

Application of International Humanitarian Law in Post Conflict Situation in the Context of Nepal

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1. Introduction

International Humanitarian Law (IHL) is applicable in the armed conflict of international and non-international character, but it does not cover internal tensions or disturbances such as isolated acts of violence. IHL, also known as the law of war, the laws and customs of war or the law of armed conflict, is the legal corpus 'comprised of the Geneva Conventions and the Hague Conventions, as well as subsequent treaties, case law, and customary international law.'¹ International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare.

There is necessity of effective application and implementation of IHL for the protection of the lives of prisoners of war (POW), surrendered combatants, journalists, Red Cross volunteers, civilians and others by the conflicting or warring parties during international or non-international armed conflict. Certain conditions are set by Geneva Conventions for the application of IHL in the pre-conflict, conflict and post-conflict situation. However, there are various challenges for the effective application of IHL in the conflict and post-conflict situation due to the vested interest of the warring parties. Many issues are brought forth in the post-conflict situation due to the gross violation of IHL during conflict.

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¹ Goel, Vaibhav. "An Introduction to Origin, Evolution & Development of International Humanitarian Law", International Humanitarian Law- An Anthology, 14-15, (2009).

Post conflict situation as a Transition Period

After the ceasefire or end of war, transition period begins. Transition period as a period of indeterminate duration which follows an armed conflict or a situation of internal strife, in which, armed violence has ended or at least entered a period of remission. In such a period, fighting may not have completely halted, despite a ceasefire or peace agreement, but a process of stabilization will have been set in motion. A deployment of peace-keeping forces may be under way. Communications will be gradually restored. Moreover, there is necessity of taking humanitarian action as follows:

- i) Such action involves much more than merely providing relief;
- ii) It involves protecting people suffering the effect of armed conflict;
- iii) To make sure that the people's dignity is respected.
- iv) Protection against abuses of power and against discrimination.

2. Stages to Be Adopted in Post Conflict Situation

2.1. Investigation for fact findings on grave breach of Geneva Convention

In case of grave breach of Geneva Convention in the armed conflict, there is necessity of finding the facts or truths related to war crimes in order to provide justice to the victims of the conflict and to punish the perpetrators. The states have responsibility for that purpose. There is provision for the creation of fact finding commission upon the request of a party to the conflict in article 51 of GC I, article 53 of GC II, article 132 of GC III, and article 149 of GC IV. In case of avoiding this by the party to the conflict, as per article 90 of AP I, there is provision of impartial investigations having the establishment of International Fact Finding Commission.

International Humanitarian Fact-Finding Commission was established in 1991. In an effort to secure the guarantees accorded to the victims of armed conflict, Article 90 of the Protocol I Additional to the Geneva Conventions of 1949 (Protocol I) provides for the establishment of an International Fact-Finding Commission. The Commission was officially constituted in 1991 and is a permanent body whose primary purpose is to investigate allegations of grave breaches and other serious violations of international humanitarian law. As such, the Commission is an important means of ensuring that international humanitarian law is both applied and implemented during armed conflict.

Ensuring respect for international humanitarian law, the States party to the Geneva Conventions of 1949 and to Protocol I undertake to "respect" and

“ensure respect” for the provisions of those treaties. The International Fact-Finding Commission is a key mechanism in achieving those objectives. By recognizing the Commission’s competence, on a permanent or ad hoc basis, a State contributes significantly to the implementation of international humanitarian law and to ensuring compliance with it during armed conflict. By depositing a declaration of recognition, a State therefore takes an important step in securing the fundamental guarantees laid down for the victims of armed conflict.²

In particular the Commission is competent to:

1. enquire into any facts alleged to be a grave breach as defined in the Conventions and the Protocol or other serious violations of the Conventions or the Protocol.
2. facilitate through its good offices, the restoration of an attitude of respect for the Conventions and the Protocol.³

As well, in terms of Article 90 (2) (d), the Commission may institute an enquiry in other situations at the request of a Party to the conflict, but only if the other Party or Parties concerned consent. That is to say competence can also be accorded ad hoc. In that context, the Commission has stated its willingness to enquire into alleged violations of humanitarian law, including those arising in non-international armed conflicts, so long as all Parties to the conflict agree.⁴

Each State Party shall take appropriate measures to investigate acts defined in article 2 [enforced disappearance] committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.⁵ States have responsibility to investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law.⁶ In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit

² ADVISORY SERVICE ON INTERNATIONAL HUMANITARIAN LAW, ICRC, 04/2001

³ AP I, Art. 90 (2)(c), (1977)

⁴ The Geneva Conventions for the Protection of War Victims, *Report of the International Humanitarian Fact-Finding Commission, 2-8, (1991-1996)*.

⁵ CONVENTION ON ENFORCED DISAPPEARANCE Art.3, (2006)

⁶ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of IHL para 3(b), (2005).

to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.⁷ In the case of serious violations, states are further bound to act, jointly or individually, in co-operation with the United Nations and in conformity with the UN Charter (Article 89 AP I).⁸

Thus, without having proper investigation of the facts of violations of Geneva Conventions and its optional protocols in the time of post conflict situation, there is no possibility of maintaining the sustainable peace in the world by ending impunity. Accordingly, there is necessity of establishing the fact finding commission by the states in order to investigate the truths of the alleged war to provide justice to the victims. Then only, there is effective application of IHL.

2.2. The Obligation to Prosecute and Punish Certain Violations of IHL

a. International armed conflicts

Common Article 49 / 50 / 129 and 146 to the 1949 Geneva Conventions compels all High Contracting Parties, i.e. virtually the entirety of the community of States, to enact criminal legislation for all individuals having commit those crimes which qualify as “grave breaches” under the Conventions. In respect of these individuals, “each High Contracting Party shall be under the obligation to search for (them) and shall bring such persons, regardless of their nationality, before its own courts.” Thus, States have been made responsible for upholding and enforcing the principle of individual criminal responsibility for “grave breaches” of IHL in international armed conflicts. Clearly, the mere adoption of a law satisfying the Conventions’ requirements does not suffice, as States have an active duty to search for and prosecute these individuals. However, the turn from theory to practice is not always easy and uncontested, as is inter alia demonstrated by Belgium’s experience in implementing and enforcing the requirement to incriminate, to search and to prosecute through its so-called “universal jurisdiction law”

A State, however, is not necessarily compelled to bring these individuals before its own courts in order to comply with the Conventions. Indeed, the

⁷ Ibid, Para. 4

⁸ Fleck, Dieter & et al (eds). *The Handbook of International Humanitarian Law*(2nd ed), Oxford University Press, 712, (2009).

same article goes on to say that a State “may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.” This is an application of the “*aut dedere, aut judicare*” principle, which equally applies to States which are in no way involved in the armed conflict. Hence, this clearly is a form of universal jurisdiction.

In more recent years, though, some States have started to enact domestic legislation empowering their authorities to exercise universal jurisdiction, sometimes even *vis-à-vis* individuals they have not captured or which are not on their territory. In these instances, the State is trying to exercise universal jurisdiction *in absentia*, very contested notion in international law. However, this may be, it is certain that the Geneva Conventions impose certain active duties on the Contracting Parties, which are reinforced by the obligation of common Article 1, pursuant to which “the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”. However, States were for a long time not making substantial efforts to live up to their treaty obligations.⁹

b. Non-international armed conflicts

In regard to the obligation to prosecute and punish violations of IHL in non-international armed conflicts, some significant changes are there in recent years. Indeed, under the Geneva Conventions, there is no obligation to prosecute for non-international armed conflicts as simply mentioned in common Article III. It has been considered to be taking place in within the state territory. However, the Rome Statute declares applicable to non-international armed conflicts what has traditionally been referred to as “international crimes”: the nature of the crime, rather than the context in which it is being perpetrated, becomes the defining criterion qualifying States’ obligations. Over the last years, a number of national courts have tried several persons for war crimes committed in non-international armed conflicts on the basis of universal jurisdiction, prompting the ICRC in its impressive Customary International Humanitarian Law study to conclude that the right of States to vest universal jurisdiction in their national courts for war crimes committed in non-international armed conflicts is now established as a norm of customary international law.¹⁰

⁹ Commentary to the Geneva Conventions 1949, Common Art. 49 / 50 / 126 / 149, accessible via www.icrc.org/ihl

¹⁰ ICRC, Customary International Humanitarian Law (Cambridge University Press, 603. (2005)

Regarding prosecution of War Crimes, States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects. State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.¹¹ Likewise, States must exercise the criminal jurisdiction which their national legislation confers upon their courts, be it limited to territorial and personal jurisdiction, or include universal jurisdiction, which is obligatory for grave breaches.¹² For instance, in the context of the Occupied Palestinian Territory (OPT), all sides are frequently accused of violating IHL as well as international human rights law (IHRL). Israeli Forces have been accused of causing extensive and unnecessary destruction of civilian property in Area C of the West Bank and the like. Meanwhile, Palestinian militants in Gaza have been accused of making no attempt to comply with the principle of distinction by launching indiscriminate rocket attacks at civilian areas.

War crimes and crimes against humanity which are not properly prosecuted in national penal procedures may be brought to the International Criminal Court (ICC) or an Ad Hoc Tribunal established for such purpose.¹³ It is affirmed that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation.¹⁴ Similarly, the International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.¹⁵ Moreover, Article 14 (2) of the 1996 Amended Protocol II to the Convention on Certain Conventional Weapons mentions that the measures envisaged in paragraph 1 of this Article include appropriate measures to ensure the imposition of penal sanctions against persons who, in relation to an armed conflict and contrary to the provisions of this Protocol, willfully kill or cause serious injury to civilians and to bring such persons to justice.

¹¹ IHL Customary Rule 158.

¹² *Ibid*, Rule 157.

¹³ FLECK & DIETER et.al (eds), *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* (2nd ed), Oxford University Press, 706, (2009).

¹⁴ ICC STATUTE, Preamble. (1998)

¹⁵ ICTY STATUTE, Art. 1, (1993).

The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention (Hague Convention for the Protection of Cultural Property 1954).¹⁶

Grave Violation of Geneva Convention

In addition to Common Article One, legal accountability for violations of IHL requires implementation of the obligations to search for and prosecute those who have committed grave breach of the Geneva Conventions. As we will see in the next section, all grave breaches constitute war crimes and can be prosecuted as such. Under customary law, States have an obligation to search for and prosecute perpetrators of all serious violations of IHL (not merely grave breaches of the Geneva Conventions.)¹⁷

Grave breaches also overlap with other war crimes. Willful killing and torture, for example, not only amount to grave breaches but also to serious violations of humanitarian law (in particular Common Article 3 of the Geneva Conventions), punishable regardless of the character of the armed conflict in which they are committed. Where national law allows it, prosecuting a grave breach as a serious violation of Common Article 3 can reduce the burden on the prosecution. It may also facilitate the finding that the victims were protected under international humanitarian law. Therefore, some grave breaches are prosecuted as violations of Common article 3.¹⁸

These IHL obligations are not restricted to the parties to the conflict. All States party to the Geneva Conventions must cooperate in the search for and prosecution of those who commit such violations. The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in [Article 50 of the 1949 Geneva Convention I, Article 51 of the 1949 Geneva Convention II, Article 130 of the 1949 Geneva Convention III and Article 147 of the 1949 Geneva Convention IV]. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered

¹⁶ HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY, Art. 28, (1954).

¹⁷ J. Stewart, *The Future of the Grave Breaches Regime: Segregate, Assimilate or Abandon?*, *J Int Criminal Justice*, 7 (4):855-877, (2009).

¹⁸ Ward Ferdinandusse, *The Prosecution of Grave Breaches in National Courts*, *Journal of International Criminal Justice*, Oxford University Press, 7:27-28: 723-741, 7 (2009).

to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned

List of main grave breaches under Geneva Conventions of 1949:

- (i) Willful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Willfully 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) Willfully 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.

List of grave breaches under Additional Protocol One:

- (a) making the civilian population or individual civilians the object of attack;
- (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects
- (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects
- (d) making non-defended localities and demilitarized zones the object of attack;
- (e) making a person the object of attack in the knowledge that he is hors de combat;
- (f) the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.
- (g) the transfer 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, in violation of Article 49 of the Fourth Convention;

- (h) unjustifiable delay in the repatriation of prisoners of war or civilians;
- (i) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
- (j) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement.

War crimes

Certain conduct may become a war crime if it meets the essential criteria like a serious breach of international humanitarian law, having grave consequences for the victim, and one which has been criminalized under treaty or customary law. Under the Rome Statute of the International Criminal Court, serious violations of IHL and grave breaches of the Geneva Conventions are classified as war crimes. Put differently, not every violation of IHL falls within the war crimes regime of the Rome Statute, (only serious violations of IHL and grave breaches of the Geneva Conventions). War crimes are most often prosecuted through domestic systems of law enforcement such as Court Martial hearings. In addition, various international forums prosecute war crimes. Recent examples include the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) for taking action against such war crimes. These are violations of customary international law, listed as war crimes in the Statute of the International Criminal Court.

- i) Making civilian objects the object of attack.
- ii) Seizing property of the adverse party not required by military necessity.
- iii) Making persons or objects involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations the object of attack, as long as they are entitled to the protection given to civilians or civilian objects under international humanitarian law.
- iv) Killing or wounding an adversary by resort to perfidy.

In the case of violations reaching the threshold of serious violations of IHL and grave breaches of the Geneva Conventions, third States have an obligation to search for and prosecute the perpetrators. In addition to the third state responsibility regime under the Geneva Conventions, general rules on state

responsibility also apply during armed conflict. These rules are particularly important when dealing with behavior that offends peremptory norms of international law because international obligations of non-assistance and non-recognition may apply. Finally, it should be remembered that crimes are ultimately committed by individuals. Those who commit serious violations of IHL and grave breaches of the Geneva Conventions may be held individually responsible in criminal trials.¹⁹

The Principle of Humanity requires that civilians and those who are *hors de combat* must be treated humanely, meaning that abuses of such persons, such as killing, torture, rape, mutilation, beatings and humiliation are prohibited. Violations of these rules may constitute violations of the laws and customs of war, and trigger individual criminal responsibility.²⁰

State's Responsibility to International Criminal Liability

States have responsibility to international criminal liability as per the Articles on State Responsibility for Internationally Wrongful Acts on the following grounds:

1. The obligation to take steps to cease the action or omission which results in a violation of international law; and
2. The obligation to make appropriate reparation. "In the light of the description by ICJ of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory".²¹

In terms of IHL, a third State's failure to adhere to their legal obligation to ensure respect of Common Article One may also constitute a wrongful act. For example, a State providing assistance, knowing that the latter is used for violations, is certainly not complying with their Common Article 1 obligation.

2.3. Reconstruction and Rebuilding, and Peace Process

All major regions of the developing world have been plagued by civil wars or regional conflicts since the end of World War II, with low-income and lower middle-income countries being particularly affected. Consequently,

¹⁹ Legal Accountability for Violations of International Humanitarian Law: An Introduction to The Legal Consequences Stemming from Violations of International Humanitarian Law, Diakonia, PEOPLE CHANGING THE WORLD, (October 2013).

²⁰ Nepal Conflict Report, Executive Summary, OHCHR (2012).

²¹ Legal Accountability for Violations of International Humanitarian Law: An Introduction to The Legal Consequences Stemming from Violations of International Humanitarian Law, Diakonia, PEOPLE CHANGING THE WORLD, (October 2013).

reconstruction and rebuilding is required to maintain long lasting peace along with development after conflict. The major current debates on reconstruction and rebuilding are:

- (i) economic policy, structural adjustment, and the consolidation of peace; and
- (ii) external economic assistance and the role of the international community.

For experts, rehabilitation, reconstruction, and rebuilding can be used interchangeably and refer to efforts by domestic and international actors aimed at rebuilding the political, economic, and social structures of war-torn countries. In post conflict situation, for reconciliation implies the restoration of (i) a minimal level of trust and confidence between former enemies; (ii) the capacity to peacefully co-exist, interact and compete for resources; and (iii) peaceful dispute settlement mechanisms.

Postwar states are in dire need of resources, especially to: (i) rehabilitate the state apparatus, the security system and public services such as education and health; (ii) restore physical infrastructure and productive assets; (iii) reintegrate ex-combatants and returnees; and (iv) clear mines. In the case of low-income countries at war, external finance is often limited to balance-of-payments support, humanitarian assistance provided by foreign aid agencies and financial aid by international institutions.

In their 1997 Guidelines on Peace, Conflict and Development Co-operation, OECD/DAC Members set the following priorities for post conflict reconstruction (OECD, 1997: 50): “Restoring internal security and the rule of law, legitimizing state institutions, establishing the basis for broadly-based economic growth, and improving food security and social services. This may require reforming security forces and legal systems or helping establish completely new structures where the former are viewed as illegitimate by society.” As for the World Bank, post-conflict reconstruction aims to facilitate the transition from war to a sustainable peace, and to support economic and social development. While many war-torn societies have fallen prey to the internationalization of criminal and purely speculative activities, they are in a much more difficult situation to seize potential benefits from the current global economic context, abundantly referred to as “globalization”.²² By whatever means, there is necessity of reconstruction, rebuilding and maintenance of sustainable peace in the war torn countries.

²² Carbonnier, Gilles. Conflict, Postwar Rebuilding and the Economy: A Critical Review of the Literature, *WSP Occasional Paper* No. 2, 1-73, (March 1998).

2.4. Justice and Reparation to the Victims of Armed Conflict

Justice must be ensured for the victims of armed conflicts by fact finding through investigation and prosecution of the perpetrators whether by domestic remedy as per state's obligation or by the international tribunals resulted from the grave breaches of Geneva Conventions. The state has obligation to respect, ensure respect for and enforce international human rights and humanitarian law so it requires providing victims with equal and effective access to justice irrespective of who may be the ultimate bearer of responsibility for the violation.²³

The Four Pillars of Transitional Justice, (Truth, Justice, Reparations, and Institutional Reform)

While ensuring transitional justice, truth of the victimization of the people, confiscation and destruction of their property and gross and serious violation of international human rights laws and international humanitarian laws must be investigated and identified. Then only justice can be ensured by providing punishment to the alleged perpetrators and compensation, restitution, reparations, and justice to the victims and their families and losses concurred due to international and non-international armed conflicts. To render transitional justice is challenging due to the **debate of amnesties and immunity** and due to the lack of evidence, lack of resources or potential negative implications for peace and security.

Various provisions within IHL are of importance when the fighting ceases and the transitional justice process commences. For example, during a conflict it is required under IHL to keep records of the dead and captured. This is hugely useful to families and the search for truth. Reparations, another pillar of transitional justice are conceptualized as much broader in scope than mere monetary awards. A reparations program can include an official apology from high ranking perpetrators and/or the State as appropriate, memorials to commemorate victims especially the dead, preferential access to services for victims, and pensions as well as single cash payments. Within IHL there are no direct provisions for reparations however this does represent a growing area of interest among practitioners and has seen some development in soft law.

²³ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, Art. 3(c) (2000).

Firstly, that adherence to the rules of IHL during a conflict, will aid the transitional justice process. Secondly in order to assist with transitional justice or advocate for compliance with IHL there needs to be a huge amount of understanding of a society and the actors involved from a range of perspectives. The international law on reparation for victims of armed conflict is complex. Numerous subfields of international law are involved, among them international human rights law, international criminal law, international humanitarian law, and the law on State responsibility. In addition to this complexity, reparation-related questions are often highly politically charged. They are focal points of contestation about moral values, different conceptions of justice, and approaches to international law, including the status of the individual human being in this order.

Debates about the establishment of reparation mechanisms beneficial to individual victims of war date back to the early hours of the codification of international humanitarian law. In 1872, co-founder of the International Committee of the Red Cross (ICRC) Gustave Moynier already developed the first proposal for an international criminal tribunal which would have had jurisdiction over breaches of the 1864 Geneva Convention.

It is a general principle of public international law that any wrongful act i.e. any violation of an obligation under international law—gives rise to an obligation to make reparation.²⁴ Article 1 of the Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001: “Every inter-nationally wrongful act of a State entails the international responsibility of that State.”

Reparation can take various forms, including 1. Restitution, 2. compensation or 3. satisfaction. These remedies can be applied either singly or in combination in response to a particular violation.²⁵ A party to a conflict which does not comply with the provisions of international humanitarian law shall be liable to make reparation. It shall be responsible for all acts committed by persons forming part of its armed forces (Article 91 AP I; Article 3 HC IV). Forms of reparation include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.²⁶

²⁴ *Germany v. Poland*, PCIJ, (ser. A) No. 17, 29, (1928).

²⁵ E MANUELA-C HIARA G ILLARD, *Reparation for Violations of International Humanitarian Law*, RICR September IRRC, Vol.85, No.851, 529-553, (September 2003)

²⁶ FLECK, DIETER & ET AL (EDS), *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* (2nd ed.), Oxford University Press, at 707, (2009)

3. Implementing Roles of Concerned Agencies

a. State's obligation during Post Conflict Time

In transition periods as in conflicts, international humanitarian law should remain a keystone of humanitarian action. Indeed, when active hostilities come to an end, States remain bound by numerous obligations under the law of war such as the duty to care for the sick and wounded and ensuring that people still detained are treated in conformity with international humanitarian law. In addition, with the end of hostilities States also become subject to further obligations, such as the duty to clarify the fate of persons of whose disappearance they have been notified by the adverse party and, in international armed conflicts, to release and repatriate prisoners of war.

Paragraph 52 of the 2000 Cairo Plan of Action urges States “to implement international humanitarian law in full, in particular by adopting national legislation to tackle the culture of impunity and to bring to justice the perpetrators of war crimes, crimes against humanity and genocide”.

b. Role of International Jurisdictions and Domestic Courts

Ever since World War II, the international community has moved increasingly toward the development of a system of international jurisdictions, complementary to that of domestic courts, to try people accused of genocide, war crimes and crimes against humanity. Such system is mainly two-fold: on one hand it relies on the establishment of ad hoc and other internationalized tribunals set up after a conflict; on the other, it counts with the newly created International Criminal Court.

The ICRC welcomed both the development of international humanitarian law through the adoption of the four 1949 Geneva Conventions and the establishment of the obligation to exercise universal jurisdiction against grave breaches found therein, as a means to deal with the challenge of impunity for war crimes.

International criminal tribunals may strengthen respect for IHL by providing justice for victims and may also act as a deterrent in future armed conflict and, by establishing the truth of what happened during a conflict, contribute to reconciliation and reconstruction.

c. Role of Security Council of UN

Competent organs of the UN shall promote universal respect for, and observance of, human rights and fundamental freedoms in peacetime as in

times of armed conflict. Human rights bodies have responsibility to investigate those limitations of human rights in armed conflicts as applies in IHL. Hence, IHL may be dealt with even by human rights organs, which can thus support to ensure respect for international humanitarian law.²⁷

In case of serious violations, states are further bound to act, jointly or individually, in cooperation with the United Nations and in conformity with the UN Charter. (Article 89 AP I) The Security Council may emphasize the direct responsibility of states and armed groups under international humanitarian law. Under chapter VII of the UN Charter, the SC is empowered to take far reaching decisions to maintain or restore international peace and security. For example, North Korea 1950-1953, South Africa 1966-1999.²⁸

Likewise, there is vital role of ICRC as Geneva Conventions and their Optional Protocols recognize its special status and assign specific tasks like visiting POWs and civilian internees to it during armed conflict and thereafter; and even it may notify one party of violations complained by another party and in this way initiate dialogue between the two conflicting parties.²⁹ Moreover, there is vital role of INGOs and NGOs in conflict prevention, conflict resolution, and post conflict resolution.

4. In the Context of Nepal

Though, in the context of Nepal, during Maoists insurgency, around seventeen thousand people lost their life and so many people became victim of enforced disappearance. However, there is no settlement of transitional justice process even after the establishment of Truth and Reconciliation Commission and Disappearance Commission. Justice and reparation to the victim of armed conflict is delaying due to not having functional transitional justice process.

Between 1996 and 2006, an internal conflict between the Government of Nepal and the Communist Party of Nepal (Maoist) (CPN (Maoist)) left over 13,000 people dead and 1,300 missing.¹ By signing the Comprehensive Peace Accord (CPA) on 21 November 2006, the Government of Nepal and the CPN (Maoist) committed to establishing the truth about the conduct of the war and to ensuring the victims of the conflict receive both justice and reparations.² To that end, the CPA references commitments to form two

²⁷ FLECK, DIETER & ET AL (EDS), *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* (2nd ed.), Oxford University Press, at 715, (2009).

²⁸ *Ibid.*, at 717.

²⁹ *Ibid.*, at 714.

transitional justice mechanisms: a Truth and Reconciliation Commission (TRC) and a Commission on Disappeared Persons (CDP). based on the fact that the conflict was between governmental forces and a non-governmental armed group, this Report refers to the provisions of IHL applicable to non-international armed conflicts. Nepal ratified the four Geneva Conventions in 1964 and is subject to their provisions, including Common Article 3 of the Geneva Conventions which provides minimum standards governing any non-international armed conflict.³⁰

Nepal's IHL and IHRL Integration Order (2008) states that Nepal's army "always follow[s] a policy of Zero Tolerance against perpetrators of [violations of] human rights and international humanitarian law"

The Truth and Reconciliation Commission (TRC) started taking complaints in April 2016, and by July 21 2016 had received 53,000 complaints. The TRC focuses on kidnapping or taking hostages; beating that causes physical disability; physical or mental torture; rape and sexual harassment; and damage against property including looting and arson. In 2008, amidst concerns about the slow progress, the Ministry of Peace and Reconstruction implemented an Interim Relief Program (IRP) that provided some benefits for certain victims of human rights violations, but there was still no acknowledgment of government responsibility. The IRP also excluded certain categories of victims, such as those who endured sexual violence.

Some Cases Decided by Supreme Court of Nepal³¹

- *Devi Sunuwar v District Police Office, Kavrepalanchowk and Others 2007*- civilians courts have jurisdiction over the killing of civilians during the conflict by the army.
- *Purnimaya Lama v District Police Office, Kavrepalanchok and others 2008* Refusal to register an FIR in case of conflict era rights abuse is unconstitutional; the govt. has an obligation to investigate and prosecute notwithstanding the possibility that transitional justice commission may be created.
- *Bhim Prakash Oli and others v. HMG and others 2006* Formulate clear legislation and appropriate arrangements to address the needs of conflict victims.

³⁰ Nepal Conflict Report Executive Summary, OHCHR, (2012).

³¹ Transitional Justice and Right to a Remedy Supreme Court Jurisprudence in Nepal, International commission of Jurists and Nepal Bar Association, (January 2012).

5. Conclusion

Post conflict situation is to be dealt with the use of measures to provide justice by all means to the victims of war crimes through the prosecution to the war perpetrators or violators/state or non-state actors for breach of Geneva conventions by international or domestic tribunals and jurisdiction so that reconstruction, reparation, rebuilding and sustainable development of peace becomes possible. More than this, humanity, human rights and humanitarian aspect is prime concern of IHL whereby there is necessity to provide justice to the victims of conflicts and punishment to the perpetrators.

Similarly, measures must be taken to ensure respect for international humanitarian law. States have an obligation to teach its rules to their armed forces and the general public. They must prevent violations or punish them if these nevertheless occur. In particular, they must enact laws to punish the most serious violations of the Geneva Conventions and Additional Protocols, which are regarded as war crimes. The States must also pass laws protecting the Red Cross and Red Crescent emblems. Measures have also been taken at an international level. Tribunals have been created to punish acts committed in two previous conflicts (the former Yugoslavia and Rwanda). An international criminal court (ICC), with the responsibility of repressing war crimes, was created by the 1998 Rome Statute. Whether as individuals or through governments and various organizations, we can all make an important contribution to compliance with international humanitarian law.

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