

INTERNATIONAL HUMANITARIAN LAW IN SOUTH ASIA: A QUICK OVERVIEW

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1. INTRODUCTION

The origin of conflicts coincides with the very inception of human society, which in turn led to the evolution of various rules of engagements between the belligerents. These belligerents may be state or non-state actors. It was through continuous application and improvisation of these procedures that the modern-day humanitarian law was chiselled out. The definitional development of 'humanitarian' focussed on the principle that, being a human precedes all other considerations and affiliations.²⁷⁷ In other terms, humanitarian law attempts to strike equilibrium between humanitarian concerns and the military necessities of the State.²⁷⁸ The present essay tries to demystify the various dimensions of international humanitarian law in the context of South Asian nations.

2. SUBJECT-MATTER OF INTERNATIONAL HUMANITARIAN LAW

The genesis of International Humanitarian Law (hereinafter 'IHL') can be traced to the rules of ancient civilisations and religions with respect to warfare. Although universal codification began in the nineteenth century, proper framework could only be evolved by 1949; perhaps the two world wars were the requisite catalyst.²⁷⁹ IHL or 'Geneva law' has kept pace with the political developments around the world, especially the changing dimension of armed conflicts. It is for the aforesaid reason that it has expanded from mere 10 Articles in 1864 to the present complex amalgamation of 600 Articles.²⁸⁰

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²⁷⁷ A S Hornby (ed), *Oxford's Advanced Learner's Dictionary of Current English* (8th edn, OUP 2010) 760; Jean S Pictet (ed), *Commentary on Geneva Convention I* (Geneva International Committee of the Red Cross 1952) 46.

²⁷⁸ International Committee of the Red Cross, 'What is International Humanitarian Law?' (Advisory Service on International Humanitarian Law, 31 July 2004) <http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf> accessed 29 November 2014.

²⁷⁹ *ibid.*

²⁸⁰ VS Mani (ed), *Handbook of International Humanitarian Law in South Asia* (OUP 2009) xiv.

The central body of humanitarian law consists of four Geneva conventions of 1949 and two supplements in the form of additions protocols of 1977. Apart from these there are hundreds of other conventions, which are operational in specific subject-matters like the conventions on Cultural Property, anti-mines convention, convention on cluster munitions etc. Moreover, there is a parallel customary humanitarian law jurisprudence which assists in giving a comprehensive and integrated coverage to the application of IHL.

The subject-matter of IHL can be broadly distinguished into international armed conflict and non-international armed conflict. While the former involves two state parties and might take place in international theatre²⁸¹, the latter conflict is restricted to the territory of a single state and involves parties from within the state itself.²⁸² Internal disturbances and tensions are not included within the ambit of non-international armed conflict.²⁸³

Humanitarian law serves a dual purpose, on one hand, it protects the participants (by regulating the procedure and protocols of warfare) and on the other hand, it protects those who are not taking part. If treaties are segregated into the above-mentioned categories, one will find disproportionate number of Conventions dealing with the international armed conflicts when compared to non-international armed conflicts. However, due to interpretation of the common Article 3, minimum core contents of humanitarian rules have been made applicable to both categories of conflicts.²⁸⁴

The concept of ‘grave breaches’ was technically not applicable to non-international conflicts and even other IHL treaties could not fill these lacunae.²⁸⁵ This in-turn led to failure of imposition of criminal sanctions in situations of an internal armed conflict. However, in the last two decades, there has been a tremendous expansion of the international law jurisprudence regarding armed conflicts and humanitarian violations incidental to it.²⁸⁶

One of the most common mix-ups has been about IHL and International Human Rights. Although both share the same roots and objective, but operate in different directions. While

²⁸¹ Protocol I additional to the Geneva Conventions 1977, art 1(4).

²⁸² Protocol II additional to the Geneva Conventions 1977, art 1.

²⁸³ Additional Protocol II, art 1(2).

²⁸⁴ *Nicaragua v United States of America (Military and Paramilitary Activities in and against Nicaragua)* 1986 ICJ 14 [254] – [256].

²⁸⁵ John Dugard, ‘Bridging the gap between human rights and humanitarian law: The punishment of offenders’, (1998) No 324 International Review of the Red Cross 447.

²⁸⁶ *Prosecutor v Dusko Tadic* IT-94-1-A; *The Public Committee against Torture in Israel v The Government of Israel*; Use of Force Committee, ‘Final Report on the meaning of armed conflict in international law’ (*International Law Association*, 2010) <<http://www.ila-hq.org/download.cfm/docid/2176DC63-D268-4133-8989A664754F9F87>> accessed 29 November 2014.

IHL tends to regulate conduct in time of conflict only, International Human Rights impose only general obligations on nation states in both peacetime and conflict.²⁸⁷ Another major difference is that, IHL is binding on both state and non-state actors, but human rights law is primarily designed to check state-initiated abuse and hence is only binding upon state actors.²⁸⁸ However, over time, this barrier between the two has been penetrated to allow for the introduction of Human Rights principles in the efficient delivery and allocation of humanitarian assistance.²⁸⁹ This inter-mix between the two fields has received criticism from certain IHL experts.²⁹⁰

3. INTERACTION OF IHL IN SOUTH ASIA

The importance of IHL in South Asia is evident from the fact that, this is a region which has witnessed many full-scale inter-state conflicts and nuclear-armed adversaries are ready to defy the goal of nuclear deterrence at any time. Furthermore, this region is the hub of global terrorism and almost every country was infested with insurgency or separatist movements at some point in the past.²⁹¹ To this, the hostile political relations act like a garnish.

S.D. Muni, a noted IHL expert, categorises conflicts in South Asia into four broad categories. *Firstly*, those arising from the external role of global political powers and their strategies; *secondly*, those arising from inherent inter-state engagements and strategies; *thirdly*, those arising from internal political, economic or social turbulence and other distortions and *fourthly*, those arising from activities between state and non-state actors.²⁹² For the present discourse, second and third types of conflict are relevant, i.e. inter-state conflict (international armed conflict) and internal armed conflict (non-international armed conflict).

²⁸⁷ Inter-Agency Standing Committee Task Force on Humanitarian and Human Rights, 'Frequently asked questions on International Humanitarian, Human Rights and Refugee Law in the context of armed conflict' (IASC, 2004) 1 <http://www.unicef.org/emerg/files/FAQs_IHL.pdf> accessed 30 November 2014.

²⁸⁸ *ibid* 23.

²⁸⁹ Kate Mackintosh, 'The Principles of Humanitarian Action in International Humanitarian Law' (*Humanitarian Policy Group Report 5, Overseas Development Institute UK*, 2000) 14 <<http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/305.pdf>> accessed 30 November 2014.

²⁹⁰ 'Improving Compliance with International Humanitarian Law ICRC Expert Seminars' (*International Committee of the Red Cross*, ICRC 2003) 14-15 <http://www.icrc.org/eng/assets/files/other/improving_compliance_with_international_report_eng_2003.pdf> accessed 30 November 2014; *See also*, Richard Burchill, 'Regional Approaches To International Humanitarian Law' (2010) 41(2) *Victoria University of Wellington Law Review* 213.

²⁹¹ SD Muni, 'Conflicts in South Asia: Causes, Consequences, Prospects' (2013) *Institute of South Asian Studies Working Paper No 170*, 2 <http://www.isas.nus.edu.sg/Attachments/PublisherAttachment/ISAS_Working_Paper_170_Conflicts_in_South_Asia_26032013170324.pdf> accessed 30 November 2014.

²⁹² *ibid*.

For better understanding of the topic, each South Asian country would be dealt separately. At the risk of being rhetoric, some nations have been excluded. The countries are dealt in the following order, Pakistan, Bangladesh, Myanmar, Nepal, India and Sri Lanka. Before proceeding with individual nations, it would be helpful to dwell upon the legal status of IHL treaties in the region.²⁹³ All of the above-mentioned countries have ratified the four Geneva Conventions of 1949. Except Bangladesh, there is no other nation in the region which is a party to Additional Protocol of Geneva Convention. Furthermore, India is the sole country, which has a domestic legislation on the lines of Geneva Convention.²⁹⁴ Many countries have individually signed (or ratified) important IHL treaties like the “Protocol on Prohibition of the Use of Bacteriological Methods of Warfare”, “Protocol on Prohibition on the use of Mines and other devices”, “Protocol on the involvement of children in armed conflict” etc.

Islamic Republic of Pakistan, one of the countries born out of the partition of the Indian Sub-continent has witnessed many conflicts since its inception. With respect to international armed conflicts involving Pakistan, there have been three full-scale wars between India and Pakistan ranging from a period of 13 days to 85 days. The outcome of the conflict is not the subject-matter of the present discussion, only the humanitarian law issues (application, violation etc.) are being addressed. Pakistan’s state practise has been consistent with the internationally recognized principle of proportionality. This principle has been proclaimed to be utilized by Pakistan armed forces against India in 1965 war.²⁹⁵ No major humanitarian law violation was reported in that short war.

The 1971 Indo-Pak war was of immense importance because there were a lot of humanitarian law issues which arose due to the conflict. At the outset, there were allegations of ‘indiscriminate killings’ by the Pakistan army.²⁹⁶ Another issue was related to the trial of Pakistani Prisoners of War (hereinafter ‘PoW’). The dispute was regarding the charges of genocide against 195 Pakistani nationals, PoW etc. in Indian custody. The 195 Pakistani

²⁹³ Divya Prasad, ‘Factsheet on the status of International Humanitarian Law in South Asia’ in VS Mani (ed), *Handbook of International Humanitarian Law in South Asia* (OUP 2009) [233]-[243].

²⁹⁴ The Geneva Convention Act 1960.

²⁹⁵ Ahmed Bilal Soofi, ‘International Humanitarian Law - A Pakistani Perspective’ in VS Mani (ed), *Handbook of International Humanitarian Law in South Asia* (OUP 2009) 93.

²⁹⁶ US Department of State Archive, ‘Foreign Relations of The United States, 1969–1976, Volume XI, South Asia Crisis, 1971’ (*Office of Historian*, 2005) <<http://2001-2009.state.gov/r/pa/ho/frus/nixon/xi/45652.htm>> accessed 1 December 2014; However, there are disputes regarding the exact number of people killed in the aforesaid carnage, see David Bergman, ‘Questioning an iconic number’, (*The Hindu*, 24 April 2014) <<http://www.thehindu.com/opinion/lead/questioning-an-iconic-number/article5940833.ece>> accessed 1 December 2014.

prisoners were to be tried for the serious charges of genocides, crimes against humanity, breach of art 3 of the Geneva Conventions, murder, arson, rape etc. Pakistan approached The International Court of Justice regarding the same²⁹⁷, but the matter was discontinued due to successful negotiations between the nations.²⁹⁸ After the conclusion of 1971 war there was an agreement signed between the parties so as to work towards establishment of durable peace and respect for each other's territorial integrity²⁹⁹, but this 'arrangement' could not stand for long as both the countries confronted each other, in 1984 and then again in 1999.

The 1984 conflict, also known as the 'Siachen Glacier Conflict' was not a full-scale war but skirmishes which took place at the highest battleground on the Earth. Fortunately, this did not escalate into a full-fledged war but both the countries have been at loggerheads on this barren land since then.³⁰⁰ 1999 Indo-Pak war, also known as the Kargil war was different from previous engagements, as now the adversaries were nuclear-armed.³⁰¹ One of the IHL violations from the Indian side was the strategy employed by the Indian Navy to blockade supplies to Pakistan from north Arabian Sea.³⁰² However, there also were 'allegations' of war crime against Pakistan armed forces for torturing prisoners of war.³⁰³

Now, considering the internal conflicts prevalent in Pakistan, there has been on-going conflict between Pakistan Army and anti-government armed groups in Federally Administered Tribal Areas (hereinafter 'FATA'), Balouchistan and North West Frontier Province (hereinafter

²⁹⁷ *Pakistan v India (Trial of Pakistani Prisoners of War)*, Order of 15 December 1973, ICJ Reports 1973 <<http://www.icj-cij.org/docket/files/60/6185.pdf>> accessed 1 December 2014.

²⁹⁸ Ministry of External Affairs, Government of India, 'India's Neighbour' (*Annual Report 1973-74, MEA Library 20*) <<http://mealib.nic.in/?25007000>> accessed 1 December 2014.

²⁹⁹ Ministry of External Affairs, Government of India 'Simla Agreement' (MEA Library 6, 2 July 1972) <<http://mea.gov.in/in-focus-article.htm?19005/Simla+Agreement+July+2+1972>> accessed 1 December 2014.

³⁰⁰ Edward W Desmond, 'The Himalayas War at the Top of the World: Fighting at breath-taking altitudes, Indians and Pakistanis are locked in an icy stalemate' (*Time*, 31 July 1989) <<http://content.time.com/time/magazine/article/0,9171,958254-2,00.html>> accessed 1 December 2014; Tim McGirk & Aravind Adiga, 'War at the top of the world' (*Time*, 04 July 2005) <<http://content.time.com/time/magazine/article/0,9171,1079528-1,00.html>> accessed 1 December 2014.

³⁰¹ *Too Close for Comfort: Cases of Near Nuclear Use and Options for Policy* (Chatham House Report, Chatham House – The Royal Institute of International Affairs, 2014) vi <<http://www.chathamhouse.org/publications/papers/view/199200>> accessed 1 December 2014.

³⁰² AK Chakraborty, 'Kargil War Brings Into Sharp Focus India's Commitment to Peace' (Press Information Bureau, Government of India) <<http://pib.nic.in/feature/feyr2000/fjul2000/f210720001.html>> accessed 1 December 2014; Indian Navy, 'President's Fleet Review 2011' (20 December 2011) <<http://indiannavy.nic.in/PFR2011/navaloperations.html>> accessed on 1 December 2014;) Carolin Alvermann, *Customary International Humanitarian Law*, (vol 1, CUP 2009) 247.

³⁰³ Harish V Nair, 'Government gives up on tortured Kargil hero: Delhi gets cold feet on taking Islamabad to International Court of Justice' (*Daily Mail*, 19 November 2013) <<http://www.dailymail.co.uk/indiahome/indianews/article-2510153/Captain-Saurabh-Kalia-Government-gives-tortured-Kargil-hero-Delhi-gets-cold-feet-taking-Islamabad-International-Court-Justice.html>> accessed 1 December 2014.

‘NWFP’) which falls into the category of non-international armed conflict, which is bound by IHL. However, there have been blatant violations reported from both the sides.³⁰⁴

Pakistan Army Act, 1952 is the sole domestic legal provision which brushes with issues of armed conflict. Although, there is no express distinction between ‘civilian’ and ‘combatant’, but the definition of ‘enemy’ given in the aforesaid Act resembles to that of ‘combatant’ given in Protocol I.³⁰⁵

People’s Republic of Bangladesh was conceived as an aftermath of 1971 civil war and was at the receiving end of the humanitarian law violations.³⁰⁶ Unlike India, there is no express provision in Bangladesh’s Constitution which deals with application of international law in the domestic arena.³⁰⁷ Bangladesh in its very infancy had to utilize the IHL in the form of the tri-partite agreement between Bangladesh-India-Pakistan regarding the treatment of PoWs of Pakistan.³⁰⁸ Further, there was a war tribunal established by the government to prosecute the crimes committed during the liberation war of 1971, but it was inclined towards awarding punishments rather than comprehensive application of the IHL principles.³⁰⁹ Although, Bangladesh was amongst the first countries to ratify the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (hereinafter ‘OPCRC’), but there are reports that, children below the age of 18 are still active in various wings of government forces.³¹⁰

Burma or the Republic of the Union of Myanmar is another South Asian nation, which has witnessed some violent phases of an armed conflict. In June 2010, the Myanmar army violated a 17-year ceasefire with the Kachin Independence Army (hereinafter ‘KIA’) in the Kachin state and before that there was fighting between the government forces and ethnic armed group forces in the Shan state.³¹¹ In the aforesaid instances, there were various IHL issues involved, which ranged from indiscriminate attack on civilians to extra-judicial

³⁰⁴ Amnesty International USA, ‘Search for Human Rights – Pakistan’ <<http://www.amnestyusa.org/research/science-for-human-rights/pakistan>> accessed 1 December 2014.

³⁰⁵ Ahmed Bilal Soofi (n 19) 92.

³⁰⁶ *Foreign Relations of the United States* (n 20).

³⁰⁷ Borhan Uddin Khan, ‘International Humanitarian Law – Bangladesh’s Attitude and Practice’ in V.S Mani (ed), *Handbook of International Humanitarian Law in South Asia* (OUP 2009) 57-59.

³⁰⁸ Ministry of External Affairs, Government of India, ‘India’s Neighbour’ (*Annual Report 1974-75, MEA Library 6*) <<http://mealib.nic.in/?pdf2502?000>> accessed 1 December 2014.

³⁰⁹ The International Crimes (Tribunals) Act 1973.

³¹⁰ Child Soldiers International, ‘Child Soldiers Global Report 2001 - Bangladesh, 2001’ <<http://www.refworld.org/docid/4988061228.html>> accessed 1 December 2014.

³¹¹ Amnesty International, ‘Archive on Myanmar, Annual Report 2012: The state of the world’s human rights’ <<http://www.amnesty.org/en/region/myanmar/report-2012>> accessed 1 December 2014.

executions. There have been allegations that soldiers sexually assaulted many Kachin and Shan civilians.³¹²

From the view-point of IHL, common Article 3 is applicable to all non-international armed conflicts, regardless of the state ratification. It is so because it has been interpreted into customary international humanitarian law. However, Additional Protocol II is yet to be accepted as part of the same.³¹³ Another phenomenon closely related to IHL violation is the high number of internally displaced persons (hereinafter 'IDPs') across Myanmar.³¹⁴ There are worrisome developments in the form of government forces resorting to air strikes in the region which not only endanger civilians but at the same time amount to a blatant violation of IHL principles. This warfare methodology has led to many nations condemning the acts and asking for inquiry into the ongoing armed conflict in Burma.³¹⁵

Nepal or Federal Democratic Republic of Nepal has been a hot-spot for armed Maoist insurgency which has dented the image of the country in the international sphere. Nepal has not signed or ratified many key IHL treaties, moreover, there is no domestic legislation enacted to incorporate provisions of Geneva Conventions. However, there are certain enabling provisions available in the Nepalese legal system, which provide for application of international treaties and conventions as a part of domestic law.³¹⁶

The violent insurgency in Nepal dates back to 1996 and was concluded in 2006, when a Comprehensive Peace Accord was signed between the belligerents, viz., government of Nepal and Communist Party of Nepal (Maoists).³¹⁷ There have been allegations against government security forces for violation of IHL, which include extra-judicial killings by virtue of failing to discriminate among targets, torture and ill-treatment during detention

³¹² *ibid.*

³¹³ Kate Mackintosh (n 13) 8.

³¹⁴ Tasneem Jamal, 'Burma – Myanmar (1988 – First combat deaths)' (*Project Ploughshares, Institute of Peace and Conflict Studies, Conrad Grebel University College, University of Waterloo*, 2013) <http://ploughshares.ca/pl_armedconflict/burma-myanmar-1988-first-combat-deaths/> accessed 1 December 2014.

³¹⁵ Amnesty International, 'Myanmar: Protect civilians caught in the Kachin state conflict, investigate attacks' (*Press Release, Media Centre*, 15 January 2013) <<http://www.amnesty.org/en/for-media/press-releases/myanmar-protect-civilians-caught-kachin-state-conflict-investigate-attacks->> accessed 27 May 2014; Human Rights Watch, 'Burma' (2012 World Report) <<http://www.hrw.org/world-report-2012/world-report-2012-burma>> accessed 1 December 2014.

³¹⁶ Nepal Treaty Act 1990, s 9(1).

³¹⁷ 'Peace Agreement signed between Government of Nepal and the Communist Party of Nepal (Maoist)' (21 November 2006) <http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/nepal_cpa_20061121_en.pdf> accessed 2 December 2014.

etc.³¹⁸ While Maoists have regularly claimed to be entitled for the protection under Geneva Convention, they themselves at the same time have refrained from acting in consonance with Geneva principles. At times, insurgents have resorted to practices like child labour, human shields, taking hostages, killing unarmed security forces etc. which constitute a breach of IHL.³¹⁹ Even though Protocol II might not be applicable, but obligations under common Article 3 are still binding upon the parties to such conflict.

Republic of India has been juggling internal and external threats from its inception in 1947. These include a concoction of security challenges ranging from wars with Pakistan and China to internal disturbances in form of Naxalite armed rebellion and insurgency in north-east.³²⁰ India has been a party to international armed conflicts with Pakistan (already dealt in the previous section) and China (1962-Sino Indian war).³²¹ One of the peculiar factors in above-mentioned facts is the initial denial of formal participation by other parties, which made it problematic for the both sides to utilize IHL principles and provisions.

With respect to India, emphasis is placed on three things, *firstly*, the internal armed conflicts in various region of country, *secondly*, the special focus on ‘landmines’ and *thirdly*, judicial application of IHL.

For long, Indian government has resisted the application of Additional Protocol II to various national liberation movements and have argued for utilizing Additional Protocol I to cover such conflicts.³²² Consider the example of Naxalite armed rebellion and north-east insurgency as non-international armed conflict, in which there have been IHL violations from both the sides. Some examples of state-sponsored violations are the 1966 bombing of Aizwal by Indian Air Force³²³ and raising the civilian vigilante group to retaliate against Naxals.³²⁴ On

³¹⁸ United Nations Office of the High Commissioner for Human Rights, (*Nepal Conflict Report 2012*, October 2012) <http://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf> accessed 2 December 2014.

³¹⁹ TR Onta, ‘International Humanitarian Law and Internal Armed Conflict in Nepal’ in VS Mani (ed), *Handbook of International Humanitarian Law in South Asia* (OUP 2009) 125.

³²⁰ Rule of Law in Armed Conflicts Project RULAC, ‘India’ (*Geneva Academy of international humanitarian law and human rights, Switzerland*, 13 April 2012) <http://www.geneva-academy.ch/RULAC/state.php?id_state=107> accessed 2 December 2014.

³²¹ VS Mani, ‘International Humanitarian Law – India’s experience since 1962’ in VS Mani (ed), *Handbook of International Humanitarian Law in South Asia* (OUP 2009) 116.

³²² Ravindra Pratap, ‘International Humanitarian Law – India’s Attitude’ in VS Mani (ed), *Handbook of International Humanitarian Law in South Asia* (OUP 2009) 74-77.

³²³ ‘Silent rally echoes Mizo pain of ‘66 IAF attacks’ (*The Times Of India*, 5 March 2011) <<http://timesofindia.indiatimes.com/city/guwahati/Silent-rally-echoes-Mizo-pain-of-66-IAF-attacks/articleshow/7636603.cms>> accessed 2 December 2014.

³²⁴ *Nandini Sundar v State of Chhattisgarh* 2011 (7) SCC 547.

the other hand, de-railing the passenger train and mutilation of body of security personals are instances of IHL violations by the Naxalite militia.³²⁵

Next, dealing with mines and IHL, India has utilized mines in various conflicts with Pakistan and China but has claimed to refrain from using them in internal conflicts.³²⁶ India has not acceded to the Mine Ban Treaty, in spite of having the sixth-largest stockpile of mines.³²⁷ The irony in this attitude of the government is that, there are various non-state actors which have declared a ban on mine-use.³²⁸ In 2001-02, Indian government undertook one of the biggest mine-laying operations in the world in years, whereby a large chunk of western border was mined. Such mining has affected civilians living in the villages adjoining the border³²⁹, which to a great extent violates humanitarian law.

Lastly, considering the role of judicial bodies in India, courts have been approached many times to adjudicate upon IHL matters. The first case in this list was that of *Rev Monterio v State of Goa*³³⁰ which arose in the background of India's annexation of Goa and the Court was faced with the issue of deportation under Geneva Convention Act, 1960. There is another bunch of cases which dealt with status and condition of PoW(s).³³¹ Insurgency has been legally covered under the category of 'wagering war against the country'. Sri Lanka or Democratic Socialist Republic of Sri Lanka is still trying to recover from the recently concluded armed conflict between government forces and Liberation Tigers of Tamil Eelam

³²⁵ K Balchand, 'Sabotage caused Jnaneswari Express derailment: CRS' *The Hindu* (New Delhi, 21 October 2010) <<http://www.thehindu.com/news/sabotage-caused-jnaneswari-express-derailment-crs/article840980.ece>> accessed 2 Dec. 2014; Bharti Jain, 'Latehar operation mastermind tipped for Maoist politbureau berth?' (*The Times of India*, 5 February 2013) <<http://timesofindia.indiatimes.com/india/Latehar-operation-mastermind-tipped-for-Maoist-politbureau-berth/articleshow/18341449.cms>> accessed 2 December 2014; 'Police refuse report of Naxals mutilating CRPF jawans' bodies' (*Hindustan Times* 02 July 2010) <<http://www.hindustantimes.com/india-news/police-refuse-report-of-naxals-mutilating-crpf-jawans-bodies/article1-566271.aspx>> accessed 2 December 2014.

³²⁶ Human Rights Watch, 'Human Rights Watch Backgrounder: Recent Landmine Use by India and Pakistan', (May 2002) 3 <<http://www.hrw.org/sites/default/files/reports/ind-pak-landmines.pdf>> accessed 2 December 2014.

³²⁷ 'Statement by Sujata Mehta' (*Permanent Representative of India to the Conference on Disarmament*, 14 November 2012) <<http://meaindia.nic.in/pmcd.geneva/?50031194>> accessed 2 December 2014.

³²⁸ (*GenevaCall*) <<http://www.genevacall.org/country-page/india/>> accessed 2 December 2014.

³²⁹ Sonia Sarkar, 'Killing Fields' (*The Telegraph*, 15 February 2012) <http://www.telegraphindia.com/1120215/jsp/opinion/story_15136116.jsp#.U4WtGfmSzh4> accessed 2 Dec. 2014.

³³⁰ *Rev Monterio v State of Goa* AIR 1970 SC 329; Chintan Chandrachud, 'International Humanitarian Law in Indian Courts: Application, Non-application, Misapplication' in D Jinks, J Maogoto, S Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International And Domestic Aspects* (TMC Asser Press forthcoming 2014).

³³¹ *Angrej Kaur v Union of India* 2005 (4) SCC 446; *Jagjit Singh Arrora v Union of India*, 2012 GLH (1) 362; Dhananjay Mahapatra, 'SC stays Gujarat HC fiat to Centre to move ICJ on 1971 POWs in Pakistan' (*The Times of India*, 3 May 2012) <<http://timesofindia.indiatimes.com/india/SC-stays-Gujarat-HC-fiat-to-Centre-to-move-ICJ-on-1971-POWs-in-Pakistan/articleshow/12973094.cms>> accessed 2 Dec. 2014.

(hereinafter LTTE). Since Sri Lanka is not a party to the Additional Protocol II, the belligerents were left to rely upon the customary international humanitarian law to regulate the conduct of conflict. The warfare strategy adopted by LTTE was a *prima facie* violation of IHL and its principles. These included, forced eviction of civilians (which also involved execution of several settlers), exploding bombs in public, religious and historical places, use of human shields, use of children as soldiers etc.³³²

This situation becomes even more problematic when the state tries to retaliate against such militancy with equal, if not greater ruthlessness. There have been grave allegations of rape committed by the police, army and navy personals and forced disappearances or extra-judicial killings. IHL and other human rights violations during the final phases of the conflict (when the violence had escalated from both the sides) are well documented.³³³

Sri Lankan government has for long denied any IHL violation from its side, however the evidence tells a different story. Utilising the modern-technology of satellite imagery, there is enough evidence to show that, there was a systemised bombing/shelling of the regions. Even though the humanitarian establishments were clearly marked with medical insignia, still they were subjected to army's mortars and shells.³³⁴

4. CONCLUSION AND THE WAY FORWARD

The primary issue involved with the IHL is never about the legitimatising violence, but protection of the parties affected (directly or indirectly) by a conflict. The importance of IHL cannot be undermined in a region where proximity actually breeds conflict instead of cooperation, viz. South Asia. There is a clear apprehension among the members regarding the utility of IHL vis-à-vis freedom of warfare tactics. Moreover, there have been practical problems with the mechanism of prosecution for breach of IHL.

Further, there are two modern challenges to IHL, *first*, the engagement with terrorism on international scale and *second*, the adoption of 'drone attacks' as a warfare methodology. Whether terrorist outfits or terrorists are covered by IHL is a matter of ongoing debate.

³³² Thushara Rajasinghe, 'International Humanitarian Law in Conflict Situations – A Sri Lankan Case study' in V.S Mani (ed), *Handbook of International Humanitarian Law in South Asia* (OUP 2009) 139-40.

³³³ *No Fire Zone*, directed by Callum Macrae (2013, Outsider Films). <<http://nofirezone.org/>> accessed 2 December 2014.

³³⁴ Joshua Lyons, 'Documenting violations of international humanitarian law from space: a critical review of geospatial analysis of satellite imagery during armed conflicts in Gaza (2009), Georgia (2008), and Sri Lanka (2009)' 2012 Vol 94 No 886 *International Review of the Red Cross* 752-756.

Whether the acts of the state parties in counter-terrorism, especially when it involves military falls within the ambit of IHL is another burning sub-issue.³³⁵ It gets even more problematic when loosely-organised terrorist organisations operate on a trans-national basis. Perhaps, it would be better to leave domestic and international human rights to deal with terrorism and matters incidental to it.³³⁶

Another contemporary debate relevant to IHL is the drone attacks, especially in the western parts of Pakistan. This debate revolves around two moot issues, *firstly*, whether drone attacks are within IHL and *secondly*, whether it is an effective method of warfare with respect to consequential collateral damage. While the institutive answer views such acts as a violation of IHL and Human Right, but there other views available, which answer otherwise.³³⁷

Although IHL Conventions and principles have withstood the test of time, but still there is a scope for improvement. In the same regard, there are following suggestions, *first*, expansion of International Criminal Court (hereinafter 'ICC') to incorporate formal IHL violations. However, this suggestion has a rider along with it, i.e., the overall sovereignty of nations must be ensured before such measure is adopted, so as not to repeat the present ICC debacle in African continent.³³⁸ *Second*, National courts must adopt a positive view while adjudication on IHL matters, especially when dealing with the grave breaches of the same. This suggestion takes into account the existing political inaction and attempts to by-pass it by empowering judiciary. *Third*, a vibrant and comprehensive definition of non-international armed conflict should be evolved. One of the methods for such labelling can be whether the regular police is required to counter it or a specialized armed force? Moreover, there is a need for certain provisions like Prisoner of War (PoW) to be incorporated into jurisprudence of internal

³³⁵ Hans Peter Gasser, 'Acts of Terror, Terrorism and International Humanitarian Law' (2002) International Review of the Red Cross No 847 2.

³³⁶ International Committee of the Red Cross, 'International Humanitarian Law and Terrorism: Questions and Answers' (*International Committee of the Red Cross*, 01 January 2011).

<<http://www.icrc.org/eng/resources/documents/faq/terrorism-faq-050504.htm>> accessed 3 December 2014.

³³⁷ Robert Barnidge, 'A Qualified Defense of American Drone Attacks in Northwest Pakistan Under International Humanitarian Law' 2011 Vol 30 Boston University International Law Journal 409446; Amnesty International, 'Will I be Next? US Drone Strikes in Pakistan' (2013)

<<https://www.amnestyusa.org/sites/default/files/asa330132013en.pdf>> accessed 3 December 2014.

³³⁸ Faith Karimi, 'African Union accuses ICC of bias, seeks delay of cases against sitting leaders' (*CNN* 12 October 2013) <<http://edition.cnn.com/2013/10/12/world/africa/ethiopia-au-icc-summit/>> accessed on 3 December 2014; Michael Birnbaum, 'African leaders complain of bias at ICC as Kenya trials get underway' (*The Washington Post*, 5 December 2013) <http://www.washingtonpost.com/world/europe/african-leaders-complain-of-bias-at-icc-as-kenya-trials-are-underway/2013/12/05/0c52fc7a-56cb-11e3-bdbf-097ab2a3dc2b_story.html> accessed 3 December 2014; Max du Plessis and Annie O'Reilly, 'Africa and the International Criminal Court' (*Chatham House International Law*, July 2013)

<http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/0713pp_iccafrica.pdf> accessed 3 December 2014.

armed conflict. *Fourth*; there should be encouragement of the application of modern technologies like satellite imagery which might help in prosecution of IHL violations. This suggestion keeps into account the violations which happen in the immediate aftermath, once the conflict has seized.

But, alas all of the above suggestions will remain quiescent unless they are internalized not as some rules of war but as pillars of human survival.

“The victims of the war are not the only one who are left with the scars of war, but it is the entire humanity which carries that scar for many years.”