of How the US Applies the Law of Armed Conflict in Global War on Terrorism*, Naval War College, Newport, USA, February 2004; www. theage.com.au/articles/2002/02/14 .

38 See *Omar Ahmed Kadr* case, ibid.

> An unlawful combatant is an individual who is not authorised to take a direct part in hostilities but does...Unlawful combatants are a proper object of attack while engaging as combatants...if captured, they may be tried and punished.

The pamphlet mentions as examples, civilians who engage in war without authorisation, non-combant members of the military such as medics or chaplains, who engage in combant,; and soldiers who fight out of uniform. Ironically, the United States during the Second World War used more or less this interpretation, to the capture eight German saboteurs who were out of uniform and proceeded to execute six of them. This is the same concept the United States pursues at Guantanamo Bay in total disregard of well-known principles of IHL.

Ever since the US's military operations starting from Afghanistan way back in 2001, thousands of people have been detained either by local puppet regimes and forces in that country (Afghanistan) and in scores of such countries as Iraq, Pakistan, etc. The Taliban and *Al-Qaeda* fighters, in particular, have been held in several prisons in those countries and in Europe besides those at Guantanamo Bay. Afghanistan prisons are holding the largest group running into several thousands. Yet, under International Humanitarian Law, combatants captured an international armed conflict (and this conflict between the United States and the Taliban and *Al-Qaeda* fits the definition) must be presumed to be PoWs and held as such until the cessation of hostilities. All those combatants who may have fallen into enemy hands have a right to the status of PoW. Such persons would include the members of the armed forces of a party to the conflict, militia forming part of the armed forces as well as inhabitants of a non-occupied territory who decide to take up arms in order to resist and fight the invaders. Similarly, just like members of regular forces, members of irregular forces like *Mai Mai* discussed below are also entitled to PoW status. As indicated already, denial of PoW status does not mean that a person has no protection. A combatant who is denied PoW status may be entitled to be treated as member of the civilian population.

Similarly, the Geneva Conventions regulate the exercise of justice where it is necessary to dispense justice on combatants or others. According to international law enshrined in the Geneva Conventions, only an independent person – a Judge – can determine the status of detainees. However, the Bush administration has established a military commission outside of international and even US's own law which offer far lower standards of justice for the suspected *Al-Queda* operatives from other countries and which provides for no right of appeal in violation of the

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Constitution of the United States. Specifically, it is not up to the detaining authority in this case the Bush administration to also label the detainee with a tag and then based on that subject him or her to kangaroo justice. This also brings into play the interface between humanitarian law and human rights law. Generally, detainees are entitled to be brought before a tribunal to determine whether they are prisoners of war or not.

(8) The Three Additional Protocols

Though established in two distinct and separate legal instruments, the two additional protocols to the Geneva Conventions, in fact, dovetail into each other's territories. Both the two protocols were adopted on the same day and by the same body – ie, by means of diplomatic conference. The term 'diplomatic conference' is another way of stating that the protocols were adopted 'by civil servants representing the various States members of the United Nations'.

8.1 Additional Protocol I

However, in spite of this, there are fundamental differences between and among them. One of the main differences of course is that Additional Protocol I essentially deals with 'International Armed Conflicts' and is therefore limited to this particular territory whereas Additional Protocol II provides for the protection of civilians in 'Non-International Armed Conflict', a very clumsy word. But this technical distinction between the two situations often only makes sense to the scholar and the policy maker and not to the war victim. An international conflict or war between two or more nations is basically the same as the so-called non-international conflict in so far as the victim is concerned. Both protocols of course deal with the same issue of war and conflict and therefore express the same need for the 'protection of the victims of armed conflict' only except that to intellectuals, it in one sense is applicable only to those who are caught up in an 'international' situation while in the other it is limited to those in who happen to be in a 'non-international' conflict or situation.

Nevertheless, the two troublesome terms 'International' and 'Non-International' are of course intended to deal with different and often conflicting situations. For example, Additional Protocol II cannot apply to an international war and *vice versa*. But wars or conflicts can both be international and national at the same time. The Democratic Republic of Congo (DRC) as well as Uganda, save as excellent examples in which both situations anticipated in the two proocols may apply with ease and of

course with hardly any difference to the victim. The DRC conflict involved outside States including Burundi, Rwanda and Uganda on the side of various rebel groups while on the other Angola, Namibia and Zimbabwe got involved on the invitation of the Government of the DRC. There are many other states than those few that are mentioned here that expressly or implicitly took part in the conflict in fact including non-African States in western countries. The DRC was a free for all kind of situation. This was exposed by none other than a United Nations explosive report on the illegal exploitation of the resources of the DRC.[39] The Lords' Resistance Army (LRA) of Joseph Kony in Uganda is fighting government power as a kind of a national conflict but which took international dimension the minute Kony escaped and set camps in neghboring Sudan and the DRC from where to launch his attacks which is the reason cited by Uganda in invading the DRC in pursuit of Joseph Kony.

But a more relevant example of 'mixed wars or conflicts' is the finding by the ICTY in the case of *Tadic*.[40] In this case, referring to Article 3 common to the four Geneva Conventions applicable as it is to armed conflicts in general, including armed conflicts not of an international character, the ICTY found that the conflict in the former Yugoslavia was of a 'mixed character'. The Appeals' Chamber of the ICTY easily found that the concept of war crimes to international and non-international conflicts but also that the conflicts in the former Yugoslavia were both of international and non-international character'.[41]

Therefore, the DRC conflict specifically is governed both by Additional Protocols I and II. On the one hand it is a classical situation of civil war which involves various local political and ethnic groups within the country fighting either vertically against the government or horizontally among themselves for autonomy, political power, resources, discrimination and domination by other more exerting and powerful groups. One of these groups still fighting for autonomy and very much in the public eye is the so-called Banyamulenge[42] ethnic group in the eastern part of the country.

39 Final Report of the Panel of Experts on the *Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo*, 5/2002/1146, 18 October 2002 UN.

40 *Prosecutor v Dusiko Tadic a/k/a 'Dule'* 7 May 1997, www.un.org/icty/index.html.

41 See also Marco Sassoli and Laura M Olson, 'The judgment of the ICTY Appeal Chamber on the merits in the *Tadic* case,' *International Review of the Red Cross*, No 839, 30-09-2000, pp 733-769.

42 The term 'Banyamulenge' is itself controversial. The word comes from a mountain called 'Mulenge' lying in the east of the country around the place where these people live. Of

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Because the DRC like the rest of the African countries is populated by various ethnic groups most of these groups produced their own militias or spontaneous fighting forces to fight for or defend themselves or as often claimed 'to defend their people'. For example the so-called *Mai Mai*[43] (also Mayi Mayi) militia is said not to be a rebel group in the formal sense of being subject to an authority and wearing uniform as in western sense of a fighter. *Mai Mai* is a people social force originating from within society and epitomising society's anger at the excesses of the conflict. Therefore, *Mai Mai* are people-based spontaneous formations not to be confused with classical State-armies or top-bottom State military formations. In fact, ancient Africa is full of this concept of people or rather men in each village rising spontaneously when attacked to defend the village.[44] Therefore, while

Tutsi origin from Rwanda, legend has it that Banyamulenge people originally came from Rwanda before they settled in their present 'home' around Mulenge mountains. There are contestations on this regarding whether this land was part of Rwanda at the time or of the DRC as presently constituted but this is neither the time nor the place to indulge in such questions. Banyamulenge ethnic group claim to be victims of discrimination and oppression in the first instance at the hands of their neighbors the local groups they live with and on the other by the State before and ever since the independence of the Congo.

43 The literal meaning of the term *Mai Mai* is 'water water'. It is often used to indicate a popular belief that with rituals, a Mai Mai fighter can defy even bullets – bullets will become water on the body of a *Mai Mai*. By most accounts, *Mai Mai* is community-based militia. It is very powerful and well-organised. They often don't wear uniforms as the Geneva Conventions require because they don't have them. Most would not dare wear uniforms because they would like to fight in and within civilians. Wearing uniform could expose and put them to danger. Strictly, there is no commander in the sense of western military. However, there is somekind of a leader as explained above such as community leader or leader of sect but nothing anywhere nearer commander in modern armies. In Kivu province of the eastern DRC, *Mai Mai* sprang up to defend their territory against other armed groups. Most *Mai Mai* were formed to resist the invasion of Rwandan forces and other Rwanda affiliated Congolese rebel groups. Others to exploit war for their own advantage by looting, cattle rustling, banditry, etc. *Mai Mai* is often led by traditional tribal elders, village heads and politically motivated resistance fighters. They allied themselves with government and foreign forces and guerrilla groups. The term does not refer to any particular movement or group but to a broad variety of groups, see www.en.wikepia.org/wiki/Mai-Mai

44 A retired Zambian politician and former Vice President of Zambia has confirmed this in his Memoirs, Alexander Grey Zulu, *The Memoirs of Alexander Grey Zulu* (Lusaka, Zambia: Times Printpak Zambia, 2007), in which he reveals that in ancient Africa, it was a duty upon every man in the village to defend the village or community he came from when attacked. Hence men kept instruments of war such as knob-kerries, machete, axes, and anything they could use during war. In many parts of Africa up to now, men still keep and can be seen carrying these arsenals of war. For example, the Zulu men of South Africa relish

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the DRC Conflict is 'international' to the extent of the involvement of foreign countries, it is also 'non-international' in another context.

8.2 Additional Protocol II

As indicated already, Additional Protocol I, deals with protection of civilians in international armed conflicts. It is probably due to the complicated nature of international armed conflicts that this Protocol is more extensive than its counterpart (Protocol II) which is far shorter in scope. Protocol I has a 'general provision' clause ie, set of provisions which is substantially devoted to defining several terms employed in both the four Geneva Conventions and the Protocols themselves. Other features include the application of the Protocol, legal status of the parties to the conflict, etc. Legal status of parties to the conflict is especially important given the extremly difficult area regarding the status of guerrilla or non-state groups. This leads to part II which is central to the issues at stake, namely, the wounded, sick and shipwrecked persons their definition, protection and respect. The wounded, sick and shipwrecked persons under this part are defined as:

> ...persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, newborn babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility.

It is particularly important that besides the military, the protocol encapsulates civilians in this distinct way. This covers rebel, militia or citizen groups that are forced to take up arms to defend themselves and not being regulars would otherwise not benefit from the protection. This is closely followed by the term 'shipwrecked' which is defined as:

> ...persons, whether military or civilian, who are in a peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility...

among other things knob-kerries. A man, a 'real man' must carry a knob-kerie wherever he goes as a social status symbol that one is a man. Society relished to praise such status through appropriate songs and other social activities indicating collective approval by society in which bravery is praised and cowardice rediculed if not rebuked altogether. Therefore, a *Mai Mai* is in fact any man in a community which makes it difficult to relate the concept to modern combatant for the sake of IHL when viewed from the perspective of modern classical war and therefore its implications in IHL.

Most significantly, the definitional clause states that provided they 'refrain from any act of hostility', they shall continue to be considered to be shipwrecked during their rescue...'. In other words, protection though guaranteed has nevertheless been severely limited and made subject to compliance to a clawback or restrictive clause. Therefore, Protocol protection for non-combatants is not self-standing but is a conditional right which ripens only with the fulfilment of the prescribed condition ie, that one is no longer engaged in the fight. This implies that shipwrecked enemy soldiers can be engaged or taken on in spite of their ship being wrecked or being in peril if it can be shown that they in fact have not refrained from fighting. On the other hand, proof that their ship is in some misfortune and that persons on that ship whether civilian or soldiers are no longer fighting is *prima facie* justification to extend the benefits of protection of the relevant parts of the Protocol on to their side.

The rest of this part deals with specifics and details regarding the protection and care of the sick, wounded and shipwrecked persons as well as the medical and related personnel tasked to attend to these people. Under this is also provided the protection of civilian medical and religious personnel; duty of civilian population to respect the wounded, sick and shipwrecked persons; identification of religious and medical personnel together with medical units and transport, hospitals; aircrafts used to undertake rescue missions, etc.

Part III provides for the 'methods and means of warfare combatant and prisoner-of-war status'. This part opens with art 35 on 'basic rules' which begins with prohibitive provisions banning Parties to a conflict the right to choose means by which to execute the warfare, employment or use of weapons which cause superfulous injury or unnecessary suffering or those that cause widespread, long-term and severe damage to the natural environment.

8.3 Protocol III

As alluded to above, a new Protocol has just been added to the Convention regime. Known as the Additional Distinctive Emblem, Protocol III was adopted pursuant to the Geneva Conventions on 8 December 2005.[45]

The background to this is that since the ninteenth century, both the Red Cross and Red Crescent emblems have been used throughout the world making them universal symbols which assist in armed conflicts. Since the original Geneva Convention adopted on 22 August 1864, the Red

45 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005.

Cross and Red Crescent have interchangeably been used as 'visible signs of the neutrality of IHL'. Volunteers in different societies have used these emblems during performance of their functions to show their neutrality. While some wore the Red Crescent, others would wear the Red Cross symbol. The 27 July 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field recognised these two emblems. This was subsequently confirmed with the Geneva Convention of 1949. The purpose of these emblems is to respect the individual in the condition implied above and who is defenceless. Whether an enemy or friend, such a person must be assisted without discrimination. However, the two emblems have been perceived by others as having religious or political connotations. This challenges the declared neutrality or impartiality of the International Red Cross and Red Cross Movement. Based on this, some States and relief organisations refused to adopt any of the emblems on the grounds they were not suitable. In order to deal with this situation, States Parties to the Geneva Convention adopted the third Protocol with the new emblem which is composed of a red frame in the shape of a square on edge on a white ground, which is referred to as 'red crystal'. Both the name and the shape of the emblem were subject of a long discussion in the diplomatic conference of States Parties. The emblem is devoid of political, religious or any other connotation. It does not replace the cross and crescent enshrined pursuant to art 38 of the 1952 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field but is meant to compliment them.

(9) Civilians In War Zones

9.1 Distinction Between Civilians and Combatants

One of the main principles of Customary International Law is what has become known as the 'principle of distinction'. In a ground-breaking study initiated by International Committee of the Red Cross (ICRC), JM Henckaerts[46] identifies a number of customary rules of International Humanitarian Law starting with the rules governing the distinction between Civilians and Combatants which constitute what he describes as 'the Principle of Distinction'. He presents them as follows:

Rule 1 The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against Civilians.

46 Jean-Marie Henckaerts. *'Study on Customary International Humanitarian Law: A Contribution to the understanding and respect for the rule of law by armed conflict'*, www.tamilnation.org/humanrights/05henckaerts.pdf.

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Rule 2 Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

Rule 3 All members of the armed forces of a party to the conflict are combatants except medical and religious personnel.

Rule 4 The armed forces of a party to the conflict consist of all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.

Rule 5 Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians.

Rule 6 Civilians are protected against attack, unless and for such time as they take direct part in hostilities.

In terms of the law of war, civilians whether defined as groups or individuals are entitled to protection. Civilian protection is a matter of legal principle. The law came to their rescue as of necessity and not pity. Genuinely civilian members of the public are so because they are not combatants. As such, besides their soul, civilians often have nothing on them to protect themselves. They are vulnerables that not only do they not have nothing to protect them but are often not party to the war. Save only in the remote sense of being relatives, kins or integrally linked by residence with parties, civilians being such are not parties even structurally defined.

Further to this, there is yet another set of distinctions between Civilian Objects and Military Objectives. Like the above, this too was recognised by experts and is an important part of IHL today. The list of injunctions it imposes on combatants is long. However, it includes the following:

Rule 1 The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against non-military objects.

Rule 2 In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

Rule 3 Civilian objects are all objects that are not military objectives.

Rule 4 Civilian objects are protected against attack, unless and for such time as they are military objectives.

The essential feature of these instructions is in the combatants' duty during combant to distinguish between civilians and the military across in enemy territory. Though the language used is much softer than the concept, the idea is to prohibit careless and indiscriminate attacks against civilians or non-military objects. Again, the interpretatation reiterates the well-known principle that unless they are proven to be military objects in the sense, for example, that they are engaged in war, civilians are 'protected objects' in war.

In spite of this highly developed normative system of protection due to civilian population, civilians are, however, quite often the worst culprits of any war or conflict. Nevertheless, it is quite easy to understand why civilians[47] easily get targeted in war and conflict zones. Because they are unlikely to be armed, and, therefore, cannot pose serious danger to combatants, every fighter knows they are easy target. Consequently, civilians and civilian installations and facilities often come much worse off in war or conflict than combatants. In fact, some combatants believe that a war is not a war if it does not target civilians. This is what we have seen in war-torn countries. Civilians and civilian objects are often targeted against the basic terms of IHL. This has been acknowledged by authorities too. For example, responding to the question whether the war in his country had become a 'civil war', Iraq Vice President contemptuously dismissed this notion saying instead that 'Iraq was facing a war against civilians'.[48] In Sudan's Darfur region, members of the militia group the *Janjaweed* have been in the public media and attention for their alleged killing, torturing and sexually abusing scores of civilian population especially women. Just like rebels in Sierra Leone, or earlier Rwanda, during their wars, the Janjaweed or men on horseback have been accused of attacking innocent villagers, cutting their limbs and orchestrating generalised violence against the civilian population leading to displacements of scores of defenceless women, children and men. In Sierra Leone where some of those said to bear the 'greatest responsibility'[49] for the grave crimes they allegedly committed during war are currently undergoing trial pursuant to the Agreement[50] Sierra Leone concluded with the United Nations. A Special

47 Interestingly, the word 'civilian' has other colloquial meanings. For example, the term is a production company that develops original projects based on the creative investigation of actual experience. See www.thecivilians.org. Also, the term is used to refer to people that are not members of a particular profession or occupation especially law enforcement agencies. It is used to distinguish one from being a member of militia units if nit of government armed forces.

48 Andrew Ross Sorkin, *Civil War or War against Civilians*, International Herald Tribune & New York Times, 25 January 2007.

49 See www.sc-si.org/scsi-agreement.html.

50 Ibid.

Court for Sierra Leone has been set up based on this to try the leaders (or those who bear the greatest responsibility) of various groups in the country's vicious civil in which scores of civilians including innocent children had their life-limbs especially hands amputated as punishment for the support they allegedly rendered to the government – some of the victims mere babies.

The situation of civilians in war or conflict zones has attracted international and particularly IHL attention. In the United Nations (UN), it is a subject of a whole session of the Security Council to consider and discuss. This is to demonstrate the importance the international community attaches to the protection of civilian populations caught up in war or conflict situations. Of course one session in a year is quitly simply put not enough particularly given the enormity of the problem at hand but it is a good start. Unfortunately, this excellent UN initiative has not yet been replicated in various parts of the world. In one of these discussions recently, the UN Emergency Relief Coordinator John Holmes told the Security Council that civilians were still being brutalised in war zones.[51] Though he acknowledged that there had been progress towards protection of civilians in war zones, this, he observed, was still nothing compared to the atrocities they were going through.

UN statistics show that 94 civilians died every day in wars in 2006. It is also estimated that 700 civilians were killed and more than 1,200 injured in the first three months of 2007 alone. It has been estimated that more than 3.3 million people most of them civilians have been killed in the DRC's multinational war. This has prompted the ICC through its Chief Prosecutor Luis Moreno-Ocampo to announce launch of an investigation into alleged war crimes in the DRC since 2002.[52] Although the investigation is still going on, two persons have already been netted and are in custody of the ICC as the ICC's 'maiden guests'. First to be arrested and transferred to the ICC in The Hague is Thomas Lubanga Dyilo, founder and leader of the Union of Congolese Patriots (UCP), one of the various rebel groups marauding the country at the height of the war. He was arrested and surrendered by Congolese authorities on 17 March 2006 on a warrant issued by the Pre-Trial Chamber at the request of the prosecutor. Mr Lubanga stands charged with commiting war crimes in which he is accused of conscripting and enlisting children under the age of 15 into the military wing of his UCP, and using them to participate actively in hostlities in Ituri region of the DRC, one of the regions most affected by war. His trial

51 Statement made by Mr John Holmes, UN Security Council, 2 June 2007 (Reuters).
52 www.aganist.org/story/2004/6/24.

is now scheduled to commence on 31 March 2008. The other is Germane Katanga who was arrested following a warrant issued by the ICC Chamber on 2 July 2007. Katanga, also a Congolese national is the alleged commander of the Patriotic Resistence Force (PRF) also operating in Ituri. He was surrendered and transferred to the ICC on 17 October 2007.[53]

Again, in the war-torn eastern DRC, civilians have often been deliberatetly targeted by combatants. For example, it has just been reported by the UN's Humanitarian News Agency (IRIN) that latest fighting between government and rebel forces belonging to General Laurent Nkunda has forced over 370,000 civilians to flee their homes.[54] Previously in this same region, Uganda Government soldiers (UPDF) were labeled arsonists by locals due to their extreme war tactics including burning whole villages of civilians of course killing them in the process allegedly while in search of and pursuing suspected *Mai Mai* militia fighters.[55] The UN has just opened an inquiry into allegations of canibbalism by fighters in the same region. It has been alleged that Jean-Pieer Bemba's allied militia (Jean-Pieer Bemba is losing presidential candidate in the first free presidential election to be held in the DRC in 2006) may have taken part in the crime of cannibalism against the country's dimunitive pygmy population.[56] This author was told by two young members of pygmy families that indeed, there were such romours in the eastern DRC. Bemba's militia are said to have been boasting that pygmy human flesh especially their fingers was very tasty 'meat'.[57]

Besides callous physical killings and eliminations, civilians especially women in war and conflict zones and situations suffer extreme forms of abuse particularly sexual violence. Again, just like Ituri, south Kivu, in the eastern DRC, is a soft target for the fighters in which scores of civilian women suffer from sexual and other forms of violence. There were 27,000 recorded cases of sexual violence in south Kivu in 2006 alone.[58] Six thousand

53 www.icc.org.
54 IRINnewsagency.org, 16 October 2007.
55 For example, see Human Rights Overview, www.hrw.org
56 www.un.org/NEWS/OBJECTIVES Press/docs/2007/sc8993.
57 This was at a Seminar organised by the Minority Rights Group International (MRG) at Bukavu, DRC for pgymy leaders held on 20-25 October 2007. The two pygmy young men who shared this senstive information with the author of course chose to plead anonimity.
58 United Nations Security Council, *Report of the Secretary General on the protection of civilians in armed conflict*, 28 October 2007. S/2007/643; Economic and Social Council, *Other Human Rights Issues. Systematic rape, sexual slavery and slavery—like practices during armed conflicts.* Report of the High Commissioner for Human Rights, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 54th Session, Item 6 of the provisional agenda.

cases of sexual violence were recorded in the same area in only two months between March and April in 2007.[59] UN's IRIN news agency has listed some of the hotest trouble spots around the world in which civilian lives were said to have no value. These include such places such as Rwanda, Somalia, Liberia, Bosnia, Iraq, Darfur and south Sudan, eastern DRC, Afghanistan, Myanmar, etc.

At a seminar of pygmy community leaders in eastern DRC's Bukavu provincial town, facilitated by this author, participants one after another expressed deep disappointment and resentment at what is seen as the international community's lack of interest of the situation in their country[60] Noting that their communities in particular but also Congolese population in general had suffered enough abuses at the instance of foreign and local armies without anyone been held to account for it, they demanded action from the UN to protect their communities from the excesses of the various warloards roaming the area. Citing detailed instances of abuses, participants regretted the fact that virtually anyone who cared to could 'help themselves' on them while the international community looked on, as they put it, without taking any action. Participants wondered why IHL was so impotent when it came to protecting them from marauding abusers by both government and rebel forces.

Therefore, while John Holmes may have expressed optimism that something was being done at last against impunity for crimes against humanity including arrests of killers and their prosecution, participants, however, noted that action was being taken belatedly and in any case only against 'small fish' of the likes of Thomas Lubanga and his comptriot Germane Katanga.[61] However, none of the 'big fish' have yet appeared before the ICC or other local or international courts in this connection. As Pygmy leaders noted, it is disappointing the way IHL is being enforced often discriminatarily mostly against perceived 'small fish'. Meanwhile, 'big fish' or big-time peroetrators are left scotfree or are perceived not to easily run foul with the law. Pygimies raised tough questions bringing into question the integrity of the international system as a whole.

59 United Nations Security Council, *Report of the Secretary General on the protection of civilians in armed conflict*, 28 October 2007. S/2007/643; Economic and Social Council, *Other Human Rights Issues. Systematic rape, sexual slavery and slavery—like practices during armed conflicts*. Report of the High Commissioner for Human Rights, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 54th Session, Item 6 of the provisional agenda.

60 Ibid.

61 Again, for this and similar cases though apart from this others are still at the level of indictment, see icc@icc.org.

What is the virtue of IHL if it is so easily violated, in fact ridiculed? In terms of formal features, as we have illustrated above, IHL appears to be complete piece of international legislation on war and conflict. It clearly is a conherent whole. It sets out a systematic and coherent set of rules and principles designed to ensure humane treatment of civilians and other privileged persons in war. From this angle, IHL is meant to guide combatants both from government and militia or rebel groups as to how to fight and execute the combat missions humanely. However, it doesn't seem to have any teeth to bite those that flout it. Save for some isolated achievements in *ad hoc* tribunals at both the ICTY and ICTR,[62] IHL has substantrially remained a delict piece of institution or *de lege feranda*, at least from the perspective of victims. While in theory, IHL may be more relevant today than at its inception, there is nothing on the ground to indicate that it indeed is affording protection due to civilians and other privileged people. The examples of some of sordid tales of abuses refered to above are testimony of the fact that at most, IHL's contribution towards a society better able to police itself in as far as wars and conflicts are concerned has been neglible.

Yet, normatively, the standards of international law and those of IHL adequately provide for the protection of the sick, wounded and the shipwrecked soldiers as well as PoW, as already indicated. For example, art 51.3 of the Fourth Geneva Conventions states that civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.[63] But of course the problem is that most of

62 More than twenty cases on various charges ranging from genocide, war crimes and crimes against humanity under the International Criminal Tribunal for Rwanda (ICTR) have been decided and completed while several more are either pending trial, in progress or pending appeal. A number of those pending trial will be taken to local jurisdiction in Rwanda and possibly other countries too for the trial as the Tribunal is winding up its activities in 2008. Some of the most interesting and simultaneously ground-breaking decisions in IHL include the very first case of *Jean Paul Akayesu v Prosecutor (ICTR–96–4); Jean Kambanda (ICTR–97–23) and Pauline Nyiramasuhuko (ICTR–97–21)*. Paul Akayesu, former Governor was not only the first accused and the first to be tried and completed, he became the first to be convicted of genocide clearly against the civilian mostly Tutsi minority population. He was also the first indictee in the history of the IHL to be charged and convicted of rape as a war crime. Jean Kambanda who acted as Prime Minister during the period of genocide evaded full trial by volunteering to admit all the charges as arraigned. He was charged of perpetrating genocide, war crimes and crimes against humanity. A double irony is in the case of Pauline Nyiramasuhuko who though a woman was charged among other counts of rape. During genocide, Pauline was cabinet minister in charge of Women Affairs. The chargesheet suggested that she used her ethnicity and position to encourage men of whom she had control to commit mass rape of mostly Tutsi women. This case is still undecided at the time of writing this chapter.

63 Geneva Conventions Protocol I, art.51.3.

it has been respected more in breach than in adherence. In as far as the normative standards in the Convention are concerned, the protection is seemingly adequate. This chapter seeks to establish the chasm that exists between principles on one hand and the real situation on the ground on the other. Second, it will also try to engage the question how this situation comes about and more particularly how it can be turned around so as to ensure effective protection of civilians and all those in similar situations as defined above. After setting out the legal frame on civilians, sick, wounded, shipwrecked soldiers and PoW, we seek to investigate why until now and even then International Humanitarian Law is perceived to be *delege ferenda*? While it is true as the UN's top peace officer John Holmes has indicated, there have recently been improvements against this, concern persists that IHL does not afford adequate protection. The adoption of the ICC under the Rome Statute has of course made a fundamental difference from the past but more is still needed.

9.2 Privileged Combatant

A privileged combatant is a person who takes no direct part in the hostilities of an armed conflict within the law of war and customs and is someone who upon capture qualifies as Prisoner of War (PoW) under the Third Geneva Convention.

In more specific detail, PoW refers to:

(a) Members of armed forces of a party to the conflict
(b) Members of militia – not under command of armed forces but commanded by a person responsible for his subordinates.
(c) Having a distinctively recognisable sign from a distance eg, carrying arms openly and conducting operations in accordance with laws and customs of war.
(d) Owe allegiance to a power not recognised by the belligerant, etc.

An important addition would be to extend the PoW status to inhabitants of non-occupied territories who spontaneously take up arms and resist invading forces, as discussed on *Mai Mai* discussion above. These are people, as indicated, that have no time limit to form themselves into a regular army. They carry arms openly and respect laws and customs of war. Article 44.3 of the PoW Convention distinguishes combatant through a distinct sign and the fact that he carries arms openly.[64] *Hors de combat* is a combatant who has surrendered or who has been captured and therefore

64 Protocol I, note 3.

becomes a PoW until they face a competent tribunal as provided under the Third Geneva Convention. This, however, does not include spies, mercenaries, breachers of laws and customs of war, militia not under the command of armed forces and who are not fighting or not fitting the description given above. Most combatants not qualifying under the Third Geneva Convention nevertheless may qualify under the Fourth Geneva Convention as civilians until they have had a fair and regular trial. They can be punished under the civilian laws if they cannot be punished. The last time that American and British unlawful combatants were executed after 'a regularly constituted tribunal' was at the Luanda Trial in Angola in June 1976, which involved thirteen foreign mercenaries who had served its defeated rival FNLA rebel forces.[65]

On 4 December 1989, the UN passed General Assembly Resolution 44/34 the International Convention against Recruitment, the Financing and Training of Mercenary Convention which made it an offence to employ mercenaries.[66] With the US invasion of Iraq, the subject of 'mercenary' and their protection is back on the agenda.[67] The US has hired several Private Security Companies (PSC) most of which constitute civilians accompanying soldiers whom they provide with various services and who generally would be qualified as PoW in the event of their capture. However, they may not take direct part in hostilities although what constitutes 'direct part' in hostilities is neither here nor there. There is a grey area between the terms 'not taking part' and 'taking direct part in hostilities', and involvement of private security companies brings this particular controversy to its height. For example, are they 'not taking direct part' if they help combatants with

65 A person who has written quite a lot on this subject is retired US Congressman William Blum. Among some of his writtings on this similar subjects see *Killing Hope. Angola, 1975 to 1980s. The Great Powers Poker Game.* Blum who served a record two-decades and more as member of US Congress was attacked by his enemies as Castroist. See also the OAU Convention for the Elimination of Mercenaies in Africa, CM/817 (XX1X). Annex 11 Rev 1. In this Convention, a mercenary is defined as 'any person who (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does in fact take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation; (d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (e) is not a member of the armed forces of a party to the conflict; (f) is not sent by a State other than a party to the conflict on official mission as a member of the armed forces of the said State. Under this Convention, mercenarism is declared a crime. In South Africa, implementing legislation exists for the punishment of the crime and several offenders have been prosecuted based on it.

66 *Civilians in War, International Peace Academy Occasional Paper*, Simon, (ed), (Paperback), Chestman, 2001.

67 For general reading, see www.en.wikipedia.org/wiki/Mercenaries.

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the needed services to execute the war without which help they cannot combant or cannot do so (combating) effectively?[68] These security companies, however, carry arms openly, wear military uniforms, etc.

While it is not necessary to describe in detail the crisis starting from the 1994 genocide in Rwanda which led to the war in Congo involving several African countries, suffice it to say eastern Congo's border area occupied a central place in this crisis. Such a detailed description would not be necessary as the events have been well-documented in various articles and in a great number of reports from the UN agencies and non-governmental organisations.[69]

Again, just like Darfur and Somalia, Eastern Congo was and still is subjected to unrestrained violence, extreme harassment of the population by armed rebel groups leading to immense human suffering. As a result, the population of the Republic of Congo is still suffering from the conflict. Millions of people are dying, being raped, or fleeing due to the war. Combatants on both sides are *prima facie* guilty of excessive lawlessness and simply irreprehensible misbehavior. What most understood of the use of force is that it must of necessity lead to excesses. The deplorable state of affairs especially against civilian population in DRC has been acknowledged by the International Court of Justice (ICJ) in the case brought by the DRC against Burundi, Rwanda and Uganda when the appex Court held that 'actions of the various Parties in the complex conflict contribute to the immense suffering faced by the Congolese population'.[70] Indeed, as the Court further found, in less than two months of the conflict, five attacks of a serious nature were launched resulting in 'considerable number of civilians killed or abducted'.[71] During the month of August in 1998 when the war started, the Uganda Peoples' Defence Forces (UPDF) took over the towns

68 See a very lucid report on this by Jennifer K Elsea and Nina M Serafino, CRS Report for Congress. Private Security Companies in Iraq. Prepared for Members and Committees of Congress, Congressional Research Service, 11 July 2007.

69 See, *inter alia*, Mel Mc Nulty, 'The collapse of Zaire: implosion, revolution or external sabotage?,' *The Journal of Modern African Studies*, Vol 37, No 1 (March 1999), pp 53-82; Gerard Prunier, 'Rebel Movements and Proxy Warfare: Uganda, Sudan and the Congo (1986-1999),' *African Affairs*, Vol 103, No 412(2004), pp 359-389; David Shearer, 'Africa's Great War,' *Survival*, Vol 41, No 2 (Summer 1999), pp 89-106. Also, see the following reports by the widely respected International Crisis Group: 'North Kivu into the Quagmire' (15 August 1998); 'Congo at War, a Briefing on the Internal and External Players in the Central African Conflict' (17 November 1998); 'How Kabila Lost his Way' (21 May 1999); 'Africa's Seven-Nation War' (21 May 1999); 'The Agreement on a Cease-Fire in the Democratic Republic of Congo' (20 August 1999).

70 *DRC v Burundi, Rwanda and Uganda*, para 221.

71 Ibid, para 132.

and airports of Beni, Bunia and Watsa, 'all in close proximity to the border'. Attacks were launched against the population resulting in serious breaches of the most basic principles of humanity. Besides attacks by States, these were attacks by armed bands and irregulars. Uganda and also Rwanda seem to have justified their terror on hapless civilian population on the basis that their toleration of irregulars and rebels amounted to acquiescing in their activities.

(10) International Criminal Court (ICC)

Part 2 on jurisdiction, admissibility, and applicable law of the Rome Statute[72] of 1998 defines the range of 'serious crimes of concern to the international community' over ICC has jurisdiction. According to art 5 of the Statute, these are four, namely:

(a) the crime of genocide;
(b) crimes against humanity;
(c) war crimes; and
(d) the crime of aggression.

Read with art 5, art 6 criminalises the offence of genocide which is defined as 'acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group'. Of particular significance to the theme under this chapter is art 7 offences.

Article 7 defines crimes against humanity, to paraphrase it, as:

> ...any of the following acts when committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack:
>
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or other sever deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced steriorisation, or any other form of violence or comparable gravity... .

72 Rome Statute of the International Criminal Court, as amended by the proces-verbaux of 10 November 1998 and 12 July 1999, on: www.un.org/icc/statute/99.

Paragraph 2 of this article is devoted to the definition of the various terminologies used in the term 'crimes against humanity' including attacks directed against a civilian population defined as 'a course of conduct involving the multiple commission of acts against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack'.

Similarly, extermination is defined as 'intentional infliction of conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population'. To enslave is defined as the 'exercise of any or all of the powers attaching to the right of ownership over a person and the exercise of such power in the course of trafficking in persons, in particular women and children'. Just as in parent Convention against Torture, torture is defined as 'the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused.....'. Related to this is the crime of 'enforced disappearance of persons' which is defined to mean 'the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or political organisation, followed by a refusal to acknowledge the deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a ploronged period of law'. This is 'cut and paste' approach in this case cutting from the 1992 UN Declaration against Enforced Disappearance.[73]

Finally, art 8 provides against war crimes. War crimes are defined to mean 'grave breaches of the Geneva Conventions of 12 August 1949'. Among other things, war crimes including wilful killing, torture or inhuman treatment, biological treatment and extensive destruction and appropriation of property which compels a prisoner of war or other protected persons to serve in the forces of a hostile power. Others include willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement; taking of hostages, etc.

Further to the above, the Statute forbids crimes which constitute violations of laws and customs applicable in armed conflicts not of an international character. In other words, International Criminal Law, besides prohibiting serious violations of international law in armed conflicts of international character extends the same to equivalent crimes but in armed conflicts not amounting to international character. The ICC Statute forbids

73 UN Declaration on the Protection of all Persons from Enforced Disappearance, General Assembly Resolution 47/133 of 18 December 1992.

grave violations of international law perpetrated both in internal and external armed conflicts. Both civil wars and wars between two or more countries are regulated in the manner the combatants should execute their combat by international law. Again, just like armed conflicts of an international character, the following acts if effected in armed conflicts not of an international character constitute violation of art 8 of the ICC Statute:

(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
(b) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
(c) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peace keeping mission in accordance with the Charter of the United Nations, as long as they are entitled to protection given to civilians or civilian objects under international law of armed conflict;
(d) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.

As shown above, what the Rome Statute of the ICC does basically is to codify the existing rules of customary International Humanitarian Law and streamline the four Geneva Conventions together with their two Protocols. Without a definite mechanism of enforcement, it has long been realised that IHL in its form was a lame duck. What the Statute does therefore is simply to restate the customary law and Convention principles into a consolidated and systematic Statute thereby providing the principles not only with universal domicile but more importantly with the means to enforce them. It will be recalled that the main challenge facing the norms of International Humanitarian Law world-wide is that there was no easy way to enforce them. Consequently, breaches were followed with impunity allowing the perpetrators to go scotfree. Again, while international law provided for universal jurisdiction for any State to arrest, prosecute and punish perpetrators of what was largely Customary International Law crimes but then and now this was and is rarely invoked by States. The post-First World War saw prosecutions of some of the leading authors of crimes during that war ostensibly the Germans and Japanees but this has been dismissed as 'victors' justice'. In other words, prosecutions by American and allied countries of members of the vanquished forces in German and Japan

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important as they may have been in the implementation of International Criminal Law nevertheless were not good example of international justice as they were seen to be 'one sided prosecuting the other side' ie, the loser versus the victor.[74] The ICC Statute and especially the crimes it enshrines are classical examples of codification of Customary International Law into treaty law. Again, these are then underpinned by an equally classical justice system the ICC elusive for centuries. In the absence of this, leading countries when faced with breaches of international crimes were forced to resort to the Nuremberg, Tokyo and the two Former Yugoslavia and Rwanda-style tribunals.

The challenge during war is how to execute war while simultaneously protecting the vulnerable. War while being war should not escalate into uncontrolled destruction of human life and property of those at its mercy. Civilians being such are vulnerable to war crimes. Normally, civilians would carry with them no arms or any weapon. They would not be trained to defend themselves let alone to fight.

The wounded and the sick are in the same category of civilians. A wounded or sick soldier is in the face of danger incapable of putting up the most basic defence. The wounded become like civilians or worse. At least civilians can run away if given opportunity or put up basic defence which is often not possible to the wounded. Similarly, the sick being sick often cannot avail themselves of even minimum defence mechanisms a normal human being can avail himself of. Whether they are soldiers or civilians, the wounded and sick fall in the same category. Their condition prevents them from putting up to any situation.

Victims of shipwreck fall in the same category as prisoners of war. Like the wounded, sick or civilians, victims of shipwreck and prisoners of war are by that very fact incapacited to fight. This condition neautralises and renders them incapable of either defenive and offensive mechanisms.

74 On this topic, see Henry J Steiner and Philip Alston, *International Human Rights in Context*, 2nd edn, Oxford: Oxford University Press, 2000, pp 56-80 & 112-125 on *Up to Nuremberg: Background to the Human Rights Movement* and *'Judgment at Nuremberg'*; Geoffrey Robertson, *Crimes against Humanity. The Struggle for Global Justice*, New Edition, 2002, pp 179-217 on *War Law* and 218-259 on *An end to Impunity;* Michael S Lief, H Mitchell Caldwell, and Ben Bycel, *Ladies and Gentlemen of the Jury—The Greatest Closing Arguments in Modern Law*, 2000; and Richard J Goldstone, *For Humanity. Reflections of a War Crimes Investigator*, New Haven: Yale University Press, 2000, especially pages 74-138 on *'International Justice: The United Nations Criminal Tribunals for the Former Yugoslavia and Rwanda'* and *'Toward an International Criminal Court'*.

(11) Conclusion

IHL is a long drawn-out system of international law developed throughout the years to regulate the conduct of man and woman as well as States and non-state actors in the prosecuting of war or conflict. Ever since 1949, conflict and war have been regulated by a highly developed system of International Humanitarian Law. The Geneva Conventions came to control the execesses of man more especially during combat so as to promote the sense of humanity. On realising that the Geneva or Red Cross Conventions important as they are nevertheless have serious loopholes on a number of factors including the issue of 'declared' and 'undeclared war' as well as 'international and non-international war', it was decided in 1977 to add to the Conventions two Additional Protocols to address these *lacunas*. Starting with the *ad hoc* tribunals on former Yugoslavia and Rwanda, the international community has since developed and advanced international criminal law through the establishment of the International Criminal Court. However, implementation of IHL remains the major challenge. International efforts at regulating how war should be fought are frustrated by a lack of an effective system of implementation of the standards and norms for the protection of the wounded, sick, prisoners of war, shipwrecked soldiers, and civilian population during war or conflict.

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CHAPTER 7

Individual Criminal Responsibility for Violations of International Humanitarian Law

Dr V Seshaiah Shasthri[1]

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(1) INTRODUCTION

A general appreciation of the developments of the international law during the 20th century brings to the interesting notice of the reader as to why the cumulative events leading to the tragic occurrence of the two world wars, resulting in massive destruction of human beings and vast amount of natural resources, certain institutional developments become pertinent issues for examination and discussion. This analysis is relevant in the context of the present thematic discussion, since they bear an important relationship as to the development of the doctrine and its implications. One of such institutionalisation was the establishment of the two international tribunals for the adjudication of criminal liability for what were alleged to be the gross violation of humanitarian concerns in flagrant disregard to the customary norms that had evolved over centuries of human civilisation.

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It is during the adjudication of these bodies, arguments in relation to and against the liability of individuals for the crimes either committed under their aegis or through their direct or indirect participation came to be closely and judiciously scrutinised leading to the establishment of one of the most important and significant principles of criminal adjudication namely, the principle of individual criminal responsibility. In view of the jurisdiction recognised for the purpose of adjudication, the two tribunals examined the scope of this principle during the time of international armed conflict in relation to:

(a) crimes against the peace;
(b) war crimes, and
(c) crimes against humanity.

What came out to be the Principles of Nuremberg gained, within no time, a momentum of international acceptance which further came to be recognised and adopted as the Four Geneva Conventions of 12 August 1949. Thus, there emerged, for the first time, in international law a legal framework that addressed to the protection of war victims in relation to the prevention and punishment of the most serious violations namely the 'grave breaches'.

However, after a close examination of the developments during the 20th century in relation to the implementation of International Humanitarian Law and their interface with the established principles of criminal law, the author submits that the relevancy of the Four Geneva Conventions 1949 and the importance of the Nuremberg Principles and, therefore, the originating basis for individual criminal responsibility cannot be overestimated, for their significance was suited to the contemporary period of time that was essentially dominated more by the international armed conflicts. Therefore, it is but natural and obvious that one could not have asked for more from the international community by accepting the application of 'grave breaches' beyond thereafter, for any such claims will have essentially made an inroad into the rigidly perceived 'state sovereignty' and would not have acquired any more legitimate approval.

Perhaps, it is the passage of time coupled with the events that led to more and more Afro-Asian states breathing the fresh air of neo colonialism, which have brought to the forefront the importance of right of self determination and thus, paved way for the much acclaimed efforts of the International Committee of Red Cross and the efforts of the international community to conclude in the Diplomatic Conference during 1973-1977 the two protocols in addition to the Geneva Conventions on 8 June 1977. It is this development which brought to the forefront a change in the very

approach of states parties at the international plane to the understanding of the protection of rights of victims during armed conflict situations that may not necessarily be qualified into the exact terminology of international armed conflicts. Besides, the newly established and politically independent states would not give in more advantage to liberally interpret the scope of what otherwise was acknowledged to be a forward step in the progressive growth of International Humanitarian Law.

If one looks into the developments of Post Additional Protocols Phase, it becomes clear that during the second half of the 20th century, the character of the armed conflict came to be severely changed, for no longer states parties remained in conflict at a global level but their confrontations got to be limited to the regional concerns. For this reason, it is but natural that a reader may speculate as to whether any nomenclature to be rendered to distinguish the nature of conflict will yield any result, specifically when the character of the violator has increasingly undergone changes besides the increasing degree of vulnerability of civilians to new methods of combat and therefore, the deprivation of protection. This kind of classification whether is necessary, if not in the interests of the victim, but in the context of the wrongdoer in order to bring in punishment for impunity to the offender, is still a hotly debated subject. This is where the modern day armed conflicts which include Cambodia, Somalia, Rwanda, Congo, Nigeria to name a few, brought forth a challenge and determination within the international community to advance the needful efforts to ensure that the perpetrators, regardless of their structural hierarchy, shall be held answerable to the community at large and accountable for the atrocities committed directly or indirectly. It is equally interesting to note that this continued assertion of the international community to deal with the modern day challenges has made a significant interference with what otherwise was traditionally seen and protected as the domain of the state ie, state sovereignty.

Emergence of these trends in the evolution of the interface between International Humanitarian Law and International Criminal Law demonstrated the importance and relevance of extending the application of the universal jurisdiction in dealing with 'serious' violations of International Humanitarian Law (IHL) to situations that may still be called as non-international conflicts. Yet, in the view of the author, such a transformation would not be a completed effort, unless, certain contemporary considerations were given due weightage. These considerations would include:

(i) the status of the on going situation;
(ii) the extent to which existing international legal regime enables the States Parties to exercise effectively the jurisdiction to try and prosecute perpetrators of such violations; and importantly,

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(iii) how to establish such a jurisdiction ie, on the basis of the existing national legal regime or by enacting new legislative requirements.

As against these concerns, the author advances his present inquiry to identify the contours of the principle of individual criminal responsibility, its predominant characteristics and importantly, its application centric challenges in relation to the crimes of *genocide* and *crimes against humanity*. Discussions in relation to genocide would demand the attention of the reader to the important developments of the 20th century which include, (i) influence of the customary law on the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, which was not only got to be recognised in the immediately succeeding years, but even years after, continued to be the guiding force of all international deliberations[2]; (ii) contours as laid out in art 1 of the Convention stating that genocide is a crime under international law 'whether committed in time of peace or in time of war'; and, (iii) the categorical assertion of the ICJ on the duty of the state to prevent and repress acts or conduct amounting to genocide in furtherance of the convention regardless of the nature of the conflict.[3] On another note relating to crimes against humanity, UN Secretary-General's report on the Draft Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) plays a very significant role as it identifies the distinct possibility of their occurrence in either circumstance.[4] Perhaps, it is for these reasons of earlier developments, the Statutes of the International Criminal Tribunals for the Former Republic of Yugoslavia and the Republic of Rwanda clearly acknowledge such a development.[5] The final phase of its development is when the Appeals Chamber in the *Tadic* case gave a formal recognition.

The legal framework in relation to war crimes and crimes against humanity has been adopted and developed within the framework of International Humanitarian Law, or the law of armed conflict, a specialised

2 See *Advisory Opinion of the International Court of Justice concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 18 May 1951,* Reports of Judgments, Advisory Opinions and Orders, 1951, p 23.

3 *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Yugoslavia), Preliminary Objections,* Judgment of 11 July 1996, para 31.

4 UN Doc S/25704, *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993),* 3 May 1993, p 13, para 47.

5 While the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) expressly stipulates, in art 3, that both categories of conflict are covered by this provision, the Statute of the International Criminal Tribunal for Rwanda (ICTR) refers to 'Crimes against Humanity' in art 3.

branch of Public International Law. This branch of law has its own peculiarities for having been in existence for over centuries in the un-codified form wherein the written and practiced rules had undergone an intense period of growth and evolution in the 20th century.

In the context of the rules of IHL relating to 'violations of IHL and individual responsibility' one of the thorniest problems is in relation to the nature of violations caused by individuals and the extent to which these violations would amount to grave breaches or serious violations of the rules of IHL.[6] The traditional understanding of the tripartite approach namely crimes against peace, war crimes and crimes against humanity is closely linked to the core principles of IHL. In understanding the contemporary relevance of IHL relating to individual criminal responsibility for violations of IHL it is necessary to bear in mind that the modern day world is confronted more by the proliferation of conflicts which are no longer international in nature, but were fought on completely different and distinct considerations.[7] Therefore, what has been seen as the distinct classification of offences with a supposedly clear borderline amongst the above referred offences is relatively obliterated. While war crimes and crimes against humanity seen together with genocide came to constitute the broad corpus of crimes that may be punished on the basis of universal jurisdiction, crimes against peace has been left aside as its scope is more uncertain and the particular features it presents imply a close connection with issues of concern with *jus ad bellum*.

For these reasons, the present endeavour will attempt to analyse the development of international crimes within distinct legal and jurisdictional frameworks wherein necessarily the reliance will be placed on the judgments of the Nuremberg and Tokyo International Military Tribunals, for these judgments marked the beginning of evolution of new principles of law which in later times were more clearly defined by the International Criminal Tribunals for the Former Republic of Yugoslavia (FRY) and for Rwanda. Hence, the following brief description with some general remarks referring to the prospects of evolution in the international system in keeping with various trends manifested within the United Nations, especially within its International Law Commission.

6 Bassiouni, M Cherif and Ved P Nanda, *A Treatise on International Criminal Law* , Springfield, IL: Thomas, 1973, p 124.

7 For the problems arising from non-international armed conflicts, see Meron, Theodor 'International criminalisaisation of internal atrocities', *American Journal of International Law,* Vol 89 (1995), pp 554-77; Thomas Graditzky, 'Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts', *International Review of Red Cross,* No 322, March 1998, pp 29-56.

(2) Development Of Law Relating To Individual Criminal Responsibility

2.1 Introduction

In modern times the foundations were formulated for incriminating individuals on the ground of war crimes being treated as grave violations of the law applicable in international armed conflicts. During the American Civil War (1861-1865), President Abraham Lincoln issued the Lieber Code ie, Instructions for the Government of Armies of the United States in the Field, General Orders No 100, of 24 April 1863.[8] Prepared by Francis Lieber, Professor of Law at Columbia College in New York, and revised by a board of officers, this text represented the first attempt to codify the laws of war. Though it was meant primarily for the American soldiers, Lieber Code had an important influence on military regulations of other armies as well. After the First World War, the Treaty of Versailles of 28 June 1919 under arts 228 and 229 established the right of the allied powers to try and punish individuals responsible for 'violations of the laws and customs of war'.[9] The German government therefore had the duty to hand over 'all persons accused', in order to permit them to be brought before an allied military tribunal. In the case of an individual 'guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers', the possibility of setting up an international tribunal was provided for. Article 227 stated that Kaiser Wilhelm II of Hohenzollern was responsible 'for a supreme offence against international morality and the sanctity of treaties' and the Allied Powers agreed to:

(i) establish 'special tribunal' composed of judges appointed by the United States, Great Britain, France, Italy and Japan to try the accused;

(ii) ensure that in its decision, the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. The Powers also agreed to submit a request to the Government of the Netherlands for the emperor's

8 Schindler, Dietrich and Jiri Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and other Documents*, 3rd edn, Dordrecht: Martinus Nijhoff Publisher; Geneva: Henry Dunant Institute, 1988, p 5.

9 In particular, art 228 declared that 'the German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war'. See *The Treaties of Peace 1919-1923*, New York: Carnegie Endowment for International Peace, 1924, Vol I, p 121.

surrender, an initiative that failed. While the Hague Conventions, 1899 and 1907; and, the Geneva Convention, 1929 relative to the Treatment of Prisoners of War did not contain any provisions to punish individuals for the violation of the rules contained therein,[10] the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field 1929 had similar provisions though they are weak in nature.[11]

2.2 Contribution of Nuremberg and Tokyo Tribunals

After the Second World War, a movement started up within the international community which clearly began to shape a deeper consciousness of the need to prosecute persons responsible for serious violations of the laws of war,[12] with regard both to the traditional responsibility of states[13] and to the personal responsibility of these individuals. The horrible crimes committed by the Nazis and the Japanese led to a quick conclusion of agreements among the allied powers and to the subsequent establishment of the Nuremberg and Tokyo International Military Tribunals 'for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities.'[14] These special jurisdictions also took into account the new categories of crimes such as crimes against humanity[15] and crimes against peace[16] encompassing the scope of activities

10 Scott, James Brown, *The Hague Conventions and Declarations of 1899 and 1907*, New York: Carnegie Endowment for International Peace, 1915, p 234.

11 See art 30:
On the request of a belligerent, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention; when such violation has been established the belligerents shall put an end to and repress it as promptly as possible.

12 'Serious violations of the laws and customs of war' is a broader concept than that of 'grave breaches'.

13 Ian Brownlie, *System of the Law of Nations: State Responsibility, Part I*, Oxford: Oxford University Press, 1983, p 212; See also *International Crimes of State*, Antonio Cassese, and Marina Spinedi, (eds), Berlin: De Gruyter, 1989, Weiler, Joseph, p 258.

14 See art 1, *London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945.

15 See Egon Schwelb, 'Crimes against humanity,' *British Yearbook of International Law*, Vol 23(1946), pp 178-226.

16 Article 6, Charter of the Nuremberg International Military Tribunal established the legal basis for trying individuals accused of the following acts namely, (i) Crimes against peace, which include, the planning, preparation, initiation or waging of a war of aggression,

continued on the next page

conducted or performed by leaders, organisers, instigators and accomplices who had taken part in the formulation or execution of a common plan or conspiracy to commit any of those crimes-all of them were considered for 'all acts performed by any persons in the execution of such plan'.

2.3 After the Nuremberg and Tokyo Trials

The Nuremberg and the Tokyo trials have greatly contributed to the formulation of case law regarding individual criminal responsibility under international law[17] and marked the start of a gradual process of precise formulation, consolidation of principles, and rules during which states and international organisations launched initiatives to bring about codification through the adoption of treaties. For example, on 11 December 1946 the UN General Assembly adopted by unanimous vote Resolution 95(I), titled 'Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal'. After 'having taken note' of the London Agreement, 8 August 1945, its annexed Charter; and, the Tokyo Tribunal, the General Assembly took two important steps namely (i) affirmation of the principles of international law recognised by both the Charter and the judgment of the Nuremberg Tribunal;[18] and,

or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; (ii) War crimes, which include, violations of the laws and customs of war. A list follows with, inter alia, murder, ill-treatment or deportation into slave labour or for any other purpose of the civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, the killing of hostages, the plunder of public or private property, the wanton destruction of cities, towns or villages, or devastation not justified by military necessity; and, (iii) Crimes against humanity, which include, murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

17 *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945—1 October 1946,* Official Documents and Proceedings, Nuremberg, 1947. See also Telford Taylor, *The Anatomy of the Nuremberg Trials,* New York: Knopf, 1992, p 278; *The Nuremberg Trial and International Law* G Ginsburg and V Kuriastev, (eds), Dordrecht, 1990; B Röling and Antony Cassese, *The Tokyo Trial and Beyond* Oxford: Polity Press, 1993.

18 This meant that in the General Assembly's view the Tribunal had taken into account already existing principles of international law, which the court had only to 'recognise'. Through this Resolution the UN confirmed that there were a number of general principles, belonging to customary law, which the Nuremberg Charter and Judgment had 'recognised' and which it appeared important to incorporate into a major instrument of codification either by way of a 'general codification of offences against the peace and security of mankind' or even as an 'international criminal code'.

(ii) codification of these principles by the International Law Commission (ILC). This Resolution also recognised the customary law nature of the provisions contained in the London Agreement.[19] In 1950, the ILC adopted a report on the 'Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal'.[20] The ILC report did not discuss whether these principles are part of positive international law or not, or to what extent since for the ILC, the General Assembly had already 'affirmed' that they belonged to international law. The ILC therefore limited only to the drafting of the content of these principles.[21] However, the above said were important steps toward the establishment of a code of international crimes entailing individual responsibility.

On 9 December 1948, on the eve of the adoption of the Universal Declaration of Human Rights, the adoption of the 'Convention on the Prevention and Punishment of the Crime of Genocide' (Convention) added new impetus in the law relating to international crimes. The Convention, which entered into force on 12 January 1951, (i) clearly classified genocide,

19 'Article 6 of the Nuremberg Charter has since come to represent general international law'. See Ian Brownlie, *Principles of Public International Law,* 5th edn, Oxford: Clarendon Press, 1991, p 562; Malcolm N Shaw, *International Law,* Cambridge: Cambridge University Press, 1998, p 471.

20 Lemkin, Raphael 'Genocide as a crime under international law', *American Journal of International Law,* Vol 41, No 1, January 1947, pp 145-151; See also Joseph L Kunz, 'The United Nations Convention on Genocide', *American Journal of International Law,* Vol 43(1949), pp 738-746; Nehemiah Robinson, *The Genocide Convention: A Commentary,* New York: Institute of Jewish Affairs, 1960.

21 Principle I states that 'any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment'. It constitutes official recognition of the fact that an individual is personally responsible for the crime. In the broadest sense 'any person' may be held responsible for having committed a crime. Principle II states that the same may be the case even if the act is not considered a crime under domestic law. Principles III and IV provide that a person who acts in his capacity as head of state or as a government official and one who acts on the orders of the government or of a superior are not thereby relieved of the responsibility. These two principles affirm what was established in arts 7 and 8 of the Nuremberg Charter. Principle IV of the ILC text modifies the approach: the individual is not relieved of responsibility 'provided a moral choice was in fact possible to him'. This leaves a great discretionary power to the tribunals that are called upon to decide whether or not the individual did indeed have a 'moral choice' to refuse to comply with an order given by a superior. Principle VI codifies the three categories of crime established by art 6 of the Nuremberg Charter. What was defined in the London Agreement as 'crimes coming within the jurisdiction of the Tribunal' has now been formulated as 'crimes under international law', using the same wording found in art 6. Last but importantly, Principle VI represents the core of a possible international criminal code.

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whether committed in time of peace or in time of war, as a crime under international law;[22] (ii) introduced a new crime under international law, directly linked to the legal category already established by art 6 of the Nuremberg Charter, ie, crimes against humanity. While international treaty law went far beyond the traditional boundaries of state responsibility, through the underlining of the development ie, individuals are 'in the front line' with respect to obligations under a particular branch of international law, the Genocide Convention offered a broad definition of the crime of genocide and of various levels of participation in it (direct acts, conspiracy, incitement, attempts, complicity). The customary nature of the principles which formed the basis of the Convention has been recognised by the International Court of Justice.[23] The Geneva Conventions, 12 August 1949, drafted on the initiative of the ICRC in the wake of the dramatic experiences of the Second World War, reshaped the entire treaty-based system dealing with the protection of war victims.[24] Parties to these Conventions undertake the basic general obligation 'to respect and to ensure respect' for their rules 'in all circumstances'.[25]

Each of these Conventions dealt with acts against protected persons called 'grave breaches',[26] which are undoubtedly crimes under international law.[27] The Conventions also established the responsibility of the direct

22 Interestingly, art 2 defines genocide as 'acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group', such as killing members of the group, causing serious bodily or mental harm to them, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group. Article 3 of the Convention states that 'such acts are considered punishable as are various degrees of involvement in them: conspiracy to commit the acts, direct and public incitement, attempts or complicity'. However, art 4 establishes the obligation to punish not only 'rulers' or 'public officials', but also 'private individuals' and art 6 recognises the competence to try offenders in the hands of both domestic and international tribunals.

23 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 18 May 1951*, ICJ Reports, 1951, p 23.

24 See also the commentaries published under the general editorship of Jean S Pictet, ICRC, Geneva, 1952-1956; GIAD Draper, 'The Geneva Conventions of 1949', *Rescueil des Cours de l'Académie de droit Internatina de La Haye (RCADI)*, Vol 114(1965), pp 63-162.

25 Article 1, Common to the Geneva Conventions, 1949.

26 But there is no doubt that grave breaches constitute 'war crimes'. See, Joyce AC Gutteridge, 'The Geneva Conventions of 1949,' *British Yearbook of International Law*, Vol 26(1949), pp 294-326.

27 These acts are defined in detail in art 50 of the First Convention, art 51 of the Second Convention, art 130 of the Third Convention and art 147 of the Fourth Convention, and include crimes such as willful killing, torture or inhuman treatment (including biological

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authors of those grave breaches as well as that of their superiors. The scope of the rules is, in fact, very wide since the word 'person' comprises both civilians and combatants, whether the latter are members of official or unofficial forces. The Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict commits the contracting parties to protecting what is called the 'cultural heritage of all mankind'. The State Parties shall 'take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions' upon those persons 'who commit or order to be committed a breach' of the Convention.[28] The two Additional Protocols, 1977, additional to the Geneva Conventions of 1949 have added more precise rules.[29]

2.4 Subsequent Developments

An important step in the process of development of the rules relating to individual criminal responsibility under international law was the setting-up of the two ad hoc tribunals for the prosecution of crimes committed in Former Republic of Yugoslavia (FRY) and Rwanda. While the establishment of these Tribunals represented a major progress towards the institutionalisation of permanent jurisdiction, they were empowered to clarify the substance of what is becoming the international criminal code, in the sense envisaged by the United Nations General Assembly (UNGA) in its Resolution 95(I). The UNSC resolutions in relation to the establishment of these tribunals contained provisions on acts punishable under international law.[30]

experiments), willfully causing great suffering or serious injury to body or health, extensive destruction or appropriation of property, compelling a prisoner of war to serve in the forces of a hostile power or willfully depriving him of the right to a fair and regular trial, unlawful deportation, the transfer or confinement of a protected person, and the taking of hostages 'not justified by military necessity and carried out unlawfully and wantonly'.

28 See art 28 and art 85, para 4(d), Additional Protocol I, 1977 make attacks against historic monuments, works of art or places of worship under certain conditions, a war crime. See Toman, J *The Protection of Cultural Property in the Event of Armed Conflict*, Paris, 1996.

29 In particular, art 11 strengthens the protection of individuals as far as their physical and mental health and integrity are concerned by stipulating that serious violations constitute a grave breach of international humanitarian law. Moreover, art 85 adds a great number of violations to the already existing list of grave breaches. Again, with art 1 of Protocol I, parties undertake 'to respect and ensure respect' for the Protocol 'in any circumstances'. See Yvez Sandoz, Christophe Swinarski, and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht: Martinus Nijhoff Publishers; Geneva: ICRC, 1987.

30 In particular, arts 2, 3, 4 and 5 of the Statute of the International Tribunal for the Former Yugoslavia enumerate the different crimes coming under the jurisdiction of the court.

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This great corpus of principles and rules has now been codified in an organic way in a single instrument, the Rome Statute of the International Criminal Court (ICC), adopted by a UN diplomatic conference on 17 July 1998.[31] For example, arts 5 to 8 dealt with the definition of the crimes coming under the jurisdiction of the ICC which are 'the most serious crimes' and are 'of concern to the international community as a whole'. This definition is comprehensive, for, it encompasses, both 'grave breaches' and 'serious violations' of the Geneva Conventions; of the laws and customs of war in general which contravene the legal and ethical rules; and, principles of the international community.

The Rome Statute adopted a new typology of crimes, with four categories instead of three namely:

(i) genocide;
(ii) crimes against humanity;
(iii) war crimes; and
(iv) crime of aggression.

Article 2, on grave breaches of the 1949 Geneva Conventions, gives the tribunal the power to prosecute persons 'committing or ordering to commit' such grave breaches. Article 3 enlarges the scope to cover violations of the laws and customs of war. Article 4 reproduces arts 2 and 3 of the 1948 Genocide Convention. Article 5 authorises the tribunal to prosecute persons responsible for crimes committed against civilians in armed conflicts 'whether international or internal in character'. In the already codified tradition, art 7 gives a wide scope to 'individual criminal responsibility', covering all persons who 'planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime'. The responsibility of a person with an official position head of state or government, government official and the effects of superior orders are treated in art 7 along the same lines as in the Nuremberg Charter and the ILC Report of 1950 specifically Principles III and IV. Reference is made to the possibility of mitigation 'if the International Tribunal determines that justice so requires', as in art 8 of the Charter. 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, was adopted on 25 May 1993 by SC Resolution 827/1993. The Statute of the Rwanda Tribunal, 1994 is different, but the global approach of its provisions does not reveal major differences. The Statute lists genocide and crimes against humanity in the first place and adds a reference to art 3 Common to the Geneva Conventions and to 1977 Additional Protocol II. The peculiar context of the Rwanda conflict explains these differences. See Daphna Shraga and Ralph Zacklin, 'The International Criminal Tribunal for the Former Yugoslavia', *European Journal of International Law*, Vol 5, No 3, 1994, pp 360-380; Paul Tavernier, 'The Experience of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', *International Review of Red Cross*, No 321, 1997, pp 605-621; and Marie-Claude Roberge, 'Jurisdiction of the ad hoc Tribunals for the Former Yugoslavia and Rwanda over Crimes Against Humanity and Genocide', *International Review of Red Cross*, No 321, November-December 1997, pp 651-64.

31 UN Doc A/CONF 183/9 Final Act: UN Doc A/CONF 183/10.

(v) While art 6 of the Rome Statute confirmed the provisions of the 1948 Genocide Convention and represented a further step towards the codification of principles and rules that are generally accepted, arts 7 and 8 represent major evolution in respect of crimes against humanity and war crimes. 'Crime against humanity' means an act 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.[32] It belongs to general, customary international law and it has been defined in several instruments subsequent to the definition under art 6 Charter of the Nuremberg. What constitutes a crime against humanity is given by the International Tribunal for the former Yugoslavia in its decision on the *Erdemovic* case:

> Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health and/or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity.[33]

No distinction is made between war and peace, international or internal armed conflicts.[34] What is identified as the core principle is the concept of humanity itself. The individual, the victim, becomes part of a much broader concept ie, mankind demonstrating a close link between the Martens clause, as codified by the Hague Convention No IV of 1907[35] and confirmed by art 1, 1977 Additional Protocol I.[36]

32 Donat-Cattin, 'Crimes against Humanity', in *The International Criminal Court: Comments on the Draft Statute*, Flavia Lattanzi (ed), Napoli: Scientifica, 1998, p 49.

33 Decision of 29 November 1996, UD Doc IT-96-22-T.

34 This principle was already stated by the ICTY in the *Tadic* case, judgment of 7 May 1997, UN Doc IT-94-1-T. The Statute of the Rwanda Tribunal makes no distinction, because most of the crimes committed in the first period lacked the character of having taken place in a conflict situation.

35 The Convention in its Preamble refers to 'the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of public conscience'.

36 See Shigeki Miyazaki, 'The Martens Clause and international humanitarian law,' in *Studies and Essays in Honour of Jean Pictet*, Christophe Swinarsky (ed), Geneva: ICRC, 1984, p 433.

Article 7, with its two parts, reflected a new approach *ie*, enumeration of acts that constitute crimes against humanity and the specific definitions for some of them. Inclusion of murder, extermination, enslavement and deportation primarily confirm the Nuremberg heritage, for, what in the Nuremberg Charter was generally referred to as 'other inhuman acts committed against any civilian population', in the Rome Statute became a list of acts like for example, 'imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; enforced disappearance of persons, *apartheid,*' which take into account the dramatic experiences of populations over the last 50 years in both international and domestic conflicts; and, even times of peace. A considerable number of these acts are crimes of sexual nature. Since the *Hagenbach* case, the behavior of certain men in conflicts and other situations of violence has gone dramatically beyond what at the time was considered as the crime of rape: today such crimes have become 'widespread' and 'systematic.'[37] But the seriousness of the crime has always been the same: 'He that forces any Woman to abuse her, and the matter be proved, he shall dye for it'.[38] Moreover, the acts committed in the former Yugoslavia have given rise to the concept of 'ethnic cleansing', which has been commented on by the ICTY, particularly in its decision on the *Review of Indictment against Karadzic and Mladic.*[39]

Article 7 also referred to a broad category namely 'other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or mental or physical health' such that in future, other acts also may be included, taking into account the fact that cases brought before domestic and international jurisdictions have shown men to be only too capable of enlarging on this category of crime, which constitutes the most serious violation of the humanity in itself. A comparison between the list of acts enumerated under art 8, Rome Statute dealing with war crimes and that of art 6, the Nuremberg Charter reveals that definition to various acts

37 See Theodor Meron, 'Rape as a crime under international humanitarian law,' *American Journal of International Law*, Vol 87(1993), pp. 424-428; See also Kelly Dawn Askin, *War Crimes Against Women, Prosecution in International Law*, The Hague: Martinus Nijhoff Publishers, 1997.

38 Article 88.

39 UN Doc IT-95-5-R61; See also, HH Jescheck, 'War crimes,' *Encyclopedia of Public International Law*, Yoram Dinstein and Mala Tabory, eds, Vol 4, p 294; *War Crimes in International Law*, The Hague/Boston/London: Martinus Nijhoff Publishers, 1996; *The Law of War Crimes: National and International Approaches*, Timothy LH McCormack and Gerry J Simpson, eds, The Hague/Boston/London: Kluwer Law International, 1997.

as war crimes has developed enormously and led to an enlarged and more detailed codification.[40] Since in a wider perspective the jurisdiction of the ICC would include war crimes, in particular, when 'committed as a part of a plan or policy or as part of a large scale commission of such crimes', this means that the ICC is also empowered to exercise its jurisdiction over acts committed by individuals.[41] The categories of war crimes, crimes against humanity and genocide, have developed in a significant and considerable way since the Second World War. A proliferation of treaties and constant work to expand the scope of international law by creating new jurisdictions and by clarifying concepts both in legal provisions and in judicial decisions are the salient features of the evolution described in these pages.

When art 6, the Nuremberg Charter was adopted, its provisions on war crimes were already declaratory of general international law of customary origin. War crimes were violations of existing provisions of *jus in bello*. The Nuremberg judgment stated in that regard that 'with respect to war crimes, however, as has already been pointed out, the crimes defined by art 6, Section b, of the Charter were already recognised as war crimes under international law. They were covered by arts 46, 50, 52 and 56, The Hague Convention of 1907, and arts 2, 3, 4, 46 and 51 of the Geneva Convention of 1929. That violation of these provisions constituted crimes for which

40 Marie-Claude Roberge, 'The new International Criminal Court: A preliminary assessment,' *International Review of Red Cross*, No 325, December 1998, pp 671-691, at p 674.

41 No doubt, these provisions must be interpreted in a very strict way. Several categories of crime are dealt with. The first is the grave breaches established by the Geneva Conventions. The second comprises 'other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law'. The list which follows is extremely detailed, with 26 types of act or behavior. It is the longest list of crimes ever included in an internationally binding instrument. The third category refers to serious violations of art 3 common to the Geneva Conventions, which pertains to armed conflicts not of an international character and covers acts committed against persons taking no active part in the hostilities such as violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and outrages upon personal dignity, in particular humiliating and degrading treatment, the taking of hostages and refusal to grant judicial guarantees 'recognised as indispensable'. A fourth is related to 'other serious violations of the laws and customs applicable in armed conflicts not of an international character'. The last two categories are followed by clauses excluding from the ICC's jurisdiction acts committed in situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence 'or other acts of similar nature'. The general right of States to maintain or establish law and order or to defend their unity and territorial integrity 'by all legitimate means' is expressly recognised. In any case, the fourth category applies to situations of 'protracted armed conflict between governmental authorities and organised armed groups or between such groups', that is, the vast majority of contemporary internal conflicts.

the guilty individuals were punishable was too well settled to admit of argument.'[42] However, the customary origins of rules on war crimes go back nearly half a millennium. The notion of crimes against humanity appears to have undergone the greatest development. Under the Nuremberg Charter, crimes against humanity were linked to war crimes. After 1946, it appeared beyond any doubt that this category of crimes had become part of Customary International Law.

The judgment of the ICTY in the *Tadic* case affirmed it openly. With the consideration of crimes against humanity as an autonomous category the connection between armed conflict and war crimes has disappeared.[43] If war crimes and crimes against humanity are two autonomous, self-sustained categories, there is no denial to closely link them with modern conflicts and with the crimes against the civilian population. Murder, deportation and other acts in the long lists that appear in recent instruments are clear examples of this connection. The Geneva Conventions, 1949 and Additional Protocol I codified a significant range of acts and situations which demonstrate that violations can be classified both as war crimes and crimes against humanity.

Draft Code of Offences against the Peace and Security of Mankind, prepared by the International Law Commission made an important contribution to the evolution of individual criminal responsibility. In the 1951 and 1954 drafts, art 1 provided that 'offences against the peace and security of mankind are crimes under international law, for which the responsible individual shall be punished'. Article 1 of the 1996 text states that 'crimes against the peace and security of mankind are crimes under international law, and punishable as such, whether or not they are punishable under national law.' Under art 2, 'a crime against the peace and security of mankind entails individual responsibility'. As far as the list of acts is concerned, the Draft Code takes into account all the developments described above. Definition of genocide under art 17 reflects the 1948 Convention, with the same wording as in art 6 of the Rome Statute. For crimes against humanity, the Code under art 18 adds that acts are 'instigated or directed by a Government or by any organisation or group'. The list is, however, less detailed than that in art 7 of the Rome Statute. In particular, instead of mentioning the crime of apartheid, the Code includes it in a general provision on 'institutional discrimination on racial, ethnic or

42 See *Trial of the Major War Criminals before the International Military Tribunal*, p 253.

43 In this regard see also art 1, 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which refers to crimes against humanity under art 6, Nuremberg Charter, completes the wording with 'whether committed in time of war or in time of peace'.

religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population'. War crimes are listed more or less in the same way as that later chosen for art 8 of the Statute, but in a less extensive formulation. However, all the different categories of crime mention the acts as 'committed wilfully in violation of IHL'.

A new provision on the protection of the natural environment is introduced which says that 'in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population'. Article 19 adds a further provision relating to crimes against UN and associated personnel committed with a view to preventing or impeding an operation involving such personnel. The only exclusion is when UN personnel are engaged as combatants against organised armed forces in an enforcement action authorised by the Security Council under ch VII of the UN Charter. In that case, 'the law of international armed conflicts applies'. The protection of UN personnel under the Rome Statute is included in art 8 (b) iii and (e) iii. Not only has the typology of crimes bringing in the individual responsibility been enlarged and given a clearer outline, but some general principles have also been laid down. When an act is being considered, the crime of omission is taken into account. Starting with the judgment of the US military commission in the *General Yamashita* case on atrocities committed against the civilian population in the Philippines, failure to prevent a crime from being committed has been considered to be an act as serious as the crime itself and deserving of equal punishment. 'Where murder and rape and vicious revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops.'[44] Articles 86 and 87 of Additional Protocol I also take the same line.

Another important development has been in relation to the practice of codifying International Law taking into account the growing connection between Humanitarian Law and Human Rights Law. Some of the recently adopted provisions of humanitarian law have been clearly influenced by human rights rules and standards of protection. The Rome Statute refers to concepts like 'personal dignity', the prohibition of 'humiliating and degrading treatment', 'judicial guarantees', the prohibition of 'persecution',

44 Judgment of 7 December 1945 (UN War Crimes Commission, 4 Law Reports of the Trials of War Criminals, 1948, 3).

discrimination and apartheid. While these concepts find their definitions under various instruments adopted by the UN for the protection of the rights of the individual, the principle of humanity is at the core of IHL and forms the basis of all the developments. Moreover, there is a growing reciprocal influence between treaty-based and Customary International Law. Customary law has come to play a role of paramount importance, since contemporary humanitarian law applicable in armed conflicts is no longer limited to the Geneva Conventions and their Additional Protocols. Customary law has accelerated the development of the law of armed conflict, particularly in relation to crimes committed in internal conflicts. In this respect, the case law established by the *ad hoc* tribunal for the former Yugoslavia has made an important contribution.[45] The basic idea underlying the legal heritage whose foundations were laid many years ago and which has since been developed remained the same ie, the principle of humanity must be considered as the very heart of a legal system aimed at providing protection against criminal acts committed by individuals, both in internal or international armed conflicts and in times of peace. This is not only a moral duty, but a basic obligation under International Customary Law. The laws of humanity and the 'dictates of public conscience', today as well as in the past, call for exceptional efforts aimed at promoting principles and rules designed to ensure effective protection of the individual, who is to a dramatically increasing extent the victim of acts of generalised violence. The 'peace and security of mankind', together with the protection of human rights and severe sanctions for serious violations and grave breaches of humanitarian law applicable in armed conflicts, are among the international community's major assets.[46]

(3) Application Of Rules Of Ihl To Violations During Armed Conflicts Of Non International Character

In view of the treaty and customary rules that apply in internal conflicts, with regard to the question of 'whether the rules of IHL are binding only on States, which would thus be held solely responsible in the event of non-observance; or, whether they also apply to individuals, who could violate them directly by their conduct', it is evident that the second option clearly

45 See Theodor Meron, 'War crimes in Yugoslavia and the development of international law,' *American Journal of International Law*, Vol 88, No 1(1994), pp 78-87.

46 The 50th anniversary offers an excellent opportunity for reflection, because 'some anniversaries are bound to evoke powerful memories'. See Cornelio Sommaruga, 'Humanitarian challenges on the threshold of the twenty-first century,' *International Review of Red Cross*, No 310, January-February 1996, pp 20-35.

outweighs the first one, irrespective of the internal or international nature of the said conflict. The rules contained in art 3 common to the four Geneva Conventions, 1949 and in Protocol II additional to the Conventions, 1977, specifically, art 4 relating to fundamental guarantees frequently refer to (i) the acts of individuals;[47] (ii) obligation of State Parties to disseminate the rules;[48] and, (iii) obligation of Parties to the conflict to 'ensure respect' for rules of IHL also apply in internal conflicts.[49] These references indisputably refer to the law that applies to conflicts of non international nature and the conduct of the individuals therein especially in the light of the famous assertion of the International Military Tribunal (IMT) at Nuremberg.[50]

(4) International Criminalisation Of Violations Of IHL

If the rules of IHL applicable to armed conflicts of non international character govern the conduct of individuals, the question for consideration will be 'whether the violation of the said rules entails individuals criminal responsibility' and, more specifically, 'whether such responsibility emanates from international law as it stands today'. Unlike the law applicable to international armed conflicts the treaty law applicable in non-international armed conflicts does not make any specific provision for the prosecution of serious violations. Neither art 3 common to the Geneva Conventions 1949 nor the Additional Protocol II, 1977 provide for any system similar to the mechanism for dealing with grave breaches established by the 1949 Conventions and as supplemented by Additional Protocol I, 1977.[51] This

47 See Meron, *International criminalisation of internal atrocities*, op cit (note 6), pp 559-562.

48 Protocol II, art 19.

49 See Military and Paramilitary Activities in and against Nicaragua, (*Nicaragua v United States of America*), Merits, Judgment of 27 June 1986, *International Court of Justice Reports*, (1986), paras 220 and 255, pp 114 and 129.

50 'Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced'. See *Judgment of the International Military Tribunal, in The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, London, 1950, Part 22, p 447.

51 For example, the report by the Secretary-General on the draft Statute of the ICTY refers only to international armed conflict when it introduces the article concerning grave breaches of the 1949 Geneva Conventions; Views of ICRC to the effect namely 'According to the terms of the Geneva Conventions and Additional Protocol I, international criminal responsibility for certain violations of humanitarian law, and the relevant obligations, have been established only in respect of international armed conflict'. See UN Doc A/CONF.169/

continued on the next page

leads to the next important issue namely, 'whether this rule out the international criminal responsibility for serious violations of humanitarian law applicable in internal conflicts other than those amounting to genocide or crimes against humanity'. For a length of time, the answer to this question would most likely have been in the affirmative.[52]

On 2 October 1995, the ICTY Appeals Chamber decision on the defence motion for interlocutory appeal on jurisdiction in the *Tadic* case did not restrict itself to making a simple finding nor to giving a definitive ruling on the fact that Common Article 3 is not subject to the system of grave breaches. Therefore, it is necessary to examine and evaluate the elements that would possibly indicate a distinctly emerging trend in the area under consideration, by looking for a hypothetical customary rule providing for international criminalisation. It is interesting to note that the IMT at Nuremberg not only emphasised that individuals could be prosecuted for particularly reprehensible conduct in violation of international law, by means of a customary rule grafted onto those which deal with such conduct but after an in-depth examination of the prevailing facets of the national jurisprudence; declarations by States etc., it arrived at the conclusion that the conduct punishable under its Statute already entailed individual criminal responsibility at the time of the commission of the offences for which the accused were being tried. To appreciate the scope and spirit of this view point it is also appreciable that legal instruments namely the Penal Codes of Ethiopia (1957),[53] Yugoslavia (1990) also adopted by

NGO/ICRC/1, Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cairo, Egypt, Statement of the International Committee of the Red Cross, 30 April 1995, p 4. Further, in the *Tadic* case, the ICTY Appeals Chamber stated: 'Notwithstanding the foregoing, the Appeals Chamber must conclude that, in the present state of development of the law, art 2 of the Statute only applies to offences committed within the context of international armed conflicts,' rejecting the idea that the scope of the provisions of the Geneva Conventions relating to grave breaches could currently be considered as extending to Common Article 3.

52 For example, the final report issued by the United Nations Commission charged with examining and analyzing information relating to serious violations of IHL in the FRY stated, in relation to the law applicable in non-international armed conflict, that 'in general the only offences committed in internal armed conflict for which universal jurisdiction exists are 'crimes against humanity' and genocide, which apply irrespective of the conflicts' classification.' See UN Doc S/1994/674 (annex), Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), 27 May 1994, p 13, para 42. Similarly, the literature has also quite recently tended towards this view on a number of occasions. See Statement by Mrs Albright (United States) during the 3217th meeting of the Security Council, UN Doc S/PV 3217, 25 May 1993, p 15.

53 *Penal Code of the Empire of Ethiopia, Proclamation No 158 of 1957,* in Negarit Gazeta, Gazette Extraordinary, Addis Ababa, 1957, arts 282-284, pp 87-88.

Bosnia-Herzegovina (1992),[54] and Slovenia (1995), Norway (1954);[55] and, the Irish Geneva Conventions Act (1962)[56] may as well be examined and appreciated.

(5) Position Under The Statutes Of ICTY And ICTR

Both Statutes of ICTY and ICTR are important in the context of the crystallisation of the principle of Individual Criminal Responsibility. A bare reading of the provisions of the Statute of the ICTY make it clear that it does not spell out either in favor of or against the actual criminalisation of serious violations committed during the times of non-international armed conflicts. However, certain factors indicate that indicate that the Security Council on its part intended that as far as possible, the subject-matter jurisdiction of the International Tribunal shall apply both to the international as well as the non-international armed conflicts and they include (a) the events that lead to the adoption of the Statute by the Security Council; (ii) the mandate rendered in favor of the Tribunal; (iii) the competence *ratione tempori* as explained under art 1 of the Statute; and lastly but most importantly, (iv) the Council's realisation of the nature of the conflict in FRY which has the interface of the elements of both International as well as the non-international armed conflict.

Very characteristically, during the time of adopting the Statute of the ICTR, the Security Council chose to demonstrate to be expansive in choosing the applicable law unlike in the case of the Statute for the FRY. It included within the subject-matter jurisdiction of the Rwanda Tribunal, all international instruments irrespective of their recognition in modern treaty law or whether they demonstration of the existing customary law. Reference

54 *Penal Code of the Socialist Federal Republic of Yugoslavia, 1990,* arts 142-143. On this point, see *Tadic decision*, op cit (note 33), para 132, pp 76-77. Penal Code of Slovenia, 1 January 1995 (unofficial translation by the Ministry of Justice), Ch 35: Criminal offences against humanity and international law, pp 117-118, arts 374-377.

55 The Norwegian military Penal Code penalises all violations of the rules protecting persons and property that are set out in the Geneva Conventions and the two Additional Protocols thereto. See Militaer Straffelov of 22 May 1902, No 13, art 108 (as incorporated by the law of 26 November 1954, No 6, and amended by the law of 12 June 1981, No 65).

56 This legal instrument provides for jurisdiction over acts committed abroad by non-nationals, although the scope of that jurisdiction is limited to cases of grave breaches of the Conventions although it does not, explicitly rule out the hypothesis of the commission of grave breaches in relation to Common Article 3. The Irish Geneva Conventions Act of 1962 makes all violations of the Geneva Conventions punishable, including, Common Article 3. See Geneva Conventions Act 1962, No 11, ss 3 and 4.

under art 4 of the Statute to art 3 common to the Geneva Conventions and of Additional Protocol II as serious violations regards the existence of law relating to individual criminal responsibility and in the view of the author this was possible essentially on account of the preliminary report by the Commission of Independent Experts for Rwanda, which had already classified the situation prevailing in Rwanda as a non-international armed conflict.[57]

(6) Contribution Of The International Law Commission

Understanding of the Contribution of the International Law Commission (ILC), in the context of the development of the doctrine would require analysis of two distinct efforts on its part namely (a) its observations on the need for the establishment of an international criminal court; (b) its view point as to what must be the scope of the jurisdiction of the Court in dealing with crimes that were committed during different kinds of situations. Accordingly, in addition to crimes against humanity, genocide and crimes of aggression, the ILC pointed out that the jurisdiction of the proposed court shall extend into serious violations of the laws and customs applicable in armed conflicts and crimes that are defined as such or are governed by the treaties enumerated by the ILC. Ironically, this list would not contain or make reference to the Additional Protocol II merely on the grounds of the later not being conformed to the ILC recognised criteria.[58] In view of the lack of clarity as to whether serious violations of the laws and customs applicable in armed conflicts are aiming to encompass the notion of 'war crimes';[59] whether non-international conflicts are brought within the fold, the ILC expressly referred in its draft code only to crimes against

57 *United Nations, Preliminary report of the Independent Commission of Experts established in accordance with Security Council resolution 935 (1994)*, UN Doc S/1994/1125, 4 October 1994, p 20, paras 89-91.

58 One of the important requirement under these criterion is that the treaty created either a system of universal jurisdiction based on the principle *aut dedere aut judicare* or the possibility for an international criminal court to try the crime, or both, thus clearly recognizing the principle of international concern. See *United Nations, Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994)*, UN Doc A/49/10, p 78. However, the exclusion of Protocol II leaves aside the question of possible 'grave breaches' of Common Article 3, which could, in this respect, fall within the jurisdiction of the court.

59 The ILC believes, for example, that conduct classified as a 'grave breach' (and therefore to be regarded as a 'war crime') would not necessarily constitute a 'serious violation' within the meaning of this article.

the peace and security of mankind.[60] Interestingly, the second draft of the ILC in specific terms referred to the crimes against the peace and security of mankind and adopted that, 'War crimes', will include acts committed in violation of humanitarian law applicable in internal conflicts as well.[61] Further, the ILC also stressed that the principle of individual criminal responsibility for such violations has come to be generally recognised.[62] Not contented with the current trend of developments in the law, the ILC also went further, moving in the direction of the possible recognition that crimes against the peace and security of mankind, to state that it amounts to an extremely serious category which incurs application of the principle *aut dedere aut judicare*, can be committed in the context of internal conflicts. In a distinctly innovative vein, the Commission also specified that para (g) of art 20 dealing with the causing of damage to the environment must be understood as encompassing both international and non-international conflicts.

(7) Position Under Various UN Security Council Resolutions

Of the UN Security Council Resolutions that point to the existence of an *opinio juris* on international criminalisation of flagrant violations of IHL applicable in internal conflicts two Resolutions adopted unanimously by the Security Council concerning events in Somalia are of importance. In these Resolutions the Security Council asserted that those committing or ordering the commission of violations of humanitarian law shall be held individually responsible.[63] Similarly, a few Resolutions concerning the

60 The commentary on the latter explains that: The expression 'armed conflict', on the other hand, was clear and precise and required no explanation. The definition of war crimes as violations of the 'rules of international law applicable in armed conflict' covered conventional law and customary law, as well as all types of armed conflict, to the extent that international law was applicable to them.

61 UN Doc A/CN 4/L.532, 8 July 1996.

62 *Report of the International Law Commission on the work of its forty-eighth session (6 May –26 July 1996)*, UN Doc A/51/10, pp 118-119.

63 See Resolutions S/RES/794 (3 December 1992) and S/RES/814 (26 March 1993). Similarly, Security Council Resolutions 1422 and 1487 and specifically Resolution 1593 specifically referred to as Darfur Resolution deserve a specific reference here in the light of the apparent implications by virtue of their outcomes as against art 16 under the Rome Statute on ICC in determining the existence of a situation of threat to peace and security and its decision to justify a deferral request as against the decision of the ICC to exercise its jurisdiction under the Statute to prosecute peacekeepers as against the allegations of their conduct. This is more so because the art 16 of the Statute makes it evident that such a deferral request is only for a temporary period lasting for twelve months and only renewable if the same conditions that justified the initial request persist.

former Yugoslavia are relevant to this discussion in so far as they address internal conflict situations.[64] Certain other Resolutions adopted in connection with the conflicts in Rwanda and Burundi, Darfur and very recently concluding Resolutions relating to Lebanon contain assertions along the same lines.[65] This shows that the Security Council clearly considers the criminal responsibility of individuals committing or ordering the commission of the violations in question (in the context of an internal conflict) to be an issue of international concern, and suggests that this principle of individual responsibility is already well established. Although one may occasionally be perplexed by the terms used, because of their rather imprecise nature or because of the range of violations covered, in general it seems that what the Security Council is addressing in these Resolutions ie, 'serious violations', IHL applicable, in non-international armed conflicts. At the same time, the conflict that has emerged in the context of Security Council Resolutions as against the powers of the ICC also deserves a specific effort of enunciation.

(8) Conclusion

In the ultimate analysis, the author raises a serious concern to the occurrence of serious violations of humanitarian law during the times of internal conflict, for they would primarily amount to 'war crimes' under the prevailing norms

64 S/RES/787 (16 November 1992), S/RES/808 (22 February 1993), S/RES/819 (16 April 1993), S/RES/820 (17 April 1993), S/RES/827 (25 May 1993), S/RES/859 (24 August 1993), S/RES/913 (22 April 1994), S/RES/941 (23 September 1994), S/RES/1010 (10 August 1995), S/RES/1019 (9 November 1995), and S/RES/1034 (21 December 1995).

65 For Rwanda, see S/RES/935 (1 July 1994), S/RES/955 (8 November 1994) and S/RES/978 (27 February 1995). For Burundi, see S/RES/1012 (28 August 1995) and S/RES/1072 (30 August 1996). Similarly, in the light of the Security Resolutions 1422, 1487 and 1593 that highlighted the situation in Darfur, specifically Resolution 1593 deserve a specific reference here. This is because of the implications on account of the outcomes as against art 16 under the Rome Statute on ICC in determining the existence of a situation of threat to peace and security and its decision to justify a deferral request as against the decision of the ICC to exercise its jurisdiction under the Statute to prosecute peacekeepers as against the allegations of their conduct. This is more so because the art 16 of the Statute makes it evident that such a deferral request is only for a temporary period lasting for twelve months and only renewable if the same conditions that justified the initial request persist. Similarly, in the light of the earlier Resolution of the UNSC 1706 referring to situation in Darfur and seeking the deployment of UN troops UNSC Resolution 1757 relating to the constitution of the Special Tribunal for Lebanon specifically contains in its annexure the Statute for the Special Tribunal for Lebanon to try the suspects in the assassination of Rafiq Hariri refers under art 3 to the Principle of Individual Criminal Responsibility (S/RES/1757 (2007).

of international law. However, an interesting development in this regard is the emergence of the States assertion to see the same from the point of applicability of universal jurisdiction, for, in the view of author, customary rules have been clear in this respect. To illustrate the same view point, the author relies on the working paper submitted during 1997 by the ICRC highlighting the needful course of action on the part of the States wherein the Preparatory Committee argued for the establishment of an International Criminal Court in view of the implications of the grave breaches and other serious violations of IHL applicable in international armed conflict, wherein the applicability of principles of IHL shall apply to the war crimes committed during the times of non-international armed conflicts.[66] Way back in 1997, the Preparatory Committee pursued its examination of the issue and drafted a new article on 'war crimes' suggesting for the incorporation of two separate sections addressing to Armed Conflicts of international as well as non-international Character. Interestingly s C of the said draft has dealt with serious violations of Common Article 3 which other wise provides for the minimum guarantees that are to be confirmed to by all parties to the conflict, regardless of its character and s D has listed out various other violations of the law applicable in internal armed conflicts that need to be looked into.[67] In view of the agreement on the part of many States for the incorporation of the either the first or both sections into the fold of application of Principle of Individual Criminal Responsibility, in conclusion, the author summates that the it is highly essential on the part of Law making bodies/institutions in International law to evolve the principle of individual criminal responsibility into a clear obligation to perpetrators of serious violations of International Humanitarian Law committed in the course of non-international armed conflicts.

66 ICRC, *War Crimes*, working paper prepared by the ICRC for the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, p 4, and ICRC, Statement of the ICRC before the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, p 2; See United Nations. Preparatory Committee for the Establishment of an International Criminal Court, Working group on the definition of crimes, Written proposal submitted by New Zealand and Switzerland, 14 February 1997, UN Doc A/AC249/1997/WG 1/DP 2, Written proposal submitted by the United States, 14 February 1997, UN Doc A/AC 249/1997/WG 1/D P 1, Draft consolidated text, 20 February 1997, UN Doc A/AC 249/1997/WG 1/CRP 2.

67 *War Crimes*, 12 December 1997, UN Doc A/AC 249/1997/WG 1/CRP 9.

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11 Humanitarian Law and Human Rights

HÉCTOR GROS ESPIELL

Introduction

The connection between human rights and humanitarian law must today be considered from two distinct viewpoints: first, analysis of the significance of humanitarian law with regard to the observance, promotion and defence of human rights: in other words, humanitarian law as it is today and as it is applied, and its contribution to the concrete existence of human rights and their observance as such in international and internal armed conflicts, within the framework of the provisions of the 1949 Geneva Conventions and the Protocols of 1977; second, the relation between humanitarian law and human rights law as two distinct branches, sectors or aspects of modern international law.

This method of analysis will allow us to bypass a number of approaches to the subject which are now obsolete. In the context of the present international situation and advances in legal theory in recent years, this question can no longer be addressed in the same way as it was 30 or 40 years ago.

Because the current international situation has a strong bearing on this issue, it is necessary to assess past and present world events in these final years of the twentieth century, including, of course, the new methods and rules of international organizations, in particular those of the United Nations, the International Committee of the Red Cross, case law and legal theory.

Geneva Conventions of 1949 and Additional Protocols of 1977 and Human Rights

There is no doubt that international humanitarian law has always been an element of vital importance in the safeguarding and defence

of human rights, both before and after the Geneva Conventions of 1949 and the Additional Protocols of 1977.

It is clear from the articles of the Conventions of 1949 that, in considering the wounded and the sick in armed forces in the field (Convention I), the wounded and shipwrecked members of the armed forces at sea (Convention II), prisoners of war (Convention III) and civilian persons in time of war (Convention IV), its provisions are essentially aimed at ensuring that the observance of certain human rights is guaranteed in specific situations. There is no need to review all the provisions of these conventions. Their common Article 3 enjoins humanitarian treatment without distinction of any kind, and prohibits violence to life and person, outrages upon personal dignity, cruel treatment and torture and humiliating and degrading treatment. Its aim is therefore to safeguard the human rights of such persons in the specific situations in which they find themselves. The wording of Article 3 is identical or similar to that used in the 1948 Universal Declaration of Human Rights, and adopted again in the 1966 International Covenants on Human Rights and, at a regional level, in the European Convention of Human Rights, the American Convention on Human Rights and the African Charter of Human and Peoples' Rights.

Many other provisions of the Conventions could be quoted to support this view. This is not necessary, but it is worth mentioning Article 27 of Convention IV, which, referring to the same principles as the common Article 3, includes among the rights of protected persons their entitlement to their honour, their family rights, their religious convictions and practices and their manners and customs.

The same principles are to be found in the two Protocols of 1977. In Protocol I, applicable to armed conflicts in which peoples are fighting against colonial or foreign domination and against racist regimes, the reference to the protection of the wounded, sick and shipwrecked and of persons who are in the power of the adverse party or who are interned, detained or deprived of liberty must be underlined (Articles 10 and 11). Article 75 (fundamental guarantees) is aimed at guaranteeing the protection of the fundamental human rights of persons who find themselves in situations referred to in Article 1 of the Protocol.

In Protocol II, applicable to international armed conflicts, Part II (humane treatment), which includes Article 4 (fundamental guarantees) and Article 5 (persons whose liberty has been restricted), is aimed at protecting and guaranteeing the rights of persons in such conflicts.

The application of international humanitarian law is steadily becoming more important for human rights law and for true observance of human rights. Conversely, human rights law is steadily becoming

more important for international humanitarian law and its effective application. This conviction, born of the awareness of common principles and objectives and the common fundamental principle of the dignity of the human person which exists in both laws and which reinforce and support each other, is constantly growing, although international humanitarian law applies in specific situations and has its own instruments and organs of enforcement.

This conviction and awareness is also present and growing within the organs of the Red Cross and the Red Crescent, in the United Nations, in the United Nations specialized agencies and in regional systems for the protection of human rights, such as the European, American and African systems. It is also the prevailing position in the relevant non-governmental organizations, in particular the International Institute of Humanitarian Law, San Remo, Italy.

For this reason, the traditional theories on the connection between human rights and international law (separatist, complementarist and integrationist) have to some extent been transcended by the development of the political situation and of practice on the international scene. There is no doubt that specific international humanitarian law is aimed at protecting human rights in certain situations, by means of special procedures and for certain categories of persons. Thus it is part of what could be called international human rights law in the broad sense (*lato sensu*).

But it is also a parallel system to international human rights law in the strict sense, based on the same principles and the same objectives. These two parallel sectors of international law influence, support and reinforce each other. In the present international political situation, it is impossible to conceive of the existence of international law without human rights law. Conversely, human rights law would not be what it is today without international humanitarian law.

Definition and Understanding of Human Rights and Humanitarian Law

An appropriate definition of both terms (human rights and humanitarian law) is clearly required today in order to determine their common elements and reciprocal connections. The fact that they are often used with different meanings on different occasions, that these meanings do not always coincide and that they are increasingly used in common parlance rather than restricted to specialized legal language, makes it necessary to clarify and define the terms and the concepts according to current legal practice and theory in this sphere.

The relationship between the two concepts and the identification of their common and distinct elements have been the subject of

various legal works[1] which have undoubtedly helped to clarify the question and, above all, facilitate its study and analysis. Nevertheless, the doubts and uncertainties which remain fully warrant an effort to achieve greater clarity.

The term 'rights' in the expression 'human rights' refers to subjective rights, powers or faculties which human beings possess in virtue of their recognition by national law and/or international law. The term 'law' in international humanitarian law refers to an objective set of principles and rules which, in international law, govern the protection of individuals in international or internal armed conflicts in accordance specifically with the provisions of the Geneva Conventions of 1949 and the two Protocols of 1977 and the protection of refugees in accordance, notably, with the Convention relating to the Status of Refugees of 1951 and the Protocol relating to the Status of Refugees of 1967. While in English the confusion does not arise, this distinction and its conceptual significance is particularly important in Latin, Spanish, French, Italian, German and the Slavonic languages, where the same word (*ius, derecho, droit, diritto, recht, pravo*), derived from the objective concept of law,[2] has both meanings.

In order to standardize terminology in these languages, it is therefore necessary to refer to the objective meaning of the term *'Derecho'*, for example, as *'Derecho Internacional de los Derechos Humanos'* (international human rights law) and *'Derecho Internacional Humano'* (international humanitarian law) and to refer to the subjective meaning of the term *'Derecho'* as *'Derechos Humanos'* or human rights and the rights (*derechos*) of combatants and civilian populations in armed conflicts.

In Spanish, Latin, French, Italian and German, a different meaning is given to the same word in the expressions 'human rights' and 'international humanitarian law'. Therefore, in order to standardize the expressions with a view to a homogeneous and common terminology, the terms 'international human rights law' and 'international humanitarian law' will have to be used.

While it does not provide us with any new information on the subject, this simple and obvious terminological clarification facilitates analysis by overcoming the confusion which usually arises.

Whatever the theoretical, philosophical, political or legal framework used as a basis for analysis, the term 'human rights' means the fundamental powers, responsibilities and requirements that a human being possesses, declared, recognized and conferred by the legal order and which, derived as they are from the inherent dignity of humankind (the general and universal bedrock of human rights), constitute today the indispensable and necessary basis of any organization or national political system, and indeed of the international community itself.

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The assertion of the possibility of a common, universal ideal in the sphere of human rights, proclaimed in the Universal Declaration of Human Rights, must recognize the unavoidable fact that there are different conceptions of those rights, both in theory and in reality in the present international situation.[3]

The universal concept of human rights was reaffirmed by the 1993 Vienna World Conference on Human Rights in Articles 1 and 5 of the Vienna Declaration and Programme of Action, while recognizing the importance of national and regional differences and the diversity of historical, cultural and religious backgrounds, and bearing in mind that all states have the duty, whatever their political, economic and cultural systems, to promote and protect all human rights (Article 5).

Today, the concept of human rights includes the traditional civil and political rights or traditional public liberties, the economic, social and cultural rights which entail the state's positive duty to satisfy human economic, social and cultural needs and the new rights which have arisen from the demands of today's world, particularly with regard to development, the environment, peace, self-determination, and so forth.

As declared by the General Assembly of the United Nations, all these rights are interdependent, every right and every category of right requiring for its actual existence the recognition and enforcement of the others. Freedom exists only when it is exercised by a person who is free from fear, poverty, hunger, insecurity and lack of culture. On the other hand, economic, social and cultural rights have a strict meaning which fully respects human dignity if they are exercised by a free person who is not subjected to arbitrary acts, despotism and discrimination.

The rights of each human being can exist in reality only as a result of a legal order which is in force, and the exercise of those rights is limited by the rights of other human beings and the demands of social coexistence, in accordance with rules derived from a law established in the general interest, without discrimination of any kind.

The declaration, protection and promotion of human rights is the responsibility, first and foremost, of internal law, because it is in and for the state, whose existence and security constitute the condition of the actual existence of human rights, that the body of rules aimed at regulating and guaranteeing them is developed.

But faced with the risk of human rights violations resulting from the activities of the state (which is not, however, the only considerable source of such violations), international law, whether in its universal or its regional manifestations, also guarantees and promotes the enforcement and observance of human rights.

The question of human rights is therefore no longer the preserve of the domestic jurisdiction of states, but is now recognized as being

governed by internal law and by international law, against which special internal law cannot be invoked.

The body of principles and rules in international law which currently governs the issue of human rights on the international plane is known as 'international human rights law'. It is derived from the Charter of the United Nations, the Universal Declaration of Human Rights, the two International Covenants on Human Rights, the Optional Protocol to the International Covenant on Civil and Political Rights and a long series of instruments, treaty-based or otherwise, developed within the framework of the United Nations[4] and some of its specialized agencies, in particular the International Labour Organisation (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

Besides these instruments of a universal nature, there are international regional instruments such as the European Convention on the Protection of Human Rights and Fundamental Freedoms and its Protocols, the European Social Charter, the American Declaration of Human Rights and Duties, the African Charter of Human and Peoples' Rights, and many others.

International human rights law, which is today one of the most dynamic and controversial branches of international law, encompasses various systems of operation with a complex organic structure in both the universal and the regional spheres. In a very broad sense, all the international rules and principles aimed at protecting and guaranteeing the rights of persons, whatever their legal status (civilian, military, national, alien, man, woman, combatant, non-combatant, and so on), at any time (peace, war, civil war, insurrection, and so on), both within the territory of which they are nationals or residents and outside it, whatever their reason for deciding to leave that country and settle in another, could be regarded as making up international human rights law.

However, this very broad and comprehensive notion, although not conceptually at fault, if its meaning is clearly stated, runs up against the existence of various branches of current international law aimed at protecting the rights of persons in different situations. Its use without the necessary qualifications could prove to be vague and controversial and lead to dangerous confusion.

However, taking into account these distinctive aspects, the dissimilarities in situation and the different systems of operation which are not always reconcilable, one must recognize that both the protection of human rights in general, based on the relevant universal and regional instruments in force, and the protection of the rights of persons under international humanitarian law constitute posts, specific sectors, of a general international legal system of essentially humanitarian origin, aimed at protecting human beings in the broadest

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Although the scope of this general system, which makes the human being the subject of internationally guaranteed rights, varies according to the different cases and situations in international human rights law proper, in international humanitarian law it is based on general fundamental principles which influence the various branches of international law aimed at protecting and guaranteeing human rights. There may be specific principles and criteria which are applicable only in certain branches of international law, as in the special case of humanitarian law,[5] but there can be no denying the existence of general principles common to all sectors, linked and interrelated, with the essential aim of protecting and guaranteeing the dignity and integrity of human beings. Indeed, it would be extremely dangerous to deny this.[6]

Let us first examine the question of international humanitarian law. This law, which is sometimes called 'the Law of Geneva', is based essentially on the four Geneva Conventions of 1949 and the two Protocols of 1977. It can be considered to be a part of the law on armed conflicts, although strictly speaking this law, also called 'the Law of The Hague' and derived from the 1907 Fourth Hague Convention and its annex, lays down the rules which must be observed by the warring parties as a consequence of the principle that the parties in an armed conflict do not have an unlimited choice of means with which to fight the enemy. However, this law is not confined to the rules of The Hague, because it also includes the Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and Bacteriological Methods of Warfare, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, of 10 April 1972, and the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, of October 1980.

In a broad sense, the humanitarian provisions cover the conduct of military operations (methods and means of combat) as well as the protection of the victims of armed conflicts (wounded, sick, prisoners, civilian populations, and so on). But, strictly speaking, international humanitarian law is based on the Geneva Conventions of 1949 and the Additional Protocols of 1977, that is to say, the Law of Geneva, which differs from the Law of The Hague in its specific system of operation.

However, one should not make the mistake of placing these laws in opposition, because together they form the law of armed conflicts and, while their approach and their immediate objectives are different, they are based on the same principles and have a common final

objective.[7] The link between international humanitarian law and international human rights law, and the acknowledgment of the fact that they are derived from the same general principles aimed at protecting human beings, has become established in current legal theory.[8] Although the Red Cross has only in exceptional circumstances invoked human rights,[9] and although its action has its own distinctive character, its work has always been aimed at achieving the observance of certain fundamental human rights.[10]

In contrast to the general character of international human rights law, which refers to the existence of rights possessed by all individuals in all situations,[11] international humanitarian law applies only in certain specific cases (international or internal armed conflicts and certain situations specifically provided for: Articles 2 and 3 common to the 1949 Conventions and articles of the 1977 Protocols I and II), and its rules apply only to those persons protected as a consequence of such situations in the cases expressly provided for in the Conventions of 1949 and the Protocols of 1977 (sick, shipwrecked, prisoners of war, wounded, civilian populations, refugees, stateless persons, and so on). Although international human rights law and international humanitarian law overlap to a certain extent, each also has its own substantive and specific field of application calling for different methods of implementation and monitoring.

International humanitarian law and international human rights law have developed along different lines historically. The former is derived from the 1864, 1899 and 1929 Geneva Conventions leading to the Conventions of 1949 and the Protocols of 1977, including the 1907 Hague Conventions and the other standards mentioned above and which, although they do not refer directly to the fate of human beings affected by armed conflict but to the conduct of military operations, also have the ultimate aim of protecting human beings.

International human rights law, on the other hand, is derived, notwithstanding certain earlier instruments, from the Charter of the United Nations, the Universal Declaration of Human Rights, the American Declaration of Human Rights and Duties, the European Convention, the American Convention, the two International Covenants on Human Rights, the Optional Protocol to the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights. Also of importance are the Final Declarations of the Tehran and Vienna Conferences on Human Rights, adopted by agreement in 1968 and 1993, respectively, which crystallize the present thinking of the international community on human rights: the duty of their observance, the need for their international protection and other relevant themes.

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enshrines the essential principle of human rights and its necessary universal unbiased recognition, enjoining as it does the duty of equal treatment for all wounded, whether allies or enemies, more and more interconnections have developed, particularly in recent years,[12] owing to the existence of principles common to both. This has been achieved, nevertheless, while recognizing the usefulness of maintaining two different systems, with distinct criteria and methods of implementation.

One must also bear in mind that, in the event of armed conflict, the application of international humanitarian law does not necessarily exclude the application of international human rights law. Human beings can consider themselves protected by both sets of standards. In situations which are not governed by international humanitarian law, all human beings are protected by international human rights law, notwithstanding the fact that, 'in exceptional circumstances endangering the life of the nation', such as some cases of internal or international armed conflict, the duty to guarantee the exercise of certain rights may be waived 'to the extent strictly required by the exigencies of the situation'.[13] However, this emergency regime does not in any circumstances permit the suspension of the duty of all states to respect at all times the right to life, for example, not to use torture, cruel, humiliating and degrading punishments and treatments, not to allow slavery or servitude and to recognize the legal status of all human beings. These absolutely fundamental rights, which cannot be revoked and which must be observed at all times and in whatever situation, constitute the essential core of respect for human rights. They are true cases of *jus cogens* in the present international situation, or mandatory norms accepted by the international community as a whole, and whose violation entails the nullity of the legal act which infringes them, whatever its nature.[14]

In the specific situations provided for by international humanitarian law, the persons to whom it applies enjoy *ab initio* the guarantees specific to humanitarian law, notwithstanding the subsidiary protection of those same persons by international human rights law, which remains in force also for those individuals who, *rationae personae*, may not have been expressly protected by international humanitarian law.

The fundamental convergence and shared concerns of international human rights law proper and international humanitarian law are further borne out by the fact that the International Committee of the Red Cross has extended its sphere of protective action, on the basis of humanitarian principles but not on those of the Geneva Conventions, to political prisoners, even when they have been imprisoned, not as a consequence of an armed conflict, but as a result of political repression. This is an application of international humanitarian law

aimed at protecting certain fundamental human rights (life, liberty, the right not to be tortured and not to suffer degrading treatment) by an organ of international humanitarian law such as the Red Cross, in a situation which differs from those which have traditionally determined the necessary practical and personal scope of this law.

This state of affairs and the efforts to extend the role of the Red Cross as regards the protection of human rights, expressed chiefly just before the 1981 Manila Conference and at the conference itself,[15] confirm the close and necessary connection between international human rights law and international humanitarian law.

This convergence, and the need to face up to the joint responsibility of international human rights law and international humanitarian law for the protection of the individual, have developed and grown more acute in recent decades. The United Nations has displayed a constant tendency to refer to and quote international humanitarian law when considering the issue of human rights in certain situations and cases.

This trend is apparent in the repeated references to the Geneva Conventions and international humanitarian law in successive resolutions of the General Assembly, the Security Council, the United Nations Commission on Human Rights, the Sub-Commission for Protection of Minorities and Prevention of Discrimination and the Human Rights Committee, created by the International Covenant on Civil and Political Rights. It acquired ultimate importance following the 1968 United Nations Conference on Human Rights held in Tehran, which adopted Resolution XXIII, entitled 'Protection of Human Rights in the Event of Armed Conflict'. The World Conference on Human Rights (Vienna, 1993), following the same course, proclaimed in paragraph 29 of the Vienna Declaration:

> The World Conference on Human Rights expresses grave concern about the continuing human rights violations in all parts of the world, in disregard of standards as contained in international human rights instruments and international humanitarian law, and about the lack of effective remedies for the victims.
> The World Conference on Human Rights is deeply concerned about violations of human rights during armed conflicts, affecting the civilian population, especially women, children, the elderly and the disabled. The Conference therefore calls upon States and all parties to armed conflicts strictly to observe international humanitarian law, as set forth in the Geneva Conventions of 1949 and other rules and principles of international law, as well as minimum standards for protection of human rights as laid down in international conventions.
> The World Conference on Human Rights reaffirms the right of the victims to be assisted by humanitarian organizations, as set forth in the Geneva Conventions of 1949 and other relevant instruments of

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The International Court of Justice has also adopted this approach. In the case concerning the military and paramilitary activities in and against Nicaragua (*Nicaragua* v. *the United States*), the Court, in the ruling of 27 June 1986, referred to the general basic principles of humanitarian law, which the Geneva Conventions developed in some cases and in others limited themselves to expressing. The Court quoted Article 63 of the First Convention, Article 62 of the Second, Article 142 of the Third and Article 158 of the Fourth, which refer to the 'laws of humanity'. Likewise, it referred to Article 3, common to the four conventions, which prescribes the rules which it is at the discretion of the Court to apply, not only in armed conflicts which are not of an international nature, but also in international armed conflicts to which the detailed and specific norms of the four conventions apply. This identical prescription by the common Article 3 is based on the existence of 'elementary considerations of humanity', an expression which the Court had already used in 1949 in the Corfu Channel case.

The Court has also repeatedly invoked 'the general principles of humanitarian law of which the Conventions are none other than the concrete expression'. International humanitarian law, strictly speaking, has a system of implementation and monitoring established by (common) Articles 8–11 of the four 1949 Geneva Conventions. This system is essentially based on the establishment of the 'Protecting Powers' (Article 8), whose system of operation includes a *sui generis* procedure of good offices (Article 11), the International Committee of the Red Cross, any other neutral humanitarian organization with the consent of the parties (Article 9) and, in certain cases, neutral states (Article 10.2).

This system, and these organs of implementation and monitoring, are exclusive to international humanitarian law. The system cannot act through the organs of international human rights law in the strict sense, which has different universal and regional organs for the enforcement of its principles and rules. Neither the General Assembly of the United Nations, nor the Economic and Social Council, the Commission on Human Rights, the Sub-Commission for Protection of Minorities and Prevention of Discrimination, the Human Rights Committee, the Committee for the Elimination of Racial Discrimination or the European Commission and/or Court of Human Rights, for example, are strictly speaking organs for the implementation of international humanitarian law. Conversely, neither the Protecting Powers, nor the International Committee of the Red Cross, are organs for the implementation of international human rights law.

However, this does not imply that an organ of an international organization which includes in its jurisdiction instruments relating to the protection and promotion of human rights cannot invoke and adopt a position on a violation of international humanitarian law, or refer to this sector of international law, as the General Assembly[16] and the Commission on Human Rights have repeatedly done, or that an organ of the Red Cross such as the International Conference cannot invoke, as has often happened, the observance and guarantee of human rights in general.

Consequently, the differences in the legal systems and the terminology of these two branches of international law, their two distinct systems of operation and control and their individual characteristics must not cause us to overlook their fundamental unity. That unity is the result of common general principles and the fact that they both have their roots in defending, guaranteeing and safeguarding human rights generally and in situations which require specific treatment. With a common and global approach, but with different procedures according to different situations, current international law aims at constantly ensuring the effective application of human rights through the international law of human rights *strictu sensu* and international humanitarian law.

Notes

1 Y. Dinstein, 'The Law of Armed Conflict and Human Rights: Convergence and Integration', International Institute of Human Rights, 6th Teaching Session, Strasbourg, 1976; E. Giraud, 'Le respect des droits de l'homme dans la guerre internationale et dans la guerre civile', *Revue de droit public et de la science politique*, July–August 1958, Paris; I.P. Blishchenko, 'Conflit armé et protection des droits de l'homme', *Revue de droit contemporain*, 177, (1); Junod (1981); Swedish Red Cross (1981); Freymond (1979); J. Moreillon, *The Fundamental Principles of the Red Cross, Peace and Human Rights*, Genèva, The International Committee of the Red Cross, 1980; MacBride (1970); Patrnogic (1970); Pilloud (1949); Alexie and Ibriescu (1976); *International Lawyers Commission*, 35, 1968, Geneva; David (1977); Dinstein (1977); La Pradelle (1977); Meyrowitz (1972); Partsch (1974); Vasak (1965); Aldrich (1973); Gros Espiell (1984); Gros Espiell (1991); Patrnogic (1991); Meron (1991); Hampson (1991); Cornelio Sommaruga (1994); Karel Vasak, 'Conclusions', *The International Dimensions of Humanitarian Law*, Geneva/Paris, Henry Dunant Institute/UNESCO/Pedone, 1988; Meurant (1993); Daswald-Beck and Vité (1993); Weissbrodt and Hicks (1993); Hans Haug, *Humanity for All: The International Red Cross and Red Crescent Movement and Human Rights*, Geneva, Henry Dunant Institute/Bern, Paul Haupt Publishers, 1993; The United Nations, 'Human Rights, International Humanitarian Law and Human Rights', Fact Sheet no. 13.

2 In his *Common Sense in Law*, P. Vinogradoff has rightly said: 'Such coincidences should not be attributed to mere chance or to a misuse of language likely to obscure the real meaning of words; on the contrary, they point to a deep-rooted connection between the concepts in question. The expression *Derecho* has two meani
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The Martens Clause and the Laws of Armed Conflict

Rupert Ticehurst

The Martens Clause has formed a part of the laws of armed conflict since its first appearance in the preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land:

> "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."

The clause was based upon and took its name from a declaration read by Professor von Martens, the Russian delegate at the Hague Peace Conferences 1899.[1] Martens introduced the declaration after delegates at the Peace Conference failed to agree on the issue of the status of civilians who took up arms against an occupying force. Large military powers argued that they should be treated as *francs-tireurs* and subject to execution, while smaller states contended that they should be treated as lawful combatants.[2] Although the clause was originally formulated to resolve this particular dispute, it has subsequently reappeared in various but similar versions in later treaties regulating armed conflicts.[3]

The problem faced by humanitarian lawyers is that there is no accepted interpretation of the Martens Clause. It is therefore, subject to a variety of interpretations, both narrow and expansive.

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At its most restricted [sense], the Clause serves as a reminder that customary international law continues to apply after the adoption of a treaty norm.[4] A wider interpretation is that, as few international treaties relating to the laws of armed conflict are ever complete, the Clause provides that something which is not explicitly prohibited by a treaty is not *ipso facto* permitted.[5] The widest interpretation is that conduct in armed conflicts is not only judged according to treaties and custom, but also to the principles of international law referred to by the Clause.

The Advisory Opinion of the International Court of Justice (ICJ) on the legality of the threat or use of nuclear weapons issued on 8 July 1996, involved an extensive analysis of the laws of armed conflict.[6] Although this analysis was specific to nuclear weapons, the Opinion required general consideration of the laws of armed conflict. Inevitably, the oral and written submissions to the ICJ and the resulting Opinion made considerable reference to the Martens Clause, revealing a number of possible interpretations. The Opinion itself did not provide a clear understanding of the Clause. However, State submissions and some of the dissenting opinions provided very interesting insight into its meaning.

In its submission, the Russian Federation argued that, as a complete code of the laws of war was formulated in 1949 and 1977, the Martens Clause is now redundant.[7] Both the Geneva Conventions of 1949 and the two Protocols additional thereto of 1977 restated the Martens Clause.[8] Furthermore, the 1977 Diplomatic Conference which led to the drafting of Additional Protocol I underlined the continuing importance of the Martens Clause by moving it from the preamble, where it first appeared in the 1973 draft, to a substantive provision of the Protocol. Undoubtedly, therefore, the Martens Clause is still relevant. This was confirmed by Nauru, stating that "...the Martens Clause was not an historical aberration. Numerous modern-day conventions on the laws of war have ensured its continuing vitality."[9]

The UK argued that the Martens Clause makes clear that the absence of a specific treaty prohibition on the use of nuclear weapons does not in itself mean that the weapons are capable of lawful use. However, they argued that the Martens Clause does not itself establish their illegality — it is necessary to point to a

rule of customary international law for a prohibition. The UK then stated that "it is...axiomatic that, in the absence of a prohibitive rule applicable to a particular state, the conduct of the state in question must be permissible ..."[10] It is clear that the UK adopted a narrow interpretation of the Clause, reducing the Martens Clause to the status of a reminder of the existence of positive customary norms of international law not included in specific treaties.

In its Opinion, the ICJ merely referred to the Martens Clause stating that "it has proved to be an effective means of addressing the rapid evolution of military technology."[11] This gives little guidance as to how the Clause should be interpreted in practice. Some of the dissenting opinions were more revealing. Judge Koroma, in his dissent, challenged the whole notion of searching for specific bans on the use of weapons, stating that "the futile quest for specific legal prohibition can only be attributable to an extreme form of positivism."[12]

Judge Shahabuddeen, in his dissent, provides a very thorough analysis of the Martens Clause. He commences by referring to the ICJ's Advisory Opinion, paragraphs 78 and 84, where the Court determined that the Martens Clause is a customary rule, and is therefore of normative status. In other words, the Clause itself contains norms regulating State conduct. With reference to submissions made by states such as the UK, noted above, he stated that "[i]t is difficult to see what norm of State conduct it lays down if all it does is to remind States of norms of conduct which exist wholly *dehors* the Clause."[13] Judge Shahabuddeen is clearly of the opinion that the Martens Clause is not simply a reminder of the existence of other norms of international law not contained in a specific treaty—it has a normative status in its own right and therefore, works independently of other norms.

In support of this contention, Judge Shahabuddeen referred to the Hague Peace Conference of 1899 at which the delegate for Belgium objected to certain draft provisions being included in the final Convention. However, once the declaration of Professor Martens was adopted by the Conference, the delegate was able to vote in favour of the disputed provisions. Judge Shahabuddeen concludes that this change in position arose because the delegate took the view, not dissented from by other delegates, that

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the Martens Clause provided the protection that the disputed provisions failed to provide and was therefore of normative status.

Judge Shahabuddeen stated that the principles of international law referred to in the Clause are derived from one or more of three different sources: usages established between civilized nations (referred to as "established custom" in Article 1[2]) of Additional Protocol I), the laws of humanity (referred to as the "principles of humanity" in Article 1[2] and the requirements of the public conscience (referred to as the "dictates of public conscience" in Article 1[2]). It appears that, when determining the full extent of the laws of armed conflict, the Martens Clause provides authority for looking beyond treaty law and custom to consider principles of humanity and the dictates of the public conscience.

This position is supported by the International Law Commission which has stated that "[the Martens Clause]...provides that even in cases not covered by specific international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."[14]

The Martens Clause is important because, through its reference to customary law, it stresses the importance of customary norms in the regulation of armed conflicts. In addition, it refers to "the principles of humanity" and "the dictates of the public conscience". It is important to understand the meaning of these terms. The expression "principles of humanity" is synonymous with "laws of humanity"; the earlier version of the Martens Clause (Preamble, 1899 Hague Convention II) refers to "laws of humanity"; the later version (Additional Protocol I) refers to "principles of humanity". The principles of humanity are interpreted as prohibiting means and methods of war which are not necessary for the attainment of a definite military advantage.[15] Jean Pictet interpreted humanity to mean that "... capture is preferable to wounding an enemy, and wounding him better than killing him; that non-combatants shall be spared as far as possible; that wounds inflicted be as light as possible, so that the injured can be treated and cured; that wounds cause the least possible pain; that captivity be made as endurable as possible."[16]

This part of the Martens Clause does not add a great deal to the existing laws of armed conflict as the protection extended by the principles of humanity appears to mirror the protections provided by the doctrine of military necessity. This doctrine requires that no more force than is strictly necessary be used to attain legitimate military objectives.[17] The doctrine is already well established in treaties such as the Hague Regulations of 1907, which were expressly recognised as declaratory of custom by the International Military Tribunal at Nuremberg in 1946.

In relation to "the dictates of the public conscience", Nauru argued in its submission before the ICJ that the Martens Clause authorizes the Court, when attempting to determine the scope of the humanitarian rules of armed conflict, to look to legal communications expressed by, or in the name of, the dictates of the public conscience. It referred to a "host of draft rules, declarations, resolutions, and other communications expressed by persons and institutions highly qualified to assess the laws of war although having no governmental affiliations." It cited, for example, the 1989 Hague Declaration on the "Illegality of Nuclear Weapons" by the International Association of Lawyers Against Nuclear Arms (IALANA). This was unanimously declared by lawyers from East and West, "affirming that the use and threat of use of nuclear weapons is a war crime and a crime against humanity, as well as a gross violation of other norms of international customary and treaty law..."[18]

Judge Shahabuddeen determined that the Court must confine itself to sources which speak with authority. He referred, in particular, to United Nations General Assembly (UNGA) resolutions. There have been a whole series of UNGA resolutions condemning the use of nuclear weapons. For example, UNGA resolution 38/75 (15 December, 1983) states that the General Assembly "resolutely, unconditionally and for all time condemns nuclear war as being contrary to human conscience and reason..." Neither this nor other resolutions were adopted unanimously and so are unlikely to reflect the existence of a customary norm *de lege lata*. However, such resolutions do provide evidence of the public conscience.[19] Judge Shahabuddeen concluded that the public conscience, as found for example in UNGA resolutions, could be viewed to oppose the use of nuclear weapons as unacceptable in all circumstances.

This position was supported by the state's submissions. For example, Australia wrote that "[t]he question is not whether the threat or use of nuclear weapons is consistent with any of these instruments, but whether the threat or use of nuclear weapons is *per se* inconsistent with the general principles of humanity. All these instruments ... provide cumulative evidence that weapons having such potentially disastrous effects on the environment, and on civilians and civilian targets, are no longer compatible with the dictates of public conscience."[20] Japan also stated that "... because of their immense power to cause destruction, death and injury to human beings, the use of nuclear weapons is clearly contrary to the spirit of humanity that gives international law its philosophical foundation."[21] In contrast, Professor Greenwood argues that this interpretation "... is impracticable since 'the public conscience' is too vague a concept to be used as the basis for a separate rule of law and has attracted little support."[22]

The positions advocated by States in their submissions to the ICJ on the issue of nuclear weapons and the differing opinions the judges gave in response, reflect the continuing divide in international law between positive and natural law. States advocating the legality of the use of nuclear weapons argued that in the absence of a prohibitive positive norm of international law, whether conventional or customary, nuclear weapons remain lawful.

By the end of the nineteenth century, concepts of legal positivism and State sovereignty had become dominant in international legal thinking. This led to an extensive codification of the laws of war—the first field of international law to be codified. Positive international law is determined by the contractual will of the State, either through its consent to treaty provisions or through State practice leading to or preventing the development of a customary rule.[23] Through a positivist interpretation of international law, States which do not consent to being bound by treaty norms or to the development of customary rules remain outside the regime governed by those norms: subjugation to a positive norm is dependent on the will of the State. It is therefore, consensual law. If that will is absent, the State is not bound by that norm and so is not responsible to the international community for non-observance of it. According to Professor Brownlie, States can "contract out" of the development of a customary rule: "... a State

may contract out of custom in the process of formation. Evidence of objection must be clear and there is probably a presumption of acceptance which is to be rebutted. Whatever the theoretical underpinnings of the principle, it is well recognised by international tribunals, and in the practice of states."[24]

In addition to contracting out of the development of a customary rule, the opposition of States most affected by the development of a norm can prevent a norm *de lege ferenda* crystallizing into a norm *de lege lata*. Consequently, the practice of the nuclear States is most important in the development of a customary rule regulating or prohibiting nuclear weapons. In their submission to the ICJ on the legal status of nuclear weapons, the United States argued that "... with respect to the use of nuclear weapons, customs could not be created over the objection of the nuclear States whose interests are most affected". So not only is positive law dependent on the will of States, it can also be dependent on the will of the States most affected by the developing norm. In the laws of armed conflict, this means that States which possess weapons the rest of the world may wish to be rid of, can prevent the development of a prohibition of those weapons. This also means that the strongest military powers have the greatest influence in the development of the laws of armed conflict.

In contrast to positive law, natural law is universal, binding all people and all States. It is therefore, a non-consensual law based upon the notion of the prevalence of right and justice. Natural law was to a great extent displaced by the rise of positivist interpretations of international law. According to Schacter, "[i]t had become evident to international lawyers as it had to others that the States that made and applied law were not governed by morality or 'natural reason'; they acted for reasons of power and interest. It followed that law could only be ascertained and determined through the actual methods used by the States to give effect to their 'political wills'".[25] However, the judgment of the Nuremberg Tribunal, which to a great extent relied on natural law to determine the culpability of the Nazi high command, confirmed the continuing validity of natural law as a basis for international law in the twentieth century.

Proponents of the illegality of nuclear weapons emphasized the importance of natural law, urging the ICJ to look beyond the

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positive norms of international law. The Martens Clause supports this position as it indicates that the laws of armed conflict do not simply provide a positive legal code, they also provide a moral code. This ensures that the views of smaller States and individual members of the international community can influence the development of the laws of armed conflict. This body of international law should not reflect the views of the powerful military States alone. It is extremely important that the development of the laws of armed conflict reflect the views of the world community at large.

In addition, the international legal system is distinct from municipal legal systems in that it does not have a central law-making body. International law is decentralized because its development is dependent upon the widespread consensus of States either in the ratification of a treaty or in the development of international customary rules. As a consequence, there can be a significant delay between the formation of moral standards and the development of positive legal norms reflecting those moral standards. Equally, there can be a delay between 'advances' in military technology and the development of normative standards to control or prohibit the use of those military advances. For this reason, positive law can be inefficacious in protecting people from the excesses of armed conflict. It is therefore, important to recognize the existence of a moral code as an element of the laws of armed conflict in addition to the positive legal code.

Conclusion

The dominant philosophy of international law is positivist. Obligations to the international community are therefore, regulated through a combination of treaty and customary law. With regard to the laws of armed conflict, this has important implications. By refusing to ratify treaties or to consent to the development of corresponding customary norms, the powerful military States can control the content of the laws of armed conflict. Other States are helpless to prohibit certain technology possessed by the powerful military States. They can pass UNGA resolutions indicating disapproval but, in the presence of negative votes and abstentions, these resolutions are not, from a strictly positivist perspective, normative.

The Martens Clause provides a link between positive norms of international law relating to armed conflicts and natural law. One of the reasons for the decline of natural law was that it was wholly subjective. Opposing States claimed the support of contradictory norms of natural law. However, the Martens Clause establishes an objective means of determining natural law: the dictates of the public conscience. This makes the laws of armed conflict much richer, and permits the participation of all States in its development. The powerful military States have constantly opposed the influence of natural law on the laws of armed conflict even though these same States relied on natural law for the prosecutions at Nuremberg. The ICJ in its Advisory Opinion did not clarify the extent to which the Martens Clause permits notions of natural law to influence the development of the laws of armed conflict. Consequently, its correct interpretation remains unclear. The Opinion has, however, facilitated an important debate on this significant and frequently overlooked clause of the laws of armed conflict.

ENDNOTES

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3. Preamble, 1907 Hague Convention (IV) respecting the laws and customs of war on land, reprinted in A. Roberts and R. Guelf, *Documents on the Laws of War*, 2nd ed., Clarendon Press, Oxford, 1989, p. 45; the four 1949 Geneva Conventions for the Protection of War Victims (GC I: Art. 63; GC II: Art. 62; GC III: Art. 142; GC IV: Art. 158), *op. cit.*, pp. 169–337; 1977 Additional Protocol I, Art. 1(2), *op. cit.*, p. 390, and 1977 Additional Protocol II, Preamble, *op. cit.*, p. 449; 1980 Weapons Convention, Preamble, *op. cit.*, p. 473.
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13. Dissenting Opini
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Judith Blau And Alberto Moncada, Human Rights: A Primer (2007)

7

Humanitarian Crimes and Human Rights Violations

Humanitarian crimes are, in essence, crimes that are so heinous that they shock the human conscience. *Human rights violations* are actions and omissions that interfere with the birthright of all human beings—their fundamental freedoms, entitlements and human dignity.

—Louise Arbour, UN High Commissioner for Human Rights

Humanitarian crimes are sui generis: despicable, unconscionable, and barbaric acts committed against human beings—mass rapes of women in Darfur; Chileans thrown alive from planes into the ocean below; the gassing of Jews, Gypsies, and homosexuals during the Holocaust; forced removals and massacres of blacks in apartheid South Africa; cruelties meted out in Soviet gulags; and the torture of prisoners in Burma, Iran, Abu Ghraib, and Guantánamo. Humanitarian crimes include genocide, crimes against humanity, and war crimes and as-yet-to-be-defined crime, wars of aggression. Because they are all covered by the Rome Statute and fall under the jurisdiction of the International Criminal Court (ICC), we will first consider them together and contrast them with human rights violations. It should be noted that the Rome Statute also states that "crimes of aggression" are humanitarian crimes, but does not define them, leaving it to its Review Committee to define what constitutes a crime of aggression. It is expected that the Review Committee will take this up at a meeting in the first months of 2010.

Comparisons

Formally, humanitarian crimes and human rights violations are treated as if they were distinct from one another, the first residing in the realm of criminal law and within the jurisdiction of the ICC, and the second considered to lie in the vague and ill-defined realm of civil society.[1] Persons are held accountable for humanitarian crimes, whereas states are for human rights violations. The ICC conducts a trial against an individual accused of a humanitarian crime, but a treaty body reviews a state for its compliance with a human rights treaty. An important difference is that humanitarian crimes are rare, whereas human rights violations are common. A single case of homelessness is, after all, a human rights violation.

Hannah Arendt writes in her book on the trial of Adolf Eichmann that it is appropriate for just "one person of flesh and blood to go on trial" for war crimes and crimes against humanity.[2] Geoffrey Robertson, when describing the role of Pinochet in the torture, murder, and disappearances of many thousands of Chileans, argues the same point. "The diminishment to the entire human race is so profound that the world needs one person who is chiefly responsible to stand for the entirety of crimes committed in Chile."[3] Thus, regardless of how many are implicated in a humanitarian crime, only one or a few in a position of authority are charged: Adolf Eichmann (Germany), Hissène Habré (Chad), Ali Kushayb (Sudan), Slobodan Milošević (Yugoslavia), Augusto Pinochet (Chile), Charles Taylor (Liberia), and Hideki Tojo (Japan).

It also a crime that people starve to death, but who is the criminal? Food shortages, for example, can be caused by monocropping practices, trade policies, agriculture policies, land appropriation, natural disasters, and seasonal droughts and rains. Nevertheless, the courts have ruled that food is a positive right, and states are responsible for the food security of their populations.[4] As we mentioned earlier, the United Nations Human Rights Council is also engaged in a discussion about the legal framework whereby states can be held accountable for human rights abuses committed by corporations based in their territory.[5]

The Food and Agriculture Organization predicted in September 2007 that food prices would jump by 25 percent within a few years due in large part to U.S. ethanol policies announced by Bush in January of that year, and that it would have devastating consequences for people in low-income food deficit countries (LIFDCs).[6] This prediction, tragicall reason for the spike in prices had to corn caused by the conversion of c Ziegler, the UN special rapporteur Organization, denounced the practic humanity," going beyond human ri United Nations, he called for a five-y "It is a crime against humanity to tive soil into soil which produces into biofuel."[7] He was sadly right; th three months.[8]

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ure Organization predicted in Septem- s would jump by 25 percent within a few o U.S. ethanol policies announced by t year, and that it would have devastat- ple in low-income food deficit countries (LIFDCs).[6] This prediction, tragically, proved to be correct. A main reason for the spike in prices had to do with shortages of edible corn caused by the conversion of corn from food to biofuel. Jean Ziegler, the UN special rapporteur for the Food and Agriculture Organization, denounced the practice as being a "crime against humanity," going beyond human rights violations. Speaking at the United Nations, he called for a five-year moratorium on biofuels: "It is a crime against humanity to covert agriculturally productive soil into soil which produces food stuff that will be burned into biofuel."[7] He was sadly right; the price of rice tripled within three months.[8]

The Evolution of Humanitarian Law: The Geneva Conventions

International humanitarian law has its origins in treaties relevant in wartime that were crafted in 1863 in Geneva, Switzerland, after the battle of Solferino in 1859. The initiative came from Henri Dumant, one of the cofounders of the International Red Cross. As listed in Box 7.1, these early conventions deal with the humane treatment of the wounded and sick forces, prisoners of war, and civilians. In 1977, two additional protocols were added.[9] (These conventions and protocols subsequently became incorporated into Article 8 of the Rome Statute.)

Box 7.1 includes the titles and initial ratification year of the four conventions and two protocols (a third protocol has not been ratified). We also include an excerpt from Common Article 3, "common" because it is included in each of the four conventions and considered by legal authorities to be of central importance to international humanitarian law. The conventions, including Common Article 3, are universally accepted. There are 194 state parties, and over 160 countries have ratified each of the first two protocols. Such extraordinary consensus makes these agreements the most universal of all international law, although of course they apply only to countries; nonstate actors are not parties to them.

By suspending Common Article 3 in 2002 in order to justify the U.S. practice of torturing prisoners held at Guantánamo and elsewhere, George W. Bush defied international law and violated the commitment of the United States to uphold Common Article 3 of the Geneva Conventions, as well as the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment

Box 7.1 Geneva Conventions, Additional Protocols, and Common Article 3

Convention I: For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 1864; 1949

Convention II: For the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 1907; 1949

Convention III: Relative to the Treatment of Prisoners of War, 1929; 1949

Convention IV: Relative to the Protection of Civilian Persons in Time of War, 1907; 1949.

Protocol I: Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts, 1977

Protocol II: Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1977

Common Article 3 to the Four Conventions

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de [out of] combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Source: International Committee of the Red Gross, "The Geneva Conventions," September 1, 2006, http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions.

or Punishment.[10] In his book *The Torture Team*, Philippe Sands outlines how top Bush administration lawyers justified eighteen different interrogation techniques, all of which were defined as torture by international conventions.[11] In giving the green light to torture, the Bush administration purposefully flouted Abraham Lincoln's historic maxim that "military necessity does not admit cruelty" and the U.S. Army field manual for interrogators.[12]

The legalizing of torture also f... Conventions; the UN Convention A... Cruel, Inhuman, and Degrading ...re Covenant on Civil and Political Rig... Article 3 prohibits "cruel treatment a... Amendment to the U.S. Constituti... unusual punishments.")

The U.S. Supreme Court was sl...t... 2006, it ruled that Common Articl... applied in the case of *Hamdan v. Rum...* protection to combatants, and fur... ...r... mission that had tried Hamdan w... court. In defiance of the Suprem... ...c... September 15, 2006, that "Commo... asked about the torture techniqu... ...s 2006, Vice President Dick Chene... ...s dunking," while the State Depart... using dog leashes, waterboardin... ...ar a prisoner "to stand naked in a c... he is repeatedly "doused with co... ...w

Torture is defined as a war crim... that implements the Internationa... is that the United States did no... ...g correctly, Bush "unsigned" it after hi... U.S. leaders, including Bush, a... least by the ICC, although not neces... will explain.

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nistration purposefully flouted Abraham
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rmy field manual for interrogators.[12]

The legalizing of torture also flew in the face of the Geneva Conventions; the UN Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment; the International Covenant on Civil and Political Rights; and U.S. law.[13] (Common Article 3 prohibits "cruel treatment and torture," and the Eighth Amendment to the U.S. Constitution expressly forbids "cruel and unusual punishments.")

The U.S. Supreme Court was slow to act, but finally on June 29, 2006, it ruled that Common Article 3 of the Geneva Conventions applied in the case of *Hamdan v. Rumsfeld*, and therefore affords protection to combatants, and furthermore that the military commission that had tried Hamdan was not a regularly constituted court. In defiance of the Supreme Court, Bush told reporters on September 15, 2006, that "Common Article 3 is too vague."[14] When asked about the torture technique of waterboarding in October 2006, Vice President Dick Cheney said it was just "a plain old dunking," while the State Department defended its practices of using dog leashes, waterboarding, and measures such as forcing a prisoner "to stand naked in a cell kept near 50 degrees" while he is repeatedly "doused with cold water."[15]

Torture is defined as a war crime under the Rome Statute that implements the International Criminal Court. The problem is that the United States did not sign the Rome Statute, or more correctly, Bush "unsigned" it after his inauguration, and therefore U.S. leaders, including Bush, are immune from prosecution, at least by the ICC, although not necessarily in other courts, as we will explain.

The Rome Treaty and the International Criminal Court: Dealing with Humanitarian Crimes

The earliest international precedents for humanitarian crimes are the Nuremburg trials (1945–1949). These were international, although only incompletely so, carried out by the United States, France, Britain, and the Soviet Union. These trials provided an opportunity to apply existing humanitarian laws and to advance new ones, including the Genocide Convention of 1948.

In 1993 the United Nations set up a tribunal to prosecute violations of international humanitarian law committed in the former Yugoslavia and a similar tribunal for Rwanda in 1994.[16] Discussions started in 1994 to establish a permanent international court

that would have jurisdiction over humanitarian crimes no matter where they were committed. The Rome Statute of the ICC was adopted in July 1998, and after ratification by sixty countries, entered into force on July 1, 2002.

The Rome Treaty sets up an international court to hear cases that involve three types of crimes: genocide, crimes against humanity, and war crimes.[17] A fourth type—crimes of aggression—will be added when the ICC Review Committee approves a definition and admissible evidence. These crimes are defined in Box 7.2. As noted, about half of the countries in the world (106 by June 1, 2008) have ratified the Rome Treaty.[18] The United States has not.

Genocide

According to the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide, which evolved in response to the military trials in Nuremburg, Germany (1945–1949), genocide is defined as an act committed with the intent to destroy a group, where a group is defined as one into which one was born.[19] Gypsies, aboriginal peoples, and ethnic and racial groups are such groups, but political parties are not. This definition was retained by the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and likewise, incorporated into the Rome Statute. Thus, General Pinochet could not have been tried for genocide because he attempted to liquidate a political group, although Bosnia Serb general Radislav Krstić was convicted by the Tribunal for the Former Yugoslavia for the crime of genocide because he directed the mass murder of nearly 8,000 Muslim boys and men. He was sentenced to forty-six years in prison. The ICC has other cases on its docket involving genocide, including cases from Darfur, the Central African Republic, Democratic Republic of the Congo, and Uganda.[20]

Crimes against Humanity

Crimes against humanity are acts that are committed deliberately "as part of widespread or systematic attack" against a civilian population, including murder, enslavement, sexual violence, and torture. Human rights lawyer and author Geoffrey Robertson clarifies that crimes against humanity under the Rome Statute need not be carried out under state auspices, and, moreover, heads of

Box 7.2 Crimes within the Jurisdiction Criminal Court; Articles of the Ro

Genocide (Article 6)

Acts committed with the intent to destro ethnic, racial or religious group;
Killing members of the group;
Causing serious bodily or mental harm
Deliberately inflicting conditions of life cal destruction;
Imposing measures to prevent births;
Forcible transfer of children of the group

Crimes against Humanity (Article 7)

These crimes comprise any of the follo of a widespread or systematic attack agai
Murder;
Extermination;
Enslavement;
Deportation or forcible transfer;
Imprisonment or severe deprivation;
Torture;
Rape, sexual slavery, enforced pro sterilization
Persecution against any group or col ethnic, cultural, religious, gender or ot
Enforced disappearance of persons;
The crime of apartheid.

War Crimes (Article 8)

The 1949 Geneva Conventions and t
Other serious violations of the laws of a peacekeepers and on non-military targets and inflicting grave harm on the envi
Certain bans on weapons and metho
Extension of Common Article 3 to incl sexual violence (see Box 7.1)

Crimes of Aggression

Definition pending state agreement Committee.

Source: http://www.un.org/law/icc/st

Box 7.2 Crimes within the Jurisdiction of the International Criminal Court; Articles of the Rome Statute

Genocide (Article 6)

Acts committed with the intent to destroy in whole or in part a national, ethnic, racial or religious group;
- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting conditions of life calculated to bring about physical destruction;
- Imposing measures to prevent births;
- Forcible transfer of children of the group to another group.

Crimes against Humanity (Article 7)

These crimes comprise any of the following acts when committed as part of a widespread or systematic attack against any civilian population;
- Murder;
- Extermination;
- Enslavement;
- Deportation or forcible transfer;
- Imprisonment or severe deprivation;
- Torture;
- Rape, sexual slavery, enforced prostitution; forced pregnancy, enforced sterilization
- Persecution against any group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds
- Enforced disappearance of persons;
- The crime of apartheid.

War Crimes (Article 8)

The 1949 Geneva Conventions and the 1977 Additional Protocols
- Other serious violations of the laws of armed conflict, including attacks on peacekeepers and on non-military targets, such as schools and museums, and inflicting grave harm on the environment
- Certain bans on weapons and methods of warfare
- Extension of Common Article 3 to include the use of child soldiers and sexual violence (see Box 7.1)

Crimes of Aggression

Definition pending state agreement and enactment by the ICC Review Committee.

Source: http://www.un.org/law/icc/statute/romefra.htm.

...over humanitarian crimes no matter ...d. The Rome Statute of the ICC was ...after ratification by sixty countries, ...1, 2002.

...an international court to hear cases ...of crimes: genocide, crimes against ...s.[17] A fourth type—crimes of aggres... ...he ICC Review Committee approves a ...evidence. These crimes are defined in ...alf of the countries in the world (106 ...tified the Rome Treaty.[18] The United

Genocide

...Convention on the Prevention and Pun... ...enocide, which evolved in response to ...nburg, Germany (1945–1949), genocide ...tted with the intent to destroy a group, ... one into which one was born.[19] Gypsies, ...nic and racial groups are such groups, ...not. This definition was retained by the ...ibunals for the Former Yugoslavia and incorporated into the Rome Statute. Thus, ...ot have been tried for genocide because ...e a political group, although Bosnia Serb ...was convicted by the Tribunal for the ...e crime of genocide because he directed ...y 8,000 Muslim boys and men. He was ...ars in prison. The ICC has other cases ...enocide, including cases from Darfur, ...ublic, Democratic Republic of the Congo,

...s against Humanity

... are acts that are committed deliberately ... or systematic attack" against a civilian ...rder, enslavement, sexual violence, and ...wyer and author Geoffrey Robertson clari... ...humanity under the Rome Statute need ...r state auspices, and, moreover, heads of

state and members of governments and parliaments do not have immunity.[21] Apartheid is also included as a crime against humanity under the Rome Statute, and it is defined as an inhumane offense of systematic murder, enslavement, and torture with the purpose of maintaining the hegemony of a regime of systematic racial oppression.

War Crimes

War crimes are more narrowly defined than genocide and crimes against humanity in that they cannot be acts committed during peacetime, as can the other two, but war crimes are broader in scope in the sense that individuals can be charged without it having been established that the crime was large-scale or part of a broader systematic pattern. Article 8 goes beyond the 1949 Geneva Conventions in some important respects, especially regarding protections of peacekeepers and children, and includes a clause about sexual violence. Note too in Box 7.2 that war crimes can include damage inflicted on nonmilitary targets, such as schools and museums, and on the environment.[22]

The ICC only hears cases of crimes committed after July 1, 2002, and only has jurisdiction if the crime is committed within a country that is party to the Rome Statute, if the crime is committed by one of its nationals, and if the state operates by the "principle of complementarity," that is, subscribes to the idea that the state party cannot carry out proceedings. Victims have the right to participate in the proceedings, and under some conditions are paid reparations. The United States has behaved very badly in the international community regarding the Rome Statute and the ICC. On September 25, 2001, the Bush administration gave its support to the American Servicemembers' Protection Act (ASPA), which "gives the President power to use military force against any country which detains U.S. soldiers on ICC arrest warrants."[23] Besides that, U.S. law states that the United States will withhold military assistance to any country that ratifies the Rome Statute, a law that was explicitly designed to sabotage the ICC.[24]

States with Universal Jurisdiction

Under international law, nation-states have the authority to implement laws that allow them universal jurisdiction for crimes

against humanity. The states that
Australia, Austria, Belgium, Canada,
Israel, Mexico, Netherlands, Senegal
and the United States.[25] Until rece
pursued cases under its universal j
most famously against Augusto P
Pinochet was in Britain for medica
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the infamous disappearances. Altho
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There have been other cases i
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killed thousands of people, and
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Ariel Sharon for crimes agains
thousands of civilians at the civil
Chatila. The court has not be
difficulty being extradition. Habré
in Senegal, and Sharon fell into
14, 2006, the Center for Cons
German court, also with universa
Rumsfeld, Alberto R. Gonzalez
torture and abuse of prisoners at
Article 3, along with the Conven
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Truth and Reconcilia

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Universal Jurisdiction

, nation-states have the authority to
them universal jurisdiction for crimes against humanity. The states that have sought this authority are Australia, Austria, Belgium, Canada, Denmark, France, Germany, Israel, Mexico, Netherlands, Senegal, Spain, Switzerland, the UK, and the United States.[25] Until recently, Spain has most actively pursued cases under its universal jurisdiction provisions, and most famously against Augusto Pinochet. In October 1998, when Pinochet was in Britain for medical treatment, Spanish judge Baltasar Garzón served Pinochet an arrest warrant that charged him with acts of systematic torture, murder, illegal detention, and the infamous disappearances. Although Pinochet was returned for medical reasons to Chile, the Spanish court established an important international precedent.

There have been other cases in which national courts have asserted universal jurisdiction. Hissène Habré, president of Chad from 1982 to 1990, is believed by human rights groups to have killed thousands of people, and he is sought by Belgium to be charged in a Belgian court. The Belgian court has also charged Ariel Sharon for crimes against humanity for the slaughter of thousands of civilians at the civilian refugee camps in Sabra and Chatila. The court has not been successful in either case, the difficulty being extradition. Habré remains under house arrest in Senegal, and Sharon fell into a coma in 2006. On November 14, 2006, the Center for Constitutional Rights filed a brief in a German court, also with universal jurisdiction, against Donald Rumsfeld, Alberto R. Gonzalez, and others for culpability in the torture and abuse of prisoners at Abu Ghraib, citing Common Article 3, along with the Convention on Torture, and the International Covenant on Civil and Political Civil Rights.[26] Extradition is the roadblock to the trial.

Truth and Reconciliation Commissions

Although extremely slow, the adjudication of cases involving humanitarian crimes is straightforward. The body of law, procedures, precedents, and what is considered acceptable evidence are explicit. Just as in domestic criminal cases, lawyers call on witnesses and gather expert testimony, and there is a simple question before the judges—guilty or not guilty. The model that has guided the practice of international humanitarian law from the nineteenth century to the twenty-first century is the criminal model. What the model neglects is the devastation to society,

communities, families, and those who survive. How is it possible to restore civil society, trust, and basic social norms? Survivors' lives are shattered. Countries have come up with their own methods of healing after suffering through the collective trauma of genocide, apartheid, and ethnic warfare.

Reeling from confusion, resentment, and guilt from the years of apartheid, South Africa set up a Truth and Reconciliation Commission (TRC) in 1995, under the Promotion of National Unity and Reconciliation Act. The TRC was charged with investigating human rights abuses and granting amnesty to lesser offenders, with the expectation that the process would contribute to a broader reconciliation in South Africa and create a human rights culture.[27] It was remarkably successful, so much so that the model was adopted in Rwanda, after its civil war in which nearly 1 million Rwandans, mostly Tutsi, were murdered. The Rwandan truth and reconciliation, or Gacaca, courts became famous in their own right. By April 2006, these courts, modeled after traditional village courts, had heard over 2,000 cases,[28] and they, along with the South African Commission, serve as models elsewhere, including in Argentina, Chile, El Salvador, Panama, Peru, East Timor, and the United States (Greensboro, North Carolina).[29] As Human Rights Watch sums it up, the goal of any truth and reconciliation commission or court is to mute recrimination with a process of "remembering, telling, listening, and sharing." The goal is to rebuild social ties and community after long devastation, collective fear, and hate.[30]

Human Rights Violations

Aside from truth and reconciliation commissions, which are quasi-criminal, humanitarian law and human rights laws are distinct domains. International human rights violations are not handled in courts but by UN monitoring committees. These committees, or treaty bodies, consider the reports of states and complaints against states, and act more as legal advisers to states than as their judges, while nevertheless recognizing that states are legally obligated to live up to the terms of the treaty that they ratified. To illustrate, a country contends that it is doing its best to provide girls with education but cites as an obstacle national religious norms that keep women and girls subordinate to male authority. Such cases are not straightforward.[31]

With the expectation that the national Covenant on Economic, Soci soon be a UN treaty, nongovernm eagerly preparing legal strategies states.[32] If human rights violations ar be held legally liable and governm progress would be made. To illustrate is approved, a particular city coul e all its population, a given nation ing health care insurance for all its within a country might be requi and minorities to meet nondiscri

Perhaps the most powerful h constitution, which gives citizens countries to ensure their rights to adequate housing, decent jobs, la well as equal educational opport ployment, gender equality, and c regions, such as the European American States, have human ri it is only a matter of time until cou to hear human rights cases agai producers, and the state itself.

Conclus

What is likely to accelerate bot tarian law and human rights law i citizenship and peoples' unders in ensuring that human rights are individual good. For the first time speak of global movements, a gl of international norms about huma Only very recently have the wo the possibility of environmental abrupt environmental and climac lish, "we are all in the same b that each and every one of us is others. Universally shared hu the common good, as are clea and reduction of carbon emissio

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Rights Violations

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With the expectation that the Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights will soon be a UN treaty, nongovernmental organizations (NGOs) are eagerly preparing legal strategies for future proceedings against states.[32] If human rights violations are justiciable, violators could be held legally liable and governments held accountable; amazing progress would be made. To illustrate, when the Optional Protocol is approved, a particular city could be held responsible for housing all its population, a given nation might be leveraged into providing health care insurance for all its citizens, and all employers within a country might be required to raise the wages of women and minorities to meet nondiscrimination requirements.

Perhaps the most powerful human rights tool is the national constitution, which gives citizens legal recourse within their own countries to ensure their rights to sufficient food, clean water, adequate housing, decent jobs, labor rights, and medical care, as well as equal educational opportunities, nondiscriminatory employment, gender equality, and democratic participation. Already regions, such as the European Union and the Organization of American States, have human rights courts, and without a doubt it is only a matter of time until countries set up their own courts to hear human rights cases against employers, property owners, producers, and the state itself. Citizens will demand it.

Conclusion

What is likely to accelerate both the implementation of humanitarian law and human rights law is an expanded sense of global citizenship and peoples' understanding that each is a stakeholder in ensuring that human rights are a collective good as well as an individual good. For the first time ever in world history, we now speak of global movements, a global conscience, and the emergence of international norms about human rights and humanitarian law. Only very recently have the world's peoples become alarmed about the possibility of environmental catastrophes and the certainty of abrupt environmental and climactic changes. In colloquial English, "we are all in the same boat" and beginning to understand that each and every one of us is vested in the welfare of all the others. Universally shared human rights are very much a part of the common good, as are clean air, clean water, the rainforests, and reduction of carbon emissions.

We noted that Jean Ziegler, the UN special rapporteur on the right to food, stated that transforming food crops such as wheat and maize into agricultural fuel is a crime against humanity.[33] We can extend Jean Ziegler's principle as a broader logic that we seek to defend, specifically, that violation of any fundamental human right on a large scale—not only harm to the food supply, but also endangerment of the water supply, systematic neglect of housing and health care needs, failure to provide jobs, and widespread exposure of the public to health hazards—constitutes a crime against individuals and against the collectivity. Existing legal institutions are insufficient to prosecute offenders, but as courts and legal bodies "catch up" with their nations' own constitutions, it will become self-evident that nations need human rights courts to try cases that citizens bring against government jurisdictions, private companies, property owners, other governments, and so forth. Jail sentences and payment of restitution would be penalties that the court could impose on those found guilty. What a difference that would make in advancing ethical societies.

8

Solidariti

Ties (noun, pl.)

1. union or fellowship arising fr
and interests, as between memb
classes, people, etc.: to prom
members
2. community of feelings, purp e
3. community of responsibility
(Origin: 1840–1850; F solidarit e
solidary + -ité/ity)

Emile Durkheim famously contr te
organic solidarity in his 1893 wor
He compared preindustrial soci
bonds, which he termed "mechanic
societies that exhibit interdepend
cording to him, it was common ident
people in preindustrial societies, w
ies, interdependencies united p
specialties. The earlier "mechanical"
on, for example, common religio
industrialization, "organic" bonds
people who had little in common
precisely because they were
of labor involving specialists cons
bonds of solidarity."[2]

Durkheim does not acknowled
but there are striking similarities
clothing her children—Smith
with, say, the weaver's self-interest

positivist law is that it is difficult to distinguish positivist law from the mere exercise of power. More recently, the rule-of-law approach has emphasized that the authority of legal procedures—for example, procedures to try persons for crimes against humanity—rests on laws that have moral content and are subject to moral criticism. What this allows is the recognition that there are core moral values that all hold, including the recognition that individuals—not laws, not states, and not institutions—possess moral standing. See Terry Nardin, "International Pluralism and the Rule of Law." In *How Might We Live? Global Ethics in the New Century*, edited by Ken Booth, Tim Dunne, and Michael Cox (Cambridge, UK: Cambridge University Press, 2001), 95–110.

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of the former Yugoslavia and Rwand
tribunals were established to punish
gression (against international treati
these provisions, trials were held in
was tried not by an international tri

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International Humanitarian Law

India's Attitude

RAVINDRA PRATAP

States continue to be the dominant players in the global system, but the norms that govern their actions no longer wholly reflect the precepts of power. International humanitarian law (IHL) is a bundle of such norms. Their observance by states, however, is not as wide and clear as their recognition.[1] This essay seeks to record briefly India's attitude towards IHL. This is gleaned from India's participation in the drafting of the 1948 Genocide Convention, the 1977 Protocols Additional to the Geneva Conventions, and the adoption of the Statute of the International Criminal Court. The essay also refers to the 1949 Geneva Conventions, the 1960 Geneva Conventions Act, and the 1970 decision of the supreme court to see continuity and change in India's attitude towards IHL.[2]

INDIA AND THE MAJOR IHL CONVENTIONS

Genocide Convention, 1948

India adhered to a 1945 agreement signed by France, the former Soviet Union, and the United Kingdom, establishing a tribunal for the trial of war criminals and a charter defining the tribunal's jurisdiction and functions. The tribunal pronounced its jurisdiction on Germany's violation of several treaties and convicted the offenders of the crime of planning and waging war. It, however, could not find jurisdiction over crimes against humanity, as it could not be established that the acts complained of were 'in execution of, or in connection with', the war. The shortcomings of the Nuremberg trial provided the necessary background to the adoption of a Convention on the Prevention and Punishment of the Crime of Genocide by the United Nations General Assembly in 1948.

India, along with Cuba and Panama, sponsored a resolution on genocide at the second part of the first session of the General Assembly at Lake Success. It was adopted as Resolution 96 (I) of 11 December 1946. It affirmed that genocide was a crime under international law and requested the United Nations Economic and Social Council to undertake the necessary studies

[1] See, in particular, V. S. Mani, 'The Fifth Afghan War and International Law', *Economic and Political Weekly*, vol. 37, no. 4, 2002, pp. 294–8.

[2] For the origin and development of humanitarian law principles in India, see V.S. Mani, 'International Humanitarian Law: An Indo-Asian Perspective', *International Review of the Red Cross*, vol. 83, no. 841, 2001, pp. 59–76.

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[3] Statement b
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[4] Ibid., p. 826.
[5] India was r
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[6] Statement b
[7] Ibid., p. 827.
[8] Ibid., p. 828.
[9] Australia, Bc
Norway, Pakistan
[10] Article IX
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Richard Guelff (e

with a view to drawing up a draft convention. India was 'generally prepared to accept it in spite of its various shortcomings, for it was a useful step towards the final goal'.[2]

India pointed out that the draft convention defined genocide in terms of 'acts committed with intent to destroy, in whole or in part, a national, ethical, racial, or religious group, as such'.[4] According to India, intent was 'closely linked to the act, but whatever the intent, the result must be the total, or partial destruction of the group. It could not be asserted, however, that the group, as such, would be annihilated by the destruction of its religious edifices, schools or libraries'.[5] While submitting that its constitution 'contained adequate provisions for safeguarding the language, religion, and culture of any minority group', India added that 'the protection of the cultural rights of groups should be assured by the declaration of human rights, which would shortly come before the General Assembly'.[6]

India supported a USSR amendment for deletion from Article VI of the draft convention the reference to a penal tribunal. According to India, '[b]efore the tribunal could begin to function, a host of complicated problems, such as jurisdictional conflicts between the national courts and the international tribunal, would have to be solved and a detailed convention drafted'.[7] India 'feared that such a provision might make it possible to bring before the International Court of Justice unsubstantiated or insufficiently substantiated cases under the pretext that a state had failed to carry out its obligations under the convention and that it was responsible for some act of genocide committed in its territory'.[8]

While 20 states had signed the Genocide Convention on 11 December 1948,[9] India signed it on 29 November 1949. It was not surprising that India made the following declaration while ratifying the Convention on 27 August 1959:

> With reference to Article IX of the Convention, the Government of India declares that, for the submission of any dispute in terms of this article to the jurisdiction of the International Court of Justice, the consent of all the parties to the dispute is required in each case.[10]

It might indeed have been expedient, nonetheless somewhat ironical, for a country to have made such a reservation, once it supported the agreement which established a tribunal for the trial of war criminals. It is not submitted that such a reservation would necessarily be

[3] Statement by Sundaram, Head of the Indian delegation, 'Draft Convention on Genocide, Reports of the Economic and Social Council and of the Sixth Committee', UN Doc. A/760/Corr.2, 3rd Session, 178th Plenary Meeting, p. 826.

[4] Ibid., p. 826.

[5] India was responding to proposals by Venezuela and Pakistan. While the Venezuelan representative raised the question as to 'whether the convention would cover cultural genocide', the representative of Pakistan wanted forcible mass conversion, and the destruction of religious edifices to be included in the definition of cultural genocide.' Ibid., pp. 815–8.

[6] Statement by India, ibid., p. 827.

[7] Ibid., p. 827.

[8] Ibid., p. 828.

[9] Australia, Bolivia, Brazil, Chile, Dominican Republic, Ecuador, Egypt, Ethiopia, France, Haiti, Liberia, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, the United States, Uruguay, and Yugoslavia.

[10] Article IX of the Convention states: 'Disputes between the contracting parties relating to the interpretation, application, or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide, or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.' Adan Roberts and Richard Guelff (eds), *Documents on the Laws of War*, Oxford, 1989, pp. 159–60.

incompatible with the object and purpose of the Genocide Convention,[11] it however tends to dilute the universality[12] of response of the international community to the crime of genocide. It has been held that 'since the [Genocide] Convention does not specifically refer to reparation, the parties to it did not undertake to have accepted the Court's compulsory jurisdiction in this question'.[13] India's attitude is further elaborated by its policy and participation in the drafting and adoption of the Statute of the International Criminal Court (ICC).[14]

Geneva Conventions, 1949

Despite initial hiccups in the deliberations of the International Law Commission for revision, clarification, and codification of the law of war, since the UN Charter proscribed war, a Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War was convened by the Swiss Federal Council in Geneva from 21 April to 12 August 1949. India was one of the sixty-three states which signed the Final Act, incorporating the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the Convention for the Amelioration of the Condition of the Wounded; Sick and Shipwrecked Members of Armed Forces at Sea; the Convention Relative to the Treatment of Prisoners of War; and the Convention Relative to the Protection of Civilian Persons in Time of War. In short, the Conventions reiterate that certain humanitarian rules must be observed, even with regard to the enemy. They are founded on the idea of respect for the individual and her/his dignity. They underline that persons not directly taking part in hostilities and those rendered sick, injured, and made prisoners must be respected and protected, and those who suffer must be aided, and cared for without discrimination.[15]

Geneva Conventions Act, 1960

Having ratified the Geneva Conventions on 16 October 1950, it took rather long for India to transpose them into its domestic law. The preamble to the Act stated that it was to 'enable effect to be given to certain international conventions at Geneva on the twelfth day of August, 1949, to which India is a party and for purposes connected therewith'.[16] According to the Statement of Object and Reasons,[17] the matters which required to be implemented by the legislation were: punishment of 'grave breaches' referred to in Article 50 of the First Convention

[11] According to the International Court of Justice, '[t]he object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them.' Advisory Opinion in the 'Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide', *ICJ Reports 1951*, p. 24. Further, see V. S. Mani, 'The International Court of Justice and Humanitarian Law of Armed Conflict', *Indian Journal of International Law*, vol. 39, 1999, pp. 32–46.

[12] See Yogesh Tyagi, 'The Conflict of Law and Policy on Reservations to Human Rights Treaties,' *British Yearbook of International Law*, vol. LXXI, 2000, p. 205.

[13] Nehemiah Robinson, *The Genocide Convention: Its Origin and Interpretation*, London, 1949, p. 42.

[14] See infra section on Statute of ICC.

[15] On IHL, see generally, Jean Pictet, *The Principles of International Humanitarian Law*, Geneva: ICRC, 1966. For a verbatim record of the drafting of the conventions, see 'Final Records of the Diplomatic Conference of Geneva, 1949', Berne: Federal Political Department, Switzerland, 1950–1.

[16] AIR (1960) 142, para. 2770. Compare Preamble to the UK Geneva Conventions Act, 1957.

[17] See *Gazette of India, Extraordinary*, 1960, Part 1, Section 2, at p. 1098.

and equivalent articles of the succeeding conventions; conferment of jurisdiction on Indian courts to try offences under these conventions, even when committed by foreigners outside India; extension of the protection given under the existing law to the Red Cross and Geneva Cross, to two new emblems, namely, the Red Crescent and the Red Lion and Sun; and procedural matters relating to legal representation, appeal, etc. However, the Act contained a provision which stated:

> No court shall take cognizance of any offence under this Act except on complaint by the Government or of such officer of the Government as the Central Government may by notification specify.[18]

Thus, unlike this provision, it is significant to note that the Zimbabwean Geneva Conventions Act of 1981 permits a private prosecution for an offence under the common law.[19] After analysing various provisions of the Act, one author has concluded, 'it appears as if the legislation was drafted and passed in a hasty manner. The law is sketchy and skeletal...'.[20] This point was noted by the supreme court which we now turn to.

Decision of the Supreme Court 1970[21]

This was the first, and perhaps the only, case in which the Geneva Conventions Act was submitted to the scrutiny of the highest court of the land. The appellant argued that he was protected by the Geneva Conventions Act, 1960.[22] The question that arose before the court was whether Articles 47 and 49 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War applied to the facts of the case.[23] Rejecting the argument of the appellant, the court reasoned:

[18] See section 17 of the Act. Again, compare the UK Geneva Conventions Act, 1957.

[19] See M.K. Balachandran, 'National Measures for the Implementation of IHL—The Geneva Conventions Act, 1960: A Study', in M. K. Balachandran and Rose Varghese (eds), *Introduction to International Humanitarian Law*, New Delhi, ICRC, 1997, p. 366.

[20] Ibid., p. 372.

[21] *Rev. Mons. Sebastiano Francisco Xavier dos Remedios Monteiro* v. *State of Goa*, AIR SC 1970, 329-37.

[22] The appellant was a resident of Goa. After the annexation of Goa by India in 1961, he had the choice of becoming an Indian national or retaining Portuguese nationality. He opted for the latter and was registered as a foreigner. He obtained a temporary residential permit which allowed him to continue his stay in India until 13 November 1964. The duration of stay expired and he did not ask for its extension. As a result, he was ordered to leave India. The appellant disobeyed the order. As a consequence, he was prosecuted, and was convicted and sentenced to 30 days simple imprisonment and a fine of Rs 50. He appealed against the order of the Judicial Commissioner, Goa. Ibid., pp. 329–30.

[23] Article 47 states: 'Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.' *The Geneva Conventions of 12 August 1949* (Geneva, 1999), p. 171.

Article 49 provides: 'Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive. Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied

[T]he Act by itself does not give any special remedy. It does give indirect protection by providing for breaches of convention. The conventions are not made enforceable by Government against itself nor does the Act give a cause of action to any party for the enforcement of conventions. Thus, there is only an obligation undertaken by the Government of India to respect the conventions regarding the treatment of civilian population, but there is no right created in favour of protected persons which the court has been asked to enforce.[24]

A country which so respects the conventions cannot convince the protected persons that their rights are enforceable.[25] 'Respect for international law and treaty obligations' is what the Indian state is enjoined by the constitution.[26] The act of ratification of a treaty may evidence respect for international law, inasmuch as treaties are part of international law, but the fact of keeping in force an ineffective legislation is nothing but a failure to respect the treaty obligations, together with the constitution.

Protocols Additional to the Geneva Conventions, 1977[27]

India was of the view that 'the struggle of national liberation movements should clearly come within the framework of international armed conflicts and consequently within the scope of draft Protocol I'.[28] India therefore supported the adoption of paragraph 4 of Article 1 and voted in its favour in conformity with its 'consistent policy of support for wars of liberation of self-determination against alien occupation and colonialism'.[29] India considered the adoption of this provision as important achievement in the development of international humanitarian law.

territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased. The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent that proper accommodation is provided to receive the protected persons that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated. The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place. The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand. The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies'. Ibid., p. 172.

[24] N. 21, p. 334, para. 15.

[25] See India's response to proposals by Venezuela and Pakistan. n. 3, at pp. 815–8. See also Rajeev Dhavan, 'Misplaced Jingoism', *The Hindu* (New Delhi), 31 May 2002, at p. 10.

[26] See Article 51 of the Constitution of India.

[27] As of 9 June 2000, 188 States had ratified the Geneva Conventions; 156 States had ratified Protocol I, and 149 Protocol II. India is not a party to either of the Protocols.

[28] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict*, Geneva (1974–7), vol. VIII, p. 47.

[29] Ibid., vol.VI, p. 52. Paragraph 4 of Article 1 states: 'The situations referred to in the preceding paragraph include armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.' *Protocols Additional to the Geneva Conventions of 12 August 1949*, ICRC, Geneva (1999), p. 4.

India agreed to join the consensus on Article 35(2) 'with the understanding that the basic rules contained in this article will apply to all categories of weapons, namely, nuclear, bacteriological, chemical, or conventional weapons, or any other category of weapons'.[30] India clarified that the term 'superfluous injury or unnecessary suffering' meant 'those physical injuries which are more severe than would be necessary to render an adversary hors de combat or to make the enemy surrender and which are not justified by considerations of military necessity'.[31]

India wanted the inclusion of nuclear weapons in the category of weapons proscribed by Protocol I.[32] According to India, in the absence of a specific listing of such weapons in Protocol I, it will be extremely difficult for an ordinary soldier in the field to decide whether a particular weapon falls in the prohibited category or not.[33] India was of the view that it would 'continue to support all measures in all forums designed to prohibit the use of certain conventional weapons of an indiscriminate or cruel nature...'[34] India, however, was 'not convinced that the establishment of a committee as envisaged in the proposed Article 86 *bis* is the best means of achieving the objective'.[35] Later, participating in a discussion on the Report of the Ad hoc Committee on Conventional Weapons, the Indian representative said that 'efforts to ban the use of certain weapons could not succeed unless a balance was struck between humanitarian principles and the sovereign right of states to defend themselves'.[36] India was against an immutable list of weapons, since all weapons could be used to increase human suffering. India was cautious to identify criteria for the categories of weapons to be included.

On the issue of distinguishing a military and a civilian object, India supported the adoption of Article 48 on the understanding that that provision would apply within the 'capability and practical possibility of each party to the conflict'.[37] India clarified that, since the capability of the parties to distinguish depended upon the means and methods available to each party, that provision would 'not require a party to do something which is not within its means or its capability'.[38]

[30] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict*, Geneva (1974–7), vol. VI, p. 115. Paragraph 2 of Article 35 states: 'It is prohibited to employ weapons, projectiles, and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.' N. 29, p. 27.

[31] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict*, Geneva (1974–7), vol. VI, p. 115.

[32] Ibid., vol. VI, p. 301.

[33] Ibid., p. 301. Even as paragraph 3 (b) of Article 85 of Protocol I is characteristic of weapons of mass destruction, such as nuclear weapons, it does not however explicitly mention nuclear weapons. See n. 29, at pp. 63–4.

[34] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict*, Geneva (1974–7), vol. VII, p. 43.

[35] Ibid., p. 43. Article 86 *bis* of draft Protocol I was rejected in want of the necessary two-thirds majority. Ibid., p. 33.

[36] Ibid., vol. V, p. 220.

[37] Ibid., p. 188.

[38] Ibid., p. 188. Article 48 of Protocol I provides: 'In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.' N. 29, p. 34.

On the dissemination of IHL, the Indian representative 'did not see how his government could disseminate instruction of that kind to the entire Indian population'.[39] For this reason, 'the use of the mandatory word "shall" rather than the word "may" in this regard was unacceptable' to India.

On repression of the breaches of the protocol, in view of paragraphs 3 and 4, according to India, it was 'difficult to see how such crimes could be tried'.[40] India stated that it was 'hard to see the connexion between the provisions in paragraph 5 and some of the provisions in paragraphs 3 and 4'.[41] India suggested following addition to the introductory paragraph of Article 10 which dealt with penal prosecution:

The application of this article shall not prejudice the right of a State to apply its national laws.[42]

India was categorically opposed to the term 'irregular forces' as it did not understand what it meant.[43] India thought that it was invented to include mercenaries to which it was 'totally opposed'.[44] According to India, '[a]ny individual, whether he is a mercenary or otherwise, will be subject to the law of the detaining power; but if he belongs to an organization and takes part in hostilities, he is then protected under the present Article 42'.[45] There is an embedded national security argument in this position. Any other view would aggravate secessionist tendencies in different parts of India.

India was always against the idea of a second protocol, although it admitted that provisions of the protocol were already part of its national law. During the drafting of Protocol II, the Indian representative said that the 'situation militated against the sovereignty of the country concerned and constituted an interference in that country's domestic affairs'.[46] Explaining its vote against the adoption of Article 1, India clarified that it 'does not need any lessons or lectures in humanitarianism from anyone'.[47] India submitted that it could not rule out the

[39] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict*, Geneva (1974–7), vol. VIII, p. 396.

[40] Ibid., p. 406. Paragraph 2 of Article 85 of Protocol I states: 'Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.' N. 29, p. 63.

[41] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict*, Geneva (1974–7), vol. IX, p. 270.

[42] Ibid., vol. IV, p. 32.

[43] Ibid., vol. XIV, p. 530.

[44] Ibid., p. 530.

[45] Ibid., p. 530.

[46] Ibid., vol. VII, p. 72. Paragraph 1 of Article 1 of the Protocol II states: 'This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized 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.' N. 29, p. 90.

[47] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict*, Geneva (1974–7), vol. VII, p. 81.

'possibility of misuse of Protocol II in this ideologically divided world'.[48] In the view of India, it was 'out of context to mention Article 3 common to the Geneva Conventions of 1949 in connection with Protocol II'.[49]

India argued that the term 'non-international armed conflicts' should be defined. According to India, 'Article 3, common to the four Geneva Conventions of 1949, was vague and did not define the term "armed conflict not of an international character".'[50] India submitted that 'if national liberation movements were included under Article 1, the application of draft Protocol II to internal disturbances and other such situations would be tantamount to interference with the sovereign rights and duties of states'.[51] India therefore proposed addition of a new paragraph 3 to Article 1 of Protocol II:

> 3. Despite the foregoing, any external interference in a non-international armed conflict as defined in Article 1 of the present protocol shall be considered a violation of the present Protocol, which will cease to apply till such time as external interference is removed.[52]

India took the view that in the case of external interference in a non-international armed conflict 'Protocol I would not be applicable.'[53] India did 'not agree with those delegations which considered that there would be a vacuum if Protocol II ceased to apply'.[54]

India further submitted that once the national liberation movements had been included in Protocol I as international conflicts, Protocol II would not be necessary, 'since any other conflict taking place within the territory of a sovereign state would be an internal conflict, and any international instrument designed to regulate non-international conflicts might in actual application impede settlement of the conflict and lead to external interference'.[55] India shared

[48] Ibid., p. 81.

[49] Ibid., p. 81. Article 3 common to Geneva Convention states: 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;(b) taking of hostages;(c) outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded, sick and shipwrecked shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict', n. 29, p. 24.

[50] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict*, Geneva (1974-7), vol. VIII, p. 207.

[51] Ibid., p. 224.

[52] Ibid., vol. IV, p. 17.

[53] Ibid., vol. VIII, p. 299.

[54] Ibid., p. 299.

[55] Ibid., vol. V, p. 345.

the concerns of many delegations that IHL should be further developed so as to lessen human suffering. However, it 'could not approve of any international document which "impinged upon" national sovereignty and permitted outside interference, direct or indirect, financial, military or otherwise, in the internal affairs of states, especially of the younger nations of the developing world'.[56]

Beneath India's strong objections to Protocol II lay the 'impossibility of discriminating between its own citizens under the national constitution and the proposed draft Protocol II'.[57] According to India, '[w]hat Governments were being asked to do was to treat some perpetrators of grave crimes leniently, while the full rigour of the law would be applicable to other citizens who dared to commit similar crimes'.[58] India noted that there had been instances in different parts of the world in which criminals had tried to justify violence, including the murder of innocent civilians, on political grounds. India wondered whether those people be 'treated differently from other criminal although they had committed the same crimes?'[59] India, however, recognized the efforts made by a number of representatives at the conference and decided 'not to oppose adoption of Protocol II but to abstain if it was put to the vote'.[60] Participating in the discussion on Article 39 of draft Protocol II,[61] the representative of India stated that it was based on a 'very vague concept, for the idea of internal armed conflict was not defined'.[62] To India, 'it was difficult to comprehend how the provisions of Article 39 could be applied without the consent of the lawfully sovereign government'.[63] India noted that 'adoption of Article 39 of draft Protocol II would give rise to many legal problems and tend to weaken the scope of common Article 3 which was accepted by all countries'.[64] India pointed out that while under the former any impartial humanitarian body could offer its services to the parties to a conflict, under the latter only the ICRC could offer its services. India also queried as to what would happen to common Article 3 when Protocol II came into being. According to India,

> Would it be automatically amended, or would both Articles remain in force? ... Would the ICRC be expected to offer its services to the rebels under Protocol II and to the State party under common Article 3? If it should be considered that common Article 3 was supplemented by Article 39 of Protocol II, many developing countries which had opposed draft Protocol II might be forced to review their

[56] Ibid., p. 346.
[57] Ibid.
[58] Ibid.
[59] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict*, Geneva (1974–7), vol. VII, p. 203.
[60] Ibid., p. 204.
[61] Now Article 18 of Protocol II provides: '1. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked. 2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as food-stuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.' n. 29, p. 98.
[62] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict*, Geneva (1974–7), vol. V, p. 379.
[63] Ibid., p. 380.
[64] Ibid.

position with respect to common Article 3, a situation hardly conducive to the development of humanitarian law applicable in armed conflicts.[65]

It was for this reason that India pressed for deletion of Article 39 of draft Protocol II.[66] India submitted that the provision on cooperation in the observance of the protocol[67] would be 'used for political reasons by a party opposing, or in rebellion against a government. A government which refused the services of the ICRC or some other impartial body called in by the rebel party might be accused of having something to hide'.[68] For this reason, India voted for deletion of the provision. On the role of the ICRC, the leader of the Indian delegation noted that '[i]t was the understanding of his delegation that the International Committee of the Red Cross, or any other humanitarian organization, would offer to act as a substitute only after the consent of the parties concerned had been obtained'.[69] To a reference to the facilitation of visits by impartial humanitarian bodies, in particular the ICRC, India pointed out that 'national Red Cross Societies were in a much better position to carry out supervision'.[70] India therefore wanted that the reference to impartial humanitarian bodies be deleted.

In the Diplomatic Conference, India appealed to 'all non-aligned countries, since it believed that, internationally or otherwise, an attempt had been made to divide them'.[71] India criticized the haste with which some of the provisions of the draft were put to vote, as it did not allow India to understand fully the meaning and import of those provisions.

Statute of the International Criminal Court, 1998

According to India, the ICC should be based on the principles of complementarity, state sovereignty, and non-intervention in internal affairs of states. According to India, the 'ICC can step in only when a national judicial system is non-existent or unable to deal with particular crimes covered by the Statute.'[72] India considered it 'inappropriate' to vest competence and authority to initiate the jurisdiction of ICC in the hands of an individual prosecutor, 'who can initiate investigations *suo moto* [sic], and thus trigger the jurisdiction of the court'.[73] India was also opposed to any pre-eminent role for the UN Security Council in relation to the ICC. It wanted that the crimes should be defined precisely in the ICC Statute. Later, explaining its vote on the adoption of the Statute of the ICC, the representative of India stated:

[65] Ibid., p. 381.

[66] India clarified that, while it had highest regard for the ICRC, its reservations related to Article 39 which might be used for 'political and propaganda purposes.' Ibid., p. 381.

[67] See Draft Article 39.

[68] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict*, Geneva (1974–7), vol. IX, p. 252.

[69] Ibid., vol. V, p. 345. On this, see V. S. Mani, 'Kargil Conflict and International Law', *IJIL*, vol. 39, 1999, pp. 341–2.

[70] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict*, Geneva (1974–7), vol. VIII, p. 340.

[71] Ibid., vol. IX, p. 367.

[72] Statement by Dilip Lahiri, Additional Secretary, Ministry of External Affairs, India, 16 June 1998. See http://www.un.org/icc/index.htm (visited 16 March 2002).

[73] Ibid.

Instead of legislating for the exception, the scope of the Statute has been broadened so much that it could be misused for political purposes or through misplaced zeal, to address situations and cases for which the ICC was not intended, and where, as a matter of principle, it should not intrude. What the zealots have achieved, therefore, is a contradiction in terms: a court framed with Armageddon in mind is set in Utopia.[74]

Later, India complained that the Statute failed to mention international terrorism in the crimes covered.[75] It also wanted specific reference to the use of nuclear weapons, land mines, and blinding lasers as war crimes. But, no such specific references were included.

Some of the more recent happenings in the world that attract application of IHL, and the international response to them, both within the United Nations and outside, testify to India's attitude towards IHL.[76] It is true, as India has pointed out, that when a permanent member of the Security Council has not accepted the jurisdiction of the court how can the Council ask another non-party to the Statute to submit to the jurisdiction of the court? It is a vaild viewpoint but the power of the Security Council and the obligations of its permanent members flow pre-eminently not from the Statute of ICC, but from the Charter of the United Nations.[77] All that may be argued is that permanent members should not be allowed to move a resolution in the Security Council for submission of a matter to the jurisdiction of ICC, or to veto the one moved for submission of a situation to its jurisdiction.

Originated in the aspirations of a colonial country, India's attitude towards IHL evolved in light of the concerns of a newly independent country in an ideologically divided world. While India's respect for the principles of IHL has been next to none, its record of their observance has nevertheless invited criticism.[78] It has long implemented the Geneva Conventions as part of its domestic law.[79] However, inadequacies of the Act to deal with specific situations have been noted by the Indian judiciary.[80] If there is a need for India to bring its laws in line with 'constitutional contours of the Indian polity',[81] equally urgent is a review of its approach to the present IHL.[82] Consequences of a non-party status to the Statute of ICC are neither the same for all non-parties, nor can be countervailed by cooperation with a non-party permanent member of the Security Council in the 'global' fight against terrorism.

[74] Explanation of vote by Dilip Lahiri, Head of Delegation of India on the Adoption of the Statute of the Statute of the International Criminal Court, 17 July 1998. Ibid. (visited 3 February 2002).

[75] Statement by the Indian representative Prem Singh Chandumajra on 22 October 1998 at the Sixth Committee, 53 Session of UN General Assembly. See http://www.indianembassy.org.policy/ICC/ICC_UN_Statement.html (visited 3 February 2002).

[76] See Mani, n. 1 at p. 295.

[77] Further on this aspect, see Ravindra Pratap, 'Nuclear Arms Control Treaties and Non-Parties', *IJIL*, vol. 39, 1999, pp. 626–76.

[78] 'Instead of following an eclectic approach, India should have authorized the ICRC to perform humanitarian activities of a Protecting Power within the zone of conflict, if it could in the recent past allow some ICRC role in respect of its anti-terrorist operations in Jammu and Kashmir.' Mani, n. 69, pp. 341–2. See also Balachandran, n. 19, at p. 372.

[79] See the Geneva Conventions Act, 1960.

[80] See n. 21.

[81] Mani, n. 2, p. 74.

[82] See Justice V. R. Krishna Iyer, 'Pak terrorism and Indian pacifism', *The Hindu*, 17 May 2002, p. 12.

India has long recognized and has never questioned the link between IHL and the human rights law. Rather, when it found that IHL principles would not be readily applicable to a given situation, it accepted the applicability of the human rights law.[83] It is this link which has in recent times come to question India's record, and serves to measure both the present scope of IHL and India's attitude towards it.[84] Thus, it is no longer possible for India not to effect changes in its domestic law necessary to comply with its obligations under the Genocide Convention and yet claim a good faith observance of the principles ingrained in it.

[83] See statement by India, n. 3, at p. 827.

[84] For instance, see Balakrishnan Rajagopal, 'Gujarat: A Plea and A Proposal', *The Hindu*, 27 March 2002, p. 10; V.S. Mani, 'Needed, A Law on Genocide', ibid., 10 April 2002, p. 10.

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Report of the Committee of Experts on Protocols Additional to the Geneva Conventions 1949

26 June 2012

Members of the Committee of Experts

Justice J. S. Verma (Former Chief Justice of India and former Chairman, National Human Rights Commission of India), Lt. General Satish Nambiar (Former Director, United Service Institution of India) Dr. E.M. Sudarsana Natchiappan, Member of Parliament, Rajya Sabha (President of the Indian Society of International Law), Prof. V. S. Mani (Director, School of Law and Governance, Jaipur National University, Jaipur), Prof. Anuradha Chenoy, (Jawaharlal Nehru University, New Delhi), Siddharth Varadarajan (Editor, The Hindu Daily), C. Jayaraj (Presently Principal State Counsel, Department of Legal Affairs, Republic of Seychelles and Former Secretary General, ISIL) and Dr. R. K. Dixit (Former Legal Adviser to the Government of India)

CONTENTS

(The Committee acknowledges the assistance provided by Dr. Srinivas Burra, Mr. Vinai Kumar Singh, Ms. Sowmya K.C.)

Report of the Committee of Experts on Additional Protocols to the Geneva Conventions of 1949

This report is prepared as a collective exercise by the Members of the Experts Committee constituted by the Centre for International Humanitarian Law at the Indian Society of International Law (ISIL). The Committee of Experts met thrice during the period of the Study and comes up with the present report. The report is broadly divided into four parts. The first part provides a background to the constitution of the present Committee of Experts; the second part gives a brief introduction to international humanitarian law and its relevance in general; the third part deals with the adoption of two Additional Protocols and their contribution to IHL; and part four focuses on the position of India vis-à-vis the Additional Protocols during and after their negotiations.

1. Background to the Constitution of the Committee of Experts on the Additional Protocols to the Geneva Conventions of 1949

The Indian Society of International Law (ISIL) and the International Committee of the Red Cross (ICRC) jointly organised a National Seminar to Mark the 30th Anniversary of the 1977 Additional Protocols to the Geneva Conventions of 1949 on 8-9 June 2007 in New Delhi. During the two-day deliberations, speakers from different backgrounds threw light on several aspects of the two Additional Protocols, some of which were general in nature and some of which were specific to Indian context. Active involvement of participants also led to stimulating discussions during the conference. One of the recommendations that came up at the end the Conference was to constitute a committee of experts to study the relevance of the two Additional Protocols to the Indian context and the viability of arguments seeking India to become a party to these protocols.

The Centre for International Humanitarian Law at the ISIL was in contact with several experts in the field and exchanged views informally on the issue of constituting a committee of experts. Some of the experts who took part in the June 2007 meeting expressed their willingness to be part of the proposed committee. Taking into consideration the significance of the Additional Protocols to the Geneva Conventions of 1949 in general and their relevance to the Indian context in particular, the ISIL constituted a committee of experts who would study pertinent aspects of the Additional Protocols and produce a report. Accordingly, the ISIL approached several experts in IHL and related fields and the following individuals consented and constituted the Committee.

Members of the Committee of Experts: Justice J. S. Verma (Former Chief Justice of India and former Chairman, National Human Rights Commission of India), Lt. General Satish Nambiar (Former Director, USI), Dr. E.M. Sudarsana Natchiappan (Member of Parliament, Rajya Sabha), Prof. V.S. Mani (Director, School of Law and Governance, Jaipur National University, Jaipur), Prof. Anuradha Chenoy, (Jawaharlal Nehru University, New Delhi), Siddharth Varadarajan (Editor, The Hindu Daily), C. Jayaraj (Presently Principal State Counsel, Department of Legal Affairs, Republic of Seychelles and Former Secretary General, ISIL) and R. K. Dixit (Former Legal Adviser to the Government of India)

2. Tasks of the Expert Committee

The report of the Expert Committee addresses, inter alia, the following issues.

1. Provide background information regarding the context of the drafting of the Additional Protocols.
2. Explain why India should become a Party to the Protocols
3. Provide additional information regarding a possible reservation which may satisfy Indian concerns regarding the Protocols.

Additional Documents Provided:

1. The Text of the Protocols
2. India's record of accession to IHL treaties
3. A list of Parties to the Protocols
4. Travaux préparatoires

2. Distribution and follow-up

It is hoped that this document will be widely circulated and will prompt the Government of India to assess its stance regarding the Protocols with a view to consider its eventual accession to the instruments.

For the Committee,
Justice J. S. Verma,

Former Chief Justice of India

WHY INDIA SHOULD RATIFY THE 1977 PROTOCOLS TO THE GENEVA CONVENTIONS OF 1949 RELATIVE TO ARMED CONFLICTS

A Background Note

This Background Note seeks to achieve four things, namely, (1) a brief introduction to International Humanitarian Law in general (2) a brief note on what the Geneva Protocols 1977 stand for, (3) the contribution of the composite Indian culture and tradition to the basic tenets of International Humanitarian Law - i.e. a historical-cultural argument why India should accede to the Protocols, and finally, (4) an enumeration / reiteration of arguments impelling India to accede to the Protocols.

I. INTRODUCTION

Armed conflict often represents the dark side of human nature - anger, greed, vengeance, false pride, strong sense of ill feeling, intolerance, or hatred. War and armed conflict survive in both international and national societies, despite the fact that most ancient civilizations of the world have had clearly laid down humanitarian rules which were required to be observed, must nations go to war. Indeed, the human society has till this day failed to abolish use of violence in intra-community relations, let alone inter-state relations.

According to General Clausewitz, the grand priest of war (as the ultimate means of dispute settlement), "War is an act of violence. …. In a situation as dangerous as war, errors of magnanimity are the worst. Indeed, moderation in the philosophy of war is absurd."[1] The Clausewitz philosophy of violence then underscores the innate inter-relationship between the factors that trigger resort to violence and those that prompt disregard for any restraints or inhibitions on levels or means and methods of violence employed. The root causes of resort to violence also condition the effectiveness or otherwise of such restraints or inhibitions. From this viewpoint, international humanitarian law (IHL) has a tenuous relationship with the principles of non-use of force and disarmament. On the one hand, like all law it would prefer an ideal world without armed conflict. On the other, it comes into operation at the outbreak of hostilities and continues to be in force until cessation of hostilities on the ground, without passing judgment on who was right or who was on the wrong in triggering them or in sustaining them. But the fact that it comes into operation at the outbreak of violence does not necessarily imply legitimation of situations resulting from use of force itself. IHL is not directly concerned with the issues of legitimation of violence; it is primarily concerned with the protection of victims of any violence - the human factor in hostilities.

Even if IHL is often "one war behind," its normative development over the past hundred and fifty years has been most impressive. However, there is a wide gulf between the promise of normative framework and the realities on the ground. In fact, most stages of the development of the law were triggered by some horrid historical experience through a catastrophe of senseless violence.

The 'Geneva law' - i.e., those aspects of IHL which directly bear upon protection of the victims of armed conflict - began with its concern for the protection of the sick and the wounded combatants at war on land and received a treaty basis in 1864. This was later expanded to encompass the sick and the wounded in war at sea in 1906 as warfare at sea became 'popular' among states, and still later, in 1929, it was further revised and expanded to cover prisoners of war. The spine-chilling experiences of Europe during the inter-war period highlighted the need to protect the civilian population from the cruel incidence of armed conflict, and also to provide some minimum rules to regulate "armed

[1] Quoted by Judge Mohammed Bedjaoui, "Humanitarian Law at A Time of Failing National and International Consensus: A Report for the Independent Commission on International Humanitarian Issues," in the Independent Commission on International Humanitarian Issues, Modern Wars: The Humanitarian Challenge - A Report for the Independent Commission on International Humanitarian Issues (Zed Books, London/ New Jersey. 1986), pp. 1-42, at p. 5.

conflict not of an international character" of the Spanish Civil War type, where the 'international' character of the conflict is indeterminate. They also eventually gave rise to three categories of 'international crimes' in the context of grave violations of human dignity perpetrated during armed conflict - crimes against the laws and customs of war, crimes against peace and crimes against humanity - with the victorious powers of the Second World War setting in motion international trials of major war criminals, at the end of the war. This provided the normative thrust to the concept of an international criminal court. The Second World War further necessitated a revision of the law that led to the adoption of the Four Geneva Conventions in 1949, with the Fourth Convention specifically aimed at protection of civilians during armed conflict.[2] All the four Conventions put together provide for humane treatment of the sick and the wounded in war, prisoners of war and civilians who fall in the hands of a belligerent power during hostilities. To guard against the possibility of a party to the conflict seeking to escape the obligations under these Conventions by arguing that the conflict at hand is not of an international character, the Conventions also embody a common Article 3 to cover armed conflicts "not of an international character" for which certain minimum rules of humane treatment of victims of the conflict are prescribed. These rules have received the international judicial imprimatur to be recognized as the minimum threshold of IHL obligations.[3]

India became a party to the four Geneva Conventions of 1949 by ratifying them on 9th November, 1950.

II. GENEVA PROTOCOLS 1977

Since 1949, the national liberation movements in Asia and Africa, and the Viet Nam war necessitated a further review of the 1949 Conventions in 1974-77 and in response, two Additional Protocols took shape in 1977. India took a lead role in the Diplomatic Conference of 1974-1977 that made this expansion and elaboration of IHL possible. This is evident from the travaux preparatoires of the Protocols.

The Additional Protocols, a product of consensus of the international community evolved soon after the Vietnam War, have achieved two things while updating the 1949 Geneva Conventions, namely:

(1) They embody IHL rules applicable to armed conflict by amalgamating those emanating from two historical strands -

   (a) those focussing on amelioration of the victims of armed conflicts represented by a succession of treaties beginning with the First Geneva Convention of 1864;

   (b) those focussing on "humanising" the means and methods of warfare, initially the significant contribution of the Hague Peace Conferences of 1899 and 1907.

(2) They assimilate a range of norms from the International Covenant of Civil and Political Rights to which India is a party, norms that have also received the endorsement of the Supreme Court of India.

A. The Merger of Hague Law into IHL

Nearly parallel to the development of the Geneva law was the so-called 'Hague law'. Hague law began its travails also contemporaneously with the germination of Geneva law since the second half of the nineteenth century. It began with the intent of avoiding unnecessary suffering and superfluous injury by circumscribing the use of certain means and methods of war, with a general indication of the rights and duties of belligerent powers. The 1899-1907 Hague regulations and various other Conventions adopted by The Hague Peace Conferences aimed, in a modest

[2] The four Geneva Conventions of 1949 are: I) the Geneva Convention for the Amelioration of the condition of the Wounded and Sick in Armed Forces in the Field; II) The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; III) The Geneva Convention relative e to the Treatment of Prisoners of War; and IV) The Geneva Convention relative to the Protection of Civilian Persons in Time of War - all of 12 August 1949.

[3] See the Nicaragua case, ICJ Reports 1986, p. 14.

way, at these objectives. The greatest normative contribution of Hague law, however, is the principle embodied in the "de Martens clause". The latest restatement of this principle states:

> "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."[4]

The de Martens clause remains a masterpiece of norm setting in international law. In its broad sweep it takes into account the evil potentials of technologies of warfare, past, present and future, as it represents a recognition that no detailed set of regulations of dos and don'ts will be able to cover all possible situations of armed conflict. And it now provides a direct linkage between both Geneva law and Hague Law of IHL even as it informs decision-makers in armed conflict of the need to keep in constant view the "principles of humanity and the dictates of public conscience" (which no democratic decisional process can afford to ignore). Indeed, the 1977 Additional Protocols appear to have achieved a general integration of both Geneva law and Hague law in several respects. On the basis of the development of IHL culminating in the 1977 Additional Protocols, the following fundamental principles of IHL can be said to exist in modern international law:-

1. The principle of "elementary considerations of humanity." [5]
2. The principle of distinction (i. between belligerents and neutrals; ii. between combatants and non-combatants-civilians, and iii. between military objects and civilian objects)
3. The principle of the prohibition of weapons and methods of warfare that cause unnecessary suffering or superfluous injury.
4. The principle of the prohibition of methods or means of warfare that are likely to cause widespread, long-term and severe damage to the natural environment.
5. The principle of the prohibition of the study, development, acquisition or adoption of any new weapon, means or method of warfare whose employment in war is prohibited by IHL or some other rule of international law.

The International Court of Justice significantly observed in the Nuclear Weapons case (1996) as follows:

> "The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behaviour expected of States."[6]

B. Contribution of IHRL to 1977 Geneva Protocols

Since the Second World War, there has been another, more broad-based, development in international norm setting. This relates to the evolution of the international human rights law (IHRL). War, and colonialism have taught us the importance of international concern for human rights. As Jawaharlal Nehru proclaimed on the eve of India's independence,

> "We believe that peace and freedom are indivisible and the denial of freedom anywhere must endanger freedom elsewhere and lead to conflict and war."[7]

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[4] Article 1 (2) of 1977 Protocol I Additional to the Geneva Conventions of 1949.

[5] See "elementary considerations of humanity, even more exacting in peace than in war:" the Corfu Channel case, ICJ Reports 1949, p. 22.

[6] See The Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, 226, at p. 258, at para 82.

[7] Speech by Jawaharlal Nehru, then Vice-President of Interim Government of India, 7 September 1946, reprinted in Surjit Mansingh, ed., Nehru' Foreign Policy (Mosaic Books, with India International Centre, New Delhi, 1998), pp. 19-24, at p. 21.

The Charter of the United Nations itself embodies this concern and mandates a role for the United Nations in promotion of increasing realization of human rights by providing a framework of coordination for joint and separate actions by states and the international organization. In furtherance of this mandate, the United Nations General Assembly adopted the all-important Universal Declaration of Human Rights (UDHR) and the Genocide Convention in 1948. The UDHR led to the eventual adoption of the two International Covenants on Human Rights in 1966 (acceded to by India on 27th March 1979) and several other declarations and conventions addressing specific categories of human rights or specific groups of beneficiaries identified in terms of their special social vulnerability. The importance of this emerging international human rights law to IHL is that the former is of broader import than the latter at least in three respects - (a) it readily applies to all situations of peace or violence, including all armed conflict; (b) it is of continuous application and therefore one need not worry overmuch as to whether a situation amounts to an "armed conflict" as defined in the Geneva law to determine what rules to apply; and (c) it tends to address denial/ deprivation of rights that may be the root cause of violence. The other advantage with international human rights law is that it has set up a range of international monitoring bodies chiefly within the UN system. It is submitted that the emerging international human rights law has vastly strengthened IHL in terms of not only the normative canvas, but institutional support system as well.

Additionally, the international community has, at least since 1970's, become increasingly sensitive to issues of human rights deprivation through mindless violence whether perpetrated by state instrumentalities, or by groups and individuals. Thus there are a number of UN General Assembly resolutions manifesting the intense concern of the international community for the protection of innocent human beings caught up in situations of international terrorism.[8] Given this sensitivity of the international community, the not-infrequent practical impossibility to distinguish various levels or degrees of violence before a situation can be formally identified to measure up to the definition of "armed conflict" under the Geneva law, and the urgency of humanitarian assistance in an evolving situation of terrorism, have all led the international community to mandate a role for impartial international organizations familiar with situations of violence, such as the ICRC, in a situation like taking of hostages.[9] All this perhaps points to the justifiability of what Judge Bedjaoui calls "a simple working definition of humanitarian law," namely,

> "[I]t is a set of legal rules intended to protect and aid the victims of all situations of armed violence."[10]

The moral authority of IHL in seeking to 'humanise" inter-state and intra-state hostilities and to inhibit them with what Hugo Grotius called some three-and-half centuries ago as the temperamenta ac belli, is no doubt well recognised by peoples of all nations of the world, and remains unquestioned by the international community of states as well. Even when states fail to comply with it often for reasons of expediency, height of passions and emotions of war, or just plain 'mistakes' committed in the thick of military operations, they do not dare deny their IHL obligations. On the contrary, they would warn their adversaries of the 'serious consequences' of committing grave breaches of these obligations.

III. IHL IN INDIAN CUTURE AND TRADITION

IHL precepts are innate in the culture and tradition that India rightly boasts of. They consist in the principal contributions of the religious texts and practices obtaining in the major religions of India, namely Buddhism, Christianity, Hinduism, Islam, Jainism, and Sikhism. The composite culture of the South Asian sub-continent has historically evolved through the interfaces and confluences of these great religions of the world.

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[8] After all, Article 29 of the UDHR underscores the duty of every individual to respect the rights of others.

[9] See the International Convention against the Taking of Hostages, 1979.

[10] See Judge Bedjaoui, n. 1, at p.8.

In Buddhism, every one of the facets of human relations is conditioned by "the all-pervading compassion" and that is founded on principles of goodwill, co-operation, non-violence and pacifism. Yet there are many venerable Buddhist writings recognising certain principles and portraying them under various headings - wars of self-defence, just war theory, and peaceful settlement of disputes. It is generally believed that the humanitarian principles of Buddhism has had a softening influence on the conduct of war in the South Asian region as well as in the Far East. The eighth rule of the Dasa Raja Dharma (ten rules of good governance) was the king's duty to exercise non-violence. The reign of Ashoka the Great in India was entirely based on Buddhist principles. India's National Emblem belongs to Ashoka.

Non-violence is clearly the foundation of the Christian religious orders. This probably stems from Jesus Christ's advice to every individual "to show the other cheek." Like many religions Christianity too emphasised the fact that man is the best of God's creations, and that He created him in the likeliness of Himself. Christ also advocates compassion to all fellow beings - "Love thy neighbour." Based on the Christian teachings, Hugo Grotius, the father of international law (as it originated in Europe), spoke of the undesirability of war, a justifiable cause for war (causus belli), and humanitarian considerations during warfare (temperamenta ac belli). These, indeed, are immediate progenitors of the current precepts of IHL and rules relating to the use of force.

The Hindu religious texts contain detailed expositions on rules of warfare, respect for the environment, regulation of the arms trade, in particular cruel weapons, the protection of civilians, superior orders, collective punishment, the right of asylum, vengeance and retaliation, and the treatment of PoWs. Even a "realist" like Kautilya spoke of the need for the invading King to observe a number of rules of warfare in order to promote on the part of the people in the invaded territories a sense of trust in and an absence of opposition to the invading King. The pre-eminent principle was that the ordinary people be kept happy and that that was the Rajadharma.

Islam condemns aggression of all kinds. It ordains that all treatment of individuals contrary to human dignity during war be forbidden, as it urges respect for the dignity of the human person. Islamic Jihad is the fulfilment of a duty - that of universalising the Islamic faith - and therefore must refrain from shedding of blood or the destruction of property not necessary for the achievement of that objective. Eminent Islamists have pointed to specific rules in Islamic law forbidding wanton destruction of the elements of the environment during war. Islamic law recognises the principle of proportionality, and the principle that the means and methods of warfare cannot "transgress limits." Means and methods of warfare, perfidy and ruses, prohibited weapons, enemy persons and property, and prisoners of war are also recognised. It would appear that the central element of Islamic humanitarian jurisprudence is the emphasis on human dignity, the foundation upon which IHL is based.

Evidently, Indian civilisation through the ages has made significant contributions to IHL precepts, which are now deeply embedded in the core values of the composite Indian culture and society. Given this background, it is hardly surprising that the Founding Fathers of the Indian Constitution decided to ensure that the best of the Indian traditions of human dignity are incorporated into the Constitution. In fact, many of the provisions of Part III of the Indian Constitution on Fundamental Rights may be taken to subsume the basic principles of the IHL.

IV. WHY SHOULD INDIA ACCEDE TO THE 1977 GENEVA PROTOCOLS?

There are at least nine compelling reasons why India should ratify the 1977 Additional Protocols to the Geneva Conventions:

1. India has ratified or acceded to a number of IHL related treaties in most of whose formulation it has in the past played a lead role. India has enacted the Geneva Conventions Act in 1960 to give effect to the 1949 Geneva Conventions, and incorporated the Chemical Weapons Convention 1993 into domestic law by the Chemical Weapons Convention Act in 2000. Further, it enacted the 2005 Weapons of Mass Destruction Act, giving domestic force of law to the 1972 Biological Weapons Convention.

2. How can India abandon its own baby with the bathwater? India played a lead role in negotiating the various provisions of the Protocols. Backing off now would amount to a certain lack of courage of conviction, and a sense of indifference to growing impunity in humanitarian affairs.

3. Indian domestic law, presided over by the Constitution, will continue to reflect developments in IHRL and IHL. This is the current judicial attitude.[11] In other words, whatever be the ambivalence on the part of the political branch of the Government, it will be ineffective against the judicial attitude.

4. Many of the provisions of Part III of the Constitution are applicable equally to Indian citizens and foreigners found in India: The Chakma Refugees cases are a case in point.[12] The humanitarian issues involved in the two Protocols are not merely matters of foreign relations, but intertwined with the human rights jurisprudence of India.

5. Even where treaty provisions are not specifically applicable as such, the Indian judiciary would not worry overmuch whether or not India is a party to a particular treaty, as it would be keen to impart justice to the situation before it. In cases where India has not been a party to certain maritime treaty, the judiciary has drawn principles from such treaties and applied them to Indian situations treating them as part of "common law".[13]

6. Even if India fails specifically to accede to the Protocols, since India is a party to ICCPR, etc., India will remain bound by much of the principles flowing from the Protocols through the treaties to which it is a party.[14] It is therefore advisable for India to become a party to the Protocols.

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[11] P. Chandrasekhara Rao, the longest serving Law Secretary to the Government of India, writing in his critical-analytical style in **The Indian Constitution and International Law** (Taxmann, New Delhi, 1993) is impelled to observe at p. 148, thus:

"What is important to note is that the courts, committed as they are to advancing the human rights jurisprudence, have come to interpret the constitutional provisions on fundamental rights more broadly in the light of international instruments on human rights, whether of the United Nations or of other international organizations."

In **Kubic Dariusz v. Union of India**, AIR 1992 SC 573, the Supreme Court held at p. 585:

"In this context it may not be out of place to bear in mind that fundamental rights guaranteed under our Constitution are in conforming line with those in the declaration [i.e. Universal Declaration of Human Rights] and the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights to which India has become a party …"

Again, citing **Ajay Hasia v. Khalid Mujib**, AIR 1981 SC 487, at p. 493, and **MC Mehta v. Union of India**, AIR 1987 SC 1086, at pp. 1089, 1097, P.C. Rao, notes as follows:

"The Supreme Court of India has innovated new methods and strategies to enlarge the range and meaning of the fundamental rights and to advance the human rights jurisprudence. The Court has in fact declared this to be its task."

Rao, ibid., p. 148.

[12] **Louis De Raedt v. Union of India**, 3 SCC 1991 SC 554 and **State of Arunachal Pradesh v. Khudiram Chakma**, 1 SCC 1994 SC 615

[13] E.g. In **M. V. Elizabeth v. Harwan Investment and Trading Pvt. Ltd.**, 1993 SC 1014, at p. 1058, the Supreme Court ruled:

"Although India has not adopted the various Brussels Conventions*, the provisions of these Conventions are the result of international unification and development of the maritime laws of the world, and can, therefore, be regarded as the international common law or transnational law rooted in and evolved out of the general principles of national laws, which, in the absence of specific statutory provisions, can be adopted and adapted by courts to supplement and complement national statutes on the subject."

The Court further observed:

"Where statute is silent and judicial intervention is required, Courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience."

[14] In the **Nicaragua** case, the International Court held as follows:

"There is no doubt that, in the event of international armed conflicts, those rules [of the common Article 3 of the 1949 Geneva Conventions] also constitute a common yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity." ICJ Reports 1986, p. 114, para. 18.

Thus given the special humanitarian character of the rules, the Court will be guided by the "elementary considerations of humanity" rather than the technicalities of applicability of certain conventional rules.

7. India seeks to be a Power to be reckoned with in the international arena. It should therefore be seen to be willing to accept more and more of IHL-IHRL obligations in order to claim a higher moral position so that its voice is better respected on the international plane.

8. The moral loss by not acceding to the Protocols for a democracy like India is much greater than the "realpolik" arguments the Administration may seek to put forth in an attempt clearly to avoid undertaking IHL obligations flowing from these Protocols.

9. Finally, the sovereign interests of India that the Administration is rightly keen to protect in its hesitation to accede to the Protocols can easily be protected by drafting appropriate reservations or interpretative declarations to the Instrument of Accession to each of the Protocols. This would in fact the double objective of protecting India's innate interests while at the same time reinforcing its moral voice on the international plane in international humanitarian affairs.

There exists no tenable argument against India's accession to the Protocols. It would appear that the following are the major points raised by India in respect of Protocol I:

1. India has all along argued that the struggles of national liberation movements should come within the framework of international armed conflicts. This argument was well recognised at the Diplomatic Conference, and the result is Article 1 (4) of Protocol I. India would not like that provision to be used in any way impairing its territorial integrity. It may be recalled that India has made a reservation to the common Article 1 of the International Covenants on Human Rights, 1966, while acceding to them on 10th April, 1979.[15] This could be taken into account in the Instrument of Accession to the Protocols.

2. India has been of the view that Article 35(2) of the Geneva Protocol I of 1977 applies "to all categories of weapons, namely nuclear, bacteriological, chemical, or conventional weapons or any other category of weapons." In fact, India suggested a listing of categories of weapons prohibited under this provision, although it recognised that no immutable list could be evolved. But it was not possible to identify criteria to determine the prohibited nature of each weapon. However, these weapons could be used in self-defence, at least theoretically. As pointed out by the International Court of Justice in the Nuclear Weapons case in 1996, even in self-defence, they cannot be used in violation of the principles of necessity and proportionality and the principles of IHL.[16]

3. India opposed the term "irregular forces" as according to it the term included mercenaries. This indeed is a matter of interpretation in the historical context of the law of armed conflict.

4. India has questioned the need for Protocol II as such, as (a) it militated against the sovereignty of the country and (b) it could be misused. India pointed to the need for a definition of the term "non-international armed conflicts." It felt that in view of the inclusion of national liberation movements in Protocol I, there was no need for Protocol II. In answer to this, it may be pointed out that the International Court's rule of "elementary considerations of humanity" would foreclose any such rethinking on Protocol II. There is no doubt that there are armed conflicts below the threshold of armed conflicts of international character and that there is to "humanise" them as well.

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[15] 'I. With reference to Article 1 of the International Covenant on Economic, Social and Cultural Rights and Article 1 of the International Covenant on Civil and Political Rights, the Government of the Republic of India declares that the words `the right of self-determination' appearing in [this article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation -which is the essence of national integrity." http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en#EndDec.

[16] See ICJ Reports 1996, p. 226, The Court ruled as follows: "[A] use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in an armed conflict which comprise in particular the principles and rules of humanitarian law." Quite logically, the elementary considerations of humanity would include all 'non-derogable human rights under Article 4(2) of ICCPR, 1966.

5. Finally, a number of issues have arisen in the context of the terrorism-related operations in different parts of the country. From the beginning, India treated the issue of terrorism as an internal matter, although it alleged active foreign participation in certain situations. It also argued that Article 3 of the Geneva Conventions 1949 would not apply because combating terrorism did not amount to a non-international armed conflict. Also, the mere fact that certain terrorist groups claimed to resort to violence as part of a struggle for self-determination did not automatically make the activity an international armed conflict within the meaning of the Geneva Protocol I of 1977. The principle of self-determination did not permit secession from an already established state that functions in accordance with that principle. Subsequently, probably in view of some international disapprobation, it decided to permit access for ICRC to terrorism-affected areas and also to detention centres. Some human rights NGOs still continue to raise issues of unlawful detentions, custodial violence and killings by security forces. Very often such issues keep coming up before the National Human Rights Commission and State Human Rights Commissions, besides of course the Indian judiciary, which has vindicated itself as a redoubtable champion of human rights in India.

Recommendations of the Committee

In view of the above, it is recommended that an impartial National Institution should be given a Controlling role in deciding whether or not a Protocol would apply to a situation involving India and if so how far. Keeping this in mind, an Instrument of Accession may be drafted.

IHL TREATIES RATIFIED/ACCEDED TO BY INDIA

http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=IN

1. Treaty relating to the Use of Submarines and Noxious Gases in Warfare. Washington, 6 February 1922.
2. Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925.
3. Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 27 July 1929.
4. Convention relative to the Treatment of Prisoners of War. Geneva, 27 July 1929.
5. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945.
6. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.
7. Geneva Conventions of 12 August 1949.
8. Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954.
9. Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954.
10. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968.
11. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. Opened for Signature at London, Moscow and Washington. 10 April 1972.
12. Convention on the prohibition of military or any hostile use of environmental modification techniques, 10 December 1976.
13. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Geneva, 10 October 1980.
14. Protocol on Non-Detectable Fragments (Protocol I). Geneva, 10 October 1980.
15. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II). Geneva, 10 October 1980.
16. Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III). Geneva, 10 October 1980.
17. Convention on the Rights of the Child, 20 November 1989.
18. Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, Paris 13 January 1993
19. Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995
20. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996)
21. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000
22. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Geneva, 10 October 1980. Amendment article 1, 21 December 2001.
23. Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), 28 November 2003

FROM RESETTLEMENT TO INVOLUNTARY REPATRIATION: TOWARDS A CRITICAL HISTORY OF DURABLE SOLUTIONS TO REFUGEE PROBLEMS

B. S. Chimni*

Introduction

The history of durable solutions to the global refugee problem in the period after the Second World War can be divided into two distinct phases. In the first phase, which lasted roughly from 1945 until 1985, the solution of resettlement was promoted in practice, even as voluntary repatriation was accepted in principle as the preferred solution. In the second part of my paper I offer a brief review of the period in which resettlement was seen as the most appropriate solution to the refugee problem.

The second phase, beginning in 1985, may be divided into three periods. In the first period (1985-93) voluntary repatriation came to be promoted as *the* durable solution, with an emphasis on ensuring the voluntary character of repatriation. In 1993, the notion of safe return was introduced into the discourse on solutions in the context of temporary protection regimes established in Western Europe; in the continuum between voluntary and involuntary repatriation the idea of safe return aspired to occupy the middle ground. In 1996, the doctrine of imposed return was aired by UNHCR to draw attention to constraints which could compel it to accept the reality of involuntary repatriation.

To be sure, neither the notion of safe return nor the doctrine of imposed return has necessarily been advanced to replace the standard of voluntary repatriation. In the case of safe return, the contention is that the standard of voluntary repatriation is irrelevant, since the cessation clause in Article 1C of the 1951 Convention Relating to the Status of Refugees (hereinafter the "1951 Convention") requires nothing more than either safe return, or that individuals be in a situation where they were given protection on the specific understanding that the standard of safe return would apply. On the other hand, the doctrine of imposed return has been advanced to carve out what are viewed as unavoidable exceptions to the standard of voluntary repatriation.

In the third part of my paper I contest the particular interpretation of the cessation clause deployed to legitimize the notion of safe return. Next, I point to the dangers of attempting to contextualize the standard of voluntary repatriation. I then go on to argue that it is the absence of burden sharing in the post Cold War era which explains the growing acceptance of involuntary repatriation as a solution to the global refugee problem.

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In the fourth part of the paper I go on to explore the meaning and implications of the new focus on returnee aid and the underlying assumption that refugees cannot be successfully repatriated if the receiving society does not sustain a certain level of development. I argue, among other things, that unless there is a clear recognition of the role external economic factors play in creating the conditions which lead to refugee flows, and steps proposed to address them, the humanitarian aid community may, in the final analysis, be seen as an instrument of an exploitative international system which is periodically mobilized to address its worst consequences.

The First Phase, 1945-1985: Insistence on the Solution of Resettlement

In 1939, reflecting on the different possible solutions to the refugee problem, Sir John Simpson wrote:

> "The possibility of ultimate repatriation belongs to the realm of political prophecy and aspiration, and a programme of action cannot be based on speculation. ... It can be ignored as an important element in any future programme of international action aiming at practical liquidation of the existing refugee problems".[1]

It is said that while this "pessimistic assessment" was "basically right for refugees of his time—Russians, Turkish Christian minorities, German Jews and others", it was "not for all times and for all refugees".[2] After all, at the end of the Second World War millions of refugees did return home.[3] Yet, it was not until 1983 that the preference for the solution of voluntary repatriation acquired "an absolute character" in relevant United Nations General Assembly resolutions.[4] Even then it is the one solution for which UNHCR, the international community and individual states had "the greatest limitations of mandate, influence, time and resources".[5] The reason for this state of affairs was that within a year of the end of the Second World War the question of a solution to the refugee problem had become an integral part of the Cold War. The latter's politics demanded the rejection of the solution of voluntary repatriation.

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[1] Sir John Hope Simpson, *The Refugee Problem: Report of a Survey* (Royal Institute of International Affairs, London: Oxford University Press, 1939), p. 529.

[2] Barry N. Stein, "Prospects for and Promotion of Voluntary Repatriation", in Howard Adelman (ed.), *Refuge or Asylum: A Choice for Canada* (Toronto: York Lanes Press, 1990), pp. 190-220 at p. 192.

[3] *Ibid.*

[4] Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (Martinus Nijhoff Publishers, The Hague, 1997), p. 81.

[5] *Ibid.*, p. 202.

This was also a period in which the economies of the Northern states "experienced unprecedented economic expansion in the context of depleted populations".[6] A key factor facilitating rapid economic recovery was the heavy influx of refugees which offset the loss of the labour force in the War.[7] This reality reinforced the determination of the Northern states to advocate resettlement as a solution to the problem of the 1,000,000 remaining refugees in Europe.[8] Thus, despite the fact that the International Refugee Organization (IRO) (1947-1950), at the insistence of the former Soviet Union, formally adopted voluntary repatriation as a solution to the refugee problem, "the organization devoted most of its attention to resettlement projects, in agreement with the intentions of the Western powers".[9] During its lifetime the IRO "repatriated 72,834 refugees, a meager 5 per cent of the total number of displaced persons registered with IRO".[10] Indeed, "although it was evident to IRO officials that the cost of repatriation per refugee was a fraction of the cost of resettlement, this argument never appeared in the discussions of the General Council".[11]

In so far as the Northern states accepted the solution of repatriation as the ideal solution in principle, they strongly supported freedom of choice even though 1,000,000 refugees were involved. So much so that even the decision to provide three months of rations to refugees deciding to repatriate was sharply criticized.[12] By contrast, in the months immediately after the end of the War, when resettlement had yet to become a part of the Western discourse on solutions, refugees had to organize and resist forcible repatriation.[13] It may also be recalled in this context that "under the refugee regime represented by UNRRA [United Nations Relief and Rehabilitation Agency, the predecessor of IRO] there was no formal respect for the basic rights of the individual. DPs [displaced persons] were repatriated against their will ....".[14] While UNRRA later abandoned this practice, it was not until after the onset of the Cold War, and the formation

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[6] Robert F. Gorman and Gaim Kibreab, "Repatriation Aid and Development Assistance" in James C. Hathaway (ed.), *Reconceiving International Refugee Law* (The Hague: Martinus Nijhoff Publishers, 1997), pp. 35-82 at p. 39; George Stoessinger, *The Refugee and the World Community* (Minneapolis: The University of Minnesota Press, 1963), p. 114.

[7] Gorman and Kibreab, "Repatriation Aid".

[8] Stoessinger, *The Refugee and the World Community*.

[9] Kim Salomon, *Refugees in the Cold War: Toward a New International Refugee Regime in the Early Postwar Era* (Lund: Lund University Press, 1991), p. 243.

[10] Stoessinger, *The Refugee and the World Community*, p. 111.

[11] *Ibid.*

[12] *Ibid.*, pp. 68-71 and p. 202.

[13] Yury Boshyk, "Repatriation and Resistance: Ukrainian Refugees and Displaced Persons in Occupied Germany and Austria, 1945-1948", in Michael R. Marrus and Anna C. Bramwell (eds.), *Refugees in the Age of Total War* (London: Unwin Hyman, 1988), pp. 198-219.

[14] Salomon, *Refugees in the Cold War*, p. 249.

of the IRO regime, that an individual's right to flee from political persecution and to choose where he or she wanted to live was recognized.[15]

The only conclusion that one can draw from this episode in the evolution of the international refugee regime is that humanitarian factors do not shape the refugee policies of the dominant states in the international system.[16] It underlines the need to be alert to the non-humanitarian objectives which are pursued by these actors from time to time behind the facade of humanitarianism. I will return to this theme later in this paper.

Meanwhile, it is not at all surprising that the end of the Cold War has meant a slow return to the days of the UNRRA, although dominant states have now to contend with the significant developments in international human rights law achieved in the period after the Second World War. It explains why contemporary attempts at justifying the departure from the standard of voluntary repatriation rest on a different set of arguments. These include the idealization of the solution of repatriation, a turn towards objectivism in interpreting the definition of refugee and the cessation clause contained in the 1951 Convention, a stress on contextualism in considering compliance with the standard of voluntary repatriation, and an internalist explanation of the root causes of refugee flows. The following sections examine critically the validity of some of these arguments.

The Second Phase 1985-98: from Voluntary to Forced Repatriation

Since the early 1980s, from the time of the arrival of "new asylum seekers" in the North, there have been calls to rethink the exilic bias of international refugee law. The theoretical justification for this has assumed the form of "a new approach to the refugee problem … based on human rights".[17] It asserts that "the goals of separation and alienation, which animated so much of the approach of the past, should be recognized as contrary to both individual human interest and the well-being of societies, particularly in today's conditions".[18] Shorn of euphemistic verbiage the new approach stated that since refugees from the South were now making their way to the North, and since there was at present no shortage of labour, it was time to rethink the solution of resettlement in other than the limited Cold War context. Even as this argument was being advanced, and despite the Office of the High Commissioner for Refugees complaining that the solution of voluntary repatriation had "not been examined in any depth by

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[15] *Ibid.*

[16] *Ibid.* p. 255.

[17] Gervaise Coles, "The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry", in Alan E. Nash (ed.), *Human Rights and the Protection of Refugees under International Law* (Nova Scotia: Institute for Research on Public Policy, 1988), pp. 195-221 at pp. 216-17.

[18] *Ibid.*

experts or scholars",[19] the Executive Committee of the UNHCR proceeded to adopt in 1985 a major conclusion on the subject.[20] A few years later, unconstrained by the politics of the Cold War, UNHCR declared the decade of 1990s to be the decade of repatriation. Needless to add, it was not the sudden availability of scholarly studies which emboldened the organization to make such an announcement.

On the contrary, from the very beginning scholars such as Harrell-Bond warned that "there are no published research data which could be used to test the assumptions which govern current policies and practices of governments and international agencies".[21] Subsequently, other researchers noted that "what is being promoted as the most desirable solution to refugee crises is a poorly understood social and spatial phenomenon".[22] However, the advocates of voluntary repatriation simply assumed that all refugees desired to go home. It was not seen as a "hypothesis to be tested", but as a statement of fact which presumed knowledge of refugees.[23]

Those who undertook the more difficult task of testing the hypothesis discovered, however, that there were a number of situations in which refugees did not want to go home. First, it was found that the passage of time can be a crucial factor when it comes to a decision to return. Thus, second generation refugees may not want to return to a home they know little about.[24] Second, exile affects individuals and groups in a profound way so that the meaning of home is often transformed. "Home is where you make it" is the title of a recent article on "repatriation and diaspora culture among Iranians in Sweden". It suggests that "the diaspora consists of 'multiple' homes including the original homeland which is merely 'the place of nostalgia' as opposed to other homes which meet more practical needs. Thus 'returning' home can mean returning to a home other than the

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[19] UNHCR study cited by Stein, *Voluntary Repatriation*, p. 202.

[20] UNHCR Executive Committee, Conclusion No. 40 (XXXVI) on Voluntary Repatriation (1985).

[21] Barbara Harrell-Bond, "Repatriation: Under What Conditions is it the Most Desirable Solution for Refugees? An Agenda for Research", *African Studies Review*, Vol. 32, (1989), pp. 41-69 at p. 43.

[22] Johnathan Bascom, "The Dynamics of Refugee Repatriation: The Case of Eritreans in Eastern Sudan", in W.T.S. Gould and A.M. Findlay (eds.), *Population Migration and the Changing World Order* (New York: John Wiley and Sons, 1994), p. 226. See also Norwegian Government, Department of Immigrant and Refugee Affairs, *Refugees and Repatriation: Our Current Knowledge on the Subject* (Oslo, May 1994). The study states at p. 5: "Even if repatriation has come more and more in focus, there is a lack of conceptual and empirical knowledge about the issue, especially in regard to why the refugees return and which factors influence their decision."

[23] D.C. Sepulveda, "Challenging the Assumptions of Repatriation: Is it the Most Desirable Solution?" (1996), unpublished paper on file with the author, pp. 12-13.

[24] John R. Rogge, "Repatriation of Refugees", in Tim Allen and Hubert Morsink (eds.), *When Refugees Go Home: African Experiences* (United Nations Research Institute for Social Development, 1994), pp. 14, 24, 31-4, 43-6.

original homeland".[25] Third, a gendered view of exile and return contested the "cozy image of home" projected by the advocates of repatriation.[26]

However, despite this evidence, the tendency to generalize "the refugee experience", particularly as an expression of loss, did not subside.[27] The simplest explanation for this is that an idealized image of return helped legitimize measures which compelled refugees to return. Furthermore, once this image was captured and set out in legal terms it tended to occlude the consideration of alternative solutions as being beside the point. For example, in her recent book on the legal aspects of voluntary repatriation Zieck states categorically: "Although it is often assumed that everyone wants to return to the country of origin, i.e. 'home', no attempt will be made to assess the validity of the assumption since it appears, in the absence of other options, to be largely irrelevant."[28]

From 1993: safe return

The crisis in former Yugoslavia led to "a resurgence of interest among Northern governments in the [1951] Convention's paradigm of temporary protection, including the right to repatriate when refugee status comes to an end".[29] It was now discovered that the 1951 Convention did not require the application of the standard of voluntary repatriation. It merely called upon state parties to ensure safe return.[30] For the requirement of voluntariness is not mentioned in the 1951 Convention; it finds a place only in the Statute of the Office of the High Commissioner for Refugees. Therefore, according to Hathaway, "it is wishful legal thinking to suggest that a voluntariness requirement can be superimposed on the text of the Refugee Convention".[31] In his opinion, "once a receiving State determines that protection in the country of origin is viable, it is entitled to withdraw refugee status".[32]

However, we need to stop and remind ourselves here that despite the inclusion of the cessation clause in the 1951 Convention interna-

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[25] Mark Graham and Shahram Khosravi, "Home is Where You Make It: Repatriation and Diaspora Culture among Iranians in Sweden", *Journal of Refugee Studies*, Vol. 10, No. 2 (1997), pp. 115-33.

[26] See for example, Helia Lopez Zarzosa, "Internal Exile, Exile, and Return: A Gendered View", *Journal of Refugee Studies*, Vol. 11, No. 2 (1998), pp. 189-99.

[27] L. Malkii, "Refugees and Exile: From 'Refugee Studies' to the National Order of Things", *Annual Review of Anthropology*, Vol. 24, (1995), pp. 495-523.

[28] Zieck, *UNHCR and Voluntary Repatriation*, p. 447, fn. 77.

[29] James C. Hathaway, "The Meaning of Repatriation", *International Journal of Refugee Law*, Vol. 9, No. 4 (1997), pp. 551-8 at p. 553.

[30] "The notion of safe return" has, as Goodwin-Gill points out, "come to occupy an interim position between the refugee deciding voluntarily to go back home and any other non-national who, having no claim to international protection, faces deportation or is otherwise required to leave." Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd edn. (Oxford: Clarendon Press, 1996), pp. 275-6.

[31] Hathaway, "The Meaning of Repatriation", p. 553, fn 29.

[32] *Ibid.*, p. 551.

tional refugee law was at the time of its drafting firmly wedded to an exilic bias. In other words, as Goodwin-Gill points out, the Convention "was drafted at a time when voluntary repatriation was effectively obsolete".[33] It is therefore not surprising that the requirement of voluntariness did not find a mention in what was initially a Eurocentric Convention, the chronological and geographical limitations of the 1951 Convention only being lifted in 1967. Second, the task of ensuring adherence to the standard of voluntary repatriation had in the past been assigned to an international agency, that is, the IRO. It was perhaps the reason that the requirement of voluntariness found a mention in the Statute and not in the Convention. Furthermore, the preamble to the Statute calls upon states to assist the Office of the High Commissioner for Refugees to promote the voluntary repatriation of refugees. States could hardly have been expected to do so by denying the requirement of voluntariness.

As for the claim that it is for the host State alone to decide when protection in the country of origin is viable, it has been perceptively observed: "State proponents of 'safe return' effectively substitute 'objective' (change of) circumstances for the refugee's subjective assessment, thereby crossing the refugee/non-refugee line."[34] The refugee/non-refugee line was, however, crossed well before the idea of safe return was advanced. In my view, once refugee determination authorities began to rely on objective factors, as opposed to a combination of subjective and objective factors, to determine refugee status, the standard of voluntary repatriation was undermined. It has been aptly observed that "refugees are by definition 'unrepatriable' … as long as a person satisfies the definition of refugee in the contemporary instruments, he remains ... 'unrepatriable' and consequently benefits from the prohibition of forced return".[35] To put it differently, it is difficult to justify the statist interpretation of safe return without at first giving the word "refugee" a different meaning. Thus, for example, it is no accident that Hathaway who supports the idea of safe return has all along been a proponent of what I call objectivism in the determination of refugee status.[36]

Objectivism, in my view, disenfranchises the refugee through eliminating his or her voice in the process leading to the decision to deny or terminate protection.[37] Lyotard has termed such objectivism an ethical tort; it has been described as "an extreme form of injustice in which the injury suffered by the victim is accompanied by a deprivation of the means to

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[33] Guy S. Goodwin-Gill, "Editorial", *International Journal of Refugee Law*, Vol. 7, No. 1, (1995), p. 8.

[34] Goodwin-Gill, *The Refugee in International Law*, p. 276.

[35] Zieck, *UNHCR and Voluntary Repatriation*, pp. 101-2.

[36] James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 65-97.

[37] See Patricia Tuitt, *False Images: The Law's Construction of the Refugee* (London: Pluto Press, 1996), chapter 5.

prove it".[38] Objectivism is sustained on the mistaken view that there are facts out there waiting to be discovered in order to arrive at a just decision with respect to the denial or termination of protection. Unfortunately, however, facts do not exist outside the world of interpretation.[39] Therefore, most often, what objectivism tends to do is to substitute the subjective perceptions of the State authorities for the experience of the refugee. Its injustice relates above all to the fact that "all traces of particularity and otherness are reduced to a register of sameness and cognition", whereas fear, pain and death are "radically singular; they resist and at the limit destroy language and its ability to construct shared worlds".[40]

It is the objectivistic interpretation of the cessation clause contained in the 1951 Convention which permits the argument that it is for the state alone to decide when there has been a sufficient change in the circumstances in the country of origin. It represents at best one possible, albeit dubious, interpretation of the 1951 Convention. This becomes clear when you take into account the simple fact that for decades it was the practice of Northern states, and continues to be the practice of UNHCR, to consider a combination of objective and subjective factors to determine refugee status.[41]

Is it not strange that whereas the element of subjectivity is celebrated when it translates into the spontaneous return of the refugee, it is ignored when it involves a decision to stay. In this scheme of things, refugees are rational actors when they decide to return but are moved by extraneous motives if they decide to stay? In the same vein, you are charged with ignoring refugee voices when you suggest, for instance, that UNHCR should not promote spontaneous return unless it is convinced that the

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[38] See Costas Douzinas and Ronnie Warrington, "A Well-Founded Fear of Justice: Law and Ethics in Postmodernity", in Jerry Leonard (ed.), *Legal Studies as Cultural Studies* (New York: State University of New York Press, 1995), pp. 197-229 at p. 209.

[39] As H.L.A. Hart, perhaps the most famous advocate of legal positivism this century, has written: "Fact situations do not await us neatly labelled, creased and folded; nor is their legal classification written on them to be simply read off by the judge. Instead, in applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand …." H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983), pp. 63-4.

[40] Douzinas and Warrington, "A Well-Founded Fear of Justice", p. 209.

[41] The principles of interpretation of treaties laid down in the Vienna Convention on the Law of Treaties 1969 states in Article 31(3) (b) that to the interpretive exercise is important "any subsequent practice" of states "which establishes the agreement of the parties regarding its interpretation". UNHCR's authoritative *Handbook on Procedures and Criteria for Determining Refugee Status* was written as late as 1979 and has remained unchanged since, although it was re-edited in January 1992. "The standard of proof for bringing refugee status to an end", as Goodwin-Gill has rightly pointed out, "is the balance of probabilities—is the nature of the changes such that it is more likely than not that the pre-existing basis for fear of persecution has been removed? ... [C]hange alone may be insufficient; it is relevant only in relation to the claim, as part of the evidence of the existence or non-existence of risk". Goodwin-Gill, *The Refugee in International Law*, p. 87.

return can take place in safety and dignity. On the other hand, when refugee voices are in favour of staying and UNHCR protests their return, little heed is to be paid to these voices. This "heads I win and tails you lose" logic needs to be squarely rejected.[42]

Objectivism, finally, does not merely mean that the state decides when it is safe for a refugee to return but also whether it is necessary for him or her to return to the place from where he or she fled. In this instance too the appropriate move has already been made in the realm of status determination. The idea of safe return is thus linked to the idea of the internal flight alternative (IFA).[43] This understanding merely carries the disenfranchisement of the refugee a step further. Apart from being forcibly returned to a place where the refugee has no desire to return, it confronts him or her with a host of difficult problems relating to property claims, employment, education etc. For example, the experience of returnees to post conflict Bosnia with the Commission on Real Property Claims set up under the 1995 Dayton Peace Accord has been that its decisions are never implemented by the local authorities concerned.[44] In other words, objectivism means that the refugee has to undergo the trauma of displacement a second time around.

From 1996: involuntary return

The doctrine of imposed return was "officially" aired first by Dennis McNamara, the Director of UNHCR's Division of International Protection (DIP), in September 1996. Under a doctrine of "imposed return", refugees may be sent back "to less than optimal conditions in their home country" against their will.[45] It is important to try and understand, even as we are critical, the circumstances under which he advanced the idea of imposed return. First, of course, there is the reality that involuntary repatriation is taking place in large numbers today. As one UNHCR publication bluntly puts it: "it is quite clear that a large proportion of the world's recent returnees have repatriated under some form of duress".[46]

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[42] For example, a group of Dutch non-governmental organizations (NGOs) have contended that for the most part the conditions under which repatriation must take place for both rejected asylum seekers and those who, having been given exceptional leave to remain, subsequently have to return to their own countries, are those spelled out by UNHCR in its Handbook entitled *Voluntary Repatriation: International Protection*, (Geneva: UNHCR, 1996). See Working Group on International Refugee Policy, "Guidelines for NGOs in Relation to Government Repatriation Projects", *Journal of Refugee Studies*, Vol. 11, No. 2 (1998), pp. 182-8.

[43] Goodwin-Gill, *The Refugee in International Law*, p. 276.

[44] "Bosnian Property Commission Struggles to Fulfill its Potential", *The Forced Migration Monitor*, No. 25 (New York: Open Society Institute, September 1998), pp. 1-3.

[45] Reuters, 29 September 1996.

[46] UNHCR, *The State of the World's Refugees: A Humanitarian Agenda* (Oxford: Oxford University Press, 1997), p. 147.

From the reality of involuntary repatriation has emerged the growing belief that the standard of voluntary repatriation needs to be contextualized. For, after all, the reasoning goes, repatriation takes place under a variety of different conditions and it is unrealistic to insist on adherence to the standard of voluntariness without taking into account the peculiar conditions in which it has to be practised. For example, in recent years UNHCR's Division of International Protection has had to confront situations under which it is said to have been "torn between the urge to stick to the spirit of international instruments and the need to find a viable solution in an environment increasingly hostile to refugees".[47] The Division's sticking to first principles has on occasions meant its marginalization in the UNHCR decision-making process.[48] In airing the doctrine of imposed return the Director of the Division of International Protection was presumably stating that in the future his division should not be expected to stick to first principles in all circumstances.

Once it is conceded that the standard of voluntary repatriation has to be made context sensitive there is a need to identify the situations in which it may be neglected. Such exercises are already underway. For example, Bayefsky and Doyle (relying on discussions held in a workshop on Sustainable Refugee Return in Princeton University in early 1998) have drafted a set of "Guidelines and Principles for Safe and Sustainable Return". One guideline is entitled "Mandating Non-Voluntary Return" and reads as follows:

> "The Security Council or appropriate regional body could authorize a non-voluntary repatriation if it determined that the conditions of asylum were (a) more dangerous and debilitating than those in the country of origin and (b) were not correctable by the actions of the host state, with international assistance. The conditions in the country of origin justifying such a decision would need to include both of the below:
>
> - a reasonable expectation of the provision of basic human needs, including shelter, nutrition, and basic human rights, including freedom from gross violations of the integrity of the person (murder, torture, arbitrary imprisonment).
>
> - the national standard of human rights could be enjoyed by the returnee population on a nondiscriminatory basis".[49]

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[47] Joel Boutroue, *Missed Opportunities: The Role of the International Community in the Return of the Rwandan Refugees from Eastern Zaire*, Working Paper No. 1 (Boston: Massachusetts Institute of Technology, June 1998), p. 20.

[48] *Ibid.*

[49] *Sustainable Refugee Return: A Report of a Workshop at Princeton University, 13-14 February 1998*, pp. 23-4.

This guideline is an open invitation to third states to deny assistance and to host states to create the circumstances in which refugees may be compelled to return to the country of origin. Further, giving the UN Security Council the authority to decide when non-voluntary repatriation is justified is to guarantee that political rather than humanitarian factors will influence the decision.[50]

Second, it is said that from the point of view of international law, where prima facie determination of refugee status is arrived at in the context of a mass influx, "it might at times be at odds with UNHCR's insistence that repatriation must be viewed from an international [*sic*] angle".[51] In my view the fact of mass influx has no direct bearing on the standards which control return. The standard of return is linked more to the principle of *non-refoulement* which applies not merely to those granted refugee status or an intermediate humanitarian status, but also to asylum seekers. Furthermore, in the context of mass influx and return there is available, as Zieck has pointed out, "a body of *leges speciales*" constituted by the numerous bilateral and tripartite agreements entered into by UNHCR, the country of asylum, and the country of origin to regulate the modalities of return.[52] According to Zieck, the agreements

> "presuppose that the refugees whose return is thus regulated (regardless of whether or not their entitlements derive simultaneously from other applicable agreements, universal or regional customary international law, or even *comitas gentium*) are unrepatriable .... and that both UNHCR and the country of refuge are *bound* to observe the prohibition of *refoulement* (regardless of whether or not that obligation may be derived from other sources of law)".[53]

Third, it is said that "in the era of mass movements the doctrine of individual expression of free will to return has been less relevant and less used (as a term). What we see are decisions by authorities and leaderships followed by acceptance by the masses".[54] The relevant literature, however, seems to suggest that there is a need to question whether "authorities and

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[50] The participants in the Princeton workshop were therefore right to state that, while the standard of voluntary repatriation is "often difficult to meet in practice, the consequences of abandoning it as a principle are potentially very harmful" *ibid.*, p. 19. Yet on the assertion that the drafted guidelines and principles reflected "a widely shared view" Bayefesky and Doyle have proceeded to erode the standard of voluntary repatriation.

[51] For example, see Boutroe, *Missed Opportunities*, p. 20, fn. 63.

[52] Zieck, *UNHCR and Voluntary Repatriation*, p. 107.

[53] *Ibid.*, p. 108.

[54] Dennis McNamara made this point in his presentation to the Princeton workshop, p. 6.

leaderships" always represent the interests of the refugees.[55] Without implying that all traditional structures are necessarily undemocratic efforts clearly need to be made to democratize the world of refugees before accepting that decisions of authorities and leaderships are in the best interests of refugees.

Finally, as McNamara pointed out in his Washington presentation, "imposed return has become necessary because of pressure from host states and a lack of money to care for refugees".[56] I would like to suggest this indeed is the real reason why involuntary repatriation is coming to be so widely discussed and practised in the Third World. The pressure from the host states is increasing because they are most often extremely poor countries and are confronted with a situation in which Northern states are unwilling to actualize the principle of burden sharing. The absence of burden sharing is manifested, it needs to be emphasized, both at the level of asylum and at the level of resources. The regime which the Northern states have constructed to prevent refugees from reaching their shores, and the unseemly hurry to return refugees from former Yugoslavia, has taken away their moral authority to protest at involuntary repatriation when this takes place in the South.[57] On the other hand, the unwillingness of the North to share the burden of the poor host states at the level of resources has meant that the "refugees must either repatriate or become the sole responsibility of the host state".[58]

Take the case of Zaire and Tanzania which gave asylum to 2,500,000 Rwandan refugees in 1994. They are among the poorest countries in the world with a ranking according to the United Nations Development Programme human development index (HDI) of 142 and 149 out of 179 respectively.[59] Given the absence of burden sharing and the economic crises which afflict the two countries, the decision of Tanzania, for example, to abandon its open door policy has been correctly characterized as

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[55] See for example Barbara Harrell-Bond, "Humanitarianism in a Straightjacket", *African Affairs*, Vol. 84, No. 334 (January 1985), pp. 3-15 at p. 12; Johan Pottier, "Relief and Rehabilitation: Views by Rwandan Refugees; Lessons for Humanitarian Aid Workers", *African Affairs*, Vol. 95 (1996), pp. 403-29 at p. 429.

[56] Reuters, 29 September 1996.

[57] In relation to recent US policies Frelick writes: "Africa, which for decades stood as a shining example of solidarity and hospitality, retreated from fundamental principles. On both sides of the continent, the spirit of generosity withered. ... Like it or not, U.S. actions set a standard. If the United States treats refugees and asylum seekers without regard to fundamental refugee principles, rest assured that other countries will cite that as justification for their own misbehavior." Bill Frelick, "The Year in Review", *The World Refugee Survey* (New York: United States Committee for Refugees, 1997), pp. 14-19 at p. 14.

[58] Bonaventure Rutinwa, "Beyond Durable Solutions: An Appraisal of the New Proposals for Prevention and Solution of Refugee Crisis in the Great Lakes Region", *Journal of Refugee Studies*, Vol. 9, No. 3 (1996), pp. 312-26 at p. 318.

[59] United Nations Development Programme, *Human Development Report 1997* (New York: Oxford University Press).

being "unfortunate but understandable".[60] Tanzania, as has been pointed out, "survives on loans from the World Bank and the IMF [International Monetary Fund], whose conditions include charging the public for every service, including health care and education, and removal of government subsidies on basic amenities. It is unrealistic to expect a country in such a desperate state to be generous to refugees",[61] in particular if the rich states have behaved no differently in the recent past [62] and refuse to share the burden of the poor host state.[63] The situation is not unique to Tanzania. Several other host countries which offer refuge to thousands and thousands of refugees are among the poorest in the world including, for instance, Guinea (HDI ranking 167), Uganda (HDI ranking 159), Sudan (HDI ranking 158), Nepal (HDI ranking 154), Bangladesh (HDI ranking 144), and Pakistan (HDI ranking 139).

What does this mean for refugees? It often means that "a life of exile is for many a life of misery–of poverty, dependency and frustration".[64] The situation is not new. Examining the repatriation of Ugandan refugees from Sudan and Zaire in the early 1980s, Jeff Crisp has written:

> "For the largest group of returnees, repatriation has more to do with the quality of life in Sudan and Zaire than conditions in their homeland. ... Food and medical supplies were often in acutely short supply in the refugee camps of Southern Sudan. By August 1984 the problem of hunger was becoming especially serious in the older settlements where food aid had been withdrawn. For refugees suffering in this way, *anything* was better than the prospect of indefinite exile".[65]

Indeed, the protection and assistance available has often been so inadequate that refugees have preferred to return to continuing insecurity at home. In such circumstances, they can hardly be said to have exercised a free choice.[66]

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[60] Bonaventure Rutinwa, "The Tanzanian Government's Response to the Rwandan Emergency", *Journal of Refugee Studies*, Vol. 9, No. 3 (1996), pp. 291-302 at p. 300.

[61] *Ibid.*

[62] "In closing its borders, the Government of Tanzania appears also to have been emboldened by the behaviour of major powers in similar situations. Citing the examples of the Haitian refugees, the Cuban exodus and the saga of the so-called boat people, the Minister for Foreign Affairs said that it was a double standard to expect weaker countries to live up to their humanitarian obligation when major powers did not do so whenever their own national rights and interests were at stake." *Ibid.*, p. 298.

[63] "Failure of the international community to give adequate assistance was the main reason for the closure of the border." *Ibid.*

[64] UNHCR, *The State of the World's Refugees: The Challenge of Protection*, (Harmondsworth: Penguin Books, 1993), p. 104.

[65] Jeff Crisp, "Ugandan Refugees in Sudan and Zaire: The Problem of Repatriation", *African Affairs*, Vol. 86, No. 4 (1986), pp. 163-80.

[66] *Ibid.*, p. 104.

Of course all this does not mean that we need to accept morally offensive notions of burden sharing which would have Northern states pay for the care of refugees in exchange for being refugee free states.[67] Such a proposal seeks to mock at the poverty of the Southern states. It is not realism but arrogance and a certain moral insensitivity which dictates such solutions.

The New Focus on Returnees

The growing emphasis on repatriation has turned the attention of the international community towards "problems of return" where it has been confronted with the reality that the countries of origin are very often poorer than the countries from which refugees are being returned. Comparing the data on refugee movements and the UNDP's human development index, UNHCR's *The State of the World's Refugees* noted in 1995:

> "Countries with the lowest ranking on the HDI have by far the highest propensity to generate large movements of refugees and displaced people. Thus of the 30 states at the bottom of the index, half have experienced substantial forced migration ..., including many of the countries most seriously affected by the problem of human displacement: Afghanistan, Angola, Bhutan, Burundi, Liberia, Rwanda, Sierra Leone, Somalia and Togo".[68]

It is not surprising then that the governments of countries of origin are often in no position to assume responsibility for the reintegration of returning refugees and other displaced populations. This fact highlighted the problem with the traditional approach to repatriation which focused on the immediate consumption needs of returnees and did little to initiate and sustain a development process necessary to prevent further crises and population displacements in the country of origin.[69]

In considering the problems of returnees it has also been realized that it is often inappropriate to distinguish between refugees and internally dis-

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[67] See James C. Hathaway and R. Alexander Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection", *Harvard Human Rights Journal*, Vol. 10 (Spring 1997), pp.115-211; James C. Hathaway, *Reconceiving International Refugee Law* (Dordrecht: Martinus Nijhoff Publishers, 1997).

[68] UNHCR, *The State of the World's Refugees: In Search of Solutions* (Oxford: Oxford University Press, 1995), p. 147.

[69] *Ibid.*, p. 176; Gorman and Kibreab, "Repatriation Aid", pp. 42-3. Indeed, if anything the focus on development of the host country created the conditions in which refugees would not be expected to return. After all, as Crisp has observed (in the context of the return of Ugandan refugees from Sudan and Zaire) "assistance distributed in the latter [i.e. host country] should be less than that available in the former if the refugees were to be persuaded to accept 'voluntary' repatriation". Crisp, "Ugandan Refugees", p. 177.

placed persons (IDPs).[70] For returnees are only "displaced persons of a special kind" and their numbers are likely to reduce in the future when compared with the number of IDPs.[71] Thus, "it can no longer be assumed that the needs of returning refugees are any greater than those of other citizens affected by war and the loss of development opportunities".[72] There is even the suggestion that returning refugees should not be given grants as this tends to discriminate against IDPs.[73]

The role of UNHCR has been transformed in the light of these concerns. According to Gorman and Kibreab: "until recently, the bulk of the UNHCR assistance programmes were almost exclusively channeled to countries of asylum. ... Reintegration was primarily considered the responsibility of the home country, and was expected to occur spontaneously".[74] However, today UNHCR has become extensively involved in the task of returnee integration.[75] Indeed, the UNHCR has played "a vanguard role" in the move away from the traditional approach to the solution of voluntary repatriation.[76]

I want briefly to explore here the wider meaning of this focus on returnee aid. In my view the justification for returnee aid involves the recognition that economic or material factors play a critical role in causing refugee flows, as also in the rehabilitation and reintegration process.[77]

[70] "Attention focusing only on returnees would merely plant the seed of divisiveness and render the reconciliation process even more complex." UNHCR document cited by Gorman and Kibreab, "Repatriation Aid", p. 42.

[71] UNHCR, *State of the world's Refugees* (1997), pp. 152 and 147.

[72] *Ibid.*, p. 173.

[73] "The distribution of grants to refugee families should be discontinued or seriously reduced. The issuing of grants to returning refugee families exacerbates economic inequalities and is socially and politically risky. It is also an inefficient use of financial resources." Richard Jacquot, "Managing the Return of Refugees to Bosnia and Herzegovina", *Forced Migration Review*, Vol. 1, No.1 (January-April 1998), pp. 24-6 at p. 26.

[74] Gorman and Kibreab, "Repatriation Aid", p. 41. Zieck, *UNHCR and Voluntary Repatriation*, likewise writes at p. 94: "UNHCR's contribution in assistance remained limited to supplying relief items to returnees such as short-term grant of food, a cash travel allowance, roofing materials, basic farming tools, and household items, on the assumption that reintegration would occur spontaneously and that other actors, in particular the government of the country of origin with the assistance of development agencies, would take responsibility for the reintegration of returnees in the context of national development programmes".

[75] Zieck, *UNHCR and Voluntary Repatriation*, p. 167. The role originally envisaged for UNHCR did not envisage the new development. Zieck writes at p. 96: "Originally UNHCR's role was considered, in accordance with the pertinent cessation clauses, [to be] to halt at the borders of the country of origin: upon re-entry the refugee ceased being a refugee and the competence of UNHCR ended simultaneously."

[76] *Ibid.*, p. 41. Whether UNHCR will continue to play an important role will depend upon the financial resources made available to it.

[77] As *The State of the World's Refugees* (1993) put it at p. 112: "There is a growing realization that extreme deprivation and competition for resources can re-ignite conflict and undermine the achievements of a fragile peace. ... If repatriation is not linked to the rehabilitation of productive capacity, a vicious circle of renewed disintegration and displacement is likely to emerge. The development gap, for this reason, represents a problem of protection as well as assistance."

As Bill Frelick points out, "the suggestion that development is an indispensable component for solving the refugee dilemma implies that the grounding for displacement is economic".[78]

The simple recognition that economic factors have a role to play in causing displacement, important as it is, is not, however, enough. There is a need to identify the different internal and external economic factors at work. For instance, when it comes to returnee aid "economic factors" or "development" are generally defined in narrow terms. The scope of returnee aid is delineated with the objective of establishing minimum material conditions in which the return of refugees can be promoted. The strategy is perhaps best epitomized by Quick Impact Projects (QIPs) executed by UNHCR to help the reintegration process. QIPs are essentially "emergency development" projects which do not take into account the long term problems of recurrent costs and sustainability.[79] Yet the weakness of QIPs merely reflects the "outer limit" of UNHCR's mandate; it can hardly be blamed for this.[80] The situation of the non-governmental organization (NGO) community is no different. With its limited resources it can at best pursue limited developmental objectives. In other words, both UNHCR and the NGO community cannot address the structural economic problems in the country of origin.

Such problems have to be addressed by the international community, in particular those powers which formulate global economic policies. First, of course, large-scale aid needs to be offered to the country to which refugees are returning, except that Northern states are unwilling to earmark the necessary resources for this purpose. For example, in his recent report on Africa Kofi Annan, the UN Secretary-General, notes the absence of support for a number of key reconstruction and development projects identified by the Government of Rwanda.[81] Second, there is a need to address the international economic factors which are responsible for the problems in the country of origin and which contributed to creating the climate in which displacement took place. For example, the role of international financial institutions in cre-

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[78] Bill Frelick, "Afterword: Assessing the Prospects for Reform of International Refugee Law", in Hathaway (ed.), *Reconceiving International Refugee Law*, pp. 147-57 at p. 151. This recognition should make us view with suspicion any explanation which attributes the cause of displacement, for example, in countries like Rwanda and former Yugoslavia to notions like ethnicity; the competition for resources explanation can always be put forward as a more plausible explanation. However, it may be noted that Frelick questions this understanding, in my view erroneously.

[79] Gorman and Kibreab, "Repatriation Aid", pp. 47-9.

[80] In fact, as Gorman and Kibreab have pointed out, "within its limited institutional framework, UNHCR has been trying innovatively to adapt to new situations either by the flexible use of its limited mandate or by seeking authority from governments". *Ibid.*, p. 48.

[81] Report of the United Nations Secretary-General to the Security Council, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, (New York: United Nations, April 1998), p. 14.

ating conditions of conflict in Africa is conceded even by the UN Secretary-General in his report on the subject.[82] He has therefore recommended "a 'peace-friendly' structural adjustment programme" and pleaded with the international financial institutions to ease the conditionalities that normally accompany loans.[83] Yet will this happen? It raises the question as to why the conditionalities were imposed in the first place. This is an important question because often the objective of the narrow development approach is to restore the pre-war economy, overlooking the fact that the conflict may have been caused by precisely those pre-war conditions.[84]

The creation of minimum economic conditions of return is also accompanied by an endeavour to create the minimum political conditions of return. The keys to the creation of minimum political conditions are seen to be the conduct of free and fair elections and "the presence of an accountable state which is able to fulfill rudimentary functions such as control over territory, maintenance of law and order, and supply of basic services" which are necessary to successful and permanent repatriation.[85] In this direction UNHCR seeks, for example, to maximize the number of returnees who can participate in the electoral process. It also helps in the difficult task of establishing or sustaining institutions which will safeguard the human rights of returnees and other displaced populations.[86] The NGO community also contributes to this process. In other words, UNHCR and the NGO community contribute in ways they can to support democratic conditions and practices in the state of origin.

However, as in the case of root economic causes, UNHCR and the NGO community cannot address the root political causes of the conflicts which led to the outflow of refugees. Thus they can in no way ensure that political democracy will lead to social and economic democracy. In the words of Chabal: "I am not saying that elections are unimportant; merely that they are no substitute for effective political accountability."[87] Often the meaning of "an accountable state" turns out to be a state which can come to terms with the legitimacy crises and social protest generated by the implementation of a neo-liberal adjustment programme and greater

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[82] "In many African countries painful structural adjustment programmes have led to a significant reduction in social spending and consequent reductions in the delivery of many of the most basic social services. Especially when this is coupled with a perception that certain groups are not receiving a fair share of diminishing resources, the potential for conflict is evident." *Ibid*., pp. 18-19.

[83] *Ibid*., p. 15.

[84] David Keen, *The Economic Functions of Violence in Civil Wars*, Adelphi Paper No. 320 (London: International Institute for Strategic Studies, Oxford University Press, June 1998), p. 13.

[85] Gorman and Kibreab, "Repatriation Aid", p. 68.

[86] UNHCR, *The State of the World's Refugees*, 1997, p. 168.

[87] Patrick Chabal, "A Few Considerations on Democracy in Africa", *International Affairs*, Vol. 74, No. 2 (April 1998), pp. 289-305 at p. 302.

integration into the world economy.[88] What is established is a system of polyarchy in which "mass participation in decision-making is confined to leadership choice in elections carefully managed by competing elites".[89]

I think the concerned non-Northern membership of international institutions and the NGO community need to understand and come to terms with the strategy of dominant states. The Northern states seek to use the humanitarian community to establish in post conflict societies a political system which is better equipped to manage the internal competition for material resources, without taking any step to withdraw at the international level measures (usually promoting a neo-liberal adjustment programme) which adversely affect the effort to augment and fairly distribute resources. To put it differently, the enormous commitment of the humanitarian community is, it would appear, being mobilized to sustain an unjust international system manifested periodically in crisis and conflict in the countries of the South.

This is not to suggest that the humanitarian community should stop offering assistance and protection to those in need or to promote democratic institutions but that it should be more aware of the function it has been assigned in the larger scheme of things and that it should critique from this perspective the practices of the Northern states. Academics, for example, have been alert to the possibility of their services being used to legitimize projects which bring little advantage to groups in whose name the project is implemented. "Anthropologists for Sale?" is the title of a recent essay. In it Ioan Lewis, Emeritus Professor of Anthropology at the London School of Economics, points to "the increasing use of anthropologists to *legitimate* development projects" and cautions against being "manipulated as required by powerful economic and political interests".[90] My intention here is simply to widen the scope and constituency of Lewis' appeal. In other words, international institutions and NGOs also need to reflect on the manner in which their services are used to sustain an iniquitous system.

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[88] That it has to be neo-liberal adjustment becomes clear from the policy recommendations made to African countries by the UN Secretary-General: "If Africa is to participate fully in the world economy, political and economic reform must be carried out. It must include predictable policies, economic deregulation, openness to trade, rationalized tax structures, adequate infrastructure, transparency and accountability, and protection of property rights." UN Secretary-General, *The Causes of Conflict*, p. 19.

[89] William I. Robinson, *Promoting Polyarchy: Globalization, US Intervention, and Hegemony* (Cambridge: Cambridge University Press, 1996), p. 49.

[90] I.M. Lewis, "Anthropologist for Sale?", in Akbar Ahmed and Cris Shore (eds.), *The Future of Anthropology: Its Relevance to the Contemporary World* (London: The Athlone Press, 1995), pp. 94-110 at pp. 100 and 101 (emphasis in original).

Conclusion

It has been my contention in this paper that the dominant states in the international system decide from time to time, in the light of their interests, which solution to the global refugee problem should be promoted as the preferred solution. Today, involuntary repatriation is coming to be pursued as a solution to the refugee problem because in the post Cold War era the rich Northern states see no reason to share the burden of the poor South at both the level of asylum and resources. Involuntary repatriation may thus be described as the favoured solution of the Northern states in the era of globalization which is marked by the end of the Cold War and a growing North-South divide.

I would, however, like to end by drawing attention to those situations where refugees want to go home but are unable to exercise their right to return. I have especially in mind the right of Palestinian refugees to return to their country of origin. A recent article in the *Harvard International Law Journal* has, in my opinion, persuasively argued that the right of Palestinian refugees to return to their country of origin rests on several alternative principles of international law which can withstand the different assessments of the factual circumstances of their departure.[91] I conclude by expressing the hope that the ongoing Middle East Peace process will see the right of return of Palestinian refugees realized in the near future.

[91] John Quigley, "Displaced Palestinians and a Right to Return", *Harvard International Law Journal*, Vol. 39, No. 1 (winter 1998), pp. 171-229.

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PROBLEMS OF REFUGEES IN THE DEVELOPING COUNTRIES AND THE NEED FOR INTERNATIONAL BURDEN - SHARING

J.N.Saxena*

One of the biggest political and human tragedies of the Twentieth century, sometimes called the 'century of the homeless man',[1] has arisen in the shape of more than fifteen million refugees and displaced persons in the world today. Forced by man's inhumanity to man, to flee the ravaged lands of their birth, they are in search of a dignified existence, following only one law: the law of survival. We cannot perceive a statistics of '100,000 expelled' unless we visualize a half-starved mother and child and an old grand-father with a bundle of belongings - 100,000 times over. It is this picture of human misery that must be kept in the fore-front when we discuss the issue of 'refugee problems'.

In the first half of this century, the refugee problem was localized within Europe and the numbers involved were in thousands. The Convention Relating to the Status of Refugees 1951,[2] sometimes called the 'Magna Carta of Refugees, was directed mainly towards Eastern-Europe refugee situations created before 1951[3] in the aftermath of World War II. The political changes in the world after 1950, particularly the

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d. Inter-organisational Cooperation

An additional point to be borne in mind for co-operation between the different agencies involved in helping refugees. While the UNHCR may be the organisation most directly concerned with protecting and assisting refugees, in some instances it has been prevented from taking action. The classic case is in relation to the 300,000 Cambodian refugees on Thai soil who, due to political impediments, are not under the mandate of the UNHCR. Assistance and protection for this group are provided by the UN Development Programme via a special operation known as the UN Border Relief Operation and the International Committee of the Red Cross (ICRC).

Interestingly, although the mandate of the UNHCR has been extended in practice to cover those in "refuge-like" situations, it is not always called upon to act even when it seeks to be flexible in its operations. The most recent quandary is the outflow of people from Kuwait and Iraq in the wake of the Iraqi invasion of Kuwait in 1990. This suggests the need to resort to other organisations such as the ICRC and the International Organisation for Migration as fall-back mechanisms to fill loopholes. There is also the potential for interlinking with a host of voluntary agencies working at the local and international levels to provide a more extensive network. Whatever institutional rivalry exists should be dampened for the sake of the needy.

Conclusion

Experience demonstrates that while few would dispute the need for burden sharing, the shadow of burden shifting is ever-present. This is enmeshed in the nexus between the source countries, the first asylum countries and the third countries in the call for international solidarity. The principle is jeopardised at times: the package may fail to function because of military, political and social discrepancies.

In the final analysis, one may observe that while in the past there was a tendency to advocate burden sharing primarily in the context of first asylum countries and third countries, it is high time to push for more. The need to address root causes and the source countries underscores a more balanced framework for international solidarity. It is a shared shift to the elusive premise that prevention is better than cure.

FUGEES IN THE OUNTRIES AND NTERNATIONAL SHARING

J.N.Saxena*

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emergence of new states in most of the regions, led to the conclusion of the Protocol Relating to the Status of Refugees 1967,[4] which recognized that new refugee situations had arisen since 1951 Convention was adopted, and that the refugees concerned might not fall within the scope of the Convention, and provided for the omission of the date of qualification for the status of refugees.

Over the past three decades, the world has faced a series of refugee crisis rather different from those which followed in the wake of the Second World War. They have differed in scale involving hundreds of thousands, even millions of persons. They have been different also in that they have generally affected many Asian, African and Latin American developing countries - countries which even at the best of times find it difficult to cope with problems of their own. Some examples are:

Asia: 10 million people from East Pakistan moving in India in 1971, 3 million Afghan refugees crossing over to Pakistan in 1979, two million Indo-Chinese refugees from Kampuchea, Laos and Vietnam since 1975, specially the plight of boat-people, taking refuge mainly in Thailand, Indonesia, Malaysia and the Philippines.

Africa: 180,000 Algerian refugees went to Morocco and Tunisia in 1957, refugees from territories under Portuguese administration and from South Africa, Namibia and Southern Rhodesia to neighbouring countries, in 1980s, there were 660,000 Ethiopians in Sudan, 325,000 Somalis and 370,000 Sudanese in Ethiopia, and by the end of March 1988; 452,000 refugees were registered in Malawi, 136,000 in Zambia, 79,000 in Angola and 72,000 in Tanzania at present.

Latin America: Large number of refugees from Chile, Brazil and Uruguay in 1973, mainly in Argentina and Perk, in 1982 Salvadorian refugees went to Honduras, 45,000 Gautemalan refugees crossed over to Mexico in 1984, and about one million Haitians and Nicaraguan refugees went to other countries.

A limited number of individual applications for asylum may be completely at variance with the problems that may be created by large-scale influxes or refugees specially for developing countries.

Large-scale influx of refugees in the developing countries impose an immediate problem-people arrive in hundreds of thousands, hungry, thirsty, without shelter and with no more

possessions than they can carry on their backs. They have to be fed, housed and provided with emergency medical needs if epidemics are to be avoided.

Then begins the long-term aspect of rehabilitation. Although virtually all refugees initially expect to return home, sooner than later, very often large numbers of them are unable to return for months or years to come. In this case temporary relief is not helpful. They need means of earning their livlihood, i.e. work, and this may be very difficult in developing countries. The options open are-settlement in the country of first asylum, re-settlement in another country or repatriation to the country of origin. In all these situations, if country involved is a poor developing country, the question of burden sharing becomes very important. But before dealing with such particular problems of these countries, it would be worthwhile at this stage to understand who is refugee.

Who is a Refugee?

The Convention Relating to the Status of Refugees, 1951, whose scope of applicability was extended by the Protocol of 1967, is the most important document on the question of protection of refugees. According to Art. 1(a) (2) of the Convention, the term 'refugee' shall apply to any person who, owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

The Annex. to the Statute of the Office of the United Nations High Commissioner for Refugees 1950,[5] extends the competence of the High Commissioner for the protection of refugees defined in Art. 6A(1) in terms similar to Art.1(A) (2) of the Refugee Convention 1951.

The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969,[6] has extended the definition in the Refugee Convention 1951 to cover in the term 'refugee' also every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality,

is compelled to leave his place seek refuge in another plac nationality. This definition all victims of man-made dis trend for its adoption in t refugee law.

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is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. This definition is wide enough to embrace virually all victims of man-made disasters, and so there is a growing trend for its adoption in the context of general international refugee law.

The U.N. General Assembly in its resolution since 1975 has extented the mandate of the High Commissioner to groups of persons who did not necessarily satisfy the statutory definition of persons within his competence, but who were deemed by the General Assembly to be persons who were his concern and who were entitled to benefit from certain protection activities as well as assistance, thus explicitly linking 'refugees' with the 'displaced persons' in refugee-like situations.

The Report of the Working Group on Current Problems in the International Protection of Refugees and Displaced Persons in Asia, 1981, noted that the definition of the term "refugee" in Article 1 of the 1969 OAU Convention, along with the extended responsibilities of the UNHCR after 1975, had the effect of including within the ambit of its protection, provisions virtually all victims of man-made disasters, including `displaced persons', and approved it in relation to the definition of the term `refugee' in Asia.

The Cartagena Declaration on Refugees of November 1984 proposed an extension of the concept of 'refugee' as applied to Central America, stipulating that a 'massive violation of human rights' should be considered as a legal basis for extended definition of 'refugee'. It laid down that the definition of refugee could not only incorporate the elements contained in 1951 Convention and the 1967 Protocol (or the 1969 OAU Convention and General Assembly resolutions), but also cover persons who have fled their country because their life, their safety or their liberty were threatened by a massive violation of human rights.

There is another development in refugee situations in recent past, giving rise to refugees who leave their country, not due to any fear of persecution, or events seriously disturbing public order, but for economic reasons or other reasons of personal convenience. "Today an explosion of 'power refugees' fleeing the destitution of their homelands, far exceeds the number of 'traditional refugees' fleeing persecution and war".[7] According to Mr.Stoltenberg, UNHCR, it is not possible to accurately

establish the number of 'poverty-refugees' but it is considerably greater than 29 million.[8]

Steps necessary to protect the refugees

The jurisprudential basis of international refugee law was the concept of common humanity and the responsibility of the international community to preserve human life, to promote the well-being of all men, to diminish human suffering as to assist states in providing protection and assistance to refugees.

The problems of large-scale influx of refugees in developing countries thus relate manily to: (a) non-refoulement, (b) asylum, (c) international solidarity, and above all (d) burden-sharing with which this paper is mainly concerned.

a. Non-refoulement

When a person is compelled to leave his country of origin or nationality what is of immediate concern to him is that he should be admitted at the frontier and should not be sent back, nor be punished if he has crossed the frontier illegally.

The principle of non-refoulement has been incorporated in a number of international instruments relating to refugees, both at the universal and aregional levels.

Art.33(1) of the 1951 Refugee Convention states: "No contracting state shall expel or return (refouler) a refugee in any manner what-so-ever to the frontiers of territories where his life of freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". It is also an obligation under the 1967 Protocol by virtue of Art.1(1) of that instrument, and Art.3(1) of the U.N.Declaration on Territorial Asylum provides likewise.

This principle has also been reiterated in Art.VIII of the Asian-African Legal Consultative Committee, Bangkok Principles, 1966, reaffirmed in Art. II(3) of the OAU Convention 1969, adopted in Art.22(8) of the American Human Rights Convention 1969, and recommended in the Resolution on Asylum to Persons in Danger of Persecution, adopted by the Committee of Ministers of the Council of Europe in September, 1969.

The most essential component of refugee status and of asylum is the protection against return reason to fear persecution. T in the principle of non-refoule states. The purpose of non- fundamental rights as life principle has acquired the s international law and "...is a

b. Asylum

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is the protection against return to a country where a person has reason to fear persecution. This protection has found expression in the principle of non-refoulement and is widely accepted by states. The purpose of non-refoulement is to ensure that such fundamental rights as life and liberty are not violated. This principle has acquired the status of a norm of customary international law and "...is a basic humanitarian law principle".[10]

b. Asylum

The principle of non-refoulement constitutes the very basis of the institution of asylum. Art.14(1) of the Universal Declaration of Human Rights lays down, "Every one has the right to seek and enjoy in other countries asylum from persecution". Once a refugee has entered a state other than that of his origin or nationality, his first need is asylum. "Asylum is the protection which a state grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it".[11] The right of asylum was a corollary to the right to life for a refugee.

The view in the traditional international law, which still goes strong, is that asylum is the right of the state. All attempts providing that everyone has the right of asylum from persecution were rejected during the debates on the UN Declaration on Territorial Asylum,[12] and at a Conference in Geneva in 1977 for adopting the Convention on Territorial Asylums.[13] The International Covenant on Civil and Political Rights only states: "Everyone shall be free to leave any country, including his own".

There is, however, a growing opinion that persons leaving their country of origin because of persecution (or a well founded fear thereof), have a primary and essential need to be granted asylum in another country, and they be allowed to stay in the territory of that country, either permanently or, at least, temporarily pending permanent asylum being granted elsewhere, or repatriation to refugee's own country. This view is supported by Art.III(4) of the Principles Concerning Treatment of Refugees (Bangkok Principles 1966). AALCC15, Art.3(3) of the U.N.Declaration on Territorial Asylum, Art.II(5) of the OAU Convention on Refugees, 1969, and the discussions in the

UNHCR's Executive Committee in 1981.

It is important to remember the distinction between the granting of asylum and non-refoulement. Refusal of asylum did not necessarily mean that the applicant had to return to the country from which he fled. Non-refoulement was not always the equivalent of granting asylum.

International solidarity

A basic principle of refugee law is international solidarity - a solidarity which transcends the many different distinctions that are made between human beings. It is clearly linked to the very first article of the Universal Declaration of Human Rights which states: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".

It is the principle of solidarity which established that the refugee is a person of concern to the international community. It is also the principle which establishes the obligation to extend refugee to those compelled to flee social order and violence and to treat them in a manner befitting their dignity. Finally, it is this principle which establishes that states have an obligation to share the responsibility of finding solutions for the people who have been deprived of a community.

In the international solidarity and cooperation for the protection of refugees, and in the effective implementation of the principles relating of asylum and non-refoulement, the institutional arrangements for "burden-sharing" play a very important role, which is discussed below.

Burden - Sharing

When a refugee crosses over to the State of asylum, whether for a temporary period or permanently, there can be no denial that he is a burden on this new state, since one state's refugees are often another state's undesirables. If the number of refugees is small the state may be able to bear the burden. But if there is a mass influx of refugees, the burden will certain be unbearable and more so if the country is poor.

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specially from 1960 onwards in the field of refugee law has been the large-scale influxes of asylum seekers in Asia and Africa and Latin America. As the countries of asylum in all these cases were economically poor developing countries and the phenomenon imposed heavy strains on them, the question of 'burden-sharing' became very important.

The concept of 'burden-sharing', which plays an important role in the protection of refugees, is getting recongnition by the international community.

It was indirectly referred to in the preamble of 1951 Refugee Convention and specially provided in Art.2(2) of the Declaration on Territorial Asylum (1967). The former stated:

> "Considering that the grant of asylum may place unduly heavy burden on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot, therefore, be achieved without international cooperation".

The latter laid down:

> "Where a State finds difficulty in granting or continuing to grant asylum, states individually or jointly or through the United Nations shall consider in a spirit of international solidarity appropriate measures to lighten the burden on that state:.

During the discussion on this article in the Sixth Committee of the General Assembly16, a number of representatives were of the view that paragraph 2 of article 2 was a valuable one which broadened the essentially humanitarian scope of the Draft Declaration and which would lighten the burden of states that had found their resources overtaxed by an influx of refugees. It was most important to provide expressly for the possibility of international assistance in cases where a state found difficulty in granting or continuing to grant asylum, and the inclusion of the paragraph would assist refugee organizations in their work. Since the Draft Declaration called upon states to adopt a liberal policy in matter of asylum, it was only right that states so doing could make certain claims on the international community seeking to alleviate the suffering of refugees who were

dispossessed and destitute of the means of subsistence. If the States in a spirit of international solidarity would be prepared to assist countries which face the onslaught of First Asylum and if they would be willing to cooperative, it will go a long way towards the protection of refugees. From the above provisions and discussions in the United Nations, it is quite apparent that in any protection system applicable universally to mass flow situations, international solidarity is an indispensable and basic element of that system, and international solidarity and burden-sharing are closely related for the cuase of refugees.

The Executive Committee of the UNHCR Programme, in its conclusion No.22(XXXII) on Protection of Asylum-seekers in situations of Large-scale Influx (1981), has observed:

a. It is imperative to ensure the establishment of effective arrangements in the context of international solidarity and burden-sharing for assisting countries which receive large number of asylum seekers.

b. A mass influx may place unduly heavy burden on certain countries, a satisfactory solution of a problem, international in scope and nature, cannot be achieved without international cooperation. States shall, within the framework of international solidarity and burden-sharing, take all necessary measures to assist, at their request, States which have admitted asylum seekers in large scale influx situations.

c. Action with a view to burden-sharing shoudld be directed towards facilitating voluntary repatriation, promoting local settlement in the receiving country, providing resettlement possibilities in third countries as appropriate.

Thus, it is apparent that the factors involved with regard to the burden-sharing are17:

a. Countries of first asylum (temporary or permanent).
b. Countries granting re-settlement.
c. Countries offering other sorts of cooperation (in funds, kinds, personnel or expertise),
d. Countries of origin.
e. International organizations and agencies, and
f. Others (VOL-AGs, local governments, individuals etc.).

Out of this list of actors, and (f) mainly provide econo directly or in coordination v of first asylum, and occa resettlement or countries c

Country of first Asylum

Taking the position of th known that a large number decades have occured in th and Latin America, causing u A view has been gaining g the international community, share the burden, and it sh countries where the mass in view has the support th Convention and the Dec mentioned earlier. It is also affluent states either dire humanitarian agencies, hav shared their burden. India 10 million refugees fro Bangladesh) crossed over such assistance at present due more aid through an interna number. A major internati in April 1980 for assitance about $600 million most assistance. A number of intern have also stressed the need of first asylum.

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Out of this list of actors, those falling in categories (c), (e) and (f) mainly provide economic and technical assistance either directly or in coordination with other states primarily to a country of first asylum, and occasionally to countries granting resettlement or countries of origin.

Country of first Asylum

Taking the position of the first actor in the list, it is well known that a large number of mass exodus during the past three decades have occured in the poor countries of Asia and Africa and Latin America, causing unbearable burden on their economy. A view has been gaining ground that it is the responsibility of the international community, specially the affluent countries, to share the burden, and it should not fall only on the neighbouring countries where the mass influx may take place "Of course, this view has the support the provisions in the 1951 Refugee Convention and the Declaration on Territorial Asylum as mentioned earlier. It is also true that in recent years, many affluent states either directly or through UNHCR or other humanitarian agencies, have helped the first asylum states and shared their burden. India got such assistance in 1970-71 when 10 million refugees from erstwhile East Pakistan (now Bangladesh) crossed over to this country. Pakistan is getting such assistance at present due to Afghan refugees and may seek more aid through an international conference due to their growing number. A major international fund raising conference was held in April 1980 for assitance to refugees in Africa. This raised about $600 million most of which was utilised for emergency assistance. A number of international conferences held in Eighties have also stressed the need for emergency assistance to countries of first asylum.

In most of these assistance programmes, the idea is to facilitate temporary stay on refugees in the country of first asylum. As there are emergency assistance measures, there is a danger that almost unconsciously the international organizations and the international community generally will focus on assistance at the expense of long term or durable solutions, and experience may show that the institutionalisation of assistance at the expense of solutions will create eventually a situation where the problems become too great to bear and the entire

protection system collapses.[19] But it is possible that if such assistance would be extended to promote development projects in certain areas of the country of first asylum, it may even create permanent settlement to a considerable number of refugees, through most of the Afro-Asian developing countries being over-populated, the chances of granting permanent asylum to large number of refugees will remain a matter of speculation.

It is interesting to note that the International Committee on the Legal Status of Refugees of the International Law Association at its Warsaw Conference, 1988, in its Draft Declaration of Principles of International Law on Compensation to Refugees and Countries of Asylum, in addition to the right of refugees to claim compensation from the State of origin or nationality in case they refuse to go back (and this is supported by the resolution of general Assembly, also proposed the right of a country of asylum to claim compensation from the State of origin of the refugees, based on the economic, social and other burdens due to the presence of large number of refugees on its territory.

Country of re-settlement

This leads us to the importance of the second category of actors - countries of re-settlement. "The track record of recent years has been rather good in re-settlement of refugees for whom no other durable solution is in prospect".[20] A large number of refugees from Kampuchea, Laos and Vietnam and some from African countries and Sri Lanka have been resettled in United States, Australia and many European countries. But it will be a delusion to expect that this practice will continue for all times to come. In 1985, well over 100,000 asylum seekers arrived from other countries in Europe alone.

Now these states are complaining that a large proportion of these refugees are not real traditonal refugees, but economic migrants, by-passing normal immigration controls. So these Governments have introduced a wide range restrictive legal and administrative measures, introduced excessing visa requirements, made provisions of imposition of fines on air-lines carrying 'irregular passengers', made more stringent border controls and narrower applications of the criterion for refugee status.

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procedures, it is even more important to ensure that the measures designed to control abuse to do no harm genuine refugees. For them, it is a matter of life and death.

Country of origin

Now we come to the last actor in the category of burden-sharing institutions, viz. the country of origin. It is interesting to note that the responsibility of the countries of origin has often been neglected while discussing the problems of refugees. The emphasis has been on the status of refugees, their obligations and rights in the country of refugee, non-refoulement, asylum, etc., as if the country of origin has no relevant obligations in regard to individuals, and only country of asylum or re-settlement is obliged to assist.

It is, however, accepted on all hands that voluntary repatriation is the most happy solution of the refugees which involves the return of large numbers of refugees to their home country. It is heartening to note that in the last few years repatriation has taken place in Asia, Africa and Latin America in reasonably good measures, the recent one of these being the return of 42,000 Nainebian rules, repatriated in 1989.

A number of International Conferences have been held in eighties in the direction of solving the problem of burden-sharing. Notable among them are: International Conference on Assistance to Refugees in Africa-ICARAI (April 1981) and ICARA II (July 1984); Round Table on Assitance to Refugees; Humanitarian Action and Political Consideration, held in Geneva, May 9, 1987; International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa - SARRED - held in Oslo (1988); International Conference on Central Americal Refugees - CIREFCA - held in Gautemala (May 29-31, 1989); International Conference for Solutions to the long-standing problems of Indo-Chinese refugees and asylum seekers (June 13-14, 1989).

They have stressed relief, care and maintenance assistance in the first instance, assistance to promote durable solutions in the form of voluntary repatriation and local integration of refugees and a critical need for infra-structural development assistance to affected countries to help them and cope with the burden of receiving refugees and returnees as a second step.

The emphasis is on the need to link relief, recovery and development assistance in order to promote self-sufficiency and reduce the burden imposed on host countries and countries of origin, and support the regional peace process through projects designed to integrate refugees, returnees and displaced persons into national development schemes.

Conclusion

Refugee problems have become truly global, and no region or continent lacks refugees. The focus of refugee problems has, however, shifted to the developing countries, and few people any longer entertain the hope that they are temporary.

In gauging the present with the past, so far as refugee problems, specially of developing countries, are concerned, one is obliged to acknowledge that the definition codified in the early 1950s no longer fully take account of the complexities existing today.[21] The clarity of the established legal definitions has become clouded by the diversity of concrete situations and the multiplicity of objective and subjective motivations which encourage a person or a large number of persons to uproot themselves. "The reality is that it is becoming harder and harder to maintain a clear focus on what is the refugee problem today, or who are the victims, what are their rights and legitimate expectations and who owes what responsibilities".[22]

This certainly does not call into question the substance of the High Commissioner's Mandate (1950) or of the 1951 Refugee Convention and Additional Protocol, 1967. It is, however, probable that some of their norms will be challenged or will open the door to counter productive controversy. The best course appears to be to continue on the path of interpretation, taking into account the general approaches like those of AALCC, OAU Convention, the Council of Europe and the Cartagena Declaration, to recognise the need, while reaffirming the basic principles, to adjust them to the new practical exigencies of the situation, "though it must be stressed that strengthened regional efforts must not be at the expense of international burden-sharing."[23]

What is needed is voluntary repatriation of refugees, their settlement in the host countries or their re-settlement in third countries. These solutions are now all the more pressing since:

- no country may unceren minorities upon its n
- the so-called countries majority of refugees
- re-settlement countries c number of asylum consequences.[24]

If 'burden-sharing' is to must recognise what it enta fair asylum policies, anc massive numbers of refug to new arrivals, (b) "it m a reasonable proportion c at home and abroad, and (c) the international commur waste, and the purpose fo all, 'burden-sharing' mea to find lasting solutions f from the developing cou peaceful and productive

Note

1. Elfan-Rees, "Century of No.515 November, 1957.
2. U.N.T.S. no.2545 Vol.189, p
3. Article 1(A) (2) of the C occuring before 1 Januar
4. U.N.T.S.No.8791, vol.606, p
5. G.A.Res. 428(V) of 14 D
6. U.N.T.S.No. 14691.
7. Thorvald Stoltenberg, UNH Hindustan Times 29 Octo
8. Ibid.
9. "Principles Concerning Trea Doc.no.AALCC/XXIV/II,
10. Opening Address by Pre of Refugees in Africa, Arks AC.96/INE 158, 7 Septembe
11. Article 1 of the Resolutic September 1950, 45 A.J.I.L.
12. G.A. Res.2312 of 14 Decem
13. U.N.Doc. A/Conf. 78/D.

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- no country may unceremoniously thrust its opponents or its minorities upon its neighbours.
- the so-called countries of first asylum cannot keep the majority of refugees in the world indefinitely today, and
- re-settlement countries cannot continue to take in a growing number of asylum seekers without facing serious consequences.[24]

If 'burden-sharing' is to become a viable proposition, then we must recognise what it entails is: (a) that States should maintain fair asylum policies, and not expect other countries to admit massive numbers of refugees while they close their own doors to new arrivals, (b) "it means that governments should devote a reasonable proportion of their spending to refugee assistance at home and abroad, and (c) it means that resources provided by the international community should be used efficiently, without waste, and the purpose for which they were intended. Above all, 'burden-sharing' means that states should cooperate in efforts to find lasting solutions for the world's refugees specially those from the developing countries, thereby allowing them to live peaceful and productive lives.

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V. K. Ahuja, Public International law (2016)

CHAPTER 17

INTERNATIONAL CRIMINAL COURT

INTRODUCTION

The judgements of Nuremberg Trial and Tokyo Trial laid down the foundation for modern-day international criminal law. The need to establish International Criminal Court was felt way back in 1948 in view of the aforesaid trials. In 1994, the United Nations General Assembly decided to pursue work towards the establishment of an international criminal court, taking the International Law Commission's draft statute as a basis.[1] The Rome Statute of the International Criminal Court was adopted at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court at the headquarters of the Food and Agriculture Organization of the United Nations in Rome, on 17 July 1998. The adoption of the Rome Statute was only possible as a result of a variety of innovations in the negotiating process. One of them was NGO participation – both as such and as part of government delegations.[2] The Rome Statute got a good response – 120 States voted in favour of the adoption of the Rome Statute. Only 7 States voted against the treaty while 21 States abstained. The States which voted against the adoption of the Statute included the United States, Israel, China, Iraq and Qatar. The Statute came into force on July 1 2002.

The establishment of Court is thus, an outcome of the efforts made for 50 years since 1948. By adopting Rome Statute, the States resolved to put an end to the impunity enjoyed by the perpetrators of the most heinous crimes.[3]

Prior to the adoption of Rome Statute, the Geneva Conventions and Additional Protocol I laid down an obligation on States to repress grave breaches of international humanitarian law, which were considered war crimes. States could also take measures to suppress other breaches of the Geneva Conventions. However, in practice many States were found unable or unwilling to exercise their jurisdiction, as a result of which

1 William A. Schabas, *An Introduction to the International Criminal Court* (2004), p. 13.
2 Andreas L. Paulus, "Legalist Groundwork for the International Criminal Court: Commentaries on the Statute of the International Criminal Court", 14 *European Journal of International Law* (2003), pp. 843–860, p. 848.
3 Knut Dormann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court* (2002), p. 1.

the serious and heinous crimes went unpunished in many cases. After the establishment of the Court, the States continue to have the primary role to prosecute and punish the criminals. The Court has been set up to step in for National Courts when these are unwilling or unable to function.[4]

After the adoption of Rome Statute, the International Committee of the Red Cross made the following statement at the United Nations General Assembly:

> The establishment of the Court has at last provided international humanitarian law an instrument that will remedy the shortcomings of the current system of repression, which is inadequate and all too often ignored. Indeed, the obligation to prosecute war criminals already exists, but frequently remains a dead letter. It is therefore to be hoped that this new institution, which is intended to be complementary to national criminal jurisdictions, will encourage State to adopt the legislation necessary to implement international humanitarian law and to bring violators before their own courts.[5]

The relationship between the Rome Statute and other norms of international law was not without friction. There were three areas of the friction – (i) unsuccessful attempts to codify the crime of aggression; (ii) the relationship of the Court to the United Nations, in particular the Security Council; and (iii) the rules of immunity which might prevent the Court from working effectively.[6]

The International Criminal Court was established at The Hague as an independent permanent court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole. The International Criminal Court is complementary to national criminal jurisdictions. It was affirmed in the Preamble of the Statute that the most serious crimes must not go unpunished and their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.[7]

The Court has international legal personality. It also has such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. It may exercise its functions and powers on the territory of any State Party and, by special agreement, on the territory of any other State.[8]

I. JURISDICTION OF THE COURT

(I) JURISDICTION WITH RESPECT TO CRIMES

The jurisdiction of the Court is limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction with respect to the following crimes:

(1) The crime of genocide
(2) Crimes against humanity

4 *Id.*, p. 2.
5 Statement of ICRC made at the United Nations General Assembly, 53rd Session, 22 October 1998.
6 Andreas L. Paulus, *Legalist Groundwork for the International Criminal Court: Commentaries on the Statute of the International Criminal Court*, 14 *European Journal of International Law* (2003), pp. 843–860 at p. 850.
7 See Preamble and Articles 1–3, Rome Statute of the International Criminal Court, 1998.
8 Article 4, *id.*

(3) War crimes
(4) The crime of aggression.

The Rome Statute described the aforesaid crimes as "the most serious crimes of concern to the international community as a whole",[9] "unimaginable atrocities that deeply shock the conscience of humanity",[10] "international crimes",[11] and "the most serious crimes of international concern".[12] The Nuremberg Tribunal prosecuted all the four crimes within the jurisdiction of the Court in somewhat embryonic form. At Nuremberg, they were called crimes against peace, war crimes and crimes against humanity. The term "crimes against peace" is now replaced by "aggression"; while probably not identical, the two terms largely overlap. Although the term "genocide" already existed at the time of the Nuremberg trial, and it was used by the prosecutors, the indictments against Nazi criminals for the genocide of European Jews were based on the charge of "crimes against humanity".[13]

(1) Genocide

The word "genocide" was coined in 1944 by Raphael Lemkin in his book on Nazi crimes in occupied Europe.[14] The term "genocide" was adopted subsequently by the prosecutors at Nuremberg and in 1946 genocide was declared an international crime by the General Assembly. On 9 December 1948, the General Assembly adopted Convention on the Prevention and Punishment of the Crime of Genocide.

"Genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.[15]

On the issue of *destruction of the group in whole or in part*, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia made the following observations in the *Krstic* case[16]:

> Despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. An enterprise attacking only the cultural or sociological characteristics of a human group

9 See the Preamble and Article 5, *id.*
10 See the Preamble, *id.*
11 *Ibid.*
12 Article 1, *id.*
13 William A. Schabas, *An Introduction to the International Criminal Court* (2004), p. 27.
14 Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (1944).
15 Article 6, Rome Statute, 1998.
16 *Krstic* case, ICTY T. Ch. 12 August 2001.

> in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.[17]

There must be an intention on the part of accused to destroy group in whole or in part. In *Bosnian Genocide* case,[18] the ICJ stated that "the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole".[19]

On the *measures of preventing births within the group*, the Trial Chamber of International Criminal Tribunal for Rwanda (ICTR) observed in *Akayesu*[20] that "in patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped subsequently refuses to procreate, in the same way that members can be led, through threats or trauma, not to procreate".

The International Criminal Tribunal for Rwanda (ICTR) has labelled genocide as "the crime of crimes".[21] In Advisory Opinion on *Reservations to the Genocide Convention*,[22] the ICJ stated that the crime of genocide shocked the conscience of mankind, resulted in great losses to humanity and was contrary to moral law and to the spirit and aims of the United Nations.[23]

(2) Crimes Against Humanity

The use of the term "crimes against humanity" can be found dating back several centuries. However, it was first used in its contemporary context in 1915. The massacres of Turkey's Armenian population were denounced as a crime against humanity in a declaration of three Allied powers pledging that those responsible would be held

17 *Id.*, para 580. These observations were approved by the ICTY Appeals Chamber. (ICTY A. Ch. 19 April 2004, para 25).
18 *Bosnian Genocide* case, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*) 2007 ICJ General List No. 91.
19 *Id.*, para 198.
20 *Prosecutor* v. *Jean Paul Akayesu*, (case No. ICTR-96-4-T), Trial Judgement, ICTR T. Ch. I 2 September 1998, paras 507–508.
21 See *Prosecutor* v. *Kambanda* (Case No. ICTR-97-23-S), Judgment and Sentence, 4 September 1998, para.16; and *Prosecutor* v. *Serashugo* (Case No.ICTR-98-39-S), Sentence, 2 February 1999, para. 15.
22 ICJ Reports (1951), pp. 15, 23.
23 See also the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)*, ICJ Reports (1993), p. 3.

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personally accountable.[24] The term "crimes against humanity" was also used in 1945 as one of three categories of offence within the jurisdiction of the Nuremberg Tribunal.

Crimes against humanity are inhumane acts which have been committed intentionally to cause great suffering, or serious injury to body or to mental or physical health against a civilian population, as part of a widespread or systematic attack. The obligation to establish and exercise jurisdiction over such crimes exists independently of treaty obligations. Article 7 of the Statute defines "Crime against humanity" to mean any of the following acts when committed as part of a widespread[25] or systematic[26] attack directed against any civilian population,[27] with knowledge of the attack:

(a) Murder;
(b) Extermination;[28]
(c) Enslavement;[29]
(d) Deportation or forcible transfer of population;[30]
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;[31]

24 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948), p. 35.

25 The term 'widespread' generally refers to the large-scale nature of the attack and the number of victims. (*Warrant of Arrest for Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, ICC-02/05-01/09, 4 March 2009, para. 81, *Katanga*, 30 September 2008, paras. 394–397). However, an attack may also be considered widespread by the "cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude". (Judgment, *Blaškić*(IT-95-14), Trial Chamber, 3 March 2000, para. 206; Judgment, *Kordić and Čerkez* (IT-95-14/2-T), Trial Chamber, 26 February 2001, para. 179; Judgment, *Kordić and Čerkez* (IT-95-14/2-A), Appeals Chamber, 17 December 2004, para. 94).

26 The concept of a 'systematic' attack refers to the organized nature of the acts of violence and the improbability of their random occurrence. (*Warrant of Arrest for Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, ICC-02/05-01/09, 4 March 2009, para 81, *Prosecutor* v. *Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, Pre-Trial Chamber I, ICC-01/04-01-/07, 30 September 2008, paras 394–397).

27 "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred above against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The population against whom the attack is directed is considered civilian if it is predominantly civilian in nature. The presence of individuals within the civilian population who do not come within the definition of civilians does not deprive the population of its civilian character. (*Naletilič and Martinović* (IT-98-34), Trial Chamber, 31 March 2003, para 235; *Akayesu* (ICTR-96-4), Trial Chamber, 2 September 1998, para 582; *Jelisić* (IT-95-10-T), Trial Chamber, 14 December 1999, para 54).

28 "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.

29 "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

30 "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.

31 "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions. The *Report of the OHCHR Investigation on Sri Lanka (OISL)*, A/HRC/30/CRP.2, 16 September 2015, para 1130 stated that "there are reasonable grounds to believe that ... torture was committed on a widespread scale. This breaches the absolute prohibition of torture, and Sri Lanka's international treaty and customary obligations. If established before a court of law, these acts of torture may, depending on the circumstances, amount to crimes against humanity if committed as part of a widespread or systematic attack, and as war crimes if a nexus is established with the armed conflict.

(g) Rape,[32] sexual slavery, enforced prostitution, forced pregnancy,[33] enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution[34] against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law;
(i) Enforced disappearance of persons;[35]
(j) The crime of apartheid;[36]
(k) Other inhumane acts[37] of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

(3) War Crimes

The history of prosecution of war criminals is very old. War criminals have been prosecuted well before the time of the ancient Greeks. The first international trial for the perpetration of atrocities was probably that of Peter von Hagenbach, who was tried

32 In *Prosecutor* v. *Furundzija* (Case No. IT-95-17/1-T), Judgment, 10 December 1998, para 185, a Trial Chamber of the Yugoslav Tribunal took a more mechanical and technical approach, holding rape to be 'the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator'. In *Prosecutor* v. *Kunarac* (Case No.IT-96-23 and IT-96-23/1-A), Judgment, 12 June 2002, para 150, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) said that sexual violence gives rise to severe pain or suffering, whether physical or mental. It further stated that it was not necessary to provide visual evidence of suffering by the victim, as this could be assumed.

33 "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.

34 "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity. In *Prosecutor* v. *Krnojelac* (Case No.IT-97-25-T), Judgment, 15 March 2002, para 436, the International Criminal Tribunal for the Former Yugoslavia held that the crime against humanity of persecution 'derives its unique character from the requirement of a specific discriminatory intent'. Persecution was defined as an act or omission that discriminated in fact and that denied or infringed on a fundamental right laid down in international customary or treaty law.

35 "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

36 "The crime of apartheid" means inhumane acts of a character similar to those referred above, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.

37 In *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, the Rwanda Tribunal used "other inhumane acts" to encompass such behaviour as forced nakedness of Tutsi women.

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in 1474 for atrocities committed during the occupation of Breisach. When the town was retaken, von Hagenbach was charged with war crimes, convicted and beheaded.[38]

The Hague Conventions of 1899 and 1907 were meant to impose obligations and duties upon States, and were not intended to create criminal liability for individuals. They declared certain acts to be illegal, but not criminal, as can be seen from the absence of anything suggesting a sanction for their violation. Despite that, the Hague Conventions were presented as a source of the law of war crimes. In 1913, a Commission of Inquiry sent by the Carnegie Foundation to investigate atrocities committed during the Balkan Wars used the provisions of the Hague Convention IV as a basis for its description of war crimes. However, actual prosecution for violations of the Hague Conventions would have to wait until Nuremberg. Offences against the laws and customs of war, known as the "Hague Law" were codified in the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia and in the Statute of the International Criminal Court.[39]

War crimes were codified at the time of Nuremberg trial[40] and thereafter in the Geneva Conventions of 1949. Article 8 of the Rome Statute which is one of the longest provisions in the Statute, represents a progressive development over the Geneva Conventions, because it expressly covers non-international armed conflicts.[41]

The Court has jurisdiction in respect of war crimes in particular when such crimes are committed as part of a plan or policy or as part of a large-scale commission of such crimes. Article 8(2) of the Statute defines "war crimes" to mean:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Wilful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) Wilfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;[42] (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance

38 William A. Schabas, *An Introduction to the International Criminal Court* (2004), p. 1.
39 *Id.*, pp. 2–3.
40 Article 6(c), Agreement for the Prosecution and Punishment of Major War Criminals.
41 William A. Schabas, *An Introduction to the International Criminal Court* (2004), p. 54.
42 See also Advisory Opinion of International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), p. 226, para 78.

with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion; (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury; (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army; (xii) Declaring that no quarter will be given; (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war; (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war; (xvi) Pillaging a town or place, even when taken by assault; (xvii) Employing poison or poisoned weapons; (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and materials and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute; (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions; (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations; (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions; (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of Article 3 common to the Four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause: (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (iii) Taking of hostages; (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) The aforesaid paragraph (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations; (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (v) Pillaging a town or place, even when taken by assault; (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions; (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;[43] (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand; (ix) Killing or wounding treacherously a combatant adversary; (x) Declaring that no quarter will be given; (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) The aforesaid paragraph (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

The responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State by all legitimate means shall not be affected notwithstanding anything contained in aforesaid paragraphs (c) and (e).

Thus, Article 8 defines war crimes comprehensively and lays down the list of acts which are prohibited during an armed conflict. It is, however, noteworthy that not every aforesaid act which is committed while a country is at war is to be taken as a war crime. It is *sine qua non* that there should be a nexus between the act perpetrated and the conflict. Thus the criminal conduct must be closely related to the conflict. In other words, the offence must be committed to pursue the aims of the conflict or, alternatively, be carried out "with a view to somehow contributing to attain the ultimate goals of a military campaign or, at a minimum, in unison with the military campaign".[44]

In *Prosecutor* v. *Kunarac*,[45] a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia made the following observations:

> [T]he criterion of a nexus with the armed conflict . . . does not require that the offences be directly committed whilst fighting is actually taking place, or at the scene of combat. Humanitarian law continues to apply in the whole of the territory under the control of

43 According to the *Report of the OHCHR Investigation on Sri Lanka (OISL)*, A/HRC/30/CRP.2, 16 September 2015, para 691, LTTE recruited children below the age of 14 years to take direct part in the hostilities. On 17 February 2009, UNICEF issued a statement expressing grave concern for the safety of children in conflict areas, stating that "we have clear indications that the LTTE has intensified forcible recruitment of civilians and that children as young as 14 years old are now being targeted".

44 Cassese, "The Nexus Requirement for War Crimes", 10(5) *Journal of International Criminal Justice* (2012), pp. 1395–1417 at p. 1397.

45 *Prosecutor* v. *Kunarac* (Case No. IT-96-23 and IT-96-23/1-A), Judgment, 22 February 2001, para 568.

one of the parties, whether or not actual combat continues at the place where the events in question took place. It is therefore sufficient that the crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. The requirement that the act be closely related to the armed conflict is satisfied if ... the crimes are committed in the aftermath of the fighting, and until the cessation of combat activities in a certain region, and are committed in furtherance or to take advantage of the situation created by the fighting.[46]

(4) Aggression

The crime of aggression was not defined in the Rome Statute. It was originally provided under Article 5 that the Court was to exercise jurisdiction once a provision was adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court should exercise jurisdiction with respect to this crime. Such a provision was to be consistent with the relevant provisions of the Charter of the United Nations. A definition of "aggression" was adopted by the General Assembly resolution in 1974.[47] But that resolution was not designed as an instrument of criminal prosecution, although it may provide a useful basis for a definition.[48]

Thus, in absence of a definition of aggression as well as the jurisdictional conditions in the Rome Statute, the Court remained unable to exercise jurisdiction over the crime of aggression. On 11 June 2010, the Review Conference of Rome Statute at Kampala adopted amendments to the Rome Statute by consensus which included a definition of the crime of aggression and a regime establishing how the Court will exercise its jurisdiction over this crime. The Court, however, will be able to exercise its jurisdiction over the crime of aggression until after 1 January 2017 when a decision is made by the States Parties to activate the jurisdiction.

Article 8 *bis* adopted in Kampala district defines the crime of aggression as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations".

An "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

In accordance with United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974, the following acts qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

46 See also *Prosecutor* v. *Kvocka* (Case No. IT-98-30-T), Judgment, 2 November 2001, para 123.
47 General Assembly Resolution 3314 (XXIX) of 14 December1974.
48 William A. Schabas, *An Introduction to the International Criminal Court* (2004), p. 32.

(c) The blockade of the ports or coasts of a State by the armed forces of another State;
(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

(II) BASIS OF JURISDICTION

The Rome Statute distinguishes between jurisdiction and admissibility. Jurisdiction refers to the legal parameters of the Court's operations, in terms of subject matter (jurisdiction *ration emateriae*), time (jurisdiction *ration etemporis*) and space (jurisdiction *ratione loci*) as well as over individuals (jurisdiction *ratione personae*). The question of admissibility arises at a subsequent stage, and seeks to establish whether matters over which the Court properly has jurisdiction should be litigated before it.[49]

(1) Jurisdiction *Ration Emateriae*

Subject matter jurisdiction (Jurisdiction *ration emateriae*) refers to the crimes which the Court may prosecute: genocide, crimes against humanity, war crimes, and aggression. These crimes have already been discussed.

(2) Jurisdiction *Ration Etemporis*

The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes which were committed after it became a Party. (Article 11)

(3) Jurisdiction *Ratione Loci*

The Court has jurisdiction over crimes committed on the territory of States parties, regardless of the nationality of the offender. This general principle is set out in Article 12(2)(a) of the Rome Statute. It also has jurisdiction over crimes committed on

49 William A. Schabas, *An Introduction to the International Criminal Court* (2004), p. 68.

the territory of States that accept its jurisdiction on an *ad hoc* basis and on territory so designated by the Security Council.[50]

Thus, according to Article 12, a State which becomes a Party to the Statute thereby accepts the jurisdiction of the Court with respect to the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. The Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court by lodging a declaration with the Registrar – (a) the State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) the State of which the person accused of the crime is a national.

(4) Jurisdiction *Ratione Personae*

The International Criminal Court will also have jurisdiction over nationals of a State party who are accused of a crime, in accordance with Article 12 as discussed above. The Court can also prosecute nationals of non-party States that accept its jurisdiction on an *ad hoc* basis by virtue of a declaration, or pursuant to a decision of the Security Council.

(III) INITIATION OF PROSECUTION

According to Article 13, the initiative to prosecute a case may come from three sources: a State party, the Security Council or the Prosecutor. Thus, the Court may exercise its jurisdiction if – (a) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party; (b) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) the Prosecutor has initiated an investigation *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

When it appears to a State Party that one or more crimes within the jurisdiction of the Court have been committed, then it may refer such a situation alongwith supporting documentation to the Prosecutor and request him to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.[51]

(IV) INVESTIGATION BY THE PROSECUTOR

The Prosecutor may initiate investigations *proprio motu* (own motion) on the basis of information on crimes within the jurisdiction of the Court. He shall analyse the seriousness of the information received. He may seek additional information from States, organs of the United Nations, inter-governmental or non-governmental organizations, or other reliable sources, and may receive written or oral testimony at the seat of the Court. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he shall submit to the Pre-Trial Chamber a request

50 *Id.*, p. 78.
51 Article 14, Rome Statute, 1998.

for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber.

The Pre-Trial Chamber is to authorise the commencement of the investigation where it considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court. This is, however, without prejudice to the subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

Where the Pre-Trial Chamber refuses to authorize the investigation, the Prosecutor may make a subsequent request based on new facts or evidence regarding the same situation. Where the Prosecutor himself concludes that the information provided does not constitute a reasonable basis for an investigation, he shall inform those who provided the information. However, this does not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.[52]

Two new Articles – Articles 15 *bis* and 15 *ter* adopted by Review Conference of Rome Statute at Kampala on 11 June 2010, set out the conditions for the Court's exercise of jurisdiction over the crime of aggression. When a 'situation' is referred to the Prosecutor by the Security Council, the Court's jurisdiction is triggered in the same manner as with the other crimes.[53] In other words, the Prosecutor may, thereafter, proceed with an investigation into the crime of aggression.

Under Article 15 *bis*, the Prosecutor may only proceed with an own motion investigation or an investigation based on a State referral of a situation into the crime of aggression – (a) after first ascertaining whether the Security Council has made a determination of the existence of an act of aggression (under Article 39 of UN Charter) and waiting for a period of 6 months; (b) where that situation concerns an act of aggression committed between States Parties; and (c) after the Pre-Trial Division of the Court has authorized the commencement of the investigation.

Any determination by an organ outside of the Court, such as the Security Council, will be without prejudice to the Court's own finding of an act of aggression. Article 15 *bis* also provides that States Parties may opt out of the Court's jurisdiction by lodging a declaration on non-acceptance of jurisdiction.[54] The Court is not to exercise its jurisdiction over the crime of aggression which is committed by nationals of a non-State Party on its territory.

(V) DEFERRAL OF INVESTIGATION OR PROSECUTION

Article 16 provides that no investigation or prosecution is to be commenced or proceeded with under this Statute for a period of 12 months if the Security Council has adopted a resolution under Chapter VII of the Charter of the United Nations and requested the Court to that effect. This request may be renewed by the Council under the same conditions. That means the Security Council may defer the proceedings

52 Article 15, *id.*
53 Article 15 *ter*, *id.*
54 See also www.iccnow.org. Last accessed on 9 December 2015.

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for an indefinite period of time. In 2002, the Security Council adopted a resolution pursuant to Article 16 of the Statute.[55] The resolution was passed at the insistence of the United States, which threatened to veto the renewal of all United Nations peacekeeping missions unless its citizens were shielded from prosecution by the Court. The resolution was renewed for one more year.

(VI) INADMISSIBILITY OF A CASE

The Court is to determine a case inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20(3);
(d) The case is not of sufficient gravity to justify further action by the Court.

In order to determine unwillingness in a particular case, the Court is to consider the following grounds:

(i) whether the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility;
(ii) whether there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; or
(iii) whether the proceedings were not or are not being conducted independently or impartially.

As far as the inability of a State to prosecute a person is concerned, the Court is to determine such inability by taking into account the situation as to whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.[56]

If a State does not incriminate one of the acts defined in Articles 6 to 8 (genocide, crimes against humanity and war crimes) of the Rome Statute, or what is more likely, if the definition of these crimes in its domestic law does not correspond with the Statute's, it runs the risk of leading the Court to find its own jurisdiction, on the basis of Article 17.[57]

55 Security Council Resolution 1422 adopted on 12 July 2002.
56 Article 17(3), Rome Statute, 1998.
57 Alain Pellet, *Entry into Force and Amendment of the Statute* in Antonio Cassese, Paola Gaeta, John R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*, vol. I (2002), p. 153.

(VII) PRELIMINARY RULINGS REGARDING ADMISSIBILITY

When a situation has been referred to the Court and the Prosecutor initiates an investigation, he shall notify all States Parties and those States which would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis. He may limit the scope of the information provided to States, where he believes that it is necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons.

Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to crimes and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation. The Prosecutor's deferral to a State's investigation is open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber. The appeal may be heard on an expedited basis.

When the Prosecutor has deferred an investigation on the request of State concerned, he may request that such State periodically inform him of the progress of its investigations and any subsequent prosecutions. States Parties are to respond to such requests without undue delay.

On an exceptional basis, the Prosecutor may, pending a ruling by the Pre-Trial Chamber, or at any time when he has deferred an investigation, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

A State which has challenged a ruling of the Pre-Trial Chamber may challenge the admissibility of a case on the grounds of additional significant facts or significant change of circumstances.[58]

(VIII) CHALLENGES TO THE JURISDICTION OF THE COURT

The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case. Challenges to the admissibility of a case or to the jurisdiction of the Court may be made by:

(i) an accused or a person for whom a warrant of arrest or a summons to appear has been issued under Article 58;
(ii) a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
(iii) a State from which acceptance of jurisdiction is required under Article 12.

The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State. The challenge is to take place prior to or at the commencement

58 Article 18, Rome Statute, 1998.

of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.

Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court is to be referred to the Pre-Trial Chamber. After confirmation of the charges, they are to be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber.

Where a challenge is made by a State, the Prosecutor shall suspend the investigation until such time as the Court makes a determination. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

(i) to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available;
(ii) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and
(iii) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest.[59]

No person is to be tried by another court for a crime for which that person has already been convicted or acquitted by the Court. No person who has been tried by another court is to be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
(b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.[60]

II. APPLICABLE LAW

In prosecuting a person who is alleged to have committed a crime, the Court is to apply – (i) in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (ii) in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (iii) failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards. The Court may apply principles and rules of law as interpreted in its previous decisions.[61]

59 Article 19, *id.*
60 Article 20, *id.*
61 Article 21, *id.*

III. GENERAL PRINCIPLES OF CRIMINAL LAW

(I) *NULLUMCRIMEN SINE LEGE* (NO CRIME WITHOUT LAW)

A person is not to be held criminally responsible unless his conduct constitutes a crime within the jurisdiction of the Court at the time it takes place. The definition of a crime is to be strictly construed and not be extended by analogy. The definition is to be interpreted in favour of the person being investigated, prosecuted or convicted in case of any ambiguity.[62] In *Vasiljevic* case,[63] a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia observed:

> [F]rom the perspective of the *nullumcrimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time. A criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of his acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility.[64]

(II) *NULLAPOENA SINE LEGE* (NO PENALTY WITHOUT A LAW)

The principle *nullapoena sine lege* requires that there are defined penalties attached to criminal prohibitions. In customary law, the punishment for international crimes may include the death penalty though many States have undertaken international obligations not to impose such a penalty, or may not permit that sentence in their domestic law.[65] The Rome Statute provides that a person convicted by the Court may be punished only in accordance with this Statute.[66]

(III) NON-RETROACTIVITY *RATIONE PERSONAE*

No person is to be held criminally responsible under this Statute for conduct prior to the entry into force of the Statute. Where there is a change in the law applicable to a given case prior to a final judgement, the law applicable shall be one which is more favourable to the person who is being investigated, prosecuted or convicted.[67]

(IV) INDIVIDUAL CRIMINAL RESPONSIBILITY

The Court is to have jurisdiction over natural persons. A person who commits a crime within the jurisdiction of the Court is to be held individually responsible and liable for punishment in accordance with the Statute. A person is to be held criminally

62 Article 22, *id.*
63 Vasiljevic, ICTY T. Ch. I 29 November 2002.
64 *Id.*, para 193.
65 Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2010), p. 20.
66 Article 23, Rome Statute, 1998.
67 Article 24, *id.*

responsible and liable for punishment for a crime within the jurisdiction of the Court of that person:

(1) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
(2) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
(3) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
(4) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution is to be intentional and shall either:
  (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
  (ii) be made in the knowledge of the intention of the group to commit the crime;
(5) in respect of the crime of genocide, directly and publicly incites others to commit genocide;
(6) attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime is not to be held liable for punishment for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

In respect of the crime of aggression, the aforesaid provisions shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State. The responsibility of States under international law is not to be affected by any provision of the Statute which is related to individual criminal responsibility.[68]

(V) EXCLUSION OF JURISDICTION OVER PERSONS UNDER EIGHTEEN

The Court is not to have jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.[69]

(VI) IRRELEVANCE OF OFFICIAL CAPACITY

The Statute is applicable equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in

68 Article 25, *id.*
69 Article 26, *id.*

no case exempt a person from criminal responsibility. Further, the official capacity is not to constitute a ground for reduction of sentence.

The immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.[70] In *Arrest Warrant* case,[71] the ICJ stated:

> It has been unable to deduce ... that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

It is, however, noteworthy that State officials cannot be held responsible for acts not attributable to them personally. In *Prosecutor* v. *Blaškić*,[72] the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia observed:

> [State] officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called 'functional immunity'. This is a well established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.

(VII) RESPONSIBILITY OF COMMANDERS AND OTHER SUPERIORS

In addition to other grounds of criminal responsibility, a military commander or person effectively acting as a military commander is to be held criminally responsible for crimes committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where – (i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

With respect to superior and subordinate relationships not described above, a superior is to be held criminally responsible for crimes committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where – (i) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) the superior failed to take all necessary and reasonable measures within his or her power to

70 Article 27, *id.*
71 *Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo* v. *Belgium*), ICJ Reports (2002), p. 3, para 58.
72 *Prosecutor* v. *Blaškić* (*Objection to the Issue of Subpoena duces Tecum*) IT-95-14-AR108 (1997), 110 ILR (1997) 607, at 707, para. 38.

prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[73]

In *Blaskic* case,[74] the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia stated that "if a commander has exercised due diligence in the fulfillment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute." In *Halilovic*,[75] the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia stated that:

> The commander is responsible for the failure to perform an act required by international law. This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates. Thus 'for the acts of his subordinates' ... does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act. The imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed.

(VIII) NON-APPLICABILITY OF STATUTE OF LIMITATIONS

The crimes within the jurisdiction of the Court is not to be subject to any statute of limitations.[76]

(IX) MENTAL ELEMENT

Normally, a person is to be held criminally responsible and liable for punishment for a crime only if the material elements are committed with intent and knowledge.[77] A person has intent when – (a) in relation to conduct, that person means to engage in the conduct; (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.[78]

IV. DEFENCES/GROUNDS FOR EXCLUDING CRIMINAL RESPONSIBILITY

In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person is not to be held criminally responsible in the circumstances discussed below.

73 Article 28.
74 *Blaskic* case, ICTY T. Ch. I March 3 2000, para 332.
75 *Halilovic*, ICTY T. Ch. November 16 2005, para 54.
76 Article 29, Rome Statute, 1998.
77 "Knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.
78 Article 30, Rome Statute, 1998.

(I) MENTAL INCAPACITY

If, at the time of that person's conduct, the person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.

(II) INTOXICATION

If, at the time of that person's conduct, the person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime.

(III) SELF-DEFENCE

If, at the time of that person's conduct, the person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility. In *Kordic and Cerkez*,[79] the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia accepted that customary law recognized self-defence.

(IV) DURESS AND NECESSITY

If, at the time of that person's conduct, the conduct which is alleged to constitute a crime has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be made by other persons; or constituted by other circumstances beyond that person's control.

A person acting under duress is someone who is compelled to commit the crime by a threat to his or her life, or to that of another person. However, the defendant is deemed to have no viable moral choice in the matter. In *Prosecutor* v. *Erdemovic*,[80] the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia determined that duress was not admissible as a defence to crimes against humanity.

79 *Kordic and Cerkez*, ICTY T. Ch. 26 February 2001, paras 448–452.
80 *Prosecutor* v. *Erdemovic*, (Case No. IT-96-22-A), Sentencing Appeal, 7 October 1997, (1998) 111 ILR 298.

The consequence of the provision in the Rome Statute is to set aside the precedent established by the Yugoslav Tribunal and to reinstate the defence of duress.[81]

In addition to the aforesaid, the Court may also, at trial, consider a ground for excluding criminal responsibility where such a ground is derived from applicable law.[82]

(V) MISTAKE OF FACT OR MISTAKE OF LAW

A mistake of fact is a ground for excluding criminal responsibility only if it negates the mental element required by the crime. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court is not a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in Article 33.[83]

(VI) SUPERIOR ORDERS AND PRESCRIPTION OF LAW

According to Article 33, the fact that a crime has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) the person was under a legal obligation to obey orders of the Government or the superior in question;
(b) the person did not know that the order was unlawful; and
(c) the order was not manifestly unlawful.

Thus, a person can escape liability for a crime which he committed in pursuance of an order of the Government or of a superior in three circumstances only – (i) that he was under a legal obligation to obey such an order; (ii) that he did not know that the order was unlawful; and (iii) that the order was not manifestly unlawful. According to Article 33(2), the orders to commit genocide or crimes against humanity are manifestly unlawful.

V. COMPOSITION AND ADMINISTRATION OF THE COURT

(I) ORGANS OF THE COURT

The Court is composed of the following organs:

(1) The Presidency;
(2) An Appeals Division, a Trial Division and a Pre-Trial Division;
(3) The Office of the Prosecutor; and
(4) The Registry.[84]

Originally, the Court is to have 18 judges. The number of judges may be increased. The judges are to be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices. They should – (i) have established

81 William A. Schabas, *An Introduction to the International Criminal Court* (2004), p. 113.
82 Article 31, Rome Statute, 1998.
83 Article 32, *id.*
84 Article 34, *id.*

competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or (ii) have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court.[85]

(1) The Presidency

The President, together with the First and Second Vice-Presidents, constitutes the Presidency. The President and the First and Second Vice-Presidents are elected by an absolute majority of the judges. They serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They are eligible for re-election once.

The First Vice-President acts in place of the President when he is unavailable or disqualified. The Second Vice-President acts in place of the President when both the President and the First Vice-President are unavailable or disqualified.

The Presidency is responsible for the proper administration of the Court, with the exception of the Office of the Prosecutor. It is also responsible for the other functions conferred upon it in accordance with this Statute. In discharging its responsibility, the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.[86]

(2) Chambers

The Court is organized into the divisions. The Appeals Division is composed of the President and four other judges. The Trial Division and Pre-Trial Division are composed of not less than six judges each. The judicial functions of the Court shall be carried out in each division by Chambers.[87]

The judges are to be independent in the performance of their functions. They are not to engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence. They are required to serve on a full-time basis at the seat of the Court and not to engage in any other occupation of a professional nature.[88]

(3) Prosecutor

The Office of the Prosecutor acts independently as a separate organ of the Court. It is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office is not to seek or act on instructions from any external source.

85 Article 36, *id.*
86 Article 38, *id.*
87 Article 39, *id.*
88 Article 40, *id.*

The Office is headed by the Prosecutor who has full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor is assisted by one or more Deputy Prosecutors, who are entitled to carry out any of the acts required of the Prosecutor. The Prosecutor and the Deputy Prosecutors are persons of high moral character. They are highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. Neither the Prosecutor nor a Deputy Prosecutor is to engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They are not to engage in any other occupation of a professional nature.[89]

(4) The Registry

The Registry is to be responsible for the non-judicial aspects of the administration and servicing of the Court. The Registry is headed by the Registrar, who is the principal administrative officer of the Court. The Registrar exercises his or her functions under the authority of the President of the Court. The Registrar and the Deputy Registrar are persons of high moral character. The Registrar holds office for a term of five years and is eligible for re-election once.

The Registrar is to set up a Victims and Witnesses Unit within the Registry. This Unit is to provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit is to include staff with expertise in trauma, including trauma related to crimes of sexual violence.[90]

(II) REMOVAL FROM THE OFFICE

A Judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar is to be removed from office where that person – is found to have committed serious misconduct or a serious breach of his or her duties under this Statute. Such a person can also be removed from office if he or she is found unable to exercise the functions required by this Statute.[91]

(III) PRIVILEGES AND IMMUNITIES

The Court is to enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes. While being engaged in the business of the Court, the Judges, the Prosecutor, the Deputy Prosecutors and the Registrar are to enjoy the same privileges and immunities as are accorded to heads of diplomatic missions. Even after the expiry of their terms of office, they will continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

89 Article 42, *id.*
90 Article 43, *id.*
91 Article 46, *id.*

The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry are to enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

Counsel, experts, witnesses or any other person required to be present at the seat of the Court is to be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.[92]

VI. INVESTIGATION AND PROSECUTION

(I) INITIATION OF AN INVESTIGATION

After evaluating the information made available to him, the Prosecutor is to initiate an investigation unless he determines that there is no reasonable basis to proceed. In deciding whether to initiate an investigation, the Prosecutor is to consider the following:

(a) whether the information available to him provides a reasonable basis to believe that a crime has been committed or is being committed;
(b) whether the case is or would be admissible; and
(c) whether taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. If he determines that there is no reasonable basis to proceed he shall inform the Pre-Trial Chamber.

If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because – (a) there is not a sufficient legal or factual basis to seek a warrant or summons; (b) the case is inadmissible; or (c) a prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; he shall inform the Pre-Trial Chamber and the State making a referral or the Security Council of his or her conclusion and the reasons for the conclusion.

At the request of the State making a referral or the Security Council, the Pre-Trial Chamber may review a decision of the Prosecutor not to proceed and may request the Prosecutor to reconsider that decision. In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed. In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.[93]

(II) DUTIES AND POWERS OF THE PROSECUTOR WITH RESPECT TO INVESTIGATIONS

In order to establish the truth, the Prosecutor is to extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility. In doing so, he is to investigate incriminating and exonerating circumstances equally.

92 Article 48, *id.*
93 Article 53, *id.*

The Prosecutor is to take appropriate measures to ensure the effective investigation and prosecution of crimes. He has to respect the interests and personal circumstances of victims and witnesses, including age, gender, and health. He is also to take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children. He has to fully respect the rights of persons arising under the Statute.

The Prosecutor may conduct investigations on the territory of a State – (a) in accordance with the provisions of Part 9 of the Statute[94]; or (b) as authorized by the Pre-Trial Chamber.

The Prosecutor may (i) collect and examine evidence; (ii) request the presence of and question persons being investigated, victims and witnesses; (c) seek the co-operation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate; (d) enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the co-operation of a State, intergovernmental organization or person; (e) agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and (f) take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.[95]

(III) RIGHTS OF PERSONS DURING AN INVESTIGATION

During an investigation, a person has following rights:

(a) he is not be compelled to incriminate himself or herself or to confess guilt;
(b) he is not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
(c) he is to have the assistance of a competent interpreter if questioned in a language which he does not understand; and
(d) he is not to be subjected to arbitrary arrest or detention, and is not to be deprived of his or her liberty except in accordance with established procedure.

Where there are grounds to believe that a person has committed a crime and he is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have certain rights of which he shall be informed prior to being questioned. Such a person has the right –

(a) to be informed, prior to being questioned, that there are grounds to believe that he has committed a crime;
(b) to remain silent, without such silence being a consideration in the determination of guilt or innocence;
(c) to have legal assistance; and
(d) to be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.[96]

94 Part 9 of the Statute is on "International Cooperation and Judicial Assistance".
95 Article 54, Rome Statute, 1998.
96 Article 55, *id.*

(IV) ISSUANCE OF ARREST WARRANT OR SUMMONS BY THE PRE-TRIAL CHAMBER

On the application of the Prosecutor at any time after the initiation of an investigation, the Pre-Trial Chamber shall issue arrest warrant of a person if it is satisfied that – (a) there are reasonable grounds to believe that the person has committed a crime; and (b) the arrest of the person appears necessary – (i) to ensure the person's appearance at trial, (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings, or (iii) to prevent the person from continuing with the commission of that crime or a related crime which arises out of the same circumstances.

The application of the Prosecutor is to contain (a) the name of the person and any other relevant identifying information; (b) a specific reference to the crimes which the person is alleged to have committed; (c) a concise statement of the facts which are alleged to constitute those crimes; (d) a summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and (e) the reason why the Prosecutor believes that the arrest of the person is necessary.

The arrest warrant is to contain – (a) the name of the person and any other relevant identifying information; (b) a specific reference to the crimes for which the person's arrest is sought; and (c) a concise statement of the facts which are alleged to constitute those crimes.

The arrest warrant is to remain in effect until otherwise ordered by the Court. On the basis of the warrant, the Court may request the provisional arrest or the arrest and surrender of the person. On the request of Prosecutor, the Pre-Trial Chamber, if satisfied, shall amend the warrant of arrest by modifying or adding to the crimes specified therein.

On the request of Prosecutor, if the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons for the person to appear. The summons shall contain – (a) the name of the person and any other relevant identifying information; (b) the specified date on which the person is to appear; (c) a specific reference to the crimes which the person is alleged to have committed; and (d) a concise statement of the facts which are alleged to constitute the crime. The summons shall be served on the person.[97]

(V) ARREST PROCEEDINGS IN THE CUSTODIAL STATE

A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question. The arrested person shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that – (a) the warrant applies to that person; (b) the person has been arrested in accordance with the proper process; and (c) the person's rights have been respected.

The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender. The competent authority shall consider whether given the gravity of the alleged crimes, there are urgent and

97 Article 58, *id.*

exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. However, the competent authority of the custodial State cannot raise any objection on the validity of the arrest warrant.

The Pre-Trial Chamber is to be notified of any request for interim release, which shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State is to give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release. Once ordered to be surrendered by the custodial State, the person is to be delivered to the Court as soon as possible.[98]

(VI) INITIAL PROCEEDINGS BEFORE THE COURT

Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber is to satisfy itself that the person has been informed of the crimes which he is alleged to have committed, and of his rights, including the right to apply for interim release pending trial.

A person may apply for interim release pending trial. The Pre-Trial Chamber shall decide whether that person should be released or detained. The Pre-Trial Chamber is to periodically review its ruling on the release or detention of the person. It may do so at any time on the request of the Prosecutor or the person concerned. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

The Pre-Trial Chamber is to ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions. If necessary, the Pre-Trial Chamber may issue arrest warrant to secure the presence of a person who has been released.[99]

(VII) CONFIRMATION OF THE CHARGES BEFORE TRIAL

Within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber is to hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing is to be held in the presence of the Prosecutor and the person charged, as well as his counsel.

Upon request of the Prosecutor or on its own motion, the Pre-Trial Chamber may hold a hearing in the absence of the person charged to confirm the charges when the person has: (a) waived his or her right to be present; or (b) fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court. In that case, the person is to be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

98 Article 59, *id.*
99 Article 60, *id.*

Within a reasonable time before the hearing, the person is to be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial. He is also to be informed of the evidence on which the Prosecutor intends to rely at the hearing. The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person is to be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of withdrawal of charges, the Prosecutor is to notify the Pre-Trial Chamber of the reasons for the withdrawal.

At the hearing, the Prosecutor is to support each charge with sufficient evidence. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

At the hearing, the person may object to the charges; challenge the evidence presented by the Prosecutor; and present evidence. On the basis of the hearing, the Pre-Trial Chamber is to determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall either confirm those charges and commit the person to a Trial Chamber for trial; or decline to confirm those charges on the basis of insufficient evidence; or adjourn the hearing and request the Prosecutor to provide further evidence or conduct further investigation with respect to a particular charge; or amend a charge because the evidence submitted appears to establish a different crime.

Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor is not to be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing to confirm those charges is to be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor. Once the charges have been confirmed, the Presidency shall constitute a Trial Chamber which shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.[100]

VII. THE TRIAL

The place of the trial is to be the seat of the Court, unless decided otherwise.[101] Article 63 states that the accused is to be present during the trial. Presence at trial should imply more than mere physical presence. The accused should be mentally fit to stand the trial. The Statute is silent with respect to cases of accused persons who are

100 Article 61, *id.*
101 Article 62, *id.*

unfit to stand trial because of mental disorder. This lacuna, however, is corrected in the Rules, which direct the Trial Chamber to adjourn the proceedings when it 'is satisfied that the accused is unfit to stand trial'. An accused who is unfit to stand trial is not 'present' within the meaning of Article 63 and therefore the hearing cannot proceed.[102]

In the *Erdemovic* case, a panel of experts concluded that the accused was suffering from post-traumatic stress disorder and that his mental condition at the time did not permit his trial before the Trial Chamber.[103] The Trial Chamber postponed the pre-sentencing hearing and ordered a second evaluation of the appellant to be submitted in three months' time.[104] A subsequent report concluded that Erdemovic's condition had improved such that he was 'sufficiently able to stand trial'.[105]

If the accused continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures are to be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

(I) FUNCTIONS AND POWERS OF THE TRIAL CHAMBER

The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary – (a) exercise any functions of the Pre-Trial Chamber; (b) require the attendance and testimony of witnesses and production of documents and other evidence; (c) provide for the protection of confidential information; (d) order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties; (e) provide for the protection of the accused, witnesses and victims; and (f) rule on any other relevant matters.

Normally the trial is to be held in public. However, certain proceedings may be in held in closed session to protect confidential or sensitive information. At the commencement of the trial, the Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt or to plead not guilty. At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner.[106]

(II) PROCEEDINGS ON AN ADMISSION OF GUILT

Where the accused makes an admission of guilt, the Trial Chamber is to determine whether – (a) the accused understands the nature and consequences of the admission of guilt; (b) the admission is voluntarily made by the accused after sufficient consultation with defence counsel; and (c) the admission of guilt is supported by the facts of the case

102 William A. Schabas, *An Introduction to the International Criminal Court* (2004), p. 146.
103 *Prosecutor* v. *Erdemovic* (Case No.IT-96-22-T), Sentencing Judgment, 29 November 1996, para. 5.
104 *Prosecutor* v. *Erdemovic* (Case No.IT-96-22-A), Appeal Judgment, 7 October 1997, para. 5.
105 *Id.*, para. 8.
106 Article 64, Rome Statute.

that are contained in – (i) the charges brought by the Prosecutor and admitted by the accused; (ii) any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and (iii) any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

Where the Trial Chamber is satisfied that the aforesaid matters are established, it shall consider the admission of guilt and may convict the accused. Where the Trial Chamber is not satisfied that the aforesaid matters are established, it shall consider the admission of guilt as not having been made. In such a case, it shall order that the trial be continued and may remit the case to another Trial Chamber.

Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may – (a) request the Prosecutor to present additional evidence, including the testimony of witnesses; or (b) order that the trial be continued, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed is not be binding on the Court.[107]

(III) PRESUMPTION OF INNOCENCE

Article 66 states that everyone is to be presumed innocent until proved guilty before the Court in accordance with the applicable law. The onus is on the Prosecutor to prove the guilt of the accused. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Thus, everyone is to be presumed innocent until he or she has been proved guilty by the law. Article 66 imposes the burden upon the prosecution to prove guilt beyond a reasonable doubt. This general rule of criminal law is common to most legal systems of the world. In the *Celebici* case, the Trial Chamber said that "the Prosecution is bound in law to prove the case alleged against the accused beyond a reasonable doubt. At the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been proved".[108]

The UN Human Rights Committee has insisted that the presumption of innocence imposes a duty on all public authorities to "refrain from prejudging the outcome of a trial".[109] In *Barber'a, Messegu'e and Jabardo* v. *Spain*,[110] the European Court of Human Rights observed that "it requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him".

107 Article 65, *id.*
108 *Prosecutor* v. *Delalic* (Case No.IT-96-21-T), Judgment, 16 November 1998, para. 601.
109 See General Comment of Human Rights Committee on Article 14 of the International Covenant on Civil and Political Rights, 'General Comment 13/21', UN Doc. A/39/40, pp. 143–147.
110 *Barber'a, Messegu'e and Jabardo* v. *Spain*, Series A, No. 146, 6 December 1988, para. 77.

(IV) RIGHTS OF THE ACCUSED

The rights of accused are provided in the domestic criminal law of every State. In *Prosecutor* v. *Tadic*,[111] the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) made the following significant observation:

> For a Tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.

According to Article 67, in the determination of any charge, the accused shall be entitled to a public hearing, a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
(b) to have adequate time and facilities for the preparation of the defence and to communicate freely with his counsel;
(c) to be tried without undue delay;
(d) to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf. The accused shall also be entitled to raise defences and to present other admissible evidence;
(f) to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, wherever required;
(g) not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
(h) to make an unsworn oral or written statement in his or her defence; and
(i) not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.[112]

(V) VICTIMS AND WITNESSES

The Court is to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims[113] and witnesses. In so doing,

111 *Prosecutor* v. *Tadic*, (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, (1997) 105 ILR 453, 35 ILM 32, para. 45.
112 Article 67 of the Rome Statute is modelled on Article 14(3) of the International Covenant on Civil and Political Rights (ICCPR).
113 A victim can be said to be a person who has suffered "harm". "Harm" in this context denotes hurt, injury and damage. It covers material, physical and psychological (or emotional) harm, but only insofar as the harm is suffered personally by the victim ("personal harm"). See *Lubanga Dyilo*, ICC A. Ch. 11 July 2008, paras 31–32.

the Court is to have regard to all relevant factors, including age, gender, health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor is to take these measures particularly during the investigation and prosecution of such crimes. These measures are not to be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

In order to protect victims and witnesses or an accused, the Chambers of the Court may conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures are to be implemented in the case of a victim of sexual violence or a child who is a victim or a witness.

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at appropriate stages of the proceedings in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance. Where the disclosure of evidence or information may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, submit only a summary thereof. Such measures are to be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[114]

(VI) EVIDENCE

Ordinarily, the testimony of a witness at trial is to be given in person. The Court may also permit the giving of oral or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts.

Evidence obtained by means of a violation of this Statute or internationally recognized human rights are not to be admissible if – (a) the violation casts substantial doubt on the reliability of the evidence; or (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.[115]

(VII) DECISION OF THE TRIAL CHAMBER

The Trial Chamber's decision is to be based on its evaluation of the evidence and the entire proceedings. The decision is not to exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges. The deliberation of the Trial Chamber is to remain secret.

The Court may make an order directly against a convicted person specifying appropriate reparations to victims, including restitution, compensation and

114 Article 68, Rome Statute, 1998.
115 Article 69, *id.*

rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund.[116]

(VIII) SENTENCING

In the event of a conviction, the Trial Chamber is to consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence. Before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence. The sentence is to be pronounced in public and, wherever possible, in the presence of the accused.[117]

VIII. PENALTIES

Where a person has been convicted, the Court may award imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. In addition to imprisonment, the Court may also order fine; and a forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of *bona fide* third parties. In determining the sentence, the Court shall take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.[118]

A Trust Fund is established by decision of the Assembly of States Parties for the benefit of victims of crimes, and of the families of such victims. The Court may order money and other property collected through fines or forfeiture to be transferred to the Trust Fund.[119]

IX. APPEAL AND REVISION

(I) APPEAL AGAINST ACQUITTAL OR CONVICTION OR AGAINST SENTENCE

A decision of the Court is appealable. The Prosecutor or the convicted person may make an appeal on the ground of procedural error, error of fact, or error of law. In addition to above, the convicted person may also make an appeal on any other ground that affects the fairness or reliability of the proceedings or decision.

A sentence may be appealed by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence. If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds and may render a decision on conviction. In case of an acquittal, the accused shall be released immediately.[120]

116 Articles 74–75, *id.*
117 Article 76, *id.*
118 Articles 77–78, *id.*
119 Article 79, *id.*
120 Article 81, *id.*

The Appeals Chamber is to have all the powers of the Trial Chamber. If the Appeals Chamber finds that the proceedings before Trial Chamber were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may reverse or amend the decision or sentence; or order a new trial before a different Trial Chamber.

If in an appeal against sentence, the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

The Appeals Chamber may revise the final judgement of conviction or sentence on the application of convicted person on the ground of discovery of new evidence.[121]

(II) COMPENSATION TO AN ARRESTED OR CONVICTED PERSON

Anyone who has been the victim of unlawful arrest or detention is to have an enforceable right to compensation. When a person has by a final decision been convicted of a criminal offence which has been reversed on the ground of newly discovered fact, the person who has suffered punishment shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.[122]

X. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

States Parties are obligated to cooperate fully with the Court in its investigation and prosecution of crimes. The Court may also invite any State not party to this Statute to provide assistance on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.[123]

Where a State Party fails to comply with a request to cooperate by the Court, thereby preventing the Court from exercising its functions and powers under this Statute,

121 Articles 83–84, *id.*
122 Article 85, *id.*
123 Articles 86–87, *id.*

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the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

(I) SURRENDER OF PERSONS TO THE COURT

The Court may request for the arrest and surrender of a person to any State on the territory of which that person may be found. It shall request the cooperation of that State in the arrest and surrender of such a person. States Parties are to comply with requests for arrest and surrender in accordance with the provisions of the Statute and procedure under their national law.

Where the person sought for surrender, brings a challenge before a National Court on the basis of the principle of *ne bis in idem* as provided in Article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State is to proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

In accordance with its national procedural law, a State Party is to authorize transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender. A person being transported is to be detained in custody during the period of transit. No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;

If the person sought is being proceeded against or is serving a sentence in the requested State for a different crime, the requested State shall consult with the Court after making its decision to grant the request.[124]

(II) COMPETING REQUESTS

Where a State Party receives a request from the Court for the surrender of a person and also receives a request from any other State for the extradition of the same person for the same crime, it shall notify the Court and the requesting State of that fact.

In case of competing request, whether from State Party or State which is not a Party, the decision is to be taken in accordance with the provisions of the Statute. Ordinarily, the request of the Court is to be given preference over the request of any State.[125]

(III) OTHER FORMS OF COOPERATION

Article 93 obligates States Parties to comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions – (i) the identification and whereabouts of persons or the location of items; (ii) the taking of evidence, including testimony under oath, and the production of evidence, including

124 Article 89, *id.*
125 Article 90, *id.*

expert opinions and reports necessary to the Court; (iii) the questioning of any person being investigated or prosecuted; (iv) the service of documents, including judicial documents; (v) facilitating the voluntary appearance of persons as witnesses or experts before the Court; (vi) the temporary transfer of persons; (vii) the examination of places or sites, including the exhumation and examination of grave sites; (viii) the execution of searches and seizures; (ix) the provision of records and documents, including official records and documents; (x) the protection of victims and witnesses and the preservation of evidence; (xi) the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and (xii) any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes.

A State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.[126]

A sentence of imprisonment is to be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons. States Parties are to give effect to fines or forfeitures ordered by the Court without prejudice to the rights of bona fide third parties.[127]

XI. ASSEMBLY OF STATES PARTIES

An Assembly of States Parties is established under the Statute. Each State Party has one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly. The Assembly is established to:

(i) consider and adopt, as appropriate, recommendations of the Preparatory Commission;
(ii) provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;
(iii) consider the reports and activities of the Bureau and take appropriate action in regard thereto;
(iv) consider and decide the budget for the Court;
(v) decide whether to alter the number of judges;
(vi) consider any question relating to non-cooperation of State Parties;
(vii) perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

126 Article 98, *id.*
127 Articles 103, 109, *id.*

The Assembly has a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms. The Bureau is to have a representative character, taking into account equitable geographical distribution and the adequate representation of the principal legal systems of the world. The Bureau can meet as often as necessary, but at least once a year. It assists the Assembly in the discharge of its responsibilities.

Each State Party has one vote in the Assembly. Where consensus cannot be reached, decisions on substantive matters must be approved by a two-third majority of those present and voting, and decisions on procedural matters are to be taken by a simple majority of those present and voting.[128]

XII. RESERVATIONS AND WITHDRAWAL

State Parties are not allowed to make any reservations to the Statute. A State Party may withdraw itself from the Statute by giving a written notification to the Secretary-General of the United Nations. The withdrawal is to take effect one year after the date of receipt of the notification, unless the notification specifies a later date. The withdrawal, however, does not discharge a State from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal is not to affect any co-operation with the Court in connection with pending criminal investigations and proceedings.[129]

If following some withdrawals pursuant to Article 127, the number of Parties to the Statute falls to a figure less than that required for its entry into force, this situation has no effect on the continued existence of the treaty or maintenance of the Court's activity.[130]

To conclude it may be said that the International Criminal Court is perhaps the most innovative and exciting development in international law since the creation of the United Nations. The Rome Statute is one of the most complex international instruments ever negotiated, a sophisticated web of highly technical provisions drawn from comparative criminal law combined with a series of more political propositions that touch the very heart of State concerns with their own sovereignty.[131] The Rome Statute will deeply influence the domestic criminal law. It will also enrich the jurisprudence of National Courts and motivate prosecutors and judges to display greater zeal in the repression of serious violations of human rights.

128 Article 112, *id.*
129 Articles 120, 127, *id.*
130 Alain Pellet, "Entry into Force and Amendment of the Statute" in Antonio Cassese, Paola Gaeta, John R.W. D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*, vol. I (2002), p. 173.
131 William A. Schabas, *An Introduction to the International Criminal Court* (2004), p. 25.

COMMENTARIES | NOV 24 2010

Should India continue to stay out of ICC?

DILIP LAHIRI

Terrorism and the use of nuclear weapons could be taken up for consideration for inclusion in t International Criminal Court's purview. Effective participation by India, even as an observer, c influence the evolution of the ICC in the course of such discussions.

The International Criminal Court (ICC) is an unprecedented initiative by the world community over the heads of national governments and bring to trial and punish individuals responsible for commission of genocide, war crimes, crimes against humanity and aggression in situations whe countries to which they belong are unable or unwilling to bring them to justice. There has been widespread international sentiment for a long time that such an independent, permanent crimina was needed to deal with heinous crimes of international concern in such situations.

But even a few years ago, the concept of sovereign jurisdiction within national territory was so ingrained that the issue of an ICC arrest warrant against the serving President of Sudan for crim committed within his own country, making him subject to arrest in any country which had ratifi ICC Statutes and to being handed over to the ICC for trial and punishment, would have been unimaginable. . In the case of Sudan, which is not a Party to the ICC, it was particularly bizarre the UN Security Council voting to subject it to ICC jurisdiction, when the majority of the perma members of the Council have themselves stayed out of the ICC.

Not everyone agrees that this set a good precedent. Many say that this declaration of a defiant Sudanese President as an international criminal has obstructed a peaceful resolution and prolon suffering in Darfur. Several countries, like Spain and South Africa, had earlier chosen peace an

reconciliation after their national traumas during the Franco dictatorship and apartheid respecti over the likely upheaval of bringing their earlier leaders, who still had substantial following, to and punishment .

The Nuremberg and Tokyo trials had earlier addressed war crimes, aggression as a crime agains peace, and crimes against humanity committed during the Second World War. But this was victo justice , and the Indian judge at Tokyo had disassociated himself from the verdicts. In the 1990s the end of the Cold War, tribunals like the International Criminal Tribunal for the former Yugos and for Rwanda were established by the UN Security Council, with dubious legal authority und Charter, to try crimes committed within a specific time-frame during specific conflicts. Lacking appropriate forum, since the ICC has no jurisdiction over crimes committed before its Statutes c into force in 2002, Cambodia and Bangladesh are engaged in national efforts, with the cooperat the UN, to try persons responsible for the millions of killings and atrocities during the Pol Pot r and the Pakistan Army crackdown in what is now Bangladesh.

The Rome Statutes of July 17, 1998, which govern the International Criminal Court (ICC), defi crimes of genocide, crimes against humanity and war crimes, three of the four major crimes wit ICC purview, and the conditions under which the ICC can exercise jurisdiction , leaving the cri aggression to be taken up later. Many major countries, between them constituting the majority c world's population, did not sign the Rome Statutes, including the United States, Russia, China, Indonesia, and many Islamic countries, including Pakistan .111 states have currently ratified the Rome Statutes, which entered into force on July 1, 2002 after ratification by 60 countries.

There was high drama at Rome when India strenuously argued against the form that the ICC wa taking under the proposed Statutes. The Rome conference even evaded a vote on India's propos include the use of nuclear weapons as an ICC crime through a procedural 'no action' resolution has always supported international cooperation for the development and codification of internat criminal law and should have been expected to be a natural supporter of such international coop to suppress and deter heinous crimes of international concern through the ICC. But an excess of by purists made the Rome Statute of the ICC a deeply flawed instrument. India eventually absta the vote on the Statutes, has not taken any steps for its signature and ratification, and has been l a silent observer in the Conferences of Parties and other ICC meetings since 1998. There has be some criticism of India's position by some prominent Indian jurists, who have felt that India sh not turn its back on such a forward looking humanitarian innovation in international law.

The principal objections of India to the Rome Statute are that it

- Made the ICC subordinate to the UN Security Council, and thus in effect to its permanent me and their political interference, by providing it the power to refer cases to the ICC and the powe

block ICC proceedings.

- Provided the extraordinary power to the UN Security Council to bind non-States Parties to th this violates a fundamental principle of the Vienna Convention on the Law of Treaties that no st be forced to accede to a treaty or be bound by the provisions of a treaty it has not accepted.

- Blurred the legal distinction between normative customary law and treaty obligations, partic in respect of the definitions of crimes against humanity and their applicability to internal conflic placing countries in a position of being forced to acquiesce through the Rome Statutes to provis international treaties they have not yet accepted.

- Permitted no reservations or opt-out provisions to enable countries to safeguard their interes placed in the above situation

- Inappropriately vested wide competence and powers to initiate investigations and trigger jurisdiction of the ICC in the hands of an individual prosecutor

- Refused to designate of the use of nuclear weapons and terrorism among crimes within the p of the ICC, as proposed by India

However, beyond these positions of principle, the iron in India's soul with respect to submitting ICC jurisdiction had entered with the increasing use fronts of terrorist organizations, with the su of domestic and international NGOs, of allegations of human rights violations as a pressure poi against Indian security and armed forces engaged in combating insurgency and terrorism in Jam Kashmir, the North East and earlier Punjab. Indian leaders were implacably opposed to allowin possibility of Indian civilian and military commanders being indicted abroad by an over zealous politically motivated ICC prosecutor for alleged crimes committed in the course of performing duties.

Such concerns regarding possible misuse and abuse were not confined to India, and were shared most countries whose armed forces found themselves involved in situations of armed conflict, in or external. There was a bruising struggle by the US to obtain immunity for its soldiers engaged peacekeeping operations and to secure bilateral agreements not to hand over accused US nation the ICC. As it turned out, such fears were exaggerated due to the safeguards built into ICC proc which have, by and large, been respected in practice.

The recently concluded Review Conference of the Rome Statutes in Kampala, Uganda in June 2 has completed the process of definition and conditions for exercising jurisdiction for the fourth designated crime of aggression, so that the ICC now has the legal framework to act against all t

crimes currently under its jurisdiction. Apart from this, it was agreed to bring under the jurisdic the Court the war crime of employing certain poisonous weapons and expanding bullets, asphyx or poisonous gases in armed conflicts not of an international character The only recent instance use of such weapons by a state was by Saddam Hussein against Iraqi Kurds ,and this is unlikely repeated after the prohibition and tightly verified process of destruction of chemical weapons. I ironical that States Parties were able to address this arcane issue, but could not deal with nuclea weapons and other WMDs, depleted uranium weapons etc.

Apart from this, the Kampala meeting agreed on certain procedural innovations which, if pragmatically agreed to at Rome in 1998, may have dramatically altered the trajectory of intern support for the ICC. An 'opt-out' provision has been added, permitting State Parties to be exem the exercise of jurisdiction by the Court with respect to the new crime of aggression .This is in addition to the provision that 30 of the State Parties who helped to adopt the aggression amendı must ratify it before it can apply to them, and that too , not before 2017. If such an 'opt-out' prc had been provided at the time of adoption of the Rome Statutes regarding the listing of crimes a humanity, whose ICC definition is not universally accepted, or the applicability of ICC jurisdict domestic conflict, there is no doubt that many more States would have signed on. The Kampala conference also decided to continue allowing new States Parties to opt for excluding themselve the Court's jurisdiction over war crimes allegedly committed by its nationals or on its territory period of seven years.

The record of the ICC since 2002 has not borne out the dire misgivings of many of the countrie stayed out at Rome. The general impression is that the ICC has guarded against politically moti prosecutions. The U.S. remains wary about exposing its troops to politically motivated prosecut for unpopular wars, such as in Iraq and Afghanistan . But it has changed its approach from outr opposition to constructive engagement. Russia and China have also participated as observers in meetings of ICC State Parties which have been negotiating substantive and procedural issues re to the evolution of the ICC.

On the other hand, the ICC has proved very expensive, having already spent over half a billion on a handful of cases . Its political judgment has also been questionable, with allegations of rac bias. By October 2007, the ICC prosecutor had received 2,889 communications about alleged w crimes and crimes against humanity in at least 139 countries. Yet by March 2009, the prosecuto opened investigations into just four cases in Uganda, Democratic Republic of Congo, the Centr African Republic, and Sudan Darfur. All of them are in Africa! Thirteen public warrants of arre been issued, all against Africans. The March 4, 2009 issue by ICC of an arrest warrant against t Sudanese President Omar al-Bashir angered the African Union, which had advised against it. O concerns about misguided activism, news that controversial Spanish judge Baltasar Garzon, wit

penchant for tilting at distant windmills, starting with General Pinochet in Chile, may be joinin ICC, has also given rise to misgivings.

But with 111 ratifications, 30 odd more signatories, and a successful Review, the ICC has clearl established itself and will grow in influence and representativeness. While there is no immediat pressure on India to join, staying out indefinitely will scarcely enhance India's moral stature an international profile with its overall past record on human rights issues. Indeed, in normal circumstances, India would have wished to be among the first to join such a revolutionary initia improve the international system. Staying out also reduces India's ability to influence the evolu the ICC or to have judges from India on the Court.

How serious are Indian concerns at being politically targeted in the ICC if it joined? This was t primary reason for the strong opposition of the armed forces and security authorities to India to supporting the ICC. In J&K, the North East and earlier Punjab, sympathizers and front organiza of the insurgents, both in India and abroad, have tried hard in the past to bring pressure on Indi international fora with allegations of human rights abuses and violations. They can be expected to take advantage of the ICC Statutes to lobby the ICC prosecutor to launch investigations agai Indian leaders and commanders. They might even succeed in constructing dossiers carrying pri facie persuasiveness against some of them.

But the specter of high ranking Indian civil and military officials being on the run to evade ICC warrants if they travel abroad is farfetched. First of all, there are strict safeguards in place agai politically motivated Prosecutor running off with the bit between his teeth, and the Prosecutor h obtain prior authorization to proceed with an investigation from a Pre-trial Chamber of judges c ICC. Secondly, ICC jurisdiction is founded on the principle of complementarity, with absolute p on exercise of national jurisdiction. The principle of complementarity provides that the ICC ca take up a case if it is already being investigated by the concerned State, unless the State is mani unwilling or unable to carry out the investigation or prosecution. To start with, when the Prosec has determined that there is a reasonable basis to commence an investigation, he has first to not States Parties which would normally exercise jurisdiction over the crime .Within one month of of that notification, a State may inform the Court that it is investigating the crime ,and at the re that State, the Prosecutor is required to defer to the State's investigation. It is highly unlikely th ICC Prosecutor could decide to take over the prosecution of an ICC crime in India on the basis determination that the Indian legal system was unable or unwilling to deal with it. These safegu thus make direct ICC prosecution of Indian officials virtually impossible to conceive.

The ICC Prosecutor cannot ,of course, on his own, try to exercise jurisdiction over nationals of country which has not joined the ICC, and this was undoubtedly one of the principal reasons fo

decision by India to stay out. But this does not mean that Indian nationals can entirely escape th ICC's reach. The UN Security Council has been provided the authority under the ICC Statutes t non members of ICC under its jurisdiction. Despite strong protests, inter alia by India, this prov was included in the Rome Statutes. Staying out of the ICC therefore does not prevent prosecuti the ICC on a reference by a mandatory Chapter VII decision of the UN security Council , as has happened in the case of Sudan.

In practice, of course, the contingency of a referral by the UNSC by a Chapter VII resolution fo serious crimes by Indian nationals to the ICC is extremely remote. Enforcement decisions unde Chapter VII of the UN Charter, which all States are obligated to implement, have never been in against India in UN history , though it is, of course, theoretically possible. Permanent members UNSC, on the other hand, cannot be referred to the ICC due to their veto. UNSC Permanent me who do not join the ICC (US, China, Russia) cannot be proceeded against by either the Prosecu the UNSC, and are therefore totally outside ICC jurisdiction.

While such gross lack of equity between the permanent members of the UNSC and India in trea before the ICC may rankle, it would be seen from the above that the actual adverse effects woul minimal. There could, of course be irritations. Allegations from reputable NGOs & other reliab sources crimes of ICC interest in India or by Indian nationals e.g. in J&K or the North East can taken cognizance of by the ICC Prosecutor. If the Prosecutor determines that there are good gro for an investigation/ prosecution, he will have to notify India which will have to start national proceedings against those accused within a month to ensure that the ICC defers its own action. ICC Prosecutor will have the right to require periodic reports of the progress of the case in Indi would however scarcely be reasonable to make heavy weather of these inconveniences, which w be faced by all States, As long as Indian diplomatic and legal machinery was alert, there is no possibility of the ICC directly investigating or prosecuting crimes under the ICC remit in India.

There are other legal issues to be resolved before India could join the ICC, whose Statutes are n consistent with India's position on other international legal instruments. For example, India has accepted Common Article 3 of the Geneva Conventions which relate to war crimes during confl of an international character. However Articles 7 and 8 of the ICC Statutes include such crimes no reservations are permitted. Article 124 of the Statutes does permit States at the time of joini opt out of war crimes jurisdiction for seven years. However, on signing up, India would immedi come under ICC jurisdiction for crimes against humanity during conflicts not of an internationa character. Perhaps India's position on Common Article 3 of the Geneva Conventions and crimes against humanity in the course of domestic conflicts needs to be reconsidered. Having become I so many UN human rights conventions, which require us to submit a variety of periodic reports scrutiny on domestic actions to implement these obligations, it is scarcely appropriate that Indi

should assert impunity for the commission of the most heinous crimes imaginable in the course combating domestic insurgencies.

With so many major countries staying out, there is no pressing hurry for India to decide immed on becoming an ICC State Party. But it is not clear why India seems to have washed its hands o substantive involvement in ICC matters over the last ten years by apparently limiting our obser delegations to ICC meetings with only a silent watching brief. US, China and Russia, which vot against the Rome Statutes, have participated actively and substantively in these ICC bodies incl at the recent Review Conference. The current set-up in the ICC is not set in stone and existing opportunities to influence developments should not be neglected. Future meetings of the ICC Assembly of Parties could well consider, for example, extending the Kampala 'opt-out' provisio Terrorism and the use of nuclear weapons could be taken up for consideration for inclusion in th ICC's purview. Effective participation by India, even as an observer , could influence the evolut the ICC in the course of such discussions. Of course , this could be done much more easily as a Party.

Conclusions

1. The ICC is here is to stay as an increasingly central institution in the international legal architecture to combat massive human rights violations which could affect peace and security.
2. Even if India is not ready to join, it should move towards a posture of constructive engagem with the ICC.
3. Concerns about Indian leaders/military commanders being prosecuted by the ICC if India joi highly exaggerated
4. ICC jurisdiction over India under the UNSC referral process would be theoretically possible whether or not India joins the ICC, but highly unlikely in practice.
5. India should immediately ensure substantive and effective participation in ICC deliberative negotiating bodies which it is entitled to attend as an observer.

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Courtesy: Indian Society of International Law

The views expressed above belong to the author(s).

Rajeev Dhawan, Refugee Law And Policy In India

IV

Legal Framework

The legal framework concerning refugees in India is in a state of undefined and unsettled evolution. On the one hand, India has a liberal constitutional framework that guarantees certain fundamental human rights even to foreigners. This human rights regime has been interpreted by an activist judiciary in the light of international human rights treaties to which India is a party. These provisions have been used to protect foreigners in general and refugees in particular. On the other hand, the Indian statutory regime dealing with foreigners refuses even to acknowledge *refugees* as a special class of people deserving its consideration. This limb of the colonially-inspired Indian legal system usually treats refugees as *foreigners*. Worse still, at times they become illegal entrants into India – susceptible to summary deportation. Special statutory regimes designed to cater to particular refugees, especially the Partition refugees, remain an exception. Somewhere in between the progressive ways of constitutional liberalism and the harsh regime of the Foreigners Act lie the realities of India's administrative and social practices, which provide some succour and support for refugees with a well-founded fear of persecution in their own country.

India's legal regime dealing with refugees may be examined in the following contexts:

(i) The citizenship regime
(ii) The statutory framework
(iii) The fundamental rights regime

(iv) India's obligations arising of its international treaty obligations
(v) The judicial expansion of rights of refugees
(vi) The SAARC framework
(vii) The Model Law on Refugee Protection.

THE CITIZENSHIP REGIME

Determination of citizenship is important to the operation of a refugee regime. Indeed, the starting point of a refugee problem is that a person, family or group has to flee from some country or area to which they cannot return. Prior to 1857, India consisted of a number of native states and of territories that were under the control of the East India Company. Following India's First War of Independence (described by the British as a Sepoy Revolt), the British Crown took over the Company's territories, annexed a few others and reconstituted the territory of British India over which the British ruled. But, in and around British India were various 'princely' states that, though under the general suzerainty of the British Raj, were, for all legal purposes, foreign territory. Several statutes of 1844, 1847 and 1852 permitted naturalization in and to British India – which was later consolidated by the Indian Naturalization Act, 1919. After 1857, the British Act XXXIII of 1857 incorporated provisions to ensure that the movement into and around British India remained firmly under the control of the British government. In 1864, a special Foreigners Act was directed not just for the peace and security of British India, but also '*of neighbouring Princes and States*'. But, the meaning of 'foreigner' was wide; and the regime that was set up, strict. Initially applied only to the British territories, it was later extended to Burma and the tribal areas. What is important to our present concern is not just the sweep of the Act of 1864, but the license and entry system, a virtual surveillance of foreigners and draconian powers of deportation that were extensively used to deport 'undesirable' persons both to the neighbouring princely states and other areas, and to Afghanistan and elsewhere. This system of control

enunciated by the Act of 1864 became – as we shall see – the prototype of future legislation in the form of the Registration of Foreigners Act, 1939 and the Foreigners Act, 1946, which are the controlling legislations on the statute book applicable today.

However, the Partition of the sub-continent into various independent states, and especially the creation of India and Pakistan, made it essential to distinguish between 'Indian citizens' and foreigners. The Constitution of India of 1950 contained specific provisions. The basic provision for determination of citizenship in 1950 was Article 5 of the Constitution, which states:

> At the commencement of this Constitution, every person who has his domicile in the territory of India and –
> a. who was born in the territory of India; or
> b. either of whose parents was born in the territory of India; or
> c. who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India.

It will thus be seen that citizenship is based on domicile with the further requirement of birth, parental connection or residence. There was specific inclusion in the Constitution of those who had migrated from India (Article 6) and exclusion of those who had migrated to Pakistan (Article 7). Those with a parental or grandparental connection with the larger pre-Partition India but ordinarily resident abroad could get Indian citizenship (Article 8) – but dual nationality was not permitted (Article 9). However, it is clear that the mere acquisition of a foreign passport is not enough to justify a deportation, until and unless a determination is made under the Indian Citizenship Act, 1955 (see Section 9 of the Act of 1955). As has been noted by the Supreme Court in *Government of Andhra Pradesh v. Syed Mohammed*, AIR 1962 SC 1778, and a number of other cases,

> *there is no doubt in all cases where action is proposed to be taken against persons residing in this country on the ground that they have acquired the citizenship of a foreign state and have lost in consequence the citizenship of this country, it is essential that that question be considered first by the Central Government*

[See also *State of UP v. Rehmatullah*, (1971) 2 SCC 113; *State of Gujarat v. Yakub Ibrahim*, (1974) 1 SCC 283; *Ayub v. Commissioner of India*, (1967) 2 SCR 401.] Subject to the above, older pre-1950 citizenships were continued (Article 10) and new rights were to be determined by Parliament (Article 11), which later enacted the Indian Citizenship Act, 1955.

Although the crisis of Partition was resolved by 1950, the new citizenship provisions left very little scope for socio-economic – still less, political – refugees. The commencement of the Constitution (26 January 1950) was the cut-off date. A fairly widely defined set of constitutional provisions extended the mantle of citizenship. Even if dual citizenship was not allowed, the mere procurement of a foreign passport would not, by itself, invite deportation as a foreigner unless the Union government determined loss of citizenship in quasi-judicial proceedings under Section 9(2) of the Citizenship Act, 1955. Under that Act of 1955, citizenship in the future could be obtained by birth (Section 3), descent (Section 4), registration (Section 5) and naturalization (Section 6). Citizenship can be both renounced (Section 8) and terminated (Section 9). The English Common Law Rule by which a person's citizenship was determined by the place of his birth is called *jus soli*. Section 3 in 1955 provided for such a rule whereby 'every person born in India on or after the 26th of February 1950' would be a citizen of India by birth. This was however amended in 1986, whereby every person born in India after the commencement of the Citizenship (Amendment) Act, 1986 had to show that one of the parents was a citizen of India before his or her claim to Indian citizenship was accepted. Thus, if a person was born in India after 1 July 1987 to non-Indian parents, that person would not be an Indian citi-

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zen. The Citizenship (Amendment) Act, 2004 adds a further qualification, whereby a person born in India can become an Indian citizen only if *both* his parents are Indian or if one of his parents is an Indian and the other is *not an illegal migrant*. (See also *Report of the Parliamentary Standing Committee on Home Affairs on the Citizenship Act*, 12 December 2003.) This immediately begs the question as to the status of a child born out of wedlock between an illegal migrant and an Indian. The Act does not allow such a person to become a citizen of India merely by birth in India. It would have to be proved that one of the parents is an Indian and, more importantly, that the other parent is not an illegal migrant. Such provisions can only increase the possibilities of statelessness.

Special Rules have been made to give effect to the Act of 1955 in the form of the Citizenship Rules, 1956, which have been amended from time to time. When the Portuguese and French enclaves in India were taken over by India, a refugee situation *in situ* was averted by the Dadra and Nagar Haveli Citizenship Order, 1962, the Goa, Daman and Diu (Citizenship) Order, 1962 and the Citizenship (Pondicherry) Order, 1962. Likewise, when problems arose in matters of citizenship in relation to residents and migrants in the state of Assam in India, Section 6A of the Citizenship Act was enacted on 7 December 1985, to give effect to what has come to be known as the Assam Accord. This was one way to deal with the Chakma influx into Assam under conditions that attract controversy on their migrant (and possibly refugee) status even today – with the Supreme Court of India taking a view in their favour (*State of Arunachal Pradesh v. Khudi Ram Chakma*, 1994 Supp (1) SCC 615) but not without obviating continuing concern over their deportation.

Citizenship regimes are important to refugee issues. Citizens cannot be deported. Foreigners, including migrants, can be deported. There is no specific law in India that prevents refugees from deportation, but an evolving practice suggests that they might not be. India's expansive determination of the right to

citizenship (including changes in the law to determine problems arising out of the Goa, Pondicherry and Assam situations) has helped to avert problems of statelessness and to recognize a large number of persons who would otherwise be foreigners susceptible to deportation under possible conditions of refoulement. This flexibility – both of and under the Citizenship laws – has been critical in the resolution of various crises. Solving citizenship issues goes a long way in solving refugee problems.

THE STATUTORY FRAMEWORK

The inadequate statutory framework dealing with refugees in India offers a stark contrast to the increasingly humane judicial declaration of refugee rights founded upon the Constitution and based on principles of international law and human rights guaranteed by treaties signed by the Indian government, including the ICCPR and the ICESCR. Except for a few notable judicial exceptions, the Indian statutory framework does not even acknowledge refugees as a separate class of people deserving separate treatment. However, the relative success of India's policy of dealing with refugees in an *ad hoc* manner without committing itself to a general statutory framework has silenced demands for a law concerning refugees as a separate class. Equally, without a specialized governance regime for refugees they are usually treated on par with *foreigners* and *illegal migrants or entrants*, without any special protection being accorded to them. To understand the law governing refugees, it would be useful to examine:

(a) Extradition laws as a precursor to refugee protection
(b) Laws regulating foreigners and illegal migrants
(c) Laws governing legal entry procedures
(d) Laws dealing specially with refugees.

These respective regulatory frameworks are discussed below.

Laws Governing Extradition Procedures and Protection

We have already explicated the significance of the law relating to extradition as a precursor to a more expanded international

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refugee law regime (in Chapter III of this Monograph, pages 20–22). India's extradition statutes provided protection to refugees who were political offenders and those who, if extradited, would not be treated well or fairly by the state seeking extradition. Thus the embryo of the right of non-refoulement was reiterated and codified in the extradition statutes – in that the basis for returning a person requested for extradition was meeting the requirement of a judicial inquiry into the justice system of the country of demand, and finding that such a system is just and follows guaranteed due process norms while trying a returning fugitive. India's extradition law, as has been explained earlier, consisted of a number of statutes dealing with different situations including the Indian Extradition Act, 1903, the English Extradition Act, 1932 and the Fugitive Offenders Act, 1881. The Supreme Court, in *State of Madras v. C.G.Menon* (AIR 1954 SC 517), had held that after India became a republic, it would not be possible for the Fugitive Offenders Act, 1881 to be applicable. The Extradition Act, 1962 was enacted to also take into stock the situation of the pre-independence, erstwhile princely states – to whom the Indian Extradition Act, 1903 did not apply – and to eliminate all confusion regarding the applicability of earlier British Indian extradition statutes to independent India.

The Extradition Act, 1962 provided a minimal measure of protection by emphasizing the fulfilment of the three conditions of double criminality, speciality and *prima facie* case as a precondition before extradition. While extradition proceedings are often necessary to deal with international crime and fugitives, they may sometimes be used as a tool by which governments persecute persons who have managed to escape their domestic jurisdictions. Each country's domestic law of extradition is, therefore, of crucial importance to that class of refugees who are sought by the authorities back home, whether with genuine or false motives. The Extradition Act, 1962 creates a due process regime in India for extradition purposes. Under the Act, extradition proceedings involve a judicial determination

by a magistrate of whether a particular fugitive should be extradited. The central government retains the power to 'expel' a foreigner under the Foreigners Act, but if it wishes to 'extradite' a person, the procedure established by the Extradition Act must be observed. The differences between the two procedures were explained by the Supreme Court in the *Hans Muller* case; AIR 1955 SC 367 at 375:

> The Extradition Act is really a special branch of the law of Criminal Procedure. It deals with criminals and those accused of certain crimes. The Foreigners Act is not directly concerned with criminals or crime though the fact that a foreigner has committed offences, or is suspected of that, may be a good ground for regarding him as undesirable. Therefore, under the Extradition Act, warrants or a summons must be issued; there must be a magisterial enquiry and when there is an arrest it is penal in character; and – this is the most important distinction of all – when the person to be extradited leaves India he does not leave the country a free man.

In *Re Bai Asha*, AIR 1929 Bom 81, the Bombay High Court observed at page 84: 'The Indian Extradition Act and the Criminal Procedure Code both being penal enactments must be construed strictly in favour of accused persons wherever such construction can be reasonably justified.'

Even under the Extradition Act, however, the magistrate merely enquires into the matter, submits a report to the government and leaves, and the final decision is left to the central government, although under Section 7(3), if the magistrate is of the opinion that a *prima facie* case is not made out against the accused, he is to be discharged. Of course, the question of what constitutes a *prima facie* case is itself often a subject of controversy. (See, generally, *Bangalore Woolen, Cotton and Silk Mills v. B. Dasappa*, AIR 1960 SC 1352 and *Martin Burn v. R.N. Bannerjee*, AIR 1958 SC 79.) Since extradition may be considered 'more' of a penalty than subjecting a person to a normal criminal trial, it would be logical to hold that the *prima facie* case requirement for extradition purposes should be more strin-

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gent than the *prima facie* case required before a person can be committed for trial in India. The 1973 amendments to the law of criminal procedure have removed the requirement of a *prima facie* case before committal in one class of cases – potentially arbitrary and discriminatory. However, the absence of a *prima facie* case may be sufficient ground for the trial court to dismiss charges or the higher judiciary to intervene if no offence is made out in the complaint or police report.

This safeguard of judicial determination of a *prima facie* case is not, however, applicable to all extradition proceedings. The Act contains two separate procedures under Chapters II and III, and the *prima facie* case in favour of extradition is only required under Chapter II. Chapter III originally applied to Commonwealth countries with whom there existed extradition agreements. By an amendment in 1993, most of the references to Commonwealth countries were removed; at present, Chapter III applies to all countries with whom India has extradition arrangements. India has extradition treaties with eleven countries and extradition arrangements with eight. (See http://cbi.nic.in/interpol/iextra.htm.) It is not clear what is the difference in principle between an extradition 'arrangement' and an extradition 'treaty'. These different provisions are a legacy of the British rule where 'arrangements' may have existed between different dominions of the British Empire. The provisions seem obsolete in the era of independent governments who interact with one another through treaties in the manner and to the extent recognized in international law. The most crucial difference between the two chapters is that under Chapter III, there need not be any determination of a *prima facie* case. The magistrate need only determine whether the warrant issued in the foreign state is duly authenticated and whether the alleged offence is an extraditable one (Section 17). This differential treatment may amount to a derogation from the fundamental rights under Articles 14 and 21 of the Constitution. (See J.N. Saxena, 'India – The Extradition Act, 1962', 13 *International & Comparative Law Quarterly*, 116 (1964), pp. 132–34) Further, the

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Madras High Court *In Re C.G. Menon*, AIR 1953 Mad 729, observed at page 736:

> The need for offering evidence to show that *prima facie* the offender is guilty of the crimes, with which he has been charged by the country asking for his extradition, has been well recognized. Though it may not be an integral part of the law of extradition of every State in relation to every other State, it is certainly a normal feature, and one can even say, almost a universal feature of extradition laws. To dispense with such a need, there must, in my opinion, be some basis better than geographical contiguity alone, if the test of 'equal protection of the laws within the territory of India' specifically provided for by Art. 14 of the Constitution, is to apply.

It has already been indicated that a provision in the Fugitive Offenders Act, 1881 was declared unconstitutional on the ground that it denied protection under extradition laws (including the requirement of a *prima facie* case) to certain persons on the basis of an antecedent connection between the requesting state and India. This Madras High Court decision striking down the provision of the Fugitive Offenders Act was upheld by the Supreme Court, although on different grounds, in *State of Madras v. C.G. Menon*, AIR 1954 SC 517. However, such a challenge to the Extradition Act in these terms has not yet been made before any Court. Section 31(a) mandates that a fugitive criminal shall not be extradited if the offence for which his surrender is sought is of a political character, or if he proves that the requisition or warrant for his surrender has been made with a view to try to punish him for an offence of a political character. The nature of the offences, and the exclusion of political offences, for which extradition is sought is normally left to the extradition treaty or arrangement, although the Schedule to India's Extradition Act specifies certain offences that shall not be considered political offences. The principle of non-extradition of political offenders is widely accepted, but it has probably not attained the status of a customary rule of international law. (See Robert Jennings and Arthur Watts, (eds),

Oppenheim's International Law – Vol 1: Peace, 9th edn, London: Longman, 1992, p. 963.) Under Section 29, the central government has the power to stay extradition proceedings and discharge the person at any stage, if it seems unjust or inexpedient to surrender or return the fugitive criminal. The final right to refuse extradition remains with the executive.

The Extradition Act, 1962 provides some form of protection to those refugees who are sought in another state to answer criminal charges. However, this protection may often exist only in theory, as the process of extradition itself is often politicized, and the government may not wish to antagonize a foreign government seeking extradition of refugees on Indian soil. An illustration of this is the case of Rongthong Dorji, a pro-democracy political dissident in Bhutan with a history of torture and persecution by the Bhutanese state. He fled to Nepal, where he was accorded refugee status. In 1996, on his arrival to India, he was detained and extradition proceedings started. In spite of an already existing extradition treaty between India and Bhutan, proceedings against Dorji were carried out under a new extradition arrangement, which was made retrospectively applicable, giving rise to strong allegations that the entire purpose of the arrangement was to facilitate the extradition of Dorji. (See 'Extradition Trial of Rongthong Kunley Dorji', http://www.bhutandnc.com/trial1.htm.) Further, despite strong evidence with the Indian government of his offence being clearly political in nature, he was extradited on the purported basis of certain charges of a commercial nature. (See R. Dhavan, 'Dorji of Bhutan', *The Hindu*, 10 October 1997.) This case clearly demonstrates that the extradition law is no substitute for a full-fledged and distinct refugee law regime, in that it does not provide adequate safeguards for refugees, especially as very few refugees actually face extradition.

Thus, the protection offered by extradition law and its substantive provisions, procedure and processes is not a complete remedy. It is always subject to political pulls and pressures. Extradition regimes come into play to deal with criminals and

fugitives and not all people who have a well-founded fear of persecution on grounds of belief, race, religion or ethnicity. It does not look into the effects of returning or deportating a person to his country of origin who is not accused of a crime but persecuted nonetheless. The protection offered by extradition law is limited to the extent of determining whether an accused would be treated fairly after extradition. At the same time, the relations between nation-states and the pressures of international politics have always played, and will inevitably continue to play, a role in the decisions taken by governments in extradition matters.

Laws Regulating Foreigners and Illegal Migrants

The basic regime governing *foreigners* is incorporated in two legislations – the Foreigners Act, 1946 and the Registration of Foreigners Act, 1939. Both of these legislations were born out of emergency measures enacted during the Second World War. Before this regime came into being, the Foreigners Act, 1864 occupied the field, which provided for the expulsion of foreigners, their arrest and detention pending removal, and a ban on further entry. The rest of the 1864 Act, seeking to mandate reporting to the authorities on arrival, licensed travel and exclusion of free movement, could be enforced only in times of emergency. The powers under the 1864 Act were found to be inadequate and ineffective both during emergency and normal times. The needs of the war emergency were met by the Foreigners Ordinance in 1939, and the promulgation under it of the Foreigners Order and the Enemy Foreigners Order. This Ordinance was replaced by a temporary measure in the form of the Foreigners Act, 1940, which was to lapse in 1946. The 1940 Act, which was to lapse on 30 September 1946, was itself extended by the Foreigners Act (Amendment) Ordinance, 1946 up to 25 March 1947. This created the need for enacting a permanent legislation.

The Foreigners Act, 1946, as is acknowledged by its Statement of Objects and Reasons, was mainly a reproduction of the

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Foreigners Act of 1940. India's main regulatory regime for foreigners, therefore, is composed of emergency war-time measures, undertaken by the colonial state and continued by the independent state after 1947. Section 2(a) of the Foreigners Act defines a 'foreigner' as '*a person who is not a citizen of India*', thus covering all refugees within its ambit as well. Section 3 of the Act provides that:

> *Section* 3(1): The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or their departure therefrom or their presence or continued presence therein.
>
> (2) In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner –
>
> a) shall not enter India, or shall enter India only at such times and by such route and at such port or place and subject to the observance of such conditions on arrival as may be prescribed;
>
> b) shall not depart from India, or shall depart only at such times and by such route and from such port or place and subject to the observance of such conditions on departure as may be prescribed;
>
> c) shall not remain in India or in any prescribed area therein;
>
> cc) shall, if he has been required under this section not remain in India, meet from any resources at his disposal the cost of his removal from India and of his maintenance therein pending such removal;
>
> d) shall remove himself to, and remain in, such area in India as may be prescribed;
>
> e) shall comply with such conditions as may be prescribed or specified –
>
> i. requiring him to reside in a particular place;
>
> ii. imposing any restrictions on his movements;
>
> iii. requiring him to furnish such proof of his identity and to report such particulars to such authority in such manner and at such time and place as may be prescribed or specified;
>
> iv. requiring him to allow his photograph and finger impressions to be taken and to furnish specimens of his handwriting and signature to such authority and at such time and place as may be prescribed or specified;
>
> v. requiring him to submit himself to such medical examination by such authority and at such time and place as may be prescribed or specified;
>
> vi. prohibiting him from association with persons of a prescribed or a specified description;
>
> vii. prohibiting him from engaging in activities of a prescribed or specified description;
>
> viii. prohibiting him from using or possessing prescribed or specified articles;
>
> ix. otherwise regulating his conduct in any such particular as may be prescribed or specified;
>
> f) shall enter into a bond with or without sureties for the due observance of, or as an alternative to the enforcement of, any or all prescribed or specified restrictions or conditions;
>
> g) shall be arrested and detained or confined;
>
> and may make provision for any matter which is to be or may be prescribed and for such incidental and supplementary matters as may, in the opinion of the Central Government, be expedient or necessary for giving effect to this Act.

There have been a number of Orders which have been framed under Section 3 of the Foreigners Act, 1946, including the Foreigners (Report to Police) Order, 1971, the Foreigners (Restriction on Movements) Order, 1960, the Foreigners (Restriction on Activities) Order 1962, the Foreigners (Proof of Identity) Order, 1986, the Foreigners (Restrictions on Residence) Order, 1968, among others. The courts have held, as has been elaborated later, that foreigners do not have any fundamental rights under Article 19 of the Indian Constitution guaranteeing basic democratic freedoms of speech, association, movement and

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the right to business. But foreigners do have the right to equality (under Article 14) and due process (under Article 21). However, all these Orders are constitutionally valid and the doctrine of equality does not forbid a classification of persons into citizens and foreigners. As is apparent from the above provisions, a foreigner, whether a refugee or not, is under the control of the government. The Calcutta High Court repelled the argument that Section 3 of the Foreigners Act suffered from the vice of excessive delegation of discretion to the executive, holding that the provision was constitutionally valid. In *A.H. Magermans v. S.K. Ghose*, AIR 1966 Calcutta 552, the High Court held at para 16 that:

> The standards and the criteria on which the power is to be exercised have been clearly defined. The Court is not kept guessing either with regard to the object or with regard to the policy of the legislation. What has been left with the executive is not any determination with regard to policy or principle, but the application of the principles to individual cases. That being so, it cannot be held that there has been excessive delegation of powers under the Foreigners Act, 1946 in favour of the executive.

Under Section 7 of the Foreigners Act, hotel keepers are obliged to keep records of foreigners staying in the hotel. Under Section 9, the burden of proving that a person is not a foreigner rests on that person. Section 12 allows for the delegation of powers by the central government to the state government to exercise any authority on behalf of the central government. This delegation was done on 10 February 1948, by way of Notification No. 9/9/46–1–Political (EW), which provided that all the powers vested in the central government would vest in the state government subject to the central government exercising any of these functions itself. The courts (*Firoz v. SDO*, AIR 1961 MP 110; *Dawood v. Deputy Commissioner of Police*, AIR 1958 Cal 565) have held that even these delegated powers can be further delegated as they are a conferment of an authority on the state government. The Patna High Court has, in *State v.*

Abdul Rashid, AIR 1961 Pat 112, suggested that the state government cannot delegate its powers under the statute to police officers and others in the state without following the various procedures laid down for the issuance of a Notification made by the central government to the state government. Whether such vast powers, including those under Section 3, ought to be given to sub-district level officers and police officials, is a matter that requires serious consideration.

Section 14 of the Act penalizes any contravention of the Act or any order made thereunder, by permitting imprisonment of up to five years as well as a fine. Thus, the Foreigners Act confers power on the central government to expel foreigners from India and this power with the central government is relatively unfettered. The central government is given extremely wide-ranging discretion to deal with foreigners during their stay in India. Reports of arrival, and departure and residence in hotels, are required to be made by foreigners, and any violation of these requirements will bring in the penalty clauses under Section 14 of the Foreigners Act, 1946. In fact, the central government can deport any person on the ground that he is a foreigner and the burden of proof is on that person to show that he is not a foreigner. (See, generally, *Louis De Raedt v. Union of India*, (1991) 3 SCC 554; *Abdul Satar v. State of Gujarat*, AIR 165 SC 810; *Ibrahim v. State of Rajasthan*, AIR 1965 SC 618.) As will be shown later, before passing the order of deportation, there is no necessity to follow any kind of extended due process or for a hearing to be given to the person to be deported.

The Foreigners Act needs to be read with the Foreigners Order, 1948. Rule 3 of the Order prohibits entry into India except with the leave of the civil authority having jurisdiction at the place of entry. Rule 3(2) says that:

> Leave to enter *shall* be refused if the civil authority is satisfied that,–
>
> (a) the foreigner is not in possession of a valid passport or visa for India or has not been exempted from the possession of a passport of visa;

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(b) he is a person of unsound mind or a mentally defective person;
(c) he is suffering from a loathsome or infectious disease in consequence of which, in the opinion of the medical officer of the port of the place of entry, as the case may be, the entry of the foreigner is likely to prejudice public health;
(d) he has been sentenced in a foreign country for an extradition offence within the meaning of the India Extradition Act, 1903;
(e) his entry is prohibited either under the order issued by a competent authority or under the specific orders of the Central Government.

Rule 4(b) empowers the central government to modify or cancel the order of refusal, while Rule 5 provides for detention of the foreigner when leave to enter is refused.

The Registration of Foreigners Act, 1939, under Section 3, obliges all foreigners present in India to report their presence to the prescribed authorities, in accordance with the Rules made by the central government. The central government has the discretion, under Section 6 of the Act, to exempt the application of the Act and the requirements of the Rules to any foreigner or cases of foreigners. The Registration of Foreigners Rules 1992, made in supersession of the Rules of 1939, require the registration of foreigners on their arrival in India (Rule 4), the report by a foreigner of his address in India (Rule 6), the production of proof of identity (Rule 9), the report of any change in address or other particulars (Rules 12 and 13) and furnishing of information in the hotel registers (Rule 14(3)).

The Foreigners Act, the Registration of Foreigners Act and the Foreigners Order, 1948, along with the other Orders issued under the Act, lead to a high degree of control over the entry–exit and movement of foreigners, suggesting intolerant tendencies on the part of India. In addition to these legislations, there are various security legislations that are particularly insensitive in their xenophobic suspicion of foreigners. For instance, Section 3(1)(b) of the National Security Act, 1980 empowers the

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central or the state government to detain a foreigner if 'satisfied . . . that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India', his detention is necessary. No public interest or security grounds need to be shown. Of course, like all other laws, it makes no special provisions for refugees, who are equally susceptible to arbitrary and preventive detention. The unfettered discretion of the central government – and the limited application of judicial review by the judiciary whereby the area of review is essentially limited to the question of whether the person is a foreigner or not – has led to a number of people being deported, in most cases without any procedures being followed. As will be seen in the section relating to judicial protection, the courts have started expanding the rights of foreigners by reading Article 21 'due process' rights and a right to be treated fairly under Article 14, even though denying them other civil and political freedom rights under Article 19 of the Constitution.

Laws Governing Legal entry Procedures

In addition to the laws regulating citizenship and foreigners, statutes have been enacted that deal with legitimate entry and exit into India and movement within India. This area is largely governed by the Passports Act, 1967 and the Passport (Entry into India) Act, 1920. These laws lay down special procedural safeguards that legitimize an entry, and therefore, by definition, anyone not in compliance with them is an *illegal entrant*. Under Section 3 of the Passport (Entry into India) Act, 1920, the central government is empowered to make Rules for the requirement of the production of passports by any person entering India. Rules 3 and 5 of the Passport (Entry into India) Rules 1950 require a validly issued passport by the country of origin as a prerequisite for a person entering India. Under Section 4 of the Passport (Entry into India) Act, if a person has contravened any of the Rules made under Section 3, he would be liable to be arrested. Thus, since the fulfilment of the procedures specified in these legislations requires the consent of the state of origin as

well, refugees fleeing persecution usually have no choice but to enter illegally and face the consequences by being detained.

Recent years have witnessed immense political focus on the issue of illegal entry or migration, in light of the alleged entry of thousands of economic migrants from Bangladesh into India, increasing the pressure on India's limited resources as also their popular portrayal as potential security threats. Therefore, there has been a clear shift in the policy of the Indian government from tolerating porous borders towards more stringent conditions for entry into India. While the security concerns underlying terrorist threats and population pressure might be justified, these make no distinction between asylum-seekers and foreigners who are not in need of protection. Therefore, the measures taken to prevent economic migrants (illegal entrants) end up affecting genuine refugee movements as well.

With a view to further curb illegal migration into India, an amendment to the Foreigners Act was proposed in 1998, which was referred to the Parliamentary Standing Committee and ultimately the Law Commission for consideration. The Law Commission, in its *One Hundred and Seventy-fifth Report on the Foreigners (Amendment) Bill, 2000*, recommended the inclusion of a definition of '*illegal entrant*' (who may well be a refugee) in the Act to mean a foreigner who enters India without valid documents or overstays the legally prescribed limit. It seeks to create new authorities to check illegal entrants coming into India. The *Report* also recommends that no foreigners, irrespective of whether in possession of valid documents or not, shall be allowed entry into India if, *inter alia*, they suffer from diseases which are a danger to public health, or are unwilling or unable to support themselves or persons dependent on them, or are skilled or unskilled labourers from neighbouring countries having no work permit. Broadly taking the view that certain piecemeal changes are necessary to tackle the problem of 'illegal migration' rather than look at the Foreigners Act, 1946 comprehensively, the Law Commission added:

The Commission has considered the relevant material including the reports and views of the States and Union Territories regarding their experience in implementation of the provisions of the Foreigners Act, 1946 and other cognate statutory enactments. While dealing with the issue, the Commission had to choose between two options which were available. The first was to recommend a comprehensive Act repealing the existing legislations and rules and orders etc. The second option was to recommend amendments to the existing legislative framework. Instead of codifying the entire law concerning foreigners, the Commission chose the second option of recommending incorporation of new provisions in the Foreigners Act so as to make it effective enough to meet the main problem confronted by the country today, namely, illegal migration, without interfering with the existing legal framework. The Commission is of the view that the problem of illegal migration from neighbouring countries has to be tackled seriously by providing a machinery for effective and speedy detection of illegal entrants. The function of determining whether a person is an 'illegal entrant' or not is proposed to be entrusted to be Immigration Officers whose orders shall be appealable, to be heard and decided by an Immigration Tribunal, manned by a person who is or has been a District Judge or an Additional District Judge. The matters shall be decided by these functionaries according to the principles of natural justice. Besides, facilitation centres are also proposed to be provided for detaining the foreigners pending the determination of their status and pending their deportation. So far as the offences under the Act are concerned, they are proposed to be tried by the Immigration Court which would be a court of District and Sessions Judge to be specified by the appropriate Government, in each district. We have also recommended the repeal of The Immigrants (Expulsion from Assam) Act, 1950 and The Illegal Migrants (Determination by Tribunals) Act, 1983. In order to concretize our recommendations, we have annexed with the report the Foreigners (Amendment) Bill, 2000, incorporating the proposed provisions in the Foreigners Act, 1946.

The measures suggested by the Commission need to be

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implemented expeditiously to curb the menace of illegal migration in our country. (Law Commission: *One Hundred and Seventy-Fifth Report on the Foreigners (Amendment) Bill, 2002*, Delhi: Union of India, 2002 letter of 21 September 2000.)

An important feature of the recommendations of the Law Commission was that an 'illegal migrant' is to be given due process in terms of 'status determination'. It follows that this 'status determination' will extend to 'refugees' (as illegal migrants), but without differentiating between illegal migrants subject to deportation and refugees being given consequential protection in India. When status determination is being made for illegal immigrants to deport them, a further status determination for refugees is possible and should be treated as the next prescriptive step forward.

On 7 May 2003, the Rajya Sabha, the upper House of the Parliament, considered changes to the Foreigners Act, 1946, for strengthening punishments for 'illegal immigrants'. It is important to note that Fali Nariman, Member of Parliament, made a plea for a comprehensive new legislation on foreigners; and Eduardo Faleiro made a specific suggestion that the Model Bill for refugees be incorporated in India. In fact Faleiro even commented on the government's role in not implementing the Model Law on Refugee Protection to observe:

> An Eminent Persons Group chaired by the former Chief Justice of India, Justice P.N. Bhagwati, had submitted about two years ago to the Government of India the Draft Refugees and Asylum Seekers Protection Act, 2000. What has happened to it? I understand that at the lower bureaucratic level, there is scope for a lot of misuse of the vague provisions regarding refugees and therefore there have been better demands for a Manual of Practice and Procedure on refugee matters for the use of administration, dealing with the subject, to be immediately prepared and finalized. *Finally, on this question, the UNHCR office does not have any diplomatic status in India. They are part of the UNDP or some such organization. This is not what is expected. What are you going to do about this? What are you going to do about the drafts submitted by Justice Bhagwati?* (emphasis added).

The proposed amendment was passed in great haste by the Rajya Sabha on 7 May 2003 – including incorporating official amendments strengthening the punitive regime of the Act. The House of the People, or the Lok Sabha, passed the amendment on 30 January 2004, paving the way for its enactment. The amendment enables a court to sentence a person staying in the country with a forged passport to up to eight years of imprisonment and a fine of Rs 50,000, as against only two years, which was previously the case. With the increase in the imprisonment term, bail can now only be granted by a Sessions Judge instead of a First Class Magistrate. A new Section 14 has been inserted into the Foreigners Act, 1946, relating to a person who is overstaying in the country. Such a person could be punished with imprisonment of up to five years and a fine of Rs 50,000. It is pertinent to note that Parliament took no note of the Law Commission's recommendation, inadequate as it might have been, to introduce a due process mechanism for determination of the status of 'illegal migrant'.

The Parliamentary Standing Committee on Home Affairs of 2003 tabled its report on the Citizenship Act on 12 December 2003. It suggested the extension of 'all humanitarian assistance' to refugees who had fled to India because of civil unrest or religious persecution, while putting pressure on the governments of those countries to create a conducive atmosphere for their return. However, the Citizenship (Amendment) Act actually passed by the Parliament in 2004 did not have any mention of 'refugees'. Instead, it defined 'illegal immigrant' in Section 2(1)(b) to mean:

> A foreigner who has entered into India –
> (i) without a valid passport or other travel document and such other document or authority as may be prescribed by or under any law in that behalf; or
> (ii) with a valid passport or other travel documents and such

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other documents or authority as may be prescribed by or under any law in that behalf but remains therein beyond the permitted period of time.

The amended Section 6 of the Citizenship Act may almost wholly diminish any possibility of an illegal migrant having any chances of being naturalized. This is because of the specific bar in Section 6 arising out of the amendment. Thus, now, any person who seeks naturalization in India will have to show that he is not an illegal migrant before the process of naturalization begins. Again, Section 3 of the Passport (Entry into India) Act, 1920 was amended in 2000 to increase the penalty for its contravention from three months to five years. Similarly, Section 3 of the Immigration (Carriers' Liability) Act, 2000 makes carriers liable in respect of passengers brought by them into India illegally with penalties to a maximum of Rupees one lakh (that is, Rs 100,000), which could be levied after giving the carrier the opportunity to be heard.

Another proposed move is the repeal of the Illegal Migrants (Determination by Tribunals) Act, 1983. The Preamble of the Act says that it is an Act 'to provide for the establishment of Tribunals for the determination, *in a fair manner*, of the question whether a person is an illegal migrant to enable the Central Government to expel illegal migrants from India and for other matters connected therewith or incidental thereto' (Emphasis added). The Act was meant to specifically target Bangladeshi nationals living in the state of Assam and to enforce the Immigrants (Expulsion from Assam) Act, 1950, which empowered the central government to expel immigrants to Assam. The 1983 Act clearly indicated the security concern underlying its enactment by declaring in its Preamble that 'it is necessary for the protection of the citizens of India to make special provisions for the detention of such foreigners in Assam and also in any other part of India in which such foreigners may be found to have remained illegally'. Section 3(c) of the Act defines 'illegal migrant' to mean:

a person in respect of whom each of the following condition is satisfied, namely:–

(i) he has entered into India on or after the 25th day of March, 1971,

(ii) he is a foreigner,

(iii) he has entered into India without being in possession of a valid passport or other travel document or any other lawful authority in that behalf.

Section 20 of the Act empowers the central government to expel a person who has been determined to be an 'illegal migrant'. Contravention of such order can invite a penalty of up to three years along with a fine, under Section 25. It needs to be reiterated here that a number of these 'illegal migrants' may also be refugees in need of protection.

However, the most important feature of the Act is that, unlike the Foreigners Act, it provides for a due process for the status determination of the person concerned, even if it is in the context of illegal migrants alone and not refugees. On 8 November 1998, the Governor of Assam submitted a report to the President of India, titled 'Report on Illegal Migration into Assam'. This Report, while taking into account the present realities, made recommendations which suggested a failure of the Illegal Migrants (Determination by Tribunals) Act, 1983. He noted that while crores of rupees were wasted on the identification of migrants, inly a minimal figure was actually deported. In such circumstances, he found continuation of the Act to be an exercise in futility. The proposed Illegal Migrants Laws (Repealing and Amending) Bill, 2003 seeks to repeal the Illegal Migrants (Determination by Tribunals) Act, 1983, so that the Foreigners Act, 1946, which is applicable throughout India, also becomes operative in the state of Assam. The Statement of Objects and Reasons suggests that the operation of the Act has been tardy, in line with the Report submitted by the Governor of Assam to the President of India. The Statement of Objects and Reasons notes:

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> The Act has failed to fulfil the objectives for which it was enacted. The operation of the Act in Assam alone has been *hurting the Assamese psyche* and is one of the contributing factors for the *feeling of alienation in Assam*. It has, therefore, been decided to repeal the Act so that the Foreigners Act, 1946, which is applicable throughout the territory of India, also becomes operative in the state of Assam to *expedite detection and deportation* of illegal migrants. (Emphasis added)

It also proposes to make a consequential amendment in the Immigrants (Expulsion from Assam) Act, 1950, so as to clarify that the persons who have migrated from Bangladesh on or after 25 March 1971 would not be entitled to the benefit of protection under the Immigrants (Expulsion from Assam) Act. The Bill, as introduced in the just dissolved Lok Sabha amidst strong objections by the Opposition, had been referred to the Parliamentary Standing Committee on Home Affairs, and was under consideration. The Bill has now lapsed. While these measures might not have any direct impact on the status of refugees in India, they do give still wider and uncontrolled powers to the government to deal with foreigners as it wants to. Clearly, an existing 'due process' regime that statutorily provided a procedure for status determination is proposed to be abandoned. Such initiatives indicate the mood of the government in these matters; and this mood seems to suggest a possible future trajectory in the wrong direction.

A particularly problematic remnant of the regime governing foreigners was the Foreigners (Report to Police) Order, 1971. This war-time measure notified during the Indo–Pak war on 14 December 1971 required citizens to inform the police about the presence of foreign citizens in their homes or premises. Even after the end of the war, the Order continued to stay on the statute books, though unenforced. However, in May 2001, the Home Ministry sought to revive and implement the Order, instigating vociferous protests from civil liberties groups. According to the Home Ministry spokesperson, P.D. Shenoy, 'following protests in the media, the Home Ministry reconsidered

the order and . . . renotified the amended order', which requires citizens to inform the police only if the foreign guest is an illegal entrant. (See 'Govt. revokes foreigners order', *The Times of India*, 5 September 2001.)

In recent years, the legal discourse on foreigners in India has been dictated by the influx of economic migrants from Bangladesh. The numerous legal measures that have been taken to curb such migration make no distinction between genuine refugees in need of protection and economic migrants. There is no due process mechanism in place, either, which can make such differentiation. Hence, the assumption is that all entrants into India in that area are either economic migrants or terrorists. In the context of growing presentiments about terrorism and increasing communal trends in India's polity, the fact that most of these migrants are Muslims is not without significance. Alleged security threats posed by them then become the unquestionable justification for any entry barrier that is sought to be created. Currently, there is a Public Interest Litigation filed by the All India Lawyers' Forum for Civil Liberties before the Supreme Court, seeking the deportation of illegal Bangladeshi migrants as also effective measures to prevent their entry into the country. In fact, the Supreme Court noted in *All India Lawyers Forum for Civil Liberties v. Union of India*, (1999) 5 SCC 714:

> 'The matter of infiltration from Bangladesh and the presence of infiltrators in certain regions in this country *is a matter of serious concern*. We hope that the Union of India and the states bordering Bangladesh will take *effective steps to check infiltration and deport illegal infiltrators* and inform the Court about those steps to prevent infiltration and to deport the illegal infiltrators. (emphasis added)

The Supreme Court has sought status reports from the central and concerned state governments about steps taken in this direction. (See SC seeks report on Bangladeshi influx', *The Hindu*, 13 February 2004.) Thus, it can be seen that, while there has

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not been any move to lay down procedures for the determination of refugee status in India, security concerns have led to further tightening of the already harsh regime governing foreigners, and therefore refugees.

A number of the above measures that are at present part of the law governing foreigners in India not only violate non-refoulement by providing for deportation without any due process for the status determination for a person claiming to be a refugee, but also violate the spirit of non-penalization of illegal entry of refugees incorporated in Article 31 of the Convention of 1951 on refugees. Even though India is not a party to the above Convention, its claim of observing the spirit of the norms on refugee protection stands seriously undermined in this light.

Laws Dealing Specially with Refugees

Even though the general law on foreigners in India is silent on treating refugees as a distinct class of foreigners needing protection, there have been special legislative measures reflecting India's crisis-driven refugee policy to address particular problems. Most of these measures have been either compensatory or rehabilitative, as in the case of Partition refugees, or giving exemptions from the general law applicable to foreigners, as in the case of Tibetan refugees.

The special measures were most extensive in the case of the Partition refugees, given probably the enormity of the problem as well as the socio-political importance of these refugees to the Indian state. While some of these measures were undertaken by the central legislature, others were by the states most affected by Partition, especially the state of Punjab. These measures were either meant to regulate the properties left behind by the evacuees (Administration of Evacuee Property Act, 1950; Evacuee Interest (Separation) Act, 1951; Transfer of Evacuee Deposits Act, 1954; East Punjab Evacuees (Administration of Property) Act, 1947; and Mysore Administration of Evacuee Property (Emergency) Act, 1949) or to provide for a compensatory and rehabilitative regime using the properties of the evacuees for the

incoming refugees (Refugees (Registration of Land Claims) Act, 1948; Displaced Persons (Claims) Act, 1950; Displaced Persons (Compensation and Rehabilitation) Act, 1954; Displaced Persons (Claims) Supplementary Act, 1954; Patiala Refugees (Registration of Land Claims) Ordinance, 1948; U.P. Land Acquisition (Rehabilitation of Refugees) Act, 1948 and East Punjab Refugees (Registration of Land Claims) Act, 1948).

Apart from the Partition refugees, there are other provisions that make exemptions for particular refugee communities from the excessively harsh regime governing foreigners. The Registration of Foreigners (Exemption) Order, 1957 made several exemptions for certain foreigners from the stringent registration requirements generally applicable to all. Children under the age of 16 were entirely exempted. Rule 3 of the said Order also relaxed certain regulations for, *inter alia*, 'indigenous inhabitants of Tibet region of China,' 'any person who is a subject of Bhutan' and 'any person who is a national of Nepal'. The Registration of Foreigners (Bangladesh) Rules, 1973 expressly disentitle Bangladeshis from such exemption. The Order Regulating Entry of Tibetan Nationals into India, 1950 stipulates that a Tibetan national '*at the time of his entry into India obtain from the officer-in-charge of the Police post at the Indo-Tibetan frontier, a permit in the form specified*'. The permit allows such a person to stay and travel in India for the prescribed period, which is extendable on application.

Similarly, during the problem of Bangladeshi refugees in 1971, the Refugee Relief Taxes Act, 1971 was passed, which was later abolished in 1973. The measure indicates the political acceptability of specifically and expressly burdening the national population with fiscal measures to cater to 'outsiders'. Only the political context of the Bangladesh war and the military defeat of Pakistan made this possible. These special measures, however, remained few and far between. Parliament needs to take a comprehensive view of refugee law policy. At present, a refugee is trapped by a harsh legislative framework subject to some ameliorative intervention by the judiciary.

THE FUNDAMENTAL RIGHTS REGIME

A Bill of Rights incorporated in Part III of the Constitution of India guarantees a series of fundamental human rights, drawing heavily from the international human rights discourse. Classifying these rights on the basis of the classes of persons entitled to protection in respect of particular guaranteed fundamental rights, there are two clear strands in the fundamental rights chapter of the Constitution, namely: (i) rights that are conferred only upon *citizens*, and (ii) rights that are guaranteed to all *persons*. This second category of rights, read with the Constitution's preambular commitments to liberty, equality and justice, offers a potential framework for protecting the rights of refugees.

Two very basic rights guaranteed to all *persons* by the Constitution are right to life and personal liberty. *Article 21* of the Constitution states: 'No *person* shall be deprived of his life or personal liberty except according to procedure established by law' and right to equality. *Article 14* of the Constitution states: 'The State shall not deny to any *person* equality before the law or the equal protection of the laws within the territory of India.' Besides these two Articles, the Bill of Rights has other provisions that guarantee rights to all persons and, therefore, to refugees. These include the right against prosecution under retrospective penal law, the right against double jeopardy, the right to silence (*Article 20*), the rights of an arrestee or detenu (*Article 22*), the right to freedom of religion (*Article 25-8*), freedom from payment of taxes for promotion of any religion (*Article 27*) and freedom from attendance in religious worship in state educational institutions (*Article 28(3)*). An important right, which is left out of this category and is granted exclusively to *citizens*, is enshrined in *Article 19* – that is, the right to basic freedoms. Article 19 guarantees to citizens the right

a. to freedom of speech and expression;
b. to assemble peacefully and without arms;
c. to form associations or unions;
d. to move freely throughout the territory of India;

e. to reside and settle in any part of the territory of India; and
g. to practise any profession, or to carry on any occupation, trade or business.

At the time of the framing of the Constitution, Article 21 was visualized as a strict provision – seen only as procedural due process that permitted transgressions of the life and liberty of a person as long as this was done through and under a legislation enacted by the central or state legislative (*A.K.Gopalan v. State of Madras*, AIR 1950 SC 27). The Court refused to examine whether any such procedure established by law met due process norms to test it for fairness and reasonableness. It was under the influence of this interpretation of Article 21 that *Hans Muller v. Superintendent, Presidency Jail, Calcutta*, AIR 1955 SC 367 was decided. In this case, the Supreme Court held that the government has a wide, virtually unfettered, freedom to expel, detain (even preventively), or make any other order with respect to a foreigner. This case did imply that foreigners were virtually without real protection under a strictly interpreted Article 21. Thus their basic rights could be interfered with not only through an enacted law but also by mere executive fiat.

The above view prevailed for almost three decades. However, in *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, the Supreme Court radically reinterpreted Article 21 to hold that the provision guarantees substantive due process as well, requiring every law impinging on life or liberty to additionally be 'just, fair and reasonable'. This paved the way to expansively read a number of unincorporated rights into Article 21, and informed its interpretation in the light of international human rights protection regimes. [For a summary of the vast substantive and procedural expansion of the rights guaranteeing the life and liberty of a person under Article 21 of the Constitution, note the Supreme Court's own catalogue of this expansion in *Unnikrishan v. Union of India* (1993) 1 SCC 645 at para 30 and *P. Rathinam v. Union of India* (1994) 3 SCC 394 at para 26. This expansion continues – its cup brimmeth over.] In terms

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of laying down a no less expansive procedural due process, a number of additions to the rights vested in Article 21 have been made through a reform of the criminal due process by the Indian judiciary required by the Constitution. [*Charles Sobhraj v. Supdt. Tihar Jail*, AIR 1978 SC 1514 (conditions of imprisonment of undertrials); *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1360 (undertrials); *Kadra Pahadiya v. State of M.P.*, WP No. 8322 of 1981 (torture of young prisoners); *Munna v. State of U.P.*, AIR 1982 SC 806 (sexual exploitation of young children in jails); *Sheela Barse v. State of Maharashtra*, AIR 1983 SC 378 (custodial violence towards women prisoners); *D.K.Basu v. State of West Bengal*, (1997) 1 SCC 416 and *Joginder Kumar Singh v. State of U.P.*, (1994) 4 SCC 260 (where detailed directions were given on pre-trial arrest and detention); and *Dilip K Basu v. State of West Bengal*, (1997) 6 SCC 642 and *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172 (which added further content to the procedural due process provisions).]

The first step towards using this framework to secure rights for non-citizens was the articulation that the Bill of Rights incorporated in Part III of the Constitution made a clear distinction between rights available to all *persons* and those available only to *citizens*. The language of Article 21 clearly made it available to refugees as well. In *National Human Rights Commission v. State of Arunachal Pradesh*, (1996) 1 SCC 742, the Supreme Court stated at para 20 that:

> We are a country governed by Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise. . . . The State Government must act impartially and carry out its legal obligations to safeguard the life, health and well-being of Chakmas residing in the State without being inhibited by local politics.

Similarly, Article 14 of the Constitution guaranteeing the right to equality was held by the Andhra Pradesh High Court to be available to all foreigners in *Vincent Ferrer v. District Revenue Officer, Anantpur*, AIR 1974 Andhra Pradesh 313 at 314: 'A foreign national though entitled to equality before the law and equal protection of the laws guaranteed by Article 14 of the Constitution, is not entitled to the protection of the Fundamental Rights guaranteed by Article 19.' In *P. Mohammad Khan v. State of Andhra Pradesh*, 1978 (II) APWR 408, the Andhra Pradesh High Court, while dealing with an Afghan national who had been ordered to leave India under Section 3(2)(c) of the Foreigners Act, held at para 92 that:

> There is a duty cast upon the authorities to decide whether the petitioner should not be permitted to stay in India because of the fact that he happened to be a foreigner. *That duty to decide carries with it the duty to act fairly*. The concept of fairness dictates that the authorities can proceed against the person concerned only after giving him notice and opportunity of being heard, as regards the statutory grounds on which the action contemplated by the statute is proposed to be taken.

The Indian Constitution's fundamental rights regime assumes special significance in the context of refugees, given the relative parliamentary indifference to their cause. The content of these fundamental rights, particularly those guaranteed under Article 21, has expanded over the course of years through judicial pronouncements. Currently, the rights regime is well-entrenched and covers much more than its strict lexical interpretation. These rights have been further augmented by international human rights law, which has also been read, *inter alia*, into the interpretation of Articles 14 and 21 of the Constitution.

INDIA'S OBLIGATIONS UNDER THE INTERNATIONAL TREATIES LAW REGIME

Both the general international law and India's obligations under international law have been viewed by the judiciary as

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informing the interpretation of fundamental rights guaranteed by the Constitution. Though not a party to the 1951 Convention or the UNHCR Statute, India has joined a number of these Human Rights Conventions. India is party to the Universal Declaration on Human Rights (1948), and joined the International Convention on Civil and Political Rights (ICCPR,1966) and the International Convention on Economic, Social and Cultural Rights (ICESCR,1966) in 1979. It is also a signatory to the Convention on the Elimination of All Forms of Racial Discrimination (CERD,1965), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW,1979) and the Convention on the Rights of the Child (CRC, 1989). In 1997 it joined the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Torture Convention, 1984). All of these instruments have a bearing upon India's obligation to protect refugees.

In so far as the Universal Declaration of Human Rights, 1948, is concerned, all persons are guaranteed the right to life, liberty and security of person (*Article 3*); freedom from slavery (*Article 4*); freedom from torture and cruel, inhuman or degrading punishment (*Article 5*); the right to recognition as a person before the law (*Article 6*); equality before the law (*Article 7*); the right to judicial remedies for violation of fundamental rights (*Article 8*); freedom from arbitrary arrest, detention and exile (*Article 9*); the right to privacy (*Article 12*); freedom of movement, including right to leave and return to one's own country (*Article 13*); the right to seek and enjoy asylum (*Article 14*); the right to nationality (*Article 15*); the right to protection of the family as the basic unit of society (*Article 16(3)*); the right to social security (*Article 22*); and the right to work without discrimination (*Article 23*).

Similarly, relevant provisions of the ICCPR (1966) include the right to life (*Article 6(1)*); freedom from torture and cruel, inhuman or degrading punishment (*Article 7*); the right to liberty and security of person and freedom from arbitrary arrest or detention (*Article 9(1)*); the right to be treated with humanity

and dignity on deprivation of liberty (*Article 10(1)*); freedom of movement, including right to leave one's own country (*Article 12*); the right against expulsion from a foreign state without due process (*Article 13*); and the right to protection of family and right to marry (*Article 23*). It should be noted that India has made the following reservation to Article 13, namely: 'the Government of India reserves its right to apply its law relating to foreigners.'

The ICESCR (1966) contains the right to adequate standard of living, including food, clothing and housing (*Article 11(1)*); the right to health (*Article 12*) and the right to education (*Article 13*). *Article 22* of the CRC (1989) obliges the state parties to take measures to ensure that a child who is a refugee or an asylum-seeker is given appropriate protection and humanitarian assistance. The state shall also make efforts to reunite the child to her family. *Article 3* of the Convention on Torture (1984) incorporates the right to non-refoulement if the person is in danger of being subjected to torture. CEDAW contains a number of provisions dealing not just with the rights of women to not be discriminated and maltreated against, but also to secure a life of social and economic dignity (*Articles 2, 9, 10, 11–16*).

While Article 51(c) of the Constitution of India provides that the state shall endeavour to 'foster respect for international law and treaty obligations in dealings of organized peoples with one another', the extent to which international law can be directly incorporated into domestic jurisdiction remained contentious for a number of years, (See R. Dhavan, 'Treaties and People: Indian Reflections', 44 *Journal of the Indian Law Institute*, 1996, pp. 362–76 – written before *Vishaka v. State of Rajasthan* (1997) 6 SCC 241.) However, the law in this regard has been substantially altered by the Supreme Court, which has incorporated human rights-enhancing international provisions in the fabric of the fundamental rights chapter of the Constitution even if they have not been specifically incorporated by law in the statute book.

The traditional view on this point (as articulated in *Maganbhai v. Union of India*, AIR 1969 SC 783) was that treaties do not create rights in municipal law unless they are specifically incorporated. The rule was slightly relaxed in *Jolly George Varghese v. Bank of Cochin*, (1980) 2 SCC 360, where the Supreme Court held that international conventions are a strong persuasive guide to interpretation. In *Gramaphone Co. of India Ltd. v. B. Pandey*, AIR 1984 SC 677, the Court took the extreme view that '(t)he comity of nations requires that rules of international law may be accommodated in the municipal law without express legislative sanction provided they do not run into conflict with Acts of Parliament.' The position was finally settled in *Visakha v. State of Rajasthan*, (1997) 6 SCC 241, which held that international conventions to which India is a party as well as international humanitarian law principles deserving of universal application can be read into Articles 14 and 21 of the Constitution to give them meaning. Since then, a number of other decisions have read various international human rights and humanitarian provisions into domestic law, to expand the horizons of the Bill of Rights. [See, generally, *Peoples Union of Civil Liberties (PUCL) v. Union of India*, (1997) 3 SCC 433; *PUCL v. Union of India* (1997) 1 SCC 301; *Vineet Narain v. Union of India* (1998) 1 SCC 226; *Apparel Export Promotion Council v. A. K. Chopra* (1999) 1 SCC 759; *Githa Hariharan v. Reserve Bank of India* (1999) 2 SCC 228; *Chairman, Railway Board v. Chandrima Das* (2000) 2 SCC 465.]

The question is whether the right to refugee determination and the principle of non-refoulement have also been incorporated into Indian law as judiciary-enforceable fundamental rights. Arguments for the acceptance of *non-refoulement as a principle recognized by Indian law* came up before the Madras High Court in the context of a case concerning the repatriation of Sri Lankan Tamil refugees. In *P. Nedumaran v. Union of India* W.M.P. No. 17372/92 and others, which was decided by the Madras High Court before *Visakha*, on a question of whether the Sri Lankan refugees were being involuntary repatriated, the

Court was satisfied that the UNHCR was in fact involved and was ensuring the voluntary nature of the repatriation. It, however, refused to answer the question as to whether the government was entitled to repatriate the refugees even without their consent. However, in *Ktaer Abbas Habib Al Qutaifi v. Union of India, supra* at paras 18 and 19, the Gujarat High Court declared that the principle of *non-refoulement* is 'encompassed in Article 21 of the Constitution, so long as the presence of the refugee is not prejudicial to the law and order and security of India'. However, this issue needs to be authoritatively determined by the Supreme Court of India.

Although India's new human rights jurisprudence has shown an inclination to read international human rights provisions into domestic law, it is not entirely clear as to how, and to what extent, the courts will go to effect such an incorporation into India's fundamental rights chapter guaranteeing judicially enforceable rights – especially in relation to the right of foreigners, including refugees.

THE JUDICIARY, FOREIGNERS AND REFUGEES

In the light of the above, there appears to be dichotomy between various seemingly conflicting trends in the human rights jurisprudence towards foreigners evolved by Indian courts. On the one hand, the judiciary has generally strictly interpreted the strong legislation on foreigners by refusing to interfere with the powers of the government to impose restrictions on foreigners in India or to effect their deportation out of India. On the other hand, various High Courts and the Supreme Court have also evolved a wider approach to incorporate human rights considerations to protect foreigners from unfair and arbitrary treatment. The reasons for this are both historical and because of the facts and circumstances of any particular class of cases which have made their way to the judiciary.

It would be useful to distinguish the jurisprudence evolved by the courts into two historical categories, namely:

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(a) judicial interpretation of the normal regime in relation to foreigners;
(b) judicial interpretation of the special cases dealing with special classes of migrants.

The Normal Regime for Dealing with Cases Concerning Foreigners

The normal regime for dealing with cases concerning foreigners has been explicated above in the discussion on the Foreigners Act and the Citizenship Act. In that context, the government had been given very wide powers of deportation. By washing its hands off the deportation process and terming it an executive prerogative in the interests of the security and safety of the nation, the judiciary had lent support to the misuse of these legislations. We have already seen that in *Louis De Raedt v. Union of India*, (1991) 3 SCC 554, the Court softened the scope of the due process available to a foreigner to a limited extent to prove his Indian citizenship. The Court observed:

> So far the right to be heard is concerned, there cannot be any hard and fast rule about the manner in which a person concerned has to be given an opportunity to place his case and it is not claimed that if the authority concerned had served a notice before passing the impugned order, the petitioners could have produced some relevant material in support of their claim of acquisition of citizenship, which they failed to do in the absence of a notice.

It is clear that even the right of a foreigner to be deported before deportation is flexibly interpreted in favour of the government, and limited to the foreigner seeking to prove that he is an Indian citizen.

The High Courts have been a little more forthright. In *P. Mohammad Khan v. State of Andhra Pradesh* (1978) II *APWR* 408, the Andhra Pradesh High Court laid down that a fair procedure needs to be followed before a deportation is effected. However, taking the cue from the ambivalent decision of the

Supreme Court in *Louis De Raedt*'s case (*supra*), a Division Bench of the Madras High Court, in *Ananda Bhabani v. Union of India*, (1991) Mad LW (Cri) 393, negatived the contention that an order of deportation passed without affording an opportunity to be heard is in violation of the principles of natural justice. Distinguishing the Andhra High Court judgment, it noted that there may be exigencies that require quick action, failing which the security of the nation may be jeopardized. Hence the right to be heard before the passing of the order might lead to security and safety concerns. In such circumstances, the discretion vested in the government is best left unfettered. This decision has been upheld and followed by Justice Shivraj Patil in *Giles Pfeiffer v. Union of India*, AIR 1996 Mad 322, leaving the whole issue of pre-decisional hearing pending deportation in some confusion as exemplified by the conflicting approaches of the Andhra High Court and the Madras High Court.

The right to a pre-decisional hearing is an important aspect of Article 14 and the principles of natural justice and due process under Article 21 of the Constitution. Considering that even foreign nationals are entitled to equality and equal protection under the laws, the lack of an opportunity to be substantially heard on all aspects of a person's proposed deportation requires elucidation and consideration in the light of the expanded interpretation of human rights by the Indian judiciary. The correct course of action would be for the Supreme Court to allow for a right to be heard pending deportation – even if through a summary process. Such a hearing should also consider issues relating to non-refoulement.

The Judicial Interpretation of Special Cases Dealing with Special Classes of Migrants and Refugees

As against this strict interpretation in favour of the government's right to deport with little or no due process, there have been a large number of decisions where the judiciary has intervened with a much more liberal interpretation to provide protection to particular classes of refugees. *It is not really possible to*

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entirely reconcile the strict interpretation in 'normal' cases as against the 'liberal' interpretation in 'special' cases. In our view, the only explanation for the courts making an exception in special cases is precisely because these cases require greater sensitivity of handling due to the historical context against which they arose for consideration. In the main, these special cases concern the Chakmas, the Sri Lankans and some UNHCR-recognized refugees.

Chakmas

The background of the Chakma migration into India has been dealt with elsewhere (see pages 4–5 and 122–24). While the influx of the various tribes collectively referred to as the Chakmas began in 1963, there was no major deportation of these tribes. The Chakma influx, along with all its attendant local pressures and concerns, resulted in the case of the *State of Arunachal Pradesh v. Khudiram Chakma*, 1994 Supp (1) SCC 615. Continuing the normal vein of judicial intervention, the Supreme Court observed that the Chakmas could be forcibly made to shift back to their originally allotted areas. A strict interpretation of the Citizenship Act and the North-Eastern Areas (Reorganization) Act, 1971 meant that the Chakmas could not claim citizenship unless they could satisfy all the conditions prescribed. However, in *NHRC v. State of Arunachal Pradesh* (1996) 1 SCC 742, the Court directed discontinuance of the process of evicting Chakmas living in India for several years, recognizing the protection of the lives of the Chakmas as a constitutional obligation of the state of Arunachal Pradesh. While there has been no grant of citizenship to any of the Chakmas born between 1950 and 1985, the Delhi High Court has ordered inclusion of all eligible Chakma and Hajong voters in the electoral rolls. A similar petition is pending before the Guwahati High Court. Thus, while the judicial intervention has not altogether been activist, it has remained supportive of the cause of the Chakmas.

Sri Lankans

Just as the Chakmas excited judicial sympathy due to the historical background of their migration into India, the Madras High Court responded to the Sri Lankan situation with sympathy even while recognizing the ground realities in Tamil Nadu, especially after the assassination of Rajiv Gandhi. In the Sri Lankan context, the Madras High Court has allowed for status determination and right not to be repatriated without consent. Questions arose in 1992 in the Madras High Court on the voluntary nature of the deportation of refugees from Sri Lanka. In *P. Nedumaran v. Union of India* WP 12298 and 12343 of 1992 and *Gurunathan v. Union of India*, WP 6708 and 7916 of 1992, the Court emphasized the need for *voluntary* repatriation, and allowed for repatriations only when they were found to be voluntary by the UNHCR. Through the intervention of the Madras High Court on 21 November 2003 in a public interest petition filed by *Dr Subramaniam Swamy v. Union of India*, the central government was allowed to reserve seats in educational institutions for refugees.

UNHCR Mandate Refugees

Various courts have intervened with respect to the right of status determination of foreigners who have applied, or wish to apply, for status determination to the UNHCR. In such situations, the courts have allowed for the deportation of the individual only after the determination of non-refugee is made. In *Dr Malvika Karlekar*, WP 583 of 1992, the Supreme Court injuncted the deportation of twenty-one Burmese refugees to Burma from the Andaman Islands until refugee determination. Similarly in *Bogyi v. Union of India*, Civil Rule No. 1847/1989, the Guwahati High Court allowed an undertrial two months' time to report to UNHCR, Delhi, for refugee determination. While dealing with the Burmese problem, the courts have been generally sympathetic. Perhaps this is because they are intuitively aware of the dictatorial junta regime in Burma to which the refugees cannot return. Similarly, while dealing with Afghan

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refugees, in *Shah Gazai v. Union of India*, WP 499 of 1996, the Punjab High Court allowed for the release of undertrials to the custody of the UNHCR. In *Ktaer Abbas's case*, CR 3433 of 1998, the Gujarat High Court recognized the role of the UNHCR and granted Ktaer Abbas, an Iraqi national, his prayer to be handed over to the UNHCR and not be deported to Iraq where his life would be in danger.

The liberal interpretation given by the courts in special cases have resulted in a number of rights for these refugees, which may be summed up as follows.

(i) *In special cases*, various Indian courts have given refugees the right to have their refugee status determined by the UNHCR [see *Mr. Bogyi v. Union of India*, CR 1847 of 1989 (Guwahati High Court); *Dr. Malvika Karlekar*, Cr. WP 583 of 1992 (Supreme Court)].

(ii) *In some special cases*, protection from deportation has also been countenanced as an interim protection [see *Dr Malvika Karlekar*, Cr. WP 583 of 1992 (Supreme Court); *State v. Khy Toon*, CR 525 of 1990; *Mr. Bogyi v. Union of India*, CR 1847 and 1849 of 1990 (Guwahati High Court); *Ktaer Abbas v. State*, CR 3433 of 1998 (Gujarat High Court)].

(iii) *In some of the special cases* relating to destitute refugees, basic amenities have been suggested – especially for women and children [*Digvijay Mote*, WA 354 of 1994 (Karnataka High Court)].

(iv) *In the context of the Sri Lankan cases*, forced deportations have been injuncted [*P. Nedumaran v. Union of India*, WP 12298 and 12313 of 1992; *Gurunathan v. Union of India*, WP 6708 and 9168 of 1992 – both of the Madras High Court].

(v) *For some Chakma refugees*, fair treatment has been laid down by the Supreme Court until their status has been determined.

(vi) Cases have been permitted to be withdrawn in respect of Burmese who are due for resettlement outside India (*Union of India v. Maung Maung*, CR 5120 of 1994).

These cases have been more fully laid out and discussed in the next chapter dealing with 'Practice and Procedure' (pages 84–93).

As a matter of legal distinction, it is clear that *the right to have one's status determined by the UNHCR can only exist in respect of those refugees who are entitled to such refugee determination under Indian refugee law and policy*. But, the UNHCR's mandate exists only for urban refugees from outside South Asia. It follows that *no right to refugee determination inheres in those cases that do not fall within the mandate of the UNHCR*. Equally, the cases on the forcible repatriation of Sri Lankan refugees stand in a distinct class of their own, in the light of the voluntary policy of repatriation agreed between India and Sri Lanka. Thus, it is generally possible to argue that the 'liberal' precedents in special cases are only partial deviations from the normal cases, and to be confined to their special facts and circumstances. *At the same time; they are precedents pointing to a possible legal future, if courts in India – especially the Supreme Court – are emboldened to enlarge the principles underlying the liberal interpretation in special cases so as to apply them to the normal cases with such modifications and adjustments as may be necessary.*

THE SAARC FRAMEWORK

In recent years, there have been disturbing developments at the level of the South Asian Association for Regional Cooperation (SAARC), of which India is an important member. This is also one of the few international frameworks India has acceded to, which acknowledges refugees as a separate class of people deserving special treatment. That this special treatment may work in a manner prejudicial to the rights of refugees, is another story.

India has recently signed the Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism, 1987,

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which has ramifications for the refugee law and policy in India. The Additional Protocol was signed by all the SAARC members on 6 January 2004, in Islamabad. The Convention mainly defined terrorist offences and imposed the obligation on member-states either to prosecute or extradite persons accused of such offences. The focus of the Additional Protocol is to criminalize the funding of terrorism and, towards this end, it seeks to promote regional cooperation and coordination between customs, immigration, law enforcement and intelligence agencies. However, the Additional Protocol may also dilute and diminish refugee protection and the defences available to refugees even under extradition law. This emerges from a careful reading of the following provisions.

(i) Article 13 of the Additional Protocol makes offences under the Convention and the Additional Protocol extraditable.

(ii) Article 15 of the Additional Protocol clarifies that the offences established in the international instruments enumerated in Article 4 of the Additional Protocol read with the Annex cannot be considered as political offences and thus the 'political offence' exception would be inapplicable in so far as these offences are concerned.

(iii) Article 16 of the Additional Protocol makes it clear that countries should ensure that 'refugee status is not granted to any person in respect of whom there are serious reasons for considering that he or she has committed an offence as defined under Article 4 of the Protocol'.

(iv) Under Article 17 of the Additional Protocol, extradition or legal assistance can be denied by a state when it has substantial grounds to believe that the extradition is for purposes of persecuting the person on the grounds of race, religion, nationality, ethnic origin or political opinion.

The effects of these provisions could be wide-ranging for refugee protection.

(i) By *deeming* certain offences as non-political (even where a person is simply accused of a terrorist offence), a valuable defence available to a person sought to be extradited or removed from a signatory state is taken away. For example, Article 14(2) of the UDHR denies the 'right to seek and enjoy asylum' only 'in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations'. Similarly, Article 1F (b) of the Refugee Convention, 1951 denies the protection of the Convention, *inter alia*, to a person who 'has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee'. This is a dilution of the existing regime of defences.

(ii) This 'political offence' defence is also incorporated as a defence to extradition proceedings in Section 7(2) of the Indian Extradition Act, 1963. Therefore, by defining it to exclude the crimes covered by the Protocol, it no longer allows a state to afford protection to a person who has committed an offence under it by designating the act as a 'political' offence.

(iii) Under Article 17 of the Additional Protocol, a state party can deny extradition or *legal assistance* when it has substantial grounds to believe that the extradition is for purposes of persecuting the person sought to be extradited on the grounds of race, religion, nationality, ethnic origin or political opinion. However, given Article 15's exclusion of the 'political offence' defence, a person suspected of terrorist acts may be in some difficulty in defending his right to a political opinion if the defence itself has become defeasible as a consequence of Article 16. Further, since mere suspicion is enough to exclude the 'political offence' defence, this provision is clearly prejudicial to the interests of persons accused of a crime enlisted in the Convention or the Additional Protocol.

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(iv) Under Article 16 of the Additional Protocol, countries should ensure that 'refugee status is not granted to any person in respect of whom there are serious reasons for considering that he or she has committed an offence as defined under Article 4 of the Protocol'. In India, executive fiat determines refugee status. This will undermine the rigour of the examination of whether 'serious reasons' exist to deny determination of refugee status. Such a determination should only be done judicially, which is not possible under the current refugee law regime in India. Therefore, the Convention leaves scope for arbitrary determination of such status by the executive, opening possibilities of the violation of the principle of non-refoulement by using the provision as an excuse to deny refugee status even in deserving cases. This also conflicts with Article 19 of the Additional Protocol, which gives primacy to international standards, including the 1951 Convention.

Principally, the Additional Protocol may bolster views that characterize refugees and other foreigners as potential terrorists. It may become an excuse for India to deport Sri Lankan Tamils who are refugees in Tamil Nadu on the ground that they may have been involved in activities of raising funds for the LTTE (Liberation of Tamil Tigers Ealam), which is a terrorist organization. While the steps taken by these nations to root out terrorism from the region are understood, there is possibility of misuse of the provisions which may end up adversely affecting refugees and their right to non-refoulement.

MODEL NATIONAL LAW ON REFUGEES

As can be seen from the above, refugee protection is based primarily on an *ad hoc* determination that varies according to the length of the proverbial chancellor's foot. Hence there is a necessity for more secure and guaranteed protection of refugees that will ensure the non-refoulement of a refugee who has fled his country due to a well-founded fear of persecution. This concern is not unique to India alone but also applies to neighbouring nations in South Asia that have been unsuccessful in their attempts to come up with a statutory regime for refugee protection. Therefore, a need was felt for a flexible statutory regime common to the nations in South Asia, but which could be modified to suit each individual country's specific concerns. The UNHCR took the lead in setting up an Eminent Persons Group (EPG) to look into this problem and to suggest a Model Law for Refugee Protection. The EPG was chaired by Justice Bhagwati who, also chaired the group of experts to fine-tune the application of the Model Law to India in 1999–2000. Although there have been technical and political misgivings about the Model Law, there is a degree of unanimity on its acceptance as a framework for future discussion on refugee protection. When the Model Law was sent to the government to take the next step, the government remained non-committal and the law has remained in limbo. This has been criticized by a number of people, including Eduardo Faleiro, in a Rajya Sabha debate.

The salient features of the Model Law are as follows.

(a) The Model Law consolidates the provisions relating to refugees in India and seeks to create a process for refugee protection.

(b) The Model Law envisages the provisions of the Act including determining refugee status (Section 7). Section 9 elaborates on the methodology to be followed for individual refugee status determination, and provides for a hearing where evidence may be presented to support a claimant's case to be treated as a refugee. It even provides for an appeal from an adverse decision of the Commissioner who makes the initial determination to a Refugee Committee under Section 9(e) read with Section 11.

(c) It defines the term refugee and seeks to recognize a refugee as deserving of statutory recognition and protection.

(d) The Model Law provides a foundation for the non-derogability of the principle of non-refoulement, which has also been read into Article 21 as a protected fundamental right by some High Courts.

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(e) The Model Law takes an important step in actually outlining the rights and duties of refugees (Section 13). Section 13(a)(3) provides for a work permit regime. Section 13(1)(5) provides that a refugee would be able to move freely within the territory of India. Section 13 provides that refugees would have access to education, health and other related services, thereby ensuring socio-economic support and rights to which they are not presently admitted.

(f) Section 5 (b) provides that a refugee or asylum-seeker found guilty of a crime against humanity, a crime against peace, a war crime, or who is certified by a Minister as a threat to India, may be asked to leave India. These provisions which are over broad, seek to address India's security concerns.

(g) Section 14 provides for situations of mass influx whereby orders can be issued permitting residence in India without individual status determination. Most importantly, the Act provides for illegal entry, provided good cause is shown, which is a considerable advance on the present provisions in the Passport (Entry into India) Act, 1920 and the Foreigners Act, 1946.

There is some hesitation on the part of the government to accept, enact and implement the Model Law. However, various jurists and others have suggested that it is not impossible to redraft the existing Foreigners Law or make rule changes under its provisions so as to provide some kind of protection to refugees. This may be a *via media* to allay the government's resistance to the enactment of a full-fledged Model Law. One of the principal concerns of the government appears to be the influx of Bangladeshis into India. There is a fear that a refugee might enable false claims to be raised to enable a migrant to claim that he is a refugee. Until proper refugee determination takes place, the claimant would have a right to stay in India (albeit in jail or camps). In our view, these fears can be addressed – both by a future Model Law and changes in the statutes or rules dealing with foreigners.

While a case for the implementation of the Model Law has lain fallow and in a state of limbo, the NHRC (National Human Rights Commission) has recently decided to pursue the Model Law as an instrument for refugee protection as part of the agenda of human rights protection. In its Seventh, Eighth and Ninth Reports, the NHRC has consistently reiterated the need for refugee protection. But the government continues to be very ambivalent in its attitude, as can be seen from the extracts of the Reports of the NHRC dealing with refugee protection (see pages 143–46).

CONCLUSION

It can be seen, therefore, that the Indian legal framework provides incomplete and skewed protection to refugees, inasmuch as:

(a) There is no clearly defined category of 'refugee' as a sub-classification of the general category of 'foreigners'.

(b) Security concerns in recent years have led to harsher entry and deportation regimes. The central government has a relatively unguided discretion under its statutes to deal with foreigners in any manner it deems fit.

(c) Indian law provides for no due process regime for either status determination or deportation of refugees and other foreigners. No less, no statutory due process regime enables refugees to have their claim to continue to stay in India determined on the basis that they have been certified to be refugees and, therefore, will have a well-founded fear of persecution if repatriated to the state they came from.

(d) Refugees are entitled to certain fundamental rights that are not restricted to citizens. This includes the right to life and liberty and equality of treatment, as well as some other guaranteed fundamental rights.

(e) India is a party to a number of international human rights instruments which potentially protect the rights of refugees. Some of these obligations have been judicially incorporated in the fundamental rights chapter of the Constitu-

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tion, and are enforceable through the High Court and Supreme Court.

(f) There is a dichotomy between the two trajectories of judicial decisions given by Indian courts. On the one hand, the courts have interpreted India's law relating to foreigners 'strictly' in the normal deportation cases. On the other hand, there are also decisions by the courts in special cases dealing with special situations and classes of refugees, where the courts have taken a 'liberal' view and granted various rights to refugees. These two trajectories of cases are difficult to reconcile. In fact, the 'strict' interpretation is the mainstream interpretation, against which the 'liberal' interpretation must be reconciled. The special cases have to be confined to their own special facts and circumstances. However, the principles underlying the 'liberal' interpretation cases could be a possible basis to yield a more humane judicially determined refugee law – if the courts (led by the Supreme Court) were inclined to take a broader view to reconcile the 'strict' and 'liberal' interpretations, to strengthen the latter.

(g) India's obligations under the SAARC framework (especially the Protocol of 2004) might lead to a harsher legal regime for refugees, with increased possibility of political abuse by invoking 'security' concerns about terrorism against the refugees.

(h) The Model Law suggested by the Eminent Persons Group for South Asia generally is still under consideration – and is being supported by the National Human Rights Commission.

(i) For the present, it is possible to either change the existing Foreigners Act, 1940 or the rules made under it to provide limited protection to refugees, so as to guarantee the right to refugee determination, the right of non-refoulement and pass the right to work if not pending refugee determination and unaccepted refugee-limited social security.

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Mohammad Salimullah v. Union of India (2021) SCC OnLine SC 296.

(BEFORE S.A. BOBDE, C.J. AND A.S. BOPANNA AND V. RAMASUBRAMANIAN, JJ.)
Decided on April 8, 2021

ORDER

1. Pending disposal of their main writ petition praying for the issue of an appropriate writ directing the respondents to provide basic human amenities to the members of the Rohingya Community, who have taken refuge in India, the petitioners who claim to have registered themselves as refugees with the United Nations High Commission for refugees, have come up with the present interlocutory applicationseeking ***(i)*** the release of the detained Rohingya refugees; and ***(ii)*** a direction to the Union of India not to deport the Rohingya refugees who have been detained in the sub
-jail in Jammu.

2. We have heard Sh. Prashant Bhushan, learned counsel and Sh. Colin Gonsalves, learned senior counsel appearing for the applicants/writ petitioners, Sh. Tushar Mehta, learned Solicitor General appearing for the Union of India, Sh. Harish Salve, learned senior counsel appearing for the Union Territory of Jammu & Kashmir, Sh. Vikas Singh and Sh. Mahesh Jethmalani, learned senior counsel appearing for persons who seek to implead/intervene in the matter.

3. Sh. Chandra Uday Singh, learned senior counsel representing the Special Rapporteur appointed by the United Nations Human Rights Council also attempted to make submissions, but serious objections were raised to his intervention.

4. According to the petitioners, both of them are Rohingya refugees from Myanmar and they are housed in a refugee's camp. They claim to have fled Myanmar in December-2011 when ethnic violence broke out.

5. It appears that persons similarly placed like the petitioners are housed in refugee camps in New Delhi, Haryana, Allahabad, Jammu and various other places in India.

6. On 8.08.2017 the Ministry of Home Affairs, Government of India issued a letter to the Chief Secretaries of all the State Governments/UT Administrations, advisingthem to sensitize all the law enforcement and intelligence agencies for taking prompt steps and initiating deportation processes. It is this circular which prompted the petitioners to approach this Court with the above writ petition.

7. According to the petitioners, new circumstances have now arisen, as revealed by newspaper reports appearing in the first/second week of March, 2021, to the effect that about 150-170 Rohingya refugees detained in a sub-jail in Jammu face deportation back to Myanmar. The reports that appeared in The Wire, The Hindu, The Indian Express and The Guardian are relied upon to show that there are more thanabout 6500 Rohingyas in Jammu and that they have been illegally detained and jailedin a sub-jail now converted into a holding centre.

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8. The contention of the petitioners is **(i)** that the principle of nonrefoulement is part of the right guaranteed under Article 21 of the Constitution; **(ii)** that the rights guaranteed under Articles 14 and 21 are available even to non-citizens; and **(iii)** that though India is not a signatory to the United Nations Convention on the Status of Refugees 1951, it is a party to the Universal Declaration of Human Rights 1948,International Covenant on Civil and Political Rights, 1966 and the Convention on the Rights of the Child 1992 and that therefore non-refoulement is a binding obligation.The petitioners also contend that India is a signatory to the Protection of All Persons against Enforced Disappearances, Convention against Torture and Other Cruel andInhuman or Degrading Treatment or Punishment.

9. Heavy reliance is placed upon a recent Judgment of International Court of Justice in *The Gambia* v. *Myanmar* dated 23.01.2020 to show that even the International Court has taken note of the genocide of Rohingyas in Myanmar and that the lives ofthese refugees are in serious danger, if they are deported. According to the petitioners, Rohingyas were persecuted in Myanmar even when an elected Government was in power and that now the elected Government has been over thrown by a military coup and that therefore the danger is imminent.

10. The Union of India has filed a reply contending *inter alia* ***(i)*** that a similar application in I.A. No. 142725 of 2018 challenging the deportation of Rohingyas from the State of Assam was dismissed by this Court on 4.10.2018; ***(ii)*** that persons for whose protection against deportation, the present application has been filed, are foreigners within the meaning of Section 2(a) of the Foreigners Act, 1946; ***(iii)*** thatIndia is not a signatory either to the United Nations Convention on the Status ofRefugees 1951 or to the Protocol of the year 1967; ***(iv)*** that the principle of non- refoulement is applicable only to "*contracting States*"; ***(v)*** that since India has open/porous land borders with many countries, there is a continuous threat of influx of illegal immigrants; ***(vi)*** that such influx has posed serious national securityramifications; ***(vii)*** that there is organized and well-orchestrated influx of illegal immigrants through various agents and touts for monetary considerations; ***(viii)*** that Section 3 of the Foreigners Act empowers the Central Government to issue orders for prohibiting, regulating or restricting the entries of foreigners into India or their departure therefrom; ***(ix)*** that though the rights guaranteed under Articles 14 and 21 may be available to non-citizens, the fundamental right to reside and settle in this country guaranteed under Article 19(1)(e) is available only to the citizens; ***(x)*** thatthe right of the Government to expel a foreigner is unlimited and absolute; and ***(xi)***that intelligence agencies have raised serious concerns about the threat to the internal security of the country.

11. It is also contended on behalf of the Union of India that the decision of the International Court of Justice has no relevance to the present application and that the Union of India generally follows the procedure of notifying the Government of the country of origin of the foreigners and order their deportation only when confirmed by the Government of the country of origin that the persons concerned are citizens/nationals of that country and that they are entitled to come back.

12. We have carefully considered the rival contentions. There is no denial of the fact that India is not a signatory to the Refugee Convention. Therefore, serious objections are raised, whether Article 51(c) of the Constitution can be pressed into service, unless India is a party to or ratified a convention. But there is no doubt that theNational Courts can draw inspiration from International Conventions/Treaties, so longas they are not in conflict with the municipal law. Regarding the contention raised on behalf of the petitioners about the present state of affairs in Myanmar, we have tostate that we cannot comment upon something happening in another country.

13. It is also true that the rights guaranteed under Articles 14 and 21 are available

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to all persons who may or may not be citizens. But the right not to be deported, is ancillary or concomitant to the right to reside or settle in any part of the territory ofIndia guaranteed under Article 19(1)(e).

14. Two serious allegations have been made in reply of the Union of India. They relate to ***(i)*** the threat to internal security of the country; and ***(ii)*** the agents and touts providing a safe passage into India for illegal immigrants, due to the porousnature of the landed borders. Moreover, this court has already dismissed I.A. No.142725 of 2018 filed for similar relief, in respect of those detained in Assam.

15. Therefore, it is not possible to grant the interim relief prayed for. However, it is made clear that the Rohingyas in Jammu, on whose behalf the present application is filed, shall not be deported unless the procedure prescribed for such deportation is followed. Interlocutory Application is disposed of accordingly.

Advisory Opinion of Legality of the Threat or Use of Nuclear Weapons

(ICJ Reports 1996, p. 226)

(Constituent elements of custom; General Assembly Resolutions as one of the sources of international law)

(The General Assembly requested the International Court of Justice to provide an advisory opinion on the following question: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?')

64. The Court will now turn to an examination of customary international law to determine whether a prohibition of the threat or use of nuclear weapons as such flows from that source of law. As the Court has stated, the substance of that law must be "looked for primarily in the actual practice and *opinio juris* of States" *(Continental Shelf (Libyan Arab Jarnahiriya/Malta), Judgment,* ***1.*** *C. J. Reports 1985,* p. 29, para. 27).

65. States which hold the view that the use of nuclear weapons is illegal have endeavoured to demonstrate the existence of a customary rule prohibiting this use. They refer to a consistent practice of non-utilization of nuclear weapons by States since 1945 and they would see in that practice the expression of an *opinio juris* on the part of those who possess such weapons.

66. Some other States, which assert the legality of the threat and use of nuclear weapons in certain circumstances, invoked the doctrine and practice of deterrence in support of their argument. They recall that they have always, in concert with certain other States, reserved the right to use those weapons in the exercise of the right to self-defence against an armed attack threatening their vital security interests. In their view, if nuclear weapons have not been used since 1945, it is not on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen.

67. The Court does not intend to pronounce here upon the practice known as the "policy of deterrence". It notes that it is a fact that a number of States adhered to that practice during the greater part of the Cold War and continue to adhere to it. Furthermore, the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an *opinio juris.* Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris.*

68. According to certain States, the important series of General Assembly resolutions, beginning with resolution 1653 (XVI) of 24 November 1961, that deal with nuclear weapons and that affirm, with consistent regularity, the illegality of nuclear weapons, signify the existence of a rule of international customary law which prohibits recourse to those weapons. According to other States, however, the resolutions in question have no binding character on their own account and are not declaratory of any customary rule of prohibition of nuclear weapons; some of these States have also pointed out that this series of resolutions not only did not meet with the approval of all of the nuclear-weapon States but of many other States as well.

69. States which consider that the use of nuclear weapons is illegal indicated that those resolutions did not claim to create any new rules, but were confined to a confirmation of customary law relating to the prohibition of means or methods of warfare which, by their use, overstepped the bounds of what is permissible in the conduct of hostilities. In their view, the resolutions in question did no more than apply to nuclear weapons the existing rules of international law applicable in armed conflict; they were no more than the "envelope" or *instrumentum* containing certain pre-existing customary rules of international law. For those States it is accordingly of little importance that the *instrumentum* should have occasioned negative votes, which cannot have the effect of obliterating those customary rules which have been confirmed by treaty law.

70. The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris.* To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradua1 evolution of the *opinio juris* required for the establishment of a new rule.

71. Examined in their totality, the General Assembly resolutions put before the Court declare that the use of nuclear weapons would be "a direct violation of the Charter of the United Nations; and in certain formulations that such use "should be prohibited". The focus of these resolutions has sometimes shifted to diverse related matters; however, several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juvis* on the illegality of the use of such weapons.

72. The Court further notes that the first of the resolutions of the General Assembly expressly proclaiming the illegality of the use of nuclear weapons, resolution 1653 (XVI) of 24 November 1961 (mentioned in subsequent resolutions), after referring to certain international declarations and binding agreements, from the Declaration of St. Petersburg of 1868 to the Geneva Protocol of 1925, proceeded to qualify the legal nature of nuclear weapons, determine their effects, and apply general rules of customary international law to nuclear weapons in particular. That application by the General Assembly of general rules of customary law to the particular case of nuclear weapons indicates that, in its view, there was no specific rule of customary law which prohibited the use of nuclear weapons; if such a rule had existed, the General Assembly could simply have referred to it and would not have needed to undertake such an exercise of legal qualification.

73. Having said this, the Court points out that the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI), and requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament. The emergence, as *lex lata,* of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.

UKRAINE V. RUSSIAN FEDERATION, (Provisional Measures) 16 MARCH 2022, ICJ

Allegations of genocide under the convention on the prevention and punishment of the crime of genocide

1. On 26 February 2022, at 9.30 p.m., Ukraine filed in the Registry of the Court an Applicationinstituting proceedings against the Russian Federation concerning "a dispute . . . relating to the interpretation, application and fulfilment of the 1948 Convention on the Prevention and Punishmentof the Crime of Genocide" (hereinafter the "Genocide Convention" or the "Convention").

2. At the end of its Application,

Ukraine"respectfully requests the

Court to:

(a) Adjudge and declare that, contrary to what the Russian Federation claims, no acts of genocide, as defined by Article III of the Genocide Convention, have been committed in the Luhansk and Donetsk oblasts of Ukraine.

(b) Adjudge and declare that the Russian Federation cannot lawfully take any action under the Genocide Convention in or against Ukraine aimed at preventing or punishing an alleged genocide, on the basis of its false claims of genocide in the Luhansk and Donetsk oblasts of Ukraine.

(c) Adjudge and declare that the Russian Federation's recognition of the independence of the so-called 'Donetsk People's Republic' and 'Luhansk People's Republic' on 22 February 2022 is based on a false claim of genocide and therefore has no basis in the Genocide Convention.

(d) Adjudge and declare that the 'special military operation' declared and carried out by the Russian Federation on and after 24 February 2022 is based on a false claim of genocide and therefore has no basis in the Genocide Convention……

3. In its Application, Ukraine seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention.

12. By a letter dated 5 March 2022, the Ambassador of the Russian Federation to the Kingdomof the Netherlands indicated that his Government had decided not to participate in the oral proceedings due to open on 7 March 2022.

17. The context in which the present case comes before the Court is well-known. On 24 February 2022, the President of the Russian Federation, Mr. Vladimir Putin, declared that he haddecided to conduct a "special military operation" against Ukraine. Since then, there has been intensefighting on Ukrainian territory, which has claimed many lives, has caused extensive displacement and has resulted in widespread damage. The Court is acutely aware of the extent of the human tragedythat is taking place in Ukraine and is deeply concerned about the continuing loss of life and human suffering.

18. The Court is profoundly concerned about the use of force by the Russian Federation in Ukraine, which raises very serious issues of international law. The Court is mindful of the purposesand principles of the United Nations Charter and of its own responsibilities in the maintenance of international peace and security as well as in the peaceful settlement of disputes under the Charter and the Statute of the Court. It deems it necessary to emphasize that all States must act in conformitywith their obligations under the United Nations Charter and other rules of international law, includinginternational humanitarian law.

19. The ongoing conflict between the Parties has been addressed in the framework of several international institutions. The General Assembly of the United Nations adopted a resolution referringto many aspects of the conflict on 2 March 2022 (doc. A/RES/ES-11/1). The present case before theCourt, however, is limited in scope, as Ukraine has instituted these proceedings only under the Genocide Convention.

23. The Court recalls that the non-appearance of one of the States concerned cannot by itself constitute an obstacle to the indication of provisional measures (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Provisional Measures, Order of15 December 1979, I.C.J. Reports 1979*, p. 13, para. 13). It emphasizes that the non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity ofits decision *Military and Paramilitary Activities in and againstNicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 23, para. 27)….

27. Ukraine and the Russian Federation are both parties to the Genocide Convention. Ukraine deposited its instrument of ratification on 15 November 1954 with a reservation to Article IX of theConvention; on 20 April 1989, the depositary received notification that this reservation had been withdrawn. The Russian Federation is a party to the Genocide Convention as the State continuing the legal personality of the Union of Soviet Socialist Republics, which deposited its instrument of ratification on 3 May 1954 with a reservation to Article IX of the Convention; on 8 March 1989, thedepositary received notification that this reservation had been withdrawn.

35. The Court recalls that, for the purposes of deciding whether there was a dispute between the Parties at the time of the filing of the Application, it takes into account in particular any statementsor documents exchanged between the Parties, as well as any exchanges made in multilateral settings.In so doing, it pays special attention to the author of the statement or document, their intended or actual addressee, and their content. The existence of a dispute is a matter for objective determinationby the Court; it is a matter of substance, and not a question of form or procedure (see *Application ofthe Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 12, para. 26).

37. In this regard the Court observes that, since 2014, various State organs and senior representatives of the Russian Federation have referred, in official statements, to the commission ofacts of genocide by Ukraine in the Luhansk and Donetsk regions. The Court observes, in particular,that the Investigative Committee of the Russian Federation — an official State organ — has, since 2014, instituted criminal proceedings against high-ranking Ukrainian officials regarding the alleged commission of acts of genocide against the Russian-speaking population living in the above-mentioned regions "in violation of the 1948 Convention on the Prevention and Punishment ofthe Crime of Genocide".

38. The Court recalls that, in an address made on 21 February 2022, the President of the Russian Federation, Mr. Vladimir Putin, described the situation in Donbass as a “horror and genocide, which almost 4 million people are facing”.

47. The Court finds therefore that the above-mentioned elements are sufficient at this stage to establish prima facie the existence of a dispute between the Parties relating to the interpretation, application or fulfilment of the Genocide Convention.

48. In light of the foregoing, the Court concludes that, prima facie, it has jurisdiction pursuantto Article IX of the Genocide Convention to entertain the case.

58. The acts undertaken by the Contracting Parties “to prevent and to punish” genocide must be in conformity with the spirit and aims of the United Nations, as set out in Article 1 of theUnited Nations Charter. In this regard, the Court recalls that, under Article 1 of the United Nations Charter, the purposes of the United Nations are, *inter alia*

> “[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace”.

60. Under these circumstances, the Court considers that Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine.

68. Ukraine submits that there is an urgent need to protect its people from the irreparable harmcaused by the Russian Federation’s military measures that have been launched on a pretext of genocide. It emphasizes that the invasion by the Russian Federation has resulted in numerous casualties among Ukrainian civilians and military personnel, the bombing of numerous cities acrossUkraine, and the displacement of over one and a half million Ukrainian civilians both within Ukraineand across its international borders.

75.The Court considers that the civilian population affected by the present conflict is extremely vulnerable. The “special military operation” being conducted by the Russian Federation has resulted in numerous civilian deaths and injuries. It has also caused significant material damage,including the destruction of buildings and infrastructure. Attacks are ongoing and are creating increasingly difficult living conditions for the civilian population. Many persons have no access to the most basic foodstuffs, potable water, electricity, essential medicines or heating. A very large number of people are attempting to flee from the most affected cities under extremely insecure conditions.

78. The Court concludes from all of the above considerations that the conditions required by its Statute for it to indicate provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the right of Ukraine that the Court has found to be plausible (see paragraph 60 above).

84. The Court reaffirms that its “orders on provisional measures under Article 41 [of the Statute] have binding effect” (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations for any party towhom the provisional measures are addressed.

86. For these reason THE COURT, indicate the following provisional measures:

1) The Russian Federation shall immediately suspend the military operations that it commencedon 24 February 2022 in the territory of Ukraine;
2) The Russian Federation shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to in point (1) above;
3) Both Parties shall refrain from any action which might aggravate or extend the dispute beforethe Court or make it more difficult to resolve.

Delivered on September 17, 2015

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO.510 OF 2007

COMMITTEE FOR C.R. OF C.A.P. & ORS. ...PETITIONERS

VERSUS

STATE OF ARUNACHAL PRADESH & ORS. ...RESPONDENTS

JUDGMENT

ADARSH KUMAR GOEL, J.

1. This petition under Article 32 of the Constitution of India mainly seeks direction against Union of India through Ministry of Home Affairs to grant citizenship to the Chakma and HajongTribals who migrated to India in 1964-1969 and were settled in the State of Arunachal Pradesh.

2. Petitioner No.1 has described itself as "Committee for Citizenship Rights of the Chakmas of Arunachal Pradesh" ("CCRC"). According to the averments in the petition, representations were filed with the National Human Rights Commission ("NHRC") alleging persecution of Chakmas and Hajongs in the State of Arunachal Pradesh. The NHRC approached this Court by way of a Writ Petition (C) No.720 of 1995 titled "National Human Rights Commission vs. State of Arunachal Pradesh" seeking direction from this Court to ensure that the Chakmas and Hajongs are not forcibly ousted from the State of Arunachal Pradesh, which was disposed of on 9th January, 1996[1]. In the said case, the Union of India appeared before this Court and stated that decision to settle the Chakmas in the State of Arunachal Pradesh was taken after discussion between the Government of India and the North-East Frontier Agency ("NEFA") Administration (Predecessor of the State of Arunachal Pradesh). The Chakmas were residing in the State of Arunachal Pradesh for more than three decades and had close social, religious and economic ties. As per joint statement issued by the Prime Ministers of India and Bangladesh in February, 1972, the Union Government took a decision to confer citizenship on the Chakmas under Section 5(1)(a) of the Citizenship Act, 1955 but the State of Arunachal Pradesh had

reservations on this count. The Central Government was in favour of a dialogue between the State Government, the Chakmas and all concerned to resolve the issue of granting citizenship while also redressing the genuine grievances of citizens of Arunachal Pradesh. The stand of the State of Arunachal Pradesh was that it had provided basic amenities to the Chakmas but the State had a right to ask the Chakmas to quit the State. The State could not permit outsiders to settle within its territory as it had limited resources and the Union of India had refused to share its responsibility. The Deputy Commissioner of the area was to forward the applications for citizenship after due inquiry but no such application was pending. Further stand of the State was that settlement of Chakmas will disturb its ethnic balance and destroy its culture and identity. The tribals of the State consider Chakmas as potential threat to their tradition and culture.

3. This Court considered rival submissions and held that the Chakmas apprehend threat on the All Arunachal Pradesh Students' Union ("AAPSU") who were reported to be enforcing economic blockades on the refugee camps, adversely affecting supply of ration, medical and essential facilities to the Chakmas. Some Chakmas had died on account of blockade. This Court further noticed that Chakmas could invoke Section 5(1)(a) of the Citizenship Act by filing application in form prescribed by Part II of the Citizenship Rules, 1956. The observations in NHRC case (supra), inter alia, are as follows :-

"18. From what we have said hereinbefore, there is no doubt that the Chakmas who migrated from East Pakistan (now Bangladesh) in 1964, first settled down in the State of Assam and then shifted to areas which now fall within the State of Arunachal Pradesh. They have settled there since the last about two and a half decades and have raised their families in the said State. Their children have married and they too have had children. Thus, a large number of them were born in the State itself. Now it is proposed to uproot them by force. The AAPSU has been giving out threats to forcibly drive them out to the neighbouring State which in turn is unwilling to accept them. The residents of the neighbouring State have also threatened to kill them if they try to enter their State. They are thus sandwiched between two forces, each pushing in opposite direction which can only hurt them. Faced with the prospect of annihilation the NHRC was moved, which, finding it impossible to extend protection to them, moved this Court for certain reliefs.

19. By virtue of their long and prolonged stay in the State, the Chakmas who migrated to, and those born in the State, seek citizenship under the Constitution read with Section 5 of the Act. We have already indicated earlier that if a person satisfies

the requirements of Section 5 of the Act, he/she can be registered as a citizen of India. The procedure to be followed in processing such requests has been outlined in Part II of the Rules. We have adverted to the relevant rules hereinbefore. According to these Rules, the application for registration has to be made in the prescribed form, duly affirmed, to the Collector within whose jurisdiction he resides. After the application is so received, the authority to register a person as a citizen of India, is vested in the officer named under Rule 8 of the Rules. Under Rule 9, the Collector is expected to transmit every application under Section 5(1)(a) of the Act to the Central Government. On a conjoint reading of Rules 8 and 9 it becomes clear that the Collector has merely to receive the application and forward it to the Central Government. It is only the authority constituted under Rule 8 which is empowered to register a person as a citizen of India. It follows that only that authority can refuse to entertain an application made under Section 5 of the Act. Yet it is an admitted fact that after receipt of the application, the Deputy Collector (DC) makes an enquiry and if the report is adverse, the DC refuses to forward the application; in other words, he rejects the application at the threshold and does not forward it to the Central Government. The grievance of the Central Government is that since the DC does not forward the applications, it is not in a position to take a decision whether or not to register the person as a citizen of India. That is why it is said that the DC or Collector, who receives the application should be directed to forward the same to the Central Government to enable it to decide the request on merits. It is obvious that by refusing to forward the applications of the Chakmas to the Central Government, the DC is failing in his duty and is also preventing the Central Government from performing its duty under the Act and the Rules.

20. We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise, and it cannot permit any body or group of persons, e.g., the AAPSU, to threaten the Chakmas to leave the State, failing which they would be forced to do so. No State Government worth the name can tolerate such threats by one group of persons to another group of persons; it is duty- bound to protect the threatened group from such assaults and if it fails to do so, it will fail to perform its constitutional as well as statutory obligations. Those giving such threats would be liable to be dealt with in accordance with law. The State Government must act impartially and carry out its legal obligations to safeguard the life, health and

well-being of Chakmas residing in the State without being inhibited by local politics. Besides, by refusing to forward their applications, the Chakmas are denied rights, constitutional and statutory, to be considered for being registered as citizens of India."

4. Accordingly, direction was issued to the State of Arunachal Pradesh to ensure that life and liberty of Chakmas residing in the State was protected against any attempt to evict them by organized groups such as AAPSU and their applications could be forwarded to the Central Government.

5. Case of the petitioners, further is that the application of the State of Arunachal Pradesh for modification and Writ Petition (C) No.593 of 1997 filed by an organization of tribals of Arunachal Pradesh against the judgment of this Court was also dismissed. Another writ petition being Writ Petition No.13 of 1998 against the judgment of this Court was dismissed on 9th December, 2002. Thereafter applications were filed for citizenship but the same were not acted upon. The Election Commission of India in the light of judgment of this Court passed orders dated 3rd March, 2004 declaring the resolution dated 14th May, 2003 passed by the State of Arunachal Pradesh against facilities to the petitioners to be unconstitutional but the authorities of the State of Arunachal Pradesh had not forwarded the applications as required under Rule 9 of the Citizenship Rules to the Central Government.

6. Counter affidavit has been filed by the Union of India stating that the applications directly received by the Ministry of Home Affairs were forwarded to the Government of Arunachal Pradesh which had not been returned except few applications with negative recommendations. The said applications were returned back to the Government of Arunachal Pradesh. Ministry of Home Affairs had advised the Government of Arunachal Pradesh to act in compliance with the judgment of this Court.

7. The stand of the State of Arunachal Pradesh is that there was no threat to the life and liberty of the Chakmas and Hajong refugees. After receiving the judgment of this Court, the judgment was circulated to Inspector General of Police, Deputy Commissioners of the concerned Districts and Principal Chief Conservator of Forests. The State Government was fully bound by the direction of this Court and had taken all necessary steps to comply with the same. The State of Arunachal Pradesh had received 4382 applications. Though the popular sentiment of the indigenous tribals was different, the State of Arunachal Pradesh was honouring the

order of this Court. It is further stated that Chakmas and Hajong tribes were settled in NEFA from 1964 to 1969 when there were no elected bodies in the State of Arunachal Pradesh. The laws applicable in the State of Arunachal Pradesh like the Government of India Act, 1870, the Bengal Eastern Frontier Regulation, 1873, the Scheduled District Act, 1874, the Assam Frontier Tract Regulation, 1880, the Assam Frontier Forest Regulation, 1891, the Chin Hills Regulations, 1896 and the Assam Frontier (Administration of Justice) Regulation, 1945 (1 of 1945) were not taken into account. One thousand four hundred ninety seven Chakmas have been included in the electoral rolls.

8. The petitioners have filed a rejoinder affidavit alleging that children of Chakmas and Hajongs are denied educational facilities. They were not being covered by the public distribution system. They presented a petition to the 10th Lok Sabha and also to Rajya Sabha Committee on Petitions. The said Committee in its 105th Report published on 14th August, 1997 made recommendation to grant Indian Citizenship to the Chakmas but the said recommendation has not been acted upon. The recommendation is as follows :

"42. The Committee, therefore, recommends that the Chakmas of Arunachal Pradesh who came there prior to 25.3.1971 be granted Indian citizenship. The Committee also recommends that those Chakmas who have been born in India should also be considered for Indian citizenship. The Committee further recommends that the fate of those Chakmas who came to the State after 25.3.1971 be discussed and decided by the Central Government and State Government Jointly. The Committees also recommends that all the old applications of Chakmas for citizenship which have either been rejected or withheld by Deputy Commissioners or the State Deputy Commissioner or the State Government continue to block the forwarding of such applications to Central Government, the Central Government may consider to incorporate necessary provision in the Rules (or the Act it so required) whereby it could directly receive, consider and decide the application for citizenship in the 23 case of Chakmas of Arunachal Pradesh. The Committee also recommends that Chakmas be also considered for granting them the status of Scheduled Tribes at the time of granting the citizenship. The Committee would like to earnestly urge upon the Central Government and State Government to ensure that until amicable solution is arrived at, the Chakmas are allowed to stay in Arunachal Pradesh with full protection and safety, honour and dignity".

9. When the matter came up for hearing before this Court on 1st August, 2012, the following order was passed :-

"Mr. B. Bhattacharyya, learned Additional Solicitor General for respondent No. 5, and Mr. Anil Shrivastav, learned counsel for respondent Nos. 1 to 4, pray for some time to seek instructions and also to ensure that the controversy raised in the Writ Petition is resolved at the hands of the Central Government and the State Government at the earliest."

10. Again on 28th August, 2012, following order was passed : "Mr. B. Bhattacharyya, learned Additional Solicitor General appearing for the respondent No. 5 - Union of India, submits that all 4637 applications for grant of citizenship in respect of Chakmas received in the Ministry of Home Affairs, Government of India have been returned to the State Government as the applications were not made to the appropriate authority in prescribed form and were also not accompanied with the recommendations of the State Government as per statutory requirement.

Having regard to the decision of this Court in National Human Rights Commission Vs. State of Arunachal Pradesh and Another, (1996) 1 SCC 742, and the directions contained therein, we direct the State of Arunachal Pradesh to submit a comprehensive report/affidavit to this Court in respect of 4637 applications returned by the Central Government to the State Government on the following aspects in respect of each application :-

(i) Whether the conditions laid down in the relevant clauses of Section 5 of the Citizenship Act, 1955 (for short, 'Act') are satisfied;

(ii) Whether the applicant has an intention to make India his permanent home;

(iii) Whether the applicant has signed oath of allegiance as specified in the Second Schedule to the Act; and

(iv) Whether the applicant is of good character and is otherwise a fit and proper person to be registered as a citizen of India.

The above report/affidavit shall be submitted by the State of Arunachal Pradesh to this Court through the Secretary (Political), Government of Arunachal Pradesh within two months from today.

A copy of the report/affidavit shall be given to the Advocate-on- Record for the petitioners well in advance."

11. On 20th January, 2014, this Court passed the following Order:

"List the matter on 5th May, 2014, so as to enable the Joint High Powered Committee constituted vide Government of India's Order No.13/2/2010-NE-II dated 10/08/2010. to place on record the progress made in the matter.

We are sure that the Committee would make all efforts so that the work entrusted to it is concluded preferably before the next date of hearing."

12. Additional Affidavit dated 2nd January, 2013 was filed by the State of Arunachal Pradesh stating that the Government of India, Ministry of Home Affairs (N.E. Division) has constituted a committee under the Chairmanship of Joint Secretary (N.E.), Ministry of Home Affairs on 10th August, 2010 to examine various issues relating to settlement of Chakmas/Hajongs in Arunachal Pradesh including the possibility of granting Indian citizenship to eligible Chakmas/ Hajongs. The Committee has held its sitting on 9th January, 2012 and taken certain decisions. Thus, the issue was not being ignored though there was no delay in the matter.

13. We have heard learned counsel for the parties and perused the record.

14. Learned counsel for the petitioners submitted that their rights have been duly acknowledged by this Court in NHRC case (supra). Still, their legitimate right of citizenship has not so far materialized. They have been settled after a conscious decision at the highest level of the Government of India. They could not be treated as foreigners. He has placed reliance on a judgment of the Gauhati High Court dated 19th March, 2013 in PIL No.52 of 2010 titled "All Arunachal Pradesh Students Union (AAPSU) vs. The Election Commission of India" dismissing a petition filed by AAPSU against the guidelines issued by the Election Commission of India for revision of electoral rolls in respect of areas where there is substantial presence of Chakmas and Hajongs. In the said judgment, the Memorandum dated 23rd March, 2005 issued by the Election Commission of India and further guidelines dated 3rd October, 2007 for revision of electoral rolls with reference to 1st January, 2007 as qualifying date are also referred to. The objection against the Chakmas being treated as ordinary residents of Arunachal Pradesh in absence of possession of valid Inner Line Passes was also considered. The Election Commission of India supported its guidelines with guidelines with reference to a judgment of the Delhi High Court dated 28th September, 2000 in W.P. No.886 of 2000 (Peoples Union for Civil Liberties vs. Election Commission of India &Ors.)

15. In the judgment of the Gauhati High Court, it was noted that in contradiction to those unwanted illegal migrants who sneak into the country, the Chakmas migrated

to India on account of their displacement and the Government of India agreed to grant them citizenship. In these circumstances, the guidelines of the Government of India were held to be justified and did not warrant any requirement of Inner Line permit. The relevant observations are :

"[18] ..... Having regard to the facts and circumstances which have been also highlighted by the Hon'ble Supreme Court as referred to above in NRHC case, we are of the view that these additional guidelines, having been issued in the peculiar circumstances obtaining, cannot be held to be discriminatory.

Further, in view of the policy decision taken by the Government of India to settle the Chakma refugees in different States and also in Arunachal Pradesh in consultation with the authorities of the Arunachal Pradesh, and also to confer Indian citizenship, the contention of the petitioners that the aforesaid guidelines have the effect of violating the provisions of law in terms of lack of Inner Line Permit or violation of provisions of section 13 of the Registration of Births and Deaths Act, 1969 does not hold water. We are of the view that once a decision had been taken to settle these Chakma refugees in Arunachal Pradesh in consultation with the authorities of Arunachal Pradesh, they would become residents of Arunachal Pradesh and would not require the Inner Line Permit/Pass. Otherwise also, once they have been allowed to settle in Arunachal Pradesh, it would be deemed that such permits had been granted to them and in our considered opinion, any other view would negate and defeat the policy decision taken by the Government of India in consultation with the Arunachal Pradesh authorities to settle these Chakmas in Arunachal Pradesh.

Similarly, as regards, the other contention of the petitioners that the guidelines would contravene the provisions of section 13 of the Registration of Births and Deaths Act, 1969 also cannot be accepted. It may be noted that the Chakmas had taken refuge in this country under distress and trying circumstances after having been uprooted from their hearth and homes and made to flee to avoid persecution. Further, later on, after having allowed to settle in Arunachal Pradesh, they had faced difficulties and harassments from the neighbouring local populace which had been taken note of by the Supreme Court in NHRC case as mentioned above. Therefore, issuing of the additional guidelines for the purpose of verification of the birth of the claimants on the basis of other credible materials for the purpose of enrolment in the electoral rolls where these Chakmas had been officially settled cannot be interfered with merely on the technical ground that certain provisions of Registration of Births and Deaths Act, 1969 have not been strictly complied with, if the evidences are otherwise credible and trustworthy.

We are of the view that the additional guidelines which had been issued by the Election Commission of India are merely to enable those Chakmas to enjoy such benefits as a citizen of this Country including the right to vote by having their names enrolled in the electoral rolls of the concerned constituency where they have been settled. Once, these Chakma refugees have been granted citizenship, they are entitled to enjoy all the rights and privileges that flow on becoming a citizen of this country and further, they are entitled to have their rights as citizens of this country protected and safeguarded."

16. We find merit in the contention of the petitioners. It stands acknowledged by this Court on the basis of stand of the Government of India that the Chakmas have a right to be granted citizenship subject to the procedure being followed. It also stands recognized by judicial decisions that they cannot be required to obtain any Inner Line permit as they are settled in the State of Arunachal Pradesh.

17. In State of Arunachal Pradesh vs. KhudiramChakma[2], this Court noted the ancient history of Arunachal Pradesh as follows :

"41. The history of the mountainous and multitribal north-east frontier region which is now known as Arunachal Pradesh ascends for hundreds of years into the mists of tradition and mythology. According to Pauranic legend, Rukmini, the daughter of King Bhishmak, was carried away on the eve of her marriage by Lord Krishna himself. The ruins of the fort at Bhalukpung are claimed by the Akas as the original home of their ancestor Bhaluka, the grandson of Bana Raja, who was defeated by Lord Krishna at Tezpur (Assam). A Kalita King, Ramachandra, driven from his kingdom in the plains of Assam, fled to the Dafla (now Nishang) foothills and established there his capital of Mayapore, which is identified with the ruins on the Ita hill. A place of great sanctity in the beautiful lower reaches of the Lohit River, the Brahmakund, where Parasuram opened a passage through the hills with a single blow of his mighty axe, still attracts the Hindu pilgrims from all over the country."

18. The above history shows the integral link of the State of Arunachal Pradesh with the rest of the country since ancient times. It is well known that the Chakmas and Hajongs were displaced from the area which became part of East Pakistan (now in Bangladesh) on construction of Kaptai Dam and were allowed to be rehabilitated under the decision of the Government of India. As earlier held by this Court, the Delhi High Court and Gauhati High Court, they need to be protected and their claims of citizenship need to be considered as per applicable procedure. They could not be discriminated against in any manner pending formal conferment of rights of

citizenship. Their status also stands duly acknowledged in the guidelines of the Election Commission of India.

19. Learned Additional Solicitor General fairly stated that the Government of India will earnestly take appropriate measures in the matter, granted some more time.

20. Accordingly, we allow this petition and direct the Government of India and the State of Arunachal Pradesh to finalise the conferment of citizenship rights on eligible Chakmas and Hajongs and also to ensure compliance of directions in judicial decisions referred to in earlier part of this order for protection of their life and liberty and against their discrimination in any manner. The exercise may be completed at the earliest preferably within three months from today.

.....J.

[ANIL R. DAVE] .....J.

[ADARSH KUMAR GOEL] NEW DELHI SEPTEMBER 17, 2015

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[1] (1996) 1 SCC 742 [2] (1994) Supp. 1 SCC 615

(R-11)

Supreme Court of India

Citations: 1970 AIR 329, 1970 SCR (1) 87

PETITIONER:

REV. MONS. SEBASTIAO FRANCISCO XAVIER DOS.REMEDIOS MONTEIR(Petitioner)

Vs.

STATE OF GOA (Respondent)

ACT:

Geneva Conventions Act Fourth Schedule, Arts. 6, 47, 49-Occupation' under Art. 47 whether continues after annexation and subjugation-True annexation distinguished from premature annexation-Art. 47 refers to premature annexation only-Goa annexed by India after swift military action-Benefit of Arts. 47 and 49 whether available to Portuguese nationals in Goa-Court's power to give remedy.

HEADNOTE:

The Geneva Conventions Act 6 of 1960 was passed by the Indian Parliament to enable effect to be given to the International Conventions done at Geneva in 1949. India and Portugal have both signed and ratified the Conventions. The four Conventions were adopted in as many Schedules to the Act. 'Mc Fourth Convention was meant to apply to all cases of partial or total occupation of the territory of the contracting parties and gave protection to persons who, found themselves in case of a conflict or occupation in the hands of a Party to the conflict or Occupying Power of which they were not nationals. In the case of occupied territory

the Convention applies under Art. 6 for a period of one year after the general close of Military operations, but during the period of occupation the Occupying Power is bound by certain Articles including, inter alia, Arts. 1-12, 47 and 49. ByArt. 47 protected persons in occupied territory can not be deprived of the benefits of the Convention despite any change introduced as a result of the occupation or even annexation of whole or part of the territory by the Occupying Power. Art. 49forbids the deportation of protected persons 'from the occupied territory. There is no definition of the term 'occupied' in the Geneva Conventions but the Hague Regulations to which the Conventions are made supplementary defined a territory as occupied when it finds itself 'in fact placed under the authority of a hostile Army'.

The territory of Goa was a Portuguese colony for about 450 years, having been seized by force of arms. On December 19, 1961 Goa was occupied by Indian Armed Forces following a short military action. It then came under Indian Administration from December 20, 1961 and was governed under the Goa, Daman and Diu (Administration) Ordinance 1962 promulgated by the President of India. The Ordinance was replaced on March 27, 1962 by Act 1 of 1962. The same day the Constitution (Twelth Amendment) Act 1962 was enacted and was deemed to have come into force on December 20,, 1961. By this amendment Goa was included in the Union Territories and a reference to Goa was inserted in Art.240 of the Constitution. Indian laws including the Citizenship Act of 1955, theForeigners Act 1946 and the Registration of Foreigners Act 1939 were extended to Goa. The Central Government also promulgated under s. 7 of the Citizenship Act, 1955, the Goa, Daman and Diu (Citizenship) Order 1962. The second paragraph of the order conferred Indian Citizenship on certain classes of persons in these territories, giving an option to those desirous of retaining their previous citizenship or nationality of another country to make a declaration to that effect within one month of the Order.

The appellant who was a resident of Goa made pursuant to the above order his declaration of Portuguese nationality. He was allowed to stay in India under a temporary residential permit till November 13., 1964. After that date he did not ask for a renewal of the permit. The Lt. Governor of Goa empowered under Art. 239 of the Constitution ordered him to leave India. For disobeying the order he was prosecuted under s. 14 read with s. 3 (2) (c) of the Foreigners Act. Being convicted he appealed unsuccessfully to the Court of Session. His revision petition being rejected by the Judicial Commissioner, he appealed by special leave to this Court.

The contention on behalf of the appellant were based on the Geneva Conventions which it was said had become a part of the law of India under Act 6 of 1960. It was urged that after the United Nations Charter the acquisition of territory in International Law by 'force of arms could not confer title. The amendment of the Constitution only legalised the annexation so far as India was concerned but in International Law the territory remained occupied because it had neither been ceded, nor had the Occupying Power withdrawn. As a result, it was contended, the protection of Arts. 47 and 49 continued to be available to the appellant and by disobeying the deportation order he did not commit any offence.

HELD : (i) The appellant's argument overlooked the cardinal principle of international law that the reception and residence of an alien is a matter of discretion and every State has by reason of its own territorial supremacy not only the legal right but also the competence to exclude aliens from the whole or any part of its territory. Accordingly every country has adopted the passport system which document certifies nationality and entry into any State is only possible with the concurrence of the State. Again a State exercises territorial supremacy over persons in its territory, whether its own subjects or aliens, and can make laws for regulating the entry, residence and

eviction of aliens. Therefore the application of the Foreigners Act, the Registration of Foreigners Act and Orders passed under them, to the appellant who had chosen Portuguese nationality was legally competent. There is authority for the proposition that an alien excluded from the territory of a State cannot maintain an action in a Municipal Court to enforce his right. [92 H-93 C]

Oppen them International Law (Vol. 1) pp. 675/676, Brierly Law of Nations p. 217, and Musgrove v. Chun Teeong Toy, [1891] A.C. 272, referred to.

(ii)The Geneva Conventions Act also gives no specific right to anyone to approach the Court. By itself it gives no special remedy. It does give indirect protection by providing for penalties for breach of Convention. The Conventions are not made enforceable by Government against itself, nor does the Act give a cause of action to any party, for the enforcement of the Conventions. Thus there is only an obligation undertaken by the Government of India to respect the Conventions regarding the treatment of civilian population but there is no right created in favour of protected which the court has been asked to enforce. If there is no provision of law which the courts can enforce the court may be powerless and has to leave the matter to the 'indignation of mankind'. [97 B-C]

(iii)The Geneva Conventions too did not support the appellant's claim to the benefit of Art. 49 of the Fourth Convention on the basis that Goa continued, even after its annexation by India, to be occupied territory B within the meaning of Art. 47.

(a)In the Hague Regulations to which the Geneva Conventions were supplementary the definition of 'occupation' shows that a territory is con-

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sidered as occupied when it finds itself in fact placed under the authority of a hostile army. This means that occupation is by military authorities i.e. belligerent occupation. Under belligerent occupation, which is a de facto situation, the Occupied Power is not deprived of its

sovereignty or its statehood. All that happens is that pro tempore the Occupied Power cannot exercise its rights, its Government cannot function and authority is exercised by the occupying force. In this connection the courts must take the Facts of State from the declaration of the State authorities. [99 C-F]

United States v. Attstoctter et tit, (1947) U.S. Military Tribunal, Nuremburg L.R. 3 T.W.C. vi, 34, referred to.

(b) Annexation as distinguished from belligerent occupation occurs when the Occupying Power acquires and makes the occupied territory its own. Annexation gives a de jure right to administer the territory. Annexation means that there is not only possession but uncontested sovereignty over the territory. [99 F-G]

Greenspan, The Modern Law of Land Warfare, p. 215; referred to.

There is however difference between true annexation on the one hand and premature annexation or 'anticipated annexation' on the other. Annexation is premature so long as hostilities are continuing and there is an opposing army in the field even if the Occupied Power is wholly excluded from the territory. Anticipated annexation by unilateral action is not true annexation. True annexation is only so when the territory is conquered and subjugated. [99 C-H; 100 A-B]

Oppenbeim : International Law (7th Edn.) pp. 846-847 (Vol. 1), 566 (Vol. 1), pp. 846-847 (Vol. 11), 430-439 (Vol. 11) and 599 et seq (Vol. 11); Greenspan pp. 215 et seq 600-603, Gould : Introduction to International Law pp. 652-656, 662-663; Brierly : Law of Nations, p. 155, referred to.

(c) When Conventions lays down that annexation has no effect they speak of premature or anticipated annexation. It was so held by the Nuremburg Tribunal and the experts who drafted the Convention were inclined to add the word 'alleged' before 'annexation' in Art. 47 to distinguish between annexation following conquest and subjugation and annexation made while hostilities were going on subjugation puts an end to the State of war and destroys the source of

authority of the existing Government. In subjugation which is recognised as one of the modes of acquiring title not only the de facto but also the de jure title passes to the conqueror. After subjugation the inhabitants must obey the laws such as they are and not resist them. [10C-D]

(d) Under Art. 6 the Convention continues to apply to occupied territory for one year after the general close of hostilities for the reason that if the Occupied Power turns victorious the land would be freed in one year, and if the Occupying Power remains victorious, as hostilities cease, strong measures against the civilian population are no longer necessary. Otherwise also, occupation, which means belligerent occupation comes to an end when hostilities cease and the territory becomes a part of the Occupying Power. [100 F-G]

(e) Title to new territory is not dependent on recognition. Despite the Stimson doctrine the conquest of Abyssinia by Italy was recognised because it was though that the State of affairs had come to stay. Even after the adoption of the United Nations Charter events since the Second 2Sup. CT/69--7
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World War have shown that transfer of title to territory by conquest is still recognised. If cession after defeat can create title, occupation combined with absence of opposition must lead to the same result. [100 H-101 B]

(f)In the present case the military engagement was only a few hours duration and there was no resistance at all. It was hardly necessary to try to establish title by history traced to the early days nor any room for Schwarzenburger's thesis that title is relative and grows with recognition. True annexation followed here so close upon military occupation as to leave no real hiatus. True annexation by conquest and subjugation was complete on December 20, 1961 and the Geneva Convention ceased to apply 'from that date. It was not disputed that the annexation was lawful. Therefore since occupation in the sense used in Art. 47 had ceased the protection must cease also. [101 C-F]

Minquiers and Ecrenos, 1953 (I.C.J.) 47 and Schwarzenburger : A Manual of International Law, 5th Edn. p. 12, referred to.

(iv)The national status of subject of the subjugated State is a matter for the State and courts of law can have no say in the matter. Having chosen Portuguese nationality the appellant could only stay in India on taking out a permit. He was therefore rightly convicted under the law applicable to him. [101 H-102 B]

Oppenheim International Law, Vol. 1 p. 573, referred to.

[On the view taken it was not considered necessary to. decide the question whether deportation was an Act of State and the Municipal Courts could therefore give no remedy.] [101 G]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 50 of 1968.

Appeal by special leave from the judgment and order dated August 7, 1967 of the Judicial Commissioner Court, Goa, Daman ,and Diu in Criminal Revision Petition in No. 55 of 1966.

Edward Gardner, O.C., A. Bruto Da Costa, M. Bruto Da Costa, P. C. Bhartari, A. K. Varma and J. B. Dadachanji, for the appellant.

Niren De, Attorney-General, G. R. Rajagopaul, J. M. Mukhi and R. H. Dhebar, for the respondent.

The Judgment of the Court was delivered by Hidayatullah, C.J. The appellant (Rev. Father Monteiro) is a resident of Goa. After the annexation of Goa by India, he had the choice of becoming an Indian national or retaining Portuguese nationality. He choose the latter and was registered as a foreigner. He also obtained a temporary residential permit which allowed him to stay on in India till November 13, 1964. The period of stay expired and he did not ask for its extension or renewal. He was ordered to leave India by the Lt. Governor of Goa. The Lt. Governor is empowered by a notification of the President of India issued under Art. 239 of the Constitution to discharge the functions of the Central Government and his order has the same force and validity as if made by the Central Government. Rev. Father

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Monteiro disobeyed the order, and in consequence was prosecuted under S. 14 read with s. 3 (2)

(c) of the Foreigners Act. He was convicted and sentenced to 30 days' simple imprisonment and a fine of Rs. 50/- (or 5 days' further simple imprisonment). He appealed unsuccessfully to the Court of Session and his revision application to the Court of the judicial Commissioner, Goa also failed. He now appeals by special leave of this Court against the order of the Judicial Commissioner, Goa dated August 7, 1967.

The defence of Rev. Father Monteiro was that he was pro- tected by the Geneva Conventions Act, 1960, that the order of the Lt. Governor for his deportation was ultra vires the Act and that he had committed no offence. The Judicial Commissioner and the two courts below have held, for different reasons, that the Geneva Conventions ceased to apply after Goa became a part of India and that the Municipal Courts in India can give him no redress against an Act of State. In the appeal before us Mr. Edward Gardner Q.C. appeared for Rev. Father Monteiro with the leave of this Court.

To understand the case, a brief history of the annexation of Goa and what happened thereafter is necessary. Goa was a Portuguese colony for about 450 years, having been seized by force of arms. On December 19, 1961 Goa was occupied by the Indian Armed Forces following a short military action. It then came under Indian Administration from December 20, 1961 and was governed under the Goa, Daman and Diu (Administration) Ordinance 1962 promulgated by the President of India. Under the Ordinance all authorities were to continue performing their functions and -all laws (with such adaptations as were necessary) were to continue in force and power was conferred on the Central Government to extend to Goa other laws in force in India. The Ordinance was later replaced by an Act of Parliament bearing the same title and numbered as Act 1 of 1962. It was enacted on March 27, 1962 and came into force from March 5, 1962. It re-enacted the provisions of the Ordinance and in addition gave representation to Goa in Parliament amending for the purpose the Representation of the People Act. The same day (March 27, 1962), the Constitution (Twelfth Amendment) Act, 1962 was enacted and was deemed to have come into force on December 20, 1961. By this amendment Goa was included in Union Territories and -a reference to Goa was inserted in Art. 240 of the Constitution. Many Acts it,.force in India were then extended to Goa and many Regulations and Orders were promulgated. Among the Acts so extended were the Citizenship Act of 1955, the Foreigners Act 1946 and the Registration of Foreigners Act, 1939.

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The Central Government also promulgated under S. 7 of the Citizenship Act, 1955, the Goa, Daman and Diu (Citizenship) Order 1962 and as it directly concerns the present matter we may re produce the second paragraph of the Order (in so far as it is material to our purpose) here :

"2. Every person who or either of whose parents or any of whose grand-parents was born before twentieth day of December, 1961, in the territories now comprised in the Union Territory of Goa, Daman and Diu shall be deemed to have become a citizen of India on that day :

Provided that any such person shall not be deemed to have become a citizen of India as aforesaid if within one month from the date of publication of this Order in the Official Gazette that person makes a declaration in writing to the Administrator of Goa, Daman and Diu or any other authority specified by him in this behalf that he chooses to retain the citizenship or nationality which he had immediately before the twentieth day of De-december, 1961.

Provided further....."

Pursuant to this Order, on April 27, 1962, Rev. Father Monteiro made his declaration of Portuguese nationality and on August 14, 1964 applied for a residential permit. On his failure to apply for a renewal of the permit the order of the Lt. Governor was passed on June 19, 1965. Prosecution followed the disobedience of the order.

At the outset it may be stated that Mr. Gardner concedes that he does, not question the legality of the military action or the annexation. In fact, he is quite clear that we may consider the annexation to be legal. His contention, in brief, is that the order of the Lt. Governor is tantamount to deportation of Rev. Father Monteiro and the Geneva Conventions Act gives protection against such deportation during occupation which has not validly come to an end, and, therefore, no offence was committed by him. The argument overlooks one cardinal principle of Inter- national Law and it is this Rev. Father Monteiro by his declaration retained his Portuguese nationality. His sojourn in India was subject to such laws as existed in India in general and in Goa in particular. It cannot be doubted that the reception and residence of an alien is a matter of discretion and every State has, by reason ,of its own territorial supremacy, not only- the legal right but also the competence to exclude aliens from the whole or any part of its. territory. This proposition is so well-grounded in International Law that every country has adopted the passport system, which document certifies nationality and entry into any State is only possible with the concurrence of that State. Again a State exercises territorial supremacy over persons in its territory, whether its own subjects or aliens -and can make laws for regulating the entry, residence

and eviction of aliens. Therefore, the application of the Foreigners Act, the Registration of Foreigners Act and the Orders passed under them, to Rev. Father Monteiro was legally competent. A considerable body of writers on International Law support the proposition and it is sufficient to refer only to Oppenheim (Vol. 1) pp. 675/676 and Brierly Law of Nations p. 217. If authority were needed the proposition would be found supported in the decision of the Privy Council in Musgrove v. Chun TeeongToy(1). The Lord Chancellor in that case denied that an alien excluded from British territory could maintain an action in a British Court to enforce such a right. This proposition being settled, Mr. Gardner sought support for his plea from the provisions of the Geneva Conventions Act of 1960. That Act was passed to enable effect to be given to the International Conventions done at Geneva in 1949. Both India and Portugal have signed and ratified the Conventions. Mr. Gardiner relies on the provisions of the Fourth Schedule relative to the protection of certain persons in time of war. Ho refers in particular to Articles 1, 2, 4, 6, 8, 47 and 49. By Arts. 1 and 2 there is an undertaking to respect and ensure respect for the Con- ventions in all circumstances of declared war or of any other armed conflict even if the state of war is not recognised by one of the parties and to all cases of partial or total occupation of the territory of a High Contracting Party even if the occupation meets with no armed resistance. Article 4 defines a protected person and the expression includes those who at a given moment and in any manner whatsoever, find themselves, in case of conflict or occupa- tion, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Article 6 then lays down the beginning and end of application of the Convention. The Convention applies from the outset of any conflict or occupation. In the territory of Parties to the conflict, the application of the Convention ceases on the general close of Military operations. In the case of occupied territories it ceases one year after the general close of military operations but the occupying Power is bound for the duration of occupation, to the extent that such Power exercise the functions of Government in such territory, by Arts. 1-12, 27, 29-34, 47, 49, 51, 52, 53, 59, 61-73 and

143. (1) [1891] A. C. 2 We next come to Arts. 47 and 49 which are the crux of the matter and are relied upon for the protection. Mr. Gardner points out that under Art. 48 even protected persons may in no circumstance renounce in part or in entirety the rights secured to them by the Conventions. The case, therefore,, depends on whether Arts. 47 and 49 apply here. We may now read Arts. 47 and 49 "47. Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or Government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory." "49. Individual or mass forcible

transfers, as well as deportation of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of -a given area if the security of the population or imperative military reasons so demand. Such evacuation may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible toavoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the danger of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

The point of difference between the parties before us in relation to Art. 47 is whether the occupation continues, the annexation of the territory notwithstanding; -and in relation to Art. 49 whether the order of the Lt. Governor amounts to deportation of a protected person. Mr. Gardner's submissions are : the order that has been made is a deportation order and it is therefore ultra vires the Geneva Conventions. These Conventions create individual rights which cannot even be waived. So long as occupation continues ,these rights are available and the Geneva Conventions must not be looked at in isolation but read in conjunction with International Law as part of the positive law. They should not be abandoned lightly. According to him, conquest was a method of acquiring territory in the past but after the Covenant of the League of Nations, the Charter of the United Nations and the General Treaty for the Renunciation of War, the acquisition of territory in Inter- national Law by the use of force does not confer any title. Occupation, therefore, can only be of terra nullins, not now possible. He invokes the rule in Heydon's(1) case and says that the history of the making of the Geneva Conventions, shows that this was precisely the mischief sought

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to be met and the Conventions now become a part of the laws of India through Parliamentary Legislation. He concedes that the war of liberation of Goa and the annexation were lawful but he contends that annexation does not deprive protected persons of the protection. According to him, once there is military action and occupation, occupation cannot cease by a unilateral act of annexation by incorporating the terri- tories of Goa with India. If India did not care to be bound by the Conventions, there was a 'Method of denunciation in Art. 158 but since the Convention is registered under Art. 159 even denunciation at a late stage was not possible. He relies upon Art. 77 and says that 'Liberated' means when the occupation comes to an end. The amendment of the Constitution only legalises annexation so far as India is concerned but in International Law the territory remains occupied. The occupation is not at an end and it cannot be brought about unilaterally. The words of Art. 47themselves are clear enough to establish this. In short, the con- tention is that occupation does not come to end by annexation and, therefore, the protection continues till there is either cession of the territory or withdrawal of the Occupying Power from the territory, both of which events have not taken place. In support of his propositions be relies upon Dholakia (International Law) (1) (1584) 3 Rep. 76.

pp. 180, 181, 293; Oppenheim International Law (Vol. 1) 7th Edn. pp. 574 et seq.; R. Y. Jennings : The Acquisition of Territories in International Law pp. 53-56, 67. The contention on behalf of the State is that by occupation is meant occupation by armed forces or belligerent occupation and occupation comes to an end by conquest followed by subjugation. Reference is made to many works on International Law. We have to decide 'between these two submission.

This is the first case of this kind and we took time to consider our decision. We are of opinion that the pleas of Mr. Gardner that the Geneva Conventions Act makes dispunishable the conduct of Rev. Father Monteiro, must fail.

To begin with, the Geneva Conventions Act gives no specific right to any one to approach the Court. The Act was passed under Art. 253 of the Indian Constitution read with entries 13 and 14 of the Union List in the Seventh Schedule to implement the agreement signed and merely provides for certain matters based on Geneva Conventions. What method an aggrieved party must adopt to move the, Municipal Court is not very clear but we need not consider the point because of our conclusions on the other parts of the case. We shall consider the Conventions themselves. Before we consider the Geneva Conventions, which form Schedules to the' Act, it is necessary to look at the Act itself to see what rights it confers in relation to the Conventions, and whether it givesa right to Rev. Father Monteiro

in the present circumstances to invite the Court's opinion. Being a court of law, this Court must be satisfied about its own jurisdiction, the foundation for which must be in some enforceable law.

Prior to the Geneva Conventions Act of 1960 there were the Geneva Convention Act of 1911 and the Geneva Conventions Implementing, Act of 1936. We need not consider them because by the twentieth section of the present Act, the former ceases to have effect as part of the law of India and the latter is repealed. The Act is divided into five Chapters. Chapter I deals with the title and extent and commencement of the Act and gives certain definitions. Of these, the important definition is that of 'protected internee' as a person protected by the Fourth Convention and interned in India. Chapter 11 then deals with punishment of offenders against the Conventions and the jurisdiction of courts to deal with breaches by punishment them. Chapter III lays down the procedure for the trial of protected persons, for offences enabling a sentence of death or imprisonment for a term of two years or more to be imposed and for appeals etc. Chapter IV prohibits the use of Red Cross and other emblems without the approval of Central Government and provides for a penalty.

Chapter V gives power to the Central Government to make rules.The Act then sets out the Conventions in its schedules and the Conventions which are four in number are set out in as many Schedules to the Act.

It will thus be seen that the Act by itself does not give any special remedy. It does give indirect protection by providing for penalties for 'breaches of Convention. The Conventions are not made enforceable by Government against itself nor does the Act give a cause of action to any party for the enforcement of Conventions. Thus there is only an obligation undertaken by the Government of India to respect the Conventions regarding the treatment of civilian population but there is no right created in favour of protected persons which the Court has been asked to enforce. If there is no provision of law which the courts can enforce the court may be powerless and the court may have to leave the matter to what Westlake aptly described as indignation of mankind.

The appellant has, however, sought the aid of the Geneva Conventions to establish that he could not be compelled to leave Goa and thus committed no offence. We may, therefore, say a few words about the Geneva Conventions, particularly Schedule IV, which deals with the protection of civilian persons in time of war. In the past protection of civilian population was inadequately provided in Conventions and treaties. The four conventions came at different times, the oldest in 1864 and the last in 1949. The Fourth Hague Convention of

1907 contained Arts. 42-56, but this protection was restricted to occupation by an enemy army. The Regulations merely stated the principles and enjoined maintenance of law and order and regard for family rights, lives of persons and private property, and prohibited collective punishments. In effect, these were confined to the 'forward areas of war' and did not apply when 'total war' took place and the civilian population was as much exposed to the dangers of war as the military. The example of the First World War showed that civilian population was exposed to exactions. At the time when the Hague Regulations were done, it was thought that such matters as non-internment of the nationals of the adversary would be observed. But the First World War proved to the contrary. It was in 1921 that the International Committee of the Red Cross produced a draft Convention which among other things enjoined that the inhabitants of the occupied territory should not be deported and civilians in enemy territory must be allowed to return to their homes unless there were reasons of state security and the internees must receive the same treatment as prisoners of war. The Diplomatic Conference of 1929 and the Red Cross Conference of 1934 made useful studies but action scheduled to take place in 1940 could not be implemented as the Second World War broke out. Although the belligerent countries had accepted that the 1929 Convention regarding prisoners of war was applicable to civilians, the lessons of the Second World War were different. We know the treatment of civilians by Germany and the horried deaths and privations inflicted on them. War, though outlawed, continues still and as President Max Huber said:

"War, as it becomes more and more total, annuls the differences which formerly existed between armies and civilian populations in regard to exposure to injury and danger."

At the termination of the last war the International Red Cross Conference at Stockholm prepared a draft in 1948, which became the basis of the deliberations of the Diplomatic Conference which met at Geneva from April 21 to August 12, 1949 and the present Convention was framed. The Regulations were not revised or incorporated. The 1949 Conventions are additional to the Regulations and it is expressly so laid down in Art. 154 of the Geneva Conventions.

The Hague Regulations, Arts. 42-56, contained some limited and general rules for the protection of inhabitants of occupied territory. The Regulations are supplementary. Regulations 43 and 55 which have no counter-part in the Geneva Conventions must be read. They are not relevant here Similarly, as there is no definition of 'occupation' in the Geneva Conventions, Art. 42 of the Regulation must be read as it contains a definition :

"42. A territory is considered as occupied when it finds itself in fact placed under the authority of a hostile army".

The Regulations further charge the authority having power over the territory to take all measures to establish and assure law and order. The Regulations generally charged the occupying power to respect the persons and property of the inhabitants of the occupied territory. There was no provision showing when occupation commenced and when it came to an end. It is because of this omission that it is claimed in this case that occupation continues so long as there is no cession of the territory by the conquered or withdrawal by the _conqueror and that till then the protection of the Geneva Conventions obtains. However, Art. 6, which provides about the beginning and end of the application of the Conventions throws some light on this matter.

The question thus remains, what is meant by occupation ? This is, of course, not occupation of terra nullins but something 'else. Since there is no definition of occupation in the Geneva Conventions, we have to turn to the definition in the Hague Regulations. Article 154 of the 4th Schedule reads:

"154. Relation with the Hague Conventions : In the relations between the Powers who are 'bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of 29th July, 1899, or that of 18th October, 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections 11 and 111 of the Regulations annexed to the above-mentioned Conventions of the Hague."

The definition of 'occupation' in the Regulations must be read since the Regulations are the original rules and the Conventions only supplement the Regulations. We have

-already quoted the definition and it shows that a territory is considered as occupied when it finds itself in fact placed under the authority of a hostile army. This means that occupation is by military authorities. In the Justice case(1) it was stated that the laws of belligerent occu- pation apply only to an occupation during the course of actual warfare and that once the enemy has been totally defeated those laws do not apply to the ensuing occupation. The question thus resolves itself into this : Is occupation in Art. 47 belligerent occupation or occupation which continues after the total defeat of the enemy ? In this connection courts must take the Facts of State from the declaration of State authorities. Military occupation is a temporary de facto situation which does not deprive the Occupied Power of its sovereignty nor does it take away its statehood. All that happens is that pro tempore the Occupied Power cannot exercise its rights. In other words, belligerent occupation means that the Government cannot function and authority is exercised by the occupying force. Annexation, on the other hand, occurs when the Occupying Power acquires and makes the occupied territory as its own. Annexation gives a de jure right to administer the territory. Annexation means that there is not only possession but uncontested sovereignty over the

territory. As Greenspan(2) put it (p. 215) military occupation must be distinguished from subjugation, where a territory is not only conquered, but -annexed by the conqueror. There is, however, a difference between true annexation on the one hand and premature annexation, or as it is sometimes called 'anticipated annexation', on the other. Jurists regard annexation as premature so long as hostilities are continuing and there is an opposing army in the field even if the Occupied Power is (1) United States V. Attstoctter, et. al. (1947) U. S. Military Tribunal, Nucmberg L. R. 3 T. W. C. vi, 34. (2) The Modern Law of Land Warfare.

wholly excluded from the territory. Anticipated annexation by unilateral action is not true annexation. True annexation is only so when the territory is conquered and subjugated [see Oppenheim International Law. (7th Edn.) pp. 846-847. (Vol. 1) 566 (Vol. 1), pp. 448/52 (Vol. 11), 430- 439 (Vol. 11) and 599 et seq (Vol. 11), Greenspan (ibid) pp. 215 et seq 600-603; Gould Introduction to International Law pp. 652-656, 662-663; Brierly Laws of Nations p.[155]. The Conventions rightly lay dowin that annexation has no effect on the protection. But they speak of premature or anticipated annexation. Premature or anticipated annexation has no effect. Such a plea was negatived for the same reason by the Nuremberg Tribunal. In fact, when the Convention itself was being drafted the experts were half-inclined to add the word " alleged' before 'annexation' in Art. 47 to distinguish between annexation following conquest and subjugation and annexation made while hostilities are going on. Subjugation puts an end to the state of war and destroys the source of authority of the existing Government. In subjugation, which is recognised as one of the modes of acquiring title, not only the de facto but also the de jure title passes to the conqueror. After subjugation the inhabitants must obey the laws such as are made and not resist them.

Thus the principle which is accepted is that the Occupying Power must apply the Convention even when it claims during conflict to have annexed the occupied territory. However, when the conflict is over and there is no hostile army in the field, annexation has the effect of creating a title to the territory. It may be- asked why does Art. 6 then mention a period of one year ? The reason given is that if the Occupied Power turns victorious the land would be freed in one year and if the Occupying Power remains victorious, as hostilities cease, strong measures against the civilian population are no longer necessary. In this, as in other laws, a line is drawn arbitrarily -and it is at the end of one year. Otherwise also, occupation, which means belligerent occupation, comes to an end when hostilities cease and the territory becomes aart of the Occupying Power. Annexation may sometimes be peaceful, as for example, Texas and Hawaiian Islands were peacefully annexed by the United States, or after war, -as the annexation of South Africa and Orange Free State by Britain. The question, when does title to the new territory begin, is not easy to answer. Some would make title depend upon recognition. Mr. Stimson's doctrine of non-recognition in cases where a state of things has been brought about contrary to the Pact of Paris was intended to deny root of