

# **The Continued Relevance of International Humanitarian Law in Post Armed Conflict Sri Lanka**

*Edited by*

**Professor Wasantha Senevirathne and Nishara Mendis**

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This book has been published with the support of the ICRC in its general endeavour to support academic research on international humanitarian law worldwide. However, opinions expressed in it are those of their authors alone and do not necessarily reflect the position of the ICRC. In particular, neither description of alleged historical facts, nor legal analysis can therefore be construed as an opinion of the ICRC.

## Foreword

It is with great pleasure that I write the preface to this fine collection of essays on the continued relevance of International Humanitarian Law (IHL) in the Post armed conflict Sri Lanka. I believe that this book is a very timely and relevant contribution to the academic literature on the scope of application of IHL.

Application of International Humanitarian Law during a post conflict phase has been the subject of discussion among academic as well as Practitioner circles in the recent times. It is commonly accepted that International Humanitarian Law imposes obligations on states that go well beyond the actual duration of the active hostilities. Once a conflict comes to an end IHL continues to govern the direct consequences of the conflict. Having gone through an internal armed conflict for over 30 years, current Sri Lankan state practice is an apt case study to be analyzed in terms of continued relevance of IHL in the aftermath of an armed conflict.

The authors who have contributed to this book engage in an in-depth academic analysis of the application of treaty as well as customary International Humanitarian Law rules in light of the domestic experience. The chapters make a full coverage of the issues that relate to the continued relevance of IHL in the aftermath of a conflict. On the one hand the essays cover the specific categories of persons who continue to benefit from the rules of IHL postwar such as the missing, persons deprived of freedom, women and children. On the other hand, they engage in a timely analysis of the other IHL obligations of the States which are relevant at all times such as national implementation, disarmament and quite uniquely, the law of armed conflict at sea.

This book is the first one of its kind published in Sri Lanka. The chapters are rich with well researched and well-reasoned arguments making the case for continued application of IHL while acknowledging the legal and practical challenges that States encounter in doing so. Having based its analysis on a case study, this book would be of immense benefit to the academic and the practitioner alike.

While commending the editors and the authors on their hard work and commitment I hope that the content of this book would generate much needed academic and practical discussion on the scope of application of IHL.



**Justice Priyasath Dep**

Former Chief Justice, Supreme Court of Sri Lanka



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## Editorial

The editors of the book titled “*Continued Relevance of International Humanitarian Law in Post Armed Conflict Sri Lanka*” are very happy to offer this book to the readers, published under the generous support of the International Committee of the Red Cross - Colombo Delegation. This book coincides with the 70<sup>th</sup> Anniversary of the universally ratified Four Geneva Conventions of 1949, which were able to open the eyes of the entire world to the need of outlawing the blatant violations of International Humanitarian Law principles, embodied in customs, treaties, general principles of civilized nations and dictates of public conscience. This book includes a number of scholarly contributions by academicians, professionals and practitioners of International Humanitarian Law that depicts the continued relevance of International Humanitarian Law in the post armed conflict Sri Lanka.

It is well-known that Sri Lanka suffered due to a protracted armed conflict that continued for nearly three decades. The armed conflict mainly occurred between the State armed forces of the Democratic Socialist Republic of Sri Lanka and the non-State actor named the Liberation Tigers of Tamil Eelam (the LTTE) and was identified as a non-international armed conflict. In spite of the several initiatives taken by the country to address the ravages of the armed conflict, there is an unaddressed gap in the IHL scholarship which remains to be filled with regard to the continued relevance of IHL in the post armed conflict Sri Lanka. Hence, the editors believe that this book is a humble attempt and a contribution toward this endeavor.

The first chapter on “*A Critique on the National Implementation of Geneva Conventions with special reference to Sri Lanka*” by Prof. Wasantha Seneviratne explores the challenges and prospects of effective implementation of IHL in armed conflicts, in particular with reference to the status of national implementation of Geneva Conventions of 1949 in post-war Sri Lanka. It examines the common challenges and prospects of implementation of IHL in general and discusses the case of national implementation of IHL in Sri Lanka with special focus on country’s IHL obligations in the post-war context. The author emphasizes that the implementation of IHL at the national level is first and foremost the responsibility of States, which requires sovereign States to take several legal and political actions. Although Sri Lanka is under an obligation to incorporate the provisions of the Conventions as a State party of the Geneva Conventions of 1949, the failure to operationalize the Geneva Convention Act of 2006 is noted in the chapter. However, Sri Lanka has taken several positive steps to disseminate the

knowledge of IHL among many of the stakeholders with the assistance of the ICRC and has initiated some positive steps to further the respect and commitment toward the implementation of IHL at the domestic sphere.

The second chapter on “*Implementation of IHL Obligations with Regard to Missing Persons in Post-War Sri Lanka*” is by Danushka S. Medawatte. The main crux of the argument is that Sri Lanka should continue to apply IHL in connection with missing persons as that obligation transcends the actual context to which belligerency applies. The author also notes that the chapter is “strictly written in a humanitarian sense in that it makes no attempt to assess whether the State or any other actor should bear criminal liability concerning missing persons”. The right to know of the families is stressed and Sri Lanka’s obligations under the Geneva Conventions, customary international law, the International Convention on the Protection of All Persons from Enforced Disappearances, as well as the implementation in Sri Lanka through legislative enactments, case law, and commissions of inquiry, is discussed within the chapter.

Chapter three is written jointly by Rajiv Goonetilleke and Yanitra Kumaraguru, and is titled “*Protecting the Rights of Detainees in Sri Lanka*”. This chapter discusses the international obligations concerning detainees, with special reference to International Humanitarian Law and the role of the ICRC, placing the issue in the context of the current Sri Lankan law on arrest and detention. The authors noted that Sri Lanka experienced non-international armed conflict between 1979 to 2009, with varying intensity and geographic spread, with detainees who were State actors as well as non-State actors. The authors also commented on the impact of the Public Security Ordinance (PSO) and the Prevention of Terrorism Act (PTA) on the constitutional guarantees of Article 13 of the fundamental rights chapter.

Nazeemudeen Ziyana is the author of chapter four “*Protection of Children: Appealing for Justice in Post-Conflict Sri Lanka*”, which reflects upon the protection of children under the rules of International Humanitarian Law and analyse how the problems of child protection issues that ensued as a result of the conflict, could be addressed, in view of the applicable tenets of IHL and Human Rights Law in the post-conflict situation in Sri Lanka. The Geneva Conventions, Customary International Law and other applicable international law obligations are discussed in the chapter, including the United Nations Convention on Rights of the Child and its Second Optional Protocol. The author goes on to comment in detail on the national commitments to protect children which Sri Lanka has developed including the National Child Protection Authority. The issue of child soldier recruitment by the LTTE is discussed as well, and the matter is also considered under transitional justice measures, which is the focus of analysis in the final sections of the chapter. Under transitional justice, the author analyses the application of the right to know, the right to justice, the right to reparations, right of participation in national consultations and guarantees of non-recurrence, in particular through institutional reforms.

“*Protection of Women under International Humanitarian Law and Sri Lankan Law*” by Hasini Rathnamalala is the fifth chapter of the book. The author first spells out

the treaty obligations, customary International Humanitarian Law and non-binding guidelines relating to the protection of women, and then goes on to discuss national implementation within the Sri Lankan legal system (legislation and judicial implementation). The author argues that there can be benefits in utilizing the intersection between International Humanitarian Law, International Criminal Law and Human Rights Law to strengthen both the domestic court system in enforcement of penal legislation against the perpetrators of sexual violence or torture against women and any transitional justice mechanisms for the benefit of victims.

Chapter six, which is titled “*Regulation of Weapons, De-Mining and Humanitarian Disarmament in Post-Armed Conflict Sri Lanka*”, has been written jointly by Nishara Mendis, Neshan Gunsekera and Nillasi Liyanage. The authors first broadly discuss the Sri Lankan Experience, treaty ratifications and State practice in their chosen area, and then go into more detail in separate sections on the Sri Lankan experiences concerning international obligations on weapons and landmines and also discuss Sri Lanka and disarmament and the arms trade. The final section of the chapter elaborates on the implementation of weapons-related obligations in Sri Lanka, including the responsibilities of specific institutions. While there are positive developments in the post armed conflict context such as the fact that Sri Lanka has ratified the Anti-Personnel Mine Ban Convention in 2017 and the Convention on Cluster Munitions in 2018, the obligations to engage with weapons control, disarmament, support for nuclear non-proliferation and the regulation of the legal arms trade will continue even in times without war.

Nishara Mendis and Samya Senaratna have collaborated on chapter seven, “*Sri Lanka’s Obligations Regarding International Humanitarian Law at Sea*”. The authors discuss an often ignored area of humanitarian law, first introducing the readers to ‘Humanitarian Law at Sea’ and the historical development of conventions, codifications and manuals relating to humanitarian protection of persons at Sea during an armed conflict. The authors next introduce the context of Sri Lanka’s geopolitical and historical background and experiences with armed conflict at sea. The majority of the chapter focuses on the application of International Humanitarian Law at sea in Sri Lanka, including statutes and implementing authorities. A detailed commentary of the ICRC Case Study, “Sri Lanka, Naval War against Tamil Tigers” is included in the chapter, which gives an understanding of the application of Humanitarian Law at sea to situations which occurred during the Sri Lankan war. The authors conclude that Sri Lanka has much to offer in terms of having learnt from past experiences and gaining the ability to continue to engage with the issues concerning security and protection in maritime contexts, both in war and peacetime.

The editors believe that the chapters abovementioned emphasize the continued relevance of International Humanitarian Law for Sri Lanka and place a step forward in contributing to the legal scholarship on International Humanitarian Law for a post armed conflict country. It is to be hoped that this endeavor would encourage further research and academic engagement with the topics discussed, and that the role of humanitarian law will continue to be appreciated and its fundamental principle of

humanity in times of war will be upheld and the need for its dissemination even in times of peace and after a conflict ends, continues to be valued.

*Wasantha Seneviratne and Nishara Mendis*

*Colombo, 2019*

# 1. A Critique on the National Implementation of Geneva Conventions with Special Reference to Sri Lanka

Wasantha Seneviratne<sup>1</sup>

## 1.1 Introduction

International Humanitarian Law (IHL), which aims at mitigating the human suffering caused by war, is comprised of many sources but derives most of its authoritative rules predominantly from treaty law and customary law. This legal regime seeks to limit the effects of armed conflict, by striking a balance between military necessity and humanity.<sup>2</sup> In particular, IHL attempts to protect those who are not, or no longer, taking part in hostilities and to set limits on the means and methods of warfare. Much of the contemporary rules of humanitarian law are accepted universally. This is evident by the fact that the main set of IHL treaties, the Geneva Conventions of 1949, has been accepted by nearly every State in the world. Sri Lanka became a State party to the four Geneva Conventions on the 29<sup>th</sup> of February 1959 through accession. This is considered a salutary step towards the national implementation of IHL in Sri Lanka. Nevertheless, this act of accession alone cannot be considered the only step necessary for the effective implementation of IHL in Sri Lanka or elsewhere. Hence, States are required to take further efforts to implement humanitarian law effectively confirming that such States respect and ensure respect for IHL in their respective territories.<sup>3</sup>

The International Committee of the Red Cross (ICRC) often echoes that the implementation and development of international humanitarian law contribute to saving countless lives, to protecting human integrity, health and dignity and to raising consciousness about the basic principles on which our common civilization is founded.<sup>4</sup>

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- 1 Professor of Law in Public and International Law, Faculty of Law, University of Sri Lanka.
  - 2 Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* ( ICRC 2001) 3. Humanity is not always contrary to military necessity. However, at times, when military necessity is achieved, it could be done with harm to humanity. Hence, IHL attempts to strike a balance between these two interests.
  - 3 This is an obligation arising from being a State party to the Geneva conventions of 1949 and to the protocol I of 1977. See, Common Article 1 of Geneva Conventions and Article 1 of Additional protocol I.
  - 4 Reports prepared by the ICRC on the outcomes of the conferences of the Red cross and Red Crescent on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, (ICRC Geneva) <[www.icrc.org](http://www.icrc.org)> accessed 10 February 2019.

In spite of the increasing respect toward the principles of IHL there prevails a set of central questions, such as, how this culture of respecting and implementing IHL can be ensured? Who/what authority should take the responsibility? Who should be the partners/stakeholders of this holistic endeavour? What are the core steps that are warranted to be followed in fostering an improved culture of respect for and compliance of IHL among all sectors of society? What distinctions should be made in implementing IHL at national and international levels as well as in differently classified armed conflict situations? This book chapter wishes to examine and analyse some of these queries from a scholarly point of view.

In this backdrop, the main objective of this chapter is to explore the challenges and prospects of effective implementation of IHL in armed conflicts, in particular with reference to the status of national implementation of Geneva Conventions of 1949 in post-war Sri Lanka. In view of that, this chapter will firstly examine the common challenges and prospects of implementation of IHL in general and secondly it will discuss the case of national implementation of IHL in Sri Lanka with special focus on country's IHL obligations in the post-war context.

## **1.2 Implementing International Humanitarian Law**

Implementing IHL obligations is important at all times; before, during and in the aftermath of armed conflicts. Effective implementation should cover all relevant measures that are fundamental to ensure that the rules of international humanitarian law are fully respected. Translating the rules of IHL from theory to practical application is essential in this regard.<sup>5</sup> However, successful implementation of IHL needs many steps to be followed and is thus a continuing process. Enacting necessary laws and issuing regulations would be significant. However, it is but one step towards such implementation. Hence, in a national context, a range of measures is required to be performed. It involves the commitment of various parties based on different levels of legal, political and moral obligations cast upon them. Efficacious national implementation of humanitarian law is thus an all-inclusive endeavour. It includes several actions and measures such as the adoption of national legislations, prompt executive actions, judicial activism, constant monitoring of the application and promotion of the law, teaching and dissemination of knowledge and updating the development of IHL in par with the emerging needs and challenges. This multitude of actions would lead to implementation of the international obligations of a country at the domestic level. A sovereign State should take the primary responsibility of implementing their internationally accepted obligations within the jurisdiction. In addition to the responsibility of the State, the ICRC too plays a significant role in facilitating the effective national implementation and enforcement of IHL, as the guardian of this legal regime.

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5 Legal Fact Sheet, 'Implementing International Humanitarian Law: from Law to Action' (ICRC 2002) <[https://www.icrc.org/en/download/file/5450/implementing\\_ihl.pdf](https://www.icrc.org/en/download/file/5450/implementing_ihl.pdf)> accessed 03 March 2019.

## 1.2.1 An Overview of Principal Laws Regulating Armed Conflicts

### 1.2.1.1 Treaty Law

Treaties and customary rules are the main sources of contemporary IHL. Main IHL treaties are the production of two main branches of IHL; Geneva law and Hague law. Hence this chapter does not focus on the differences of treaties originating from different branches of IHL but examines their current level of application and implementation. The four Geneva Conventions of 1949 were adopted in the immediate aftermath of the Second World War. Grave breaches of laws and customs of war which occurred in the World War II was one of the pressing reasons, which influenced the world to review and revise the treaties already in existence and adopted. Among many such efforts, the ICRC pioneered the adoption of the four Geneva Conventions of 1949 at the diplomatic conferences of plenipotentiaries specifically convened for that purpose. Hague Conventions and regulations are mainly the outcome documents of two Peace Conferences held in Hague in the Netherlands at the dawn of the twentieth century.<sup>6</sup> Over a period of time these original conventions were subject to review and further development. Eventually many provisions of these treaties transformed to be customary international rules.<sup>7</sup> In particular, the Additional Protocols to the Geneva Conventions of 1977 have incorporated such customary rules derived from Hague Conventions.<sup>8</sup> Accordingly, the difference between Geneva Conventions and Hague Conventions are increasingly diminishing.

The Geneva Conventions of 1949 and their Additional Protocols of 1977 are the principal treaties, which govern the protection of the victims of armed conflicts and regulate the means and methods of warfare. Applicability of IHL provisions is determined based on the nature of the armed conflict. In situations of international armed conflict, the most important IHL treaties applicable are the four Geneva Conventions, their Additional Protocol I, and some weapons treaties, such as the Convention on Certain Conventional Weapons and its Protocols, Chemical Convention on the Prohibition of the Bacteriological (Biological) and Toxin Weapons, Convention on the Prohibition of Chemical Weapons and on their Destruction and the Convention on Cluster Munitions.

However, IHL treaties applicable in non-international armed conflicts are fewer in number and content. Common Article 3 and Additional Protocol II of 1977 are applied to this type of armed conflicts but the applicability of Protocol II requires the satisfaction of a stringent criteria.<sup>9</sup> Many rules previously applicable in international armed

6 Hague Peace Conferences of 1899 and 1907.

7 The 1907 Regulations annexed to the Hague Convention IV of 1907 and Hague Convention IX are widely accepted as international customary law, and are binding on all parties in all conflicts at all times. <<https://theblueshield.org/resources/laws/1954-hague-convention-treaty-law/1329-2/>> accessed 10 June 2019.

8 See the 'Case concerning Military and Paramilitary Activities in and against Nicaragua' *Nicaragua v United States of America* (ICJ 27 June 1986).

9 James G Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 850 IRRC 313.



conflicts are now believed to be binding as a matter of customary law in non-international armed conflicts.<sup>10</sup> In judgments of the International Court of Justice, the world court has authoritatively referred to the customary character of some provisions of the Geneva Conventions of 1949 and their extended application in non-international armed conflicts as a result of this transformation.<sup>11</sup> ‘The ICRC Study on Customary International Humanitarian Law Applicable in Armed Conflicts’ too endorses the customary law nature of such treaty provisions. Despite this progression, given that most contemporary armed conflicts are non-international in nature, some scholars believe that IHL treaty provisions governing these situations are still in need of further strengthening, development or clarification.<sup>12</sup>

In spite of the strengths and weaknesses of applicable treaty law, which predominately regulates the contemporary armed conflicts, it is vital for their State parties to take necessary steps to secure the guarantees provided by these instruments by implementing them to the fullest possible extent at the national level. Some provisions of Geneva Conventions and Protocols impose numerous obligations, known as *erga omnes* (undeniable obligations), to the State parties of these instruments. For example, Common Article 1 of the 1949 Geneva Conventions states that ‘the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances’. Using identical terms, Article 1(1) of the Additional Protocol I too provides that ‘the High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances’. Kalshoven and Zegveld state that this formula originally conceived in the context of the law of Geneva is now explicitly expanded to the law of the Hague as codified and developed in the Protocol.<sup>13</sup> Although a similar prescription is not available in the Protocol II, Kalshoven and Zegveld warn that this silence should not be deduced to understand that a State by becoming party to that Protocol does not undertake ‘to respect and to ensure respect’ for it. The reason for non-inclusion of the identical wordings in Protocol II is outlined as a result of the general tendency of the drafters of Protocol II to reduce the expression of their obligations under Protocol II to the barest minimum. Hence, States preferred to omit this formula

10 See the discussion in the preceding sections. *Nicaragua v United States of America* (ICJ 27 June 1986) paras 218-219, *Prosecutor v. Dusko Tadic* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (ICTY- IT-94-1-A 2 October 1995) para. 98, *Prosecutor v. Naletilic and Martinovic*, (ICTY -IT-98-34-T 31 March 2003) *Prosecutor v. Akayesu*, Case (ICTR-96-4-T 2 September 1998) paras 608–609.

11 See for an example, *Nicaragua v. USA* decision of the ICJ. The ICRC’s Customary Law Study too includes a vast amount of state practices in the area of international humanitarian law followed with a contention of obligation. It shows evidence about overall acceptance of the rules of the Additional Protocols after their adoption. Most of the core rules of the Protocols now have become part of customary international law. Therefore, these customary IHL rules in effect bind all States and all parties to all armed conflicts. See, Jean-Marie Henckaerts and Louise Doswald-Beck (eds) *The ICRC Study on Customary International Humanitarian Law- Volume I and Volume I* (Cambridge Press 2005).

12 Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC 2016) 21.

13 Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* 136.

in Protocol II.<sup>14</sup> Protocol II is significantly silent on the issue of ‘implementation and enforcement’. Only Article 19 requires the Protocol II to be disseminated as widely as possible, authoritatively using mandatory terms, i.e., ‘shall be disseminated’. Given the absolute silence on other aspects of implementation and enforcement, this provision becomes significant and striking with regard to the obligation of national level implementation of the provisions laid down in the protocol applicable to non-international armed conflict situations. In contrast, Part I on General Provisions and Part V on Execution of the Geneva Conventions and of Protocol I include an array of measures aimed at high level of implementation and enforcement of IHL. Further, Article 89 of Additional Protocol I provides that ‘in situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter’. All these provisions delineated in the Geneva conventions and the Protocols demonstrate the extra caution paid by the drafters of these instruments, pertaining to the stringent implementation of IHL, in particular, in situations of international armed conflicts.

### 1.2.1.2 Customary International Humanitarian Law

Customary law is another primary source of IHL. While treaty law is the most palpable source of IHL, its rules and principles are often rooted in custom.<sup>15</sup> Also, some of these customary rules were formed based on the universal acceptance of treaty law. The ICRC has codified the widely dispersed customary IHL rules and it is now available as a single document. This codified document (ICRC Customary Law Study) is divided into six headings relating to the principle of distinction; specifically protected persons and objects; specific methods of warfare; weapons; treatment of civilians and combatants hors de combat, and implementation.<sup>16</sup> Being parties to IHL treaties, States contribute to form customary law as well. This happens when State practices get combined with the intention of States called *opinio juris* (as evidence of State practices followed as law).<sup>17</sup> Finding State practices are less tedious than finding evidence of *opinio juris*. The obligations arising from judicial decisions held by national

14 *ibid.*

15 Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* 21.

16 The ICRC Study is divided into two parts: Volume I (“Rules”) contains the customary rules of IHL with a short commentary, as well as indications of trends in practice where no clear rule of customary international law has yet emerged (about 400 pages). Volume II (Practice) contains summaries of all the practice from which the rules and commentary in Volume I were inductively derived (about 4000 pages).

See < <http://www.icrc.org> > accessed 10 June 2019. However, it is noted that this customary IHL study is only the ICRC’s interpretation of the Customary IHL and it reflects the ICRC position. States are not bound by this interpretation. They may have their own interpretation of what principles are customary IHL.

17 See Article 38 (1) (b) of the Statute of the International court of Justice for the fundamental elements of a binding customary international law principle. See further, the ICJ judgments on the elements of a legally binding custom that can be used as a source of international law before the World Court, i.e., *Colombia v. Peru* (Asylum), *North Sea Continental Shelf Cases*, *Anglo Norwegian fisheries case* (*UK v. Norway*).

or international courts and tribunals and high level Resolutions adopted by the organs of the United Nations such as General Assembly Resolutions and Security Council Resolutions may be used as evidence of State practices followed as law.<sup>18</sup>

The World Conference on Human Rights in 1968 adopted a Resolution to the following effect:

States parties to the Red Cross Geneva Conventions sometimes fail to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict.<sup>19</sup>

This Resolution exhibits the responsibility cast on third parties who do not directly engage in hostilities. It further requested that the UN Secretary-General, after consultation with the ICRC, to draw the attention of all the member States of the United Nations system to the existing rules of international law governing situations of war. The Resolution urged the UN membership to ensure that in all armed conflicts the inhabitants and belligerents are protected in accordance with ‘the principles of the law of nations derived from the usages established among civilized peoples, from the laws of humanity and from the dictates of the public conscience’. This Resolution shows the applicability of customary international law principles in regulating armed conflicts effectively.

### 1.2.2 Obligation to Implement International Obligations of a State

Sovereign States, as the responsible national authorities, bear a primarily responsibility to implement the core principles of humanitarian law, when and where necessary. This should include an obligation to duly execute their juridical powers when an internationally wrongful act or omission occurs within the scope of recognized grounds of jurisdiction.<sup>20</sup> Article 3 of the International Law Commission’s (ILC) Articles on

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18 Some principles of IHL have been recognized as customary rules by the ICJ. See, *Nicaragua v United States of America* (ICJ 27 June 1986) *op cit*. Also, some principles of IHL were developed by international tribunals and later on these interpretations have turned to be customary. For example, the criteria to establish a NIAC as stated in the *Prosecutor v. Dusko Tadic* (ICTY- IT-94-1-A 2 October 1995) *op cit*.

19 The first International Conference on Human Rights was held in Teheran from 22 April to 13 May 1968 to review the progress made in the 20 years since the adoption of the Universal Declaration of Human Rights and formulate an agenda for the future <<https://www.un.org/en/development/devagenda/humanrights.shtml>> accessed 12 June 2019.

20 A State is responsible under International Law when an act or omission imputable to it produces a breach of an international obligation arising from a treaty or from any other source of International Law. See, Article 1 of the ILC Articles, which is a customary international law principle as well. In the *Spanish Zone of Morocco* claims (2 RIAA, p 615 (1923); 2 ILR, p 157) it was held that responsibility is the necessary corollary of a right so that all rights of an international character involve international responsibility.

Responsibility of States for Internationally Wrongful Acts of 2001<sup>21</sup> stipulates that the characterisation of an act of a State as internationally wrongful is governed by international law and such characterisation is not affected by the characterisation of the same act as lawful by internal law.<sup>22</sup> Article 1 of ILC Articles describes the basic principle of responsibility of a State as follows:

Every Internationally wrongful act of a State entails the international responsibility of that State.<sup>23</sup>

This Article sets out the general principles of State responsibility. Wrongful act of a State may consist of one or more actions or omissions or a combination of both. This does not mean that other States may not also be held responsible for the conduct in question or for injury caused as a result. Although an internationally wrongful act is essentially bilateral, it has been recognized that some wrongful acts involve the responsibility of the State concerned towards the international community as a whole. This responsibility embraces the universal jurisdiction of States in particular based on the nature of the crime. Geneva Conventions and their First Protocol designate certain violations as grave breaches. War crimes, crimes against humanity and genocide are now recognized as international crimes over which any State should have universal jurisdiction. Rome Statute of International Criminal Court of 1998 defines these three crimes over which the Court has the jurisdiction and stipulates that when grave breaches of Geneva Conventions and the Protocol I are committed they would amount to violations of these crimes with the establishment of the required elements as required by the Rome Statute.

Under international law, States can claim or are obliged to execute their jurisdiction territorially or extra-territorially, based on their sovereign authority. Therefore, in addition to the territorial principles (subjective or objective) of State jurisdiction, States are obliged to execute their juridical powers occasionally beyond their borders when violation of *jus cogens* occurred. This extended application of territorial jurisdiction to extra-territorial matters is called 'universal jurisdiction'. In spite of who has committed these serious violations (nationality principle of jurisdiction) or against whom (passive personality principle) is the crime committed or under which territory, States are under an undeniable obligation (*erga omnes*) and universal jurisdiction authorises the States to try and punish the perpetrators based on the nature of the violation. Such crimes include the violations of inviolable international norms (peremptory norms). Vienna Convention on the Law of Treaties of 1969 stipulates the responsibility of States to protect the peremptory norms with utmost care.<sup>24</sup> International Law Commission's (ILC) Articles on State Responsibility, adopted by the General Assembly

21 This ILC Convention is yet to come into entry by receiving the required number of ratifications. It is referred in this Chapter as the ILC Articles.

22 See, Article 12 of the ILC Articles.

23 See Article 1 of the ILC Articles.

24 See, Article 64 of the UN Convention on Law of Treaties of 1969 and Thomas Kleinlein, 'Jus Cogens as the 'Highest Law'? Peremptory Norms and Legal Hierarchies' 46 (2015) 46 Netherlands Yearbook of International Law 173–210. <<https://ssrn.com/abstract=2923974>> accessed 5 June 2019.

defines the international crimes with much gravity and urges all the member States to protect them.<sup>25</sup>

Neither International law nor IHL specify the manner of incorporating their principles into domestic law. It could be varied in accordance with different State practices. Contemporary practices of various States show that many States support the traditional theories of incorporating and transforming international law into domestic law, such as the theories of monism and dualism. When domestic law is silent, some dynamic judges contribute through progressive decisions to implement international IHL standards. This judicial activism also has led to successful implementation of international law including IHL. Since such commitments and contributions are not common, implementation of IHL obligations by States in their legal systems still remains a daunting challenge.

### **1.3 National Implementation of International Humanitarian Law**

This section of the Chapter examines the basic issues regarding the national implementation of IHL. Implementation of IHL is rather difficult due to numerous reasons. It could be partly due to the general inherent difficulties associated with the implementation of international law. This problem is exacerbated with the lack of designated implementing and monitoring mechanisms at the international level, insufficient political will among the States and geo political motivations that would lead to misuse or abuse of the protection afforded in international law to State parties in adhering or respecting international law in general. In addition, the implementation of IHL is particularly difficult due to the selective application of IHL principles based on the nature of the armed conflict.

The ICRC lucidly explains the clear obligation owed by all States to adopt and carry out measures implementing humanitarian law.<sup>26</sup> The obligation to implement IHL exists at all stages of a conflict, preceding it and after its conclusion. It is extremely difficult to introduce the rules of IHL into the domestic legal system after the onset of war as the warring parties might consider it as curtailing their freedom to achieve their military objective. Therefore, it is the responsibility of sovereign authorities to set forth the necessary pre-conditions in peacetime to ensure that if an armed conflict is begun, that the obligations of humanitarian law can be fulfilled. Gasser points out that the commitments demanded from warring parties as stipulated in treaty law or customary law have to be met not only in times of war but also in times of peace.<sup>27</sup>

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25 UN General Assembly Resolution 56/83 of 12 December 2001 took note of the adopted ILC draft articles and commended them to Governments.  
< [http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf) > accessed 5 June 2019.

26 See the ICRC Fact Sheet on Implementing International Humanitarian Law: from Law to Action, *op cit*.

27 Hans Peter Gasser, *International humanitarian law: An introduction*, (Paul Haupt Publishers 1993)79-89.

However, unless the necessary prerequisites are well in place prior to any outbreak of war it would be difficult to apply the relevant IHL provisions effectively.

Article 80(1) of Additional Protocol I, stipulates the Measures for execution as below.

The High Contracting Parties and the Parties to the conflict shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol.

This provision is unique to Protocol I and thus could be applied to situations of international armed conflicts. However, since this obligation has now turned to be a principle of customary international law,<sup>28</sup> even the non-member States should take necessary measures to protect relevant IHL principles in their jurisdictions. Armed conflicts not of international character are governed either by Common Article 3 of the Geneva Conventions or by Protocol II (based on the expected high level of intensity, duration, casualties and damages).<sup>29</sup> Since neither Common Article 3 nor Protocol II require States parties to implement IHL principles in similar severity, (as required by Common Article 1 of the Geneva Conventions or Article 1(1) of the Protocol I in the context of international armed conflicts), it is good to extend this customary rule to require States that would involve in such armed conflicts to implement applicable IHL obligations without fail.

### **1.3.1 *pacta sunt servanda* - Performing Treaty Obligations in Good Faith**

*Pacta sunt servanda* embodies an elementary and universally agreed principle fundamental to all legal systems. In the context of international law, it is considered a well-established principle found in customary international law, which requires States to perform the agreements (treaties) they entered into in good faith. The foundation of international treaty law is the consent of States. Since States are expected to become parties to international treaties with informed consent they cannot delay or deny the timely implementation of obligations arising from their membership to those instruments.<sup>30</sup>

Sovereign states nonetheless can delegate the task of national implementation among its different organs, such as to the legislature, the executive and the judiciary, as necessary and appropriate. The Legislature should enact necessary laws whereas the Executive should take the policy decisions for such enactments. The Executive is responsible in executing the laws and applying them to real situations. Necessary interpretations of the laws should be obtained from the judiciary while the violations

28 See the above discussions on this.

29 James G Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 850 IRRC 313.

30 *pacta sunt servanda* is one of the cornerstone principles of international law which require the State parties of international obligations to duly discharge their responsibilities undertaken. This Latin phrase may be translated in simple as 'treaties shall be complied with'. In light of this universal bedrock principle, the high contracting parties should comply with IHL treaty law obligations.

of laws should be submitted for adjudication before the courts with necessary jurisdiction. If any State is not having the required capacity or is unable to discharge its national level obligations, such States are encouraged to resort to the international level mechanisms set forth for effective implementation of IHL.<sup>31</sup>

In many international conferences organised by the ICRC, participating States have widely agreed that ‘third States’, which, do not take part in an armed conflict are bound by a legal obligation to neither encourage a party to an armed conflict to violate international humanitarian law nor take action that would assist in such violations.<sup>32</sup> At the ‘2003 Conference of the Red Cross and Red Crescent on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, the participating States acknowledged a positive obligation on States not involved in an armed conflict to take action (either unilaterally or collectively) against States who are violating IHL.<sup>33</sup> Although majority of the participants considered this to be a moral responsibility this constitutes a legal obligation cast on State parties to Geneva Conventions under Common Article 1.<sup>34</sup>

### 1.3.2 Enacting Necessary Domestic Laws

It is imperative for States to enact national penal legislation to punish violations of international humanitarian law, during and after an armed conflict. Prosecution of war criminals should be done without fail to foster justice to the victims and their families and also to achieve a deterrent effect during armed conflicts. Hence, the State parties to Geneva Conventions are under an undeniable responsibility to create conditions in their jurisdictions that are conducive to apply IHL principles in accordance with their treaty law obligations. As stated above, Article 80(1) of Protocol I delineates that ‘The High Contracting Parties and the Parties to the conflict shall without delay take

31 See, <[https:// www.icrc.org/en/war-and-law/ihl-domestic-law/documentation](https://www.icrc.org/en/war-and-law/ihl-domestic-law/documentation)> accessed 10 June 2019.

32 This negative obligation is explained by referring to prohibited actions such as the transfer of arms or sale of weapons to a State who is known to use such arms or weapons to commit violations of international humanitarian law. See, Regional Conference of the Red cross and Red Crescent on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Geneva, Switzerland, 2003, <<http://www.icrc.org/>> accessed 12 June 2019.

33 *ibid.*

34 States expressed this positive obligation, for example, in the Final Declaration of the International Conference for the Protection of War Victims in 1993: ‘We affirm our responsibility, in accordance with Article 1 common to the Geneva Conventions, to respect and ensure respect for international humanitarian law in order to protect the victims of war. We urge all States to make every effort to: [...] Ensure the effectiveness of international humanitarian law and take resolute action in accordance with the law, against States bearing responsibility for violations of international humanitarian law with a view to terminating such violations’. See, International Review of the Red Cross, September-October 1993, ICRC, Geneva. Also, see the responsibility of Regional Conference of the Red Cross and Red Crescent on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Geneva, Switzerland, 2003, <<http://www.icrc.org/>> accessed 12 June 2019.

all necessary measures for the execution of their obligations under the Conventions and this Protocol.<sup>35</sup> States parties to this protocol thus needs to enact necessary laws and to make their domestic laws sufficiently in place to penalise the grave breaches outlined in Geneva Conventions and the Protocol I with required severity. Since this provision is now a customary law principle irrespective of the nature of the armed conflict States are under an obligation to enact necessary domestic laws and to designate the judges and prosecuting officers with needed authority to try and punish the perpetrators of the violations of these provisions.<sup>36</sup> Rule 139 of the ICRC Customary IHL states that ‘each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control’. This rule is applicable to both types of armed conflicts. This obligation to respect and ensure respect for IHL is found in several military manuals.<sup>37</sup> The *Democratic Republic of the Congo v Uganda* case decided by the ICJ has supported this rule.<sup>38</sup> Common Article 3 of the Geneva Conventions set out this obligation and extended it to armed opposition groups to respect, as a minimum, certain rules of IHL applicable in such armed conflicts. This requirement is also laid down in the Hague Convention for the Protection of Cultural Property and its Second Protocol and in Amended Protocol II to the Convention on Certain Conventional Weapons. The ICRC has required this obligation to be fulfilled by all parties in non-international armed conflicts such as in Afghanistan, Angola, Bosnia and Herzegovina, Somalia and the former Yugoslavia.<sup>39</sup>

### 1.3.3 No Impunity for IHL Violations

Punishing the perpetrators of violations of IHL principles without fail is another requirement for effective implementation of IHL. Before the establishment of the international Criminal Court in 1998, *ad hoc* measures were taken at the regional and international level to ensure that serious violations of IHL be punished. As a result, well developed case law jurisprudence is available now based on the decisions of such international military tribunals and hybrid tribunals set up in different places.<sup>40</sup> This

35 See, Article 80(1) of Protocol I.

36 See the above discussion on the customary law nature of the Protocol I.

37 See, for an example the military manuals of Argentina, Australia, Belgium, Benin, Cameroon, Canada, Colombia, Congo, Croatia, Ecuador, El Salvador, Germany, Israel, Italy, Kenya Netherlands, New Zealand Philippines (ibid., §§ 43–44), Russian Federation, Spain, Switzerland, United Kingdom and United States.

38 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, (2000) ICJ Reports.

39 See, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter40\\_rule139](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter40_rule139) accessed 06 May 2019.

40 After the Second World War for the first time in the history, Nuremberg and Tokyo War Crimes Tribunals were set up to prosecute and punished the war criminals of the defeated countries. Though the best way of prosecuting the alleged offenders is through the domestic criminal justice system when the States are unwilling or not able to use their own laws and court system to prosecute the offenders, there should be an alternative system of prosecution beyond the domestic level. In 1990s the UN Security Council set up the *ad hoc* International Criminal Tribunal for the Former Yugoslavia and for Rwanda



commitment should come from all the States. When all the States commit to prosecute and punish the perpetrators of human rights atrocities it will create an era of complete and permanent end to impunity despite it being an arduous challenge.

### **1.3.4 Implementing the International Fact-Finding Commission**

Article 90 of the Protocol I provides for the establishment of an International Fact-Finding Commission. This Commission was established to secure the guarantees afforded to the victims of armed conflicts as pursuant to the provisions of the Additional Protocol I of 1977. In this backdrop, the main purpose of this establishment is to investigate allegations of grave breaches and serious violations of international humanitarian law. This Commission was officially constituted in 1991 as a permanent international body to be used to ensure the effective implementation of international humanitarian law. Unfortunately it has not yet become operational. This Commission has the power and mandate to 'inquire 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 and also to facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and the Protocol.'<sup>41</sup>

The Commission has that competence if the States parties to the proceedings have deposited the appropriate declarations accepting its competence. The Commission has received support and encouragement through a number of resolutions, declarations, recommendations and guidelines adopted by international institutions and bodies.<sup>42</sup> For an example, the United Nations General Assembly has adopted three resolutions acknowledging the competence of the International Fact Finding Commission, Resolutions 55/148 of 2000, 57/ 14 of 2002 and 59/36 of 2004. The UN Security Council too has adopted the Resolution 1265 of 1999 with reference to this Commission. However, mainly due to the lack of will of States to be subjected to international scrutiny this Commission is not operational yet.<sup>43</sup>

### **1.3.5 Education, Instructions and Dissemination of knowledge**

Educating all the stakeholders on applicable principles of IHL is paramount. Dissemination of knowledge is one of the integral pre-requisites of the overarching project of IHL implementation. Rule 143 of the ICRC Customary Law study also requires the dissemination of IHL among the Civilian Population both in international and non-international armed conflicts.

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to prosecute the perpetrators of human rights and humanitarian violations occurred in the territories of the Former Yugoslavia, and in Rwanda. Considering the problems of having temporary tribunals, the Rome Statute of the International Criminal Court (ICC) was adopted in 1998. However, the scope of this chapter does not allow a detailed discussion on the jurisprudence of these courts and tribunals.

41 See, International fact Finding Commission, Fact Sheets and Advisory Services, ICRC, Geneva, <<http://www.icrc.org/>> accessed 12 June 2019.

42 *ibid.*

43 Frits Kalshoven, 'The International Humanitarian Fact-Finding Commission: A Sleeping Beauty?' <[http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5TLESB/\\$File/Frits%20Kalshoven%202.pdf](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5TLESB/$File/Frits%20Kalshoven%202.pdf)> accessed 21 May 2019.

Making the affected parties familiar with the principles of IHL takes time. Both civilians and the military personnel should be provided with the opportunity to be acquainted with the rules of humanitarian law through different ways. When individuals breach IHL principles they must bear individual responsibility for what they did and should be subjected to penal sanctions. In contrast, military commanders are under an obligation to do everything possible to prevent IHL breaches by their subordinates. Issuing accurate instructions to the armies at war is essential for successful implementation of IHL. Hence, it is the responsibility of commanders to give lawfully correct orders to their subordinates. A commander who neglects to give the necessary instructions or allows to breach IHL provisions should be responsible under superior/commanders responsibility. If they fail in issuing lawful orders they will be held responsible under command responsibility.<sup>44</sup>

However, dissemination and education could be better pursued in peacetime, targeting various sectors including: politicians, opinion makers, academics, military personnel, youth, civil society, media, and the general public.<sup>45</sup> Successful campaigns by civil society will add a positive pressure on States to focus on genuine measures needed for effective implementation of their obligations. Also, such civil society activism may deter States giving aid to violating States.

### **1.3.6 Role of National IHL Committees**

Setting up of a national IHL Committee is beneficial in particular in ensuring the comprehensive implementation of international humanitarian law.<sup>46</sup> Given the expertise and the involvement in the Government, the members of such a Committee are expected to commit to work towards securing the essential guarantees laid down for the victims of armed conflict. The Committees have to demonstrate that the State is taking steps to fulfill its fundamental obligation to respect and ensure respect for IHL.<sup>47</sup> Although the Geneva Conventions or the Additional Protocols do not require

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44 See the cases decided in ICTY, ICTR, and the ICC, which held that the Commanders are accountable for issuing unlawful orders to their subordinates. For an example, in Tadic (ICTY) and Jean Paul Akayesu (ICTR) cases, commanders were held guilty under superior responsibility for ordering, aiding and abetting the violations of IHL. However, the Appeal chamber of the ICC decided to acquit Bemba Gombo from the charges based on superior responsibility reversing the trial Chamber judgments given by convicting him for issuing unlawful orders to his soldiers.

45 Regional Conference of the Red cross and Red Crescent on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Geneva, Switzerland, 2003, [www.icrc.org](http://www.icrc.org). accessed on 12 June 2019.

46 Some States have already created National IHL Committees or National Inter-ministerial Working Groups. Their purpose is to advise and assist the government in implementing and spreading knowledge of IHL. Setting up such committees has been advocated by the International Committee of the Red Cross, the Intergovernmental Group of Experts for the Protection of War Victims and the 26th International Conference of the Red Cross and Red Crescent (Geneva, 1995), <<http://www.icrc.org/>> accessed 20 May 2019.

47 ICRC Fact Sheets on National Committees for the Implementation of International Humanitarian Law, <<http://www.icrc.org/>> accessed 20 May 2019.

such a committee to be set up, National IHL Committees can be used to create a culture of respecting and implementing IHL principles.<sup>48</sup> The membership of such a committee may be varied based on the context, in which it is created. The organization and objectives of a national committee must be determined by the State at the time of the committee's formation. However, a national IHL committee requires a wide range of expertise and therefore should include representatives of the government ministries concerned with implementing IHL,<sup>49</sup> representatives of national law making bodies, judiciary, armed forces, the experts of the subject matter (academicians and practitioners in the field of IHL and human rights) and personnel who engage in humanitarian work. Such a diverse group of experts could be a good combination to represent different but relevant interests and commitment in the committee.<sup>50</sup>

The documents produced by the ICRC on the creation of National IHL Committees expect the following characteristics in the National Committees:<sup>51</sup>

1. The Committee should be able to evaluate existing national law in the light of the obligations created by the Conventions, Protocols, and other instruments of IHL.
2. Monitoring the implementation of IHL at the national level, making recommendations for further implementation of IHL and ensure it is applied. Such efforts may require proposing new legislation or amendments to existing law, coordinating the adoption and content of administrative regulations, or providing guidance on the interpretation and application of humanitarian rules.
3. Promoting activities with regard to dissemination of knowledge of IHL could be another task of the Committee.<sup>52</sup>

In Sri Lanka a national IHL Committee is set up. It is expected to work closely with the ICRC delegation in Colombo. It is yet to include academicians, who are familiar with IHL principles.<sup>53</sup>

48 It is therefore entirely up to the State concerned to determine how it is created, how it functions, and who are its members.

49 It is useful to include representatives from Ministries with mandates to deal with IHL issues such as include Defence, Foreign Affairs, Internal Affairs, Justice, Finance, Education and the Culture.

50 ICRC Fact Sheets on National Committees for the Implementation of International Humanitarian Law, <<http://www.icrc.org/>> accessed 20 May 2019.

51 This section is mainly based on the information available in the official website of the ICRC.

52 National IHL Committees are expected to conduct studies, propose activities, and assist in making IHL more widely known. The committee should therefore be involved in instructing the armed forces in this domain, teaching it at various levels of the public education system and promoting the basic principles of IHL among the general population. ICRC Fact Sheets on National Committees for the Implementation of International Humanitarian Law, <<http://www.icrc.org/>> accessed 20 May 2019.

53 This is the personal opinion of the author.

## 1.4 Implementing the Geneva Conventions of 1949 at the National Level

This section of the Chapter fundamentally examines the national implementation of Geneva Conventions of 1949. National implementation of the provisions of the Geneva Conventions requires the member States to adopt corresponding local laws and regulations. In addition, the States are obliged to disseminate knowledge of the Conventions and Protocols as widely as possible and to translate them to national languages. Owing to the broad range of issues associated with these responsibilities, comprehensive implementation of the rules of international humanitarian law (IHL) requires coordination and support from all the government departments and other entities concerned.<sup>54</sup>

The International Committee of the Red Cross (ICRC) plays a key role in the national implementation and enforcement of IHL. The ICRC has prepared ‘Guidelines for Assessing the Compatibility between National Law and Obligations under Treaties of International Humanitarian Law’ with the purpose of evaluating national measures to implement international humanitarian law. These Guidelines allow the national authorities of a State party to verify which measures have already been taken and which remain to be taken in order to honour the obligations undertaken by the said State. It is further important to assess the level of national implementation of IHL treaties by respective member States in order to plan and organize what must be done to bring national law fully in line with international treaties.<sup>55</sup>

As discussed in the above sections of this Chapter, Geneva Conventions of 1949 provides protection for the ones who are either no longer participating in the armed conflict or to the people who do not directly take part in hostilities. This protection is thus extended to but not limited to categories of people such as civilians, the wounded, ship wrecked, sick soldiers who have laid down their arms due to incapacitation and to the prisoners of war. There are four conventions: the first Geneva Convention protects wounded and sick soldiers on land during war, the second Geneva Convention protects wounded, sick and shipwrecked military personnel at sea during war, the third Geneva Convention applies to the protection of the prisoners of war and the fourth Geneva Convention protects the civilians at times of war. The context of Diplomatic Conference convened for the establishment of international conventions for the protection of war victims of 1949 is noteworthy. It was convened in the immediate aftermath of the second World War during which millions of people (either as civilians or as former combatants who gave up their weapons due to reasons such as being wounded, shipwrecked, surrendered or captured as prisoners of war) were subject to serious violations of human rights and humanitarian law. The dire need to prevent or mitigate such violations was a fundamental concern of the time.

54 National Committees for the Implementation of International Humanitarian Law ICRC Database on National Implementation of International Humanitarian Law, <<http://www.icrc.org/>> accessed 20 May 2019.

55 Guidelines for Assessing the Compatibility between National Law and Obligations under Treaties of International Humanitarian Law. ICRC Publication, <<http://www.icrc.org/>> accessed 20 May 2019.

## 1.4.1 Application and Implementation of IHL Provisions in Non-international Armed Conflict Situations

Violations of all the provisions of the Geneva Conventions do not carry the same weight. Drafters of the Geneva Conventions have designated certain provisions as grave breaches. A corresponding provision is set forth to ensure that the prerequisites for successful implementation of these provisions are well in place. For an example, Articles 49 and 50 of the First Convention, Articles 50 and 51 of the Second Convention, Articles 129 and 130 of the third Convention, Article 146 and 147 of the Fourth Convention. These provisions prohibits the commission of the designated breaches in armed conflicts defined by Common Article 2 of the Geneva Conventions. In essence, in the case of grave breaches, which would occur in international armed conflict situations, the main obligations of the national state are

to enact legislation providing for effective penal sanctions, to search for persons alleged to have committed or to have ordered to be committed such grave breaches and to bring such persons regardless of their nationality before its own courts, unless the State prefers to hand over such persons for trial to another High Contracting Party, provided such State has made out a prima-facie case.<sup>56</sup>

Accordingly, each State party is under a strong obligation to take measures necessary to try and punish the perpetrators who have violated the grave breaches provisions of Geneva Conventions.

The grave breaches outlined in each of the Geneva Conventions, in identical terms, are stated below:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person

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56 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 the following Article.

‘Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered 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, provided such High Contracting Party has made out a prima facie case’.

See, Article 49 of the First Convention, Article 50 of the Second Convention, Article 129 of the third Convention and Article 146 of the Fourth Convention.

to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.<sup>57</sup>

In addition to the list of designated grave breaches stipulated in Geneva Conventions, the Additional protocol I of 1977 too presents a supplementary list of grave breaches in Articles 11 and 85.

It is important to note that the definition of war crimes stipulated in the Rome Statute of International Criminal Court of 1998 includes under separate heads both 'grave breaches' according to the Geneva Conventions of 1949, and 'other serious violations of the laws and customs' applicable in international, as well as in non-international armed conflicts. Further, the list of crimes in this category includes the additional grave breaches set out in Protocol 1.

The Statute also includes serious violations of Article 3 common to the four Geneva Conventions of 1949 as war crimes. This extension of war crimes to non-international conflicts is a remarkable progress.

#### **1.4.2 Implementation of Common Article 3 in Non-international Armed Conflict Situations**

Article 3 common to all the Geneva Convention is the sole provision included therein to regulate armed conflicts not of an international character. It is famously called a mini convention within the main Geneva Convention/s considering its high level impact. Common Article 3 is the only article included in the Geneva Conventions to regulate non international armed conflicts. However, despite the reference made to 'armed conflicts not of an international character' as the field of application of this article, it does not provide a definition of this type of armed conflicts, which occur in the territory of one of the High Contracting Parties. Notwithstanding this lacuna, Common Article 3 imposes strong obligations on each party to the conflict specified therein in a mandatory language:

Each party to the conflict shall be bound to apply, as a minimum, the following provisions:

This article requires to protect 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 in all circumstances be

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57 See, Article 50 of the First Convention, Article 51 of the Second Convention, Article 130 of the third Convention and Article 147 of the Fourth Convention.

treated humanely, without any adverse distinction. Common Article 3 also provides a list of prohibited acts against the protected persons mentioned in the above paragraph.<sup>58</sup>

One of the most prominent parts of this Article relevant to the discussion of this Chapter is stated below;

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.

Common Article 3 requires both State parties and non-state actors, if they engage in hostilities in armed conflicts not of international character, to implement the obligations stipulated in this Article and the other provisions. However, because these armed conflicts occur within the territorial boundaries of a Sovereign State, such States are often reluctant to be bound by international laws. They may consider it as leading to undermine their sovereignty. Hence, it is apparent that States frequently show reluctance to acknowledge that a situation of violence amounts to an internal armed conflict. Also, they are not willing to recognise the armed groups with whom they engage in hostilities as a party to a conflict.<sup>59</sup>

Another practical difficulty arising with regard to non-State actors is that they are not motivated to respect IHL principles given that implementation of their IHL obligations does not help them in avoiding punishment under domestic law for their mere participation in the conflict.<sup>60</sup> Participants of the ‘2003 Regional IHL Conference of the Red cross and Red Crescent on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’ held in Geneva, Switzerland advocated for the encouragement of special agreements between States and armed groups, such as those envisaged under common Article 3(3) of the Geneva Conventions. They considered such agreements as one of the most powerful ways under the current treaty regime to better regulate non-international armed conflicts.<sup>61</sup> When the State is reluctant to enter into any agreement with the armed groups a ‘unilateral declaration’ by the armed group of their commitment to comply with international humanitarian

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58 ‘(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’.

59 Outcome Documents of the Red cross and Red Crescent on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Geneva, Switzerland, <<http://www.icrc.org/>> accessed 20 May 2019.

60 *ibid.*

61 As agreed by the participants, these Special agreements provide some incentive for the non State actors to comply with IHL principles. The primary obstacle would be the willingness of States to enter into such agreements, in particular where the State denies that the violence has reached the level of internal armed conflict or where the State refuses to acknowledge the armed group as party to the conflict. *ibid.*

law might is proposed to be pursued.<sup>62</sup> However, armed groups may not be sincere in making such a declaration which could be done for political motives without real commitment. Hence, the proposed unilateral declaration could be combined with a verification mechanism that might supervise compliance with IHL in the conflict.<sup>63</sup> Armed groups who engage in hostilities in non-international armed conflicts could be encouraged to adopt an internal code of conduct or disciplinary code incorporating IHL. Such a code if adopted would lead to greater implementation of IHL norms by the armed group and the positive results could be visible in their training of their cadres.<sup>64</sup> This would lead to boost their public image and recognition of the causes of resorting to armed activities.

Common Article 3 of the 1949 Geneva Conventions is believed as turned to be customary law. The ICRC's Customary Law Study too confirmed that the substantive provisions of Common Article 3 are binding as customary law.<sup>65</sup> In *Nicaragua v. USA* case, International Court of Justice authoritatively declared about this gradual transformation of Common Article 3 into part of customary law.<sup>66</sup> The International Criminal Tribunal in Yugoslavia too held similarly in *Dusko Tadic* case.<sup>67</sup> It was held in the *Naletilic and Martinovic* Case that 'it is well established that Common Article 3 has acquired the status of customary international law.'<sup>68</sup> The International Criminal Tribunal for Rwanda also affirmed the customary law nature of Common Article 3 in the *Akayesu* case.<sup>69</sup> These authoritative sources confirm that the substantive provisions of Common Article 3 have become customary law and bind all parties to an armed conflict.

Rule 144 of the ICRC Customary Law Study requires the States to exert their influence, to the degree possible, to stop violations of IHL in both types of armed conflicts.

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62 This was already utilized by the Geneva Call with regard to the Ottawa Treaty banning anti-personnel landmines. The aim of such a declaration is to provide a self-disciplining effect on the armed groups, in particular where groups are concerned about their public image and reputation.

63 *ibid.*

64 The views of the participants of the '2003 Regional IHL Conference of the Red cross and Red Crescent on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' held in Geneva.

65 See, Jean-Marie Henckaerts and Louise Doswald-Beck, (eds) Customary International Humanitarian Law, ((Cambridge University Press, 2005).

66 The International Court of Justice affirmed in the Nicaragua case that: Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. International Court of Justice (ICJ), Case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*) 27 June 1986, Judgment, paras. 218 -219.

67 See International Criminal Tribunal for Yugoslavia (ICTY), *Dusko Tadic* case that Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (IT-94-1-A, 2 October 1995) para 98.

68 See International Criminal Tribunal for Yugoslavia (ICTY) *Prosecutor v Naletilic and Martinovic*, (IT-98-34-T 31 March 2003). para 228.

69 See International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v Akayesu* (ICTR-96-4-T September 2 1998) paras 608-609.



## 1.5 Continued Relevance of Implementation of IHL in Sri Lanka in the Post- Armed Conflict Period

Sri Lanka witnessed a protracted armed conflict for about three decades. This armed conflict falls into the category of non-international armed conflict under international humanitarian law. According to Common Article 3 of four Geneva Conventions, an armed conflict not of an international character is a non-international armed conflict. The ICTY affirmed that a non-international armed conflict exists when there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.<sup>70</sup> Article 1 of the Additional Protocol II of 1977 defines a non-international armed conflict as follows:

...as of having taken 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.

Parties engaged in hostilities in the armed conflict of Sri Lanka were the Government armed forces and the dissident armed group named the Liberation Tigers of Tamil Eelam (the LTTE). Although there was no official date of commencement of this armed conflict it is said that the hostilities were ended with the assassination of the leader of the LTTE Velupillai Prabhakaran in May 2009.<sup>71</sup> Considering the duration, intensity and the control maintained by the LTTE over certain areas of North and East Provinces it can be said that the war situation that prevailed in Sri Lanka was a non-international armed conflict.

At the end of the hostilities, Sri Lanka was subject to much criticism based on alleged violations of IHL principles during the war period. The international community demanded that the Government of Sri Lanka provide an assessment of what really happened in the armed conflict. The need to evaluate the continued relevance of IHL in a post armed conflict situation became apparent in this context.

### 1.5.1 Sri Lanka's Treaty Obligations

Before or after an armed conflict, relevant IHL principles should be incorporated into domestic legal systems in order to punish the offenders who committed IHL violations during the period of war. Once a war is started there will be practical difficulties to include international legal obligations into local laws. Responsible authorities may be unwilling to pass new laws during war situations due to numerous reasons. Therefore, pre or post war periods are ideal for adopting new laws to try and punish IHL viola-

70 See, *Prosecutor v Dusko Tadic* (ICTY), Judgement, 15 July 1999 *op cit*.

71 Humanitarian Operation Factual Analysis July 2006 – May 2009, Ministry of Defence Democratic Socialist Republic of Sri Lanka, July 2011.  
<[https://web.archive.org/web/20160304055103/http://www.defence.lk/news/20110801\\_Conf.pdf](https://web.archive.org/web/20160304055103/http://www.defence.lk/news/20110801_Conf.pdf)> accessed on 10 May 2019.

tions. Disciplinary regulations applicable to the armed forces should be prepared and documented in such a period. Courts with relevant jurisdiction should be designated to prosecute the alleged offenders of IHL violations. However, there may be legal barriers for passing retrospective penal laws in the aftermath of a war to regulate things that happened in the past, unless the laws incorporate customary international law principles.<sup>72</sup>

Incorporation of international legal principles into domestic legal systems explains the extent to which municipal courts will give effect within the domestic system to rules of international law which are contrary or not contrary to domestic law. The extent of incorporation is dependent upon the legal systems and constitutional provisions of each individual country. The incorporation of IHL into domestic legal systems can be better done in times of peace.<sup>73</sup> Sri Lanka is generally believed a dualistic country and as a result it is required to adopt an enabling legislation by the Sri Lankan Parliament to incorporate domestic law. Occasionally, the judiciary of the country has attempted to incorporate certain international law principles through judicial activism and broad interpretation.

Sri Lanka has become a State party to Geneva Conventions of 1949 in 1959. Also, it has signed the Final Act of the Diplomatic Geneva Conference 1974-1977 in 1977. In 1954, the country has acceded to Geneva Protocol on Asphyxiating or Poisonous Gases and of Bacteriological Methods of 1925. The list of treaties pertaining to methods and means of warfare ratified/acceded by Sri Lanka includes inter alia the following: Convention on the prohibition of Biological Weapons, 1972 in 1986, Convention prohibiting Certain Conventional Weapons (CCW), 1980 in 2004, Protocols I, II and III of 1980 to the CCW Convention in 2004, Convention prohibiting Chemical Weapons, 1993 in 1994, CCW Protocol IV, 1995 in 2004, Anti-Personnel Mine Ban Convention, 1997 in 2017 and Convention on Cluster Munitions, 2008 in 2018.<sup>74</sup> This long list of ratifications/accessions provides evidence that Sri Lanka's commitment towards effective implementation of IHL rules is reasonably satisfactory. This strong record further provides evidence of State practice and *opinio juris*; the essential elements needed to establish customary international law. Therefore, it is clear that in addition to the treaty law obligations Sri Lanka determines to be a contributing country to create essential customary international humanitarian rules for the present and the future.

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72 This argument was brought in Sri Lanka in the case *Sepala Ekanayake v. Attorney General* 1 Sri LR 46 (14 January 1988).

73 The scope of this article does not allow for a detailed discussion on the different theories involved in the incorporation of international law principles into a domestic legal system.

74 These information are available in the official website of the ICRC. <<http://www.icrc.org/>> accessed 12 June 2019.

## 1.5.2 Geneva Conventions Act of Sri Lanka

The Geneva Conventions Act, No. 4 of 2006 was adopted on 26 February 2006 in order to incorporate selected provisions of the Geneva Conventions of 1949.<sup>75</sup> This Act is considered the enabling legislation adopted by Sri Lanka in accordance with her obligations as a State party to the Geneva Conventions. 2006 Act was published in the Official Gazette on 3 March 2006.<sup>76</sup> Article 1(1) of the Act stipulates the date of operation of the Act as follows:

This Act may be cited as the Geneva Conventions Act, No 4 of 2006 and shall come into operation on such date as the Minister may by Order published in the Gazette appoint (hereinafter referred to as the “appointed date”).

The purpose of this Act was to incorporate IHL principles of the four Geneva Conventions to Sri Lanka’s domestic legal system. Although this Act has included only a few articles of the Geneva Conventions it is significant to note that it has incorporated grave breaches provisions of the four Geneva Conventions.<sup>77</sup> The Geneva Conventions Act of Sri Lanka has followed the format and the contents of the Indian Act of 1963 to a greater extent. However, the Indian Act has additional provisions than the Sri Lanka Act.

This Act of Sri Lanka provides provisions on how to punish the grave breaches of the four Geneva Conventions. On becoming a party to Geneva Conventions, a State must enact national legislation prohibiting and punishing grave breaches of the Geneva Conventions either by adopting a separate law or by amending existing criminal laws. Such legislation must cover all people, regardless of nationality, who commit grave

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75 Preamble of the 2006 Act states that Sri Lanka is a State Party to the First, Second, Third and Fourth Geneva Conventions relating to Armed Conflict and Humanitarian Law having ratified the said Geneva Conventions on February 28, 1959 and the Conventions entered into force in respect of Sri Lanka on February 28, 1959. See Preamble of the Geneva Conventions Act, No. 4 of 2006 <[https://srilankalaw.lk/YearWisePdf/2006/GENEVA\\_CONVENTIONS\\_ACT\\_No\\_4\\_OF\\_2006.pdf](https://srilankalaw.lk/YearWisePdf/2006/GENEVA_CONVENTIONS_ACT_No_4_OF_2006.pdf)> accessed 6 May 2019.

76 Preamble further states that it become necessary to make legislative provision to give effect to Sri Lanka’s obligations under the aforesaid Geneva Conventions. The long title of the Act describes the Act as an Act adopted to give effect to the first, second, third and fourth Geneva conventions on armed conflict and humanitarian law; and to provide for matters connected therewith or incidental thereto. See, the Preamble and the long title of the Geneva Conventions Act, No. 4 of 2006.

77 Article 2(1) Any person, whether a citizen of Sri Lanka or not, who within or outside Sri Lanka (a) commits or attempts to commit; or (b) aids, abets, conspires or procures the commission by any other person of, a grave breach in terms of the relevant Articles of the Conventions .....shall be guilty of an offence. See previous notes on the provisions of grave breaches of four GCs. Violations of grave breaches are considered to be serious offences in IHL. For example, Article 50 of the First Convention, Article 51 of the Second Convention, Article 130 of the Third Convention, Article 147 of the Fourth Convention; and Articles 11 and 85 of the AP I list out the grave breaches of IHL when committed in international armed conflict situations.

breaches or order them to be committed and must include violations that result from a failure to act when under a legal duty to do so. It must cover acts committed both within and outside the territory of the State and must also provide sanctions scaled to the severity of the crimes.<sup>78</sup>The Sri Lankan Act provides that the person/s convicted of an offence where the offence involves the wilful killing of a person protected by any of the aforesaid Conventions should be punished with death. Any other offence should be punished with imprisonment of either description for a term which shall not exceed twenty years.<sup>79</sup> These provisions allow the Courts to punish the violations of the grave breaches provisions of the Conventions with severity.<sup>80</sup>

The Act designates the High Court of Sri Lanka under Article 154P of the Constitution of 1978 for the Western Province in Colombo as the court with jurisdiction to try and punish the violators of the grave breaches provisions stipulated in the Act.<sup>81</sup> However, it is important to note that the scope of the application of grave breaches provisions are limited to international armed conflict situations. Since Sri Lanka is not a party to Additional Protocol I this Act has not incorporated additional grave breaches provisions included in the Protocol I in order to supplement the grave breaches provisions of the Conventions.

The Act sets out the obligation to serve notice of trial of protected prisoners of war and internees on the protecting power or on the prisoner's representative.<sup>82</sup> It further contains provisions on the legal representation of persons brought for trial for a breach of the Act, on appeals by protected prisoners of war and internees, on reduction of sentence and on custody for the purpose of determining whether persons who have taken part in hostilities should be granted prisoner-of-war status in accordance with Article 5 of the Third Geneva Convention.<sup>83</sup> The rights of the accused to be represented by a legal practitioner is a reaffirmation of the human rights of the persons specified in the Act and also satisfactory fulfilment of the obligations undertaken by Sri Lanka

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78 See, Christopher Harland, *The Domestic Implementation and Application of International Humanitarian Law Norms*, ICRC Advisory Service on IHL, <http://www.supremecourt.gov.pk/ijc/Articles/1/3.pdf> accessed 01 June 2019.

79 Article 2(4) (a) and (b).

80 See Article (2) Every offence under this Act shall be a cognizable offence and a non-bailable offence within the meaning and for the purposes of the Code of Criminal Procedure Act, No. 15 of 1979.

81 A State party to the four Geneva Conventions and Additional Protocol I has the obligation to “enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches” of these instruments. The grave breaches regime stipulates that States Parties must search for persons alleged to have committed, or to have ordered to be committed, those violations of the Conventions and Additional Protocol I defined as “grave breaches”. States are also required to bring such persons, regardless of their nationality, before their own courts or hand them over for trial by another State Party concerned.

82 See, Article 7 of the Act.

83 Article 8 of the Act.

under international human rights and humanitarian law. The Act further provides for the prevention and sanction of misuse of the Red Cross emblem and other distinctive emblems.<sup>84</sup>

Although the Act has made the violations of grave breaches provisions of Geneva Conventions offences, punishable in our country, the legislature has taken no steps or not been enthusiastic to incorporate Common Article 3 of Geneva Conventions into our legal system. In some countries, Common Article 3 has been incorporated to their domestic statutes in order to regulate non international armed conflict situations. Sri Lanka was faced with an armed conflict not of an international character for several decades and during that time it has not paid attention to implement the obligations stipulated in this Article in the domestic law of Sri Lanka. However, the customary law character of the Common Article 3 is widely accepted. Hence it could be argued that even in the absence of a corresponding Article incorporated into the Geneva Conventions Act of Sri Lanka, the State is under an undeniable obligation to effectuate where necessary the letter and spirit of the Article due to this customary law character of the Article. As decided in the Sri Lankan case *Sepala Ekanayake v Attorney General*,<sup>85</sup> due to the applicability of the phrase 'according to the general principles of law recognized by the community of nations' included in the proviso of the Article 13(6) of the 1978 Constitution of Sri Lanka the country is under an obligation to duly discharge its international obligations including both treaty law and customary law. It was held in the salutary land mark case named *Bullankulama and Others v Minister of Industrial Development*<sup>86</sup> that Sri Lanka is under an obligation to implement her customary international law obligations even in the absence of a direct provision stipulated in the Constitution or any other Act. Hence, it is argued that the monist nature of customary international law incorporation in Sri Lanka suggested in the *Bullankulama case* can be used to propose that Common Article 3 is accepted as customary law and therefore it can be applied in Sri Lanka in the absence of its direct transformation to our law by way of a statutory provision. Furthermore, due to the widely accepted fact that many IHL treaty provisions, only applicable to international armed conflicts, now having derived the status of customary law these provisions can be applied to non- international armed conflicts as well. It may be further argued that serious violations of laws and customs of war, when they occur, should be punished with the required severity without being bothered as to the non- incorporation of them into our domestic law.<sup>87</sup>

Article 3(4) common to the Geneva Conventions clearly states that application of Article 3 'shall not affect the legal status of the Parties to the conflict'. The application

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84 See further, 'National implementation of international humanitarian law biannual update on national legislation and case law January-June 2006, Reports and Documents' (2006) 88 (863)IRRC 694.

85 *Ekanayaka v The Attorney General*, 1 Sri LR 46, 1988.

86 *Bulankulama v Minister of Industrial Development (Eppawala case)*, S.C. Application No. 884/99 (F/R).

87 See *Prosecutor v Dusko Tadic*, *op cit*.

of IHL to a non-international armed conflict therefore never internationalises the conflict or confers any status to a party to that conflict (other than the international legal personality necessary to have rights and obligations under IHL).<sup>88</sup>

Despite the significant move of adopting the Act in Sri Lanka, it is distressing to note that the Act is not yet operationalised just because the operational date is not yet published in the Gazette as required in this Article.<sup>89</sup> Hence, it poses a daunting task for the national authorities to pay their immediate and serious attention to make it operationalised in the post armed conflict Sri Lanka. However, recently, the 'National Human Rights Action Plan (NHRP) for the Protection and Promotion of Human Rights 2017 – 2021' has referred to the need of operationalising the Geneva Conventions under the broad title of 'Rights of Women'. The required activity named 'to bring the Geneva Conventions Act No. 4 of 2006 into operation by promulgating necessary regulations and also make necessary amendments' is one of the proposed activities to achieve the objective of 'Transitional Justice under the Goal 13A of the NHRP titled gender sensitive justice system. It ensures the protection of rights of victims and the accountability of perpetrators. The responsible agency for the activity is the Ministry of Foreign Affairs and the time duration is mentioned as 'short term'. The Sri Lanka delegation of the ICRC lobbies the relevant government authorities to implement the Act by issuing the required Gazette notification by the Minister of the relevant date of operationalization of the Act.

## **1.6 Responses and Initiatives of Post-Armed Conflict Sri Lanka**

Sri Lanka was subject to much criticism and scrutiny in the aftermath of the armed conflict which ended in 2009, in particular based on alleged violations of IHL committed by the parties to the armed conflict. The 'Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka of 2011' included allegations of blatant violations of international human rights and humanitarian law during the final stages of the Sri Lankan Civil War.<sup>90</sup> This Report included serious allegations which, if proven, indicated that war crimes and crimes against humanity were committed both by the Sri Lankan military and the LTTE during the war in Sri Lanka. The Panel requested the UN Secretary-General to conduct an independent international investigation into the alleged violations of international humanitarian and human rights law

88 Article 49, Geneva Convention; Article 50, Geneva Convention II; Article 129, Geneva Convention III; Article 146, Geneva Convention IV; and Article 85(1), Additional Protocol I

89 See, Article 1(1) states that this Act shall come into operation on such date as the Minister may by Order published in the Gazette appoint (hereinafter referred to as the "appointed date").

90 The Report was produced by a panel of experts appointed by United Nations Secretary-General (UNSG) Ban Ki-moon to advise him on the issue of accountability with regard to any alleged violations of international human rights and humanitarian law during the final stages of the Sri Lankan Civil War. The report is referred to by some as the Darusman Report, after the name of the chairman of the panel Marzuki Darusman.

committed by both sides. The government of Sri Lanka completely rejected the entire report claiming it as fundamentally flawed in many respects. Sri Lanka determined to produce a credible State sponsored report to counter the revelations of the Report of the Secretary-General's Panel of Experts. The result was Sri Lanka's official commission report produced by the Lessons Learnt and Reconciliation Commission.

### **1.6.1 The Report of the Lessons Learnt and Reconciliation Commission (LLRC)**

The Lessons Learnt and Reconciliation Commission (LLRC) was a commission of inquiry mandated to investigate the facts and circumstances which led to the failure of the ceasefire agreement made operational on 27 February 2002, the lessons that should be learnt from those events and the institutional, administrative and legislative measures which need to be taken in order to prevent any recurrence of such concerns in the future, and to promote further national unity and reconciliation among all communities.<sup>91</sup> Following the release of the UN Secretary General's Advisory Panel Report and the calls for international investigation of the allegations of war crimes and violations of international humanitarian law (IHL) made against the LTTE and the Government of Sri Lanka (GOSL), the GOSL has maintained that the LLRC Report would answer its critics. After an 18-month inquiry, the commission submitted its report to the President on 15 November 2011. The report was made public on 16 December 2011, after being tabled in the parliament of Sri Lanka. The report acknowledges important events and complaints that have contributed to the non-international armed conflict of Sri Lanka followed with a series of recommendations to rectify the situations and to bring justice to the victims of the war. It advocated for an acceptable and sustainable political solution. But some critiques pointed out that the Report failed in providing the thorough and independent investigation of alleged violations of international humanitarian and human rights law that the UN and other partners of Sri Lanka have been asking for.<sup>92</sup> Hence, a strong call came from the international community to probe into the allegations based on the violations of IHL levelled against Sri Lanka through the UN Human Rights Council. Such demands strongly requested to establish an independent international investigation in 2012 to examine deeply the alleged war crimes and to bring the alleged perpetrators before justice to be punished with no impunity. Those critical views highlighted that without such an investigation, leading to accountability for the crimes committed at the end of the civil war lasting peace cannot be achieved. However, in 2012, the United Nations Human Rights Commission (UNHRC) issued a statement welcoming the publication of this report. Although this statement pointed out the shortcomings and some problems of the report it urged the GOSL to implement the recommendations included in the Report.

91 The Lessons Learnt and Reconciliation Commission (LLRC) was a commission of inquiry appointed by the then President of Sri Lanka Mahinda Rajapaksa in May 2010. After an 18-month inquiry, the commission submitted its report to the President on 15 November 2011. The report was made public on 16 December 2011, after being tabled in the parliament of Sri Lanka.

92 See the full Report of the Commission, < <https://www.crisisgroup.org/asia/south-asia/sri-lanka/statement-report-sri-lankas-lessons-learnt-and-reconciliation-commission>> accessed 1 June 2019.

A National Action Plan on LLRC was crafted to implement the recommendations of the LLRC Report.<sup>93</sup> Subsequently, it was approved by the Cabinet of Ministers in Sri Lanka. The action plan covers International Humanitarian Issues, Human Rights, Return of Land, and Resettlement, Restitution/ Compensatory Relief and Reconciliation.<sup>94</sup> However, while the implementation of some of the prioritized activities included in the National Action Plan on LLRC was carried out hastily many activities termed as medium term or long term are yet to be achieved.<sup>95</sup>

## **1.6.2 Resolutions Adopted by the UN Human Rights Council from 2015 to 2019**

In 2015 the government of Sri Lanka co-sponsored a resolution<sup>96</sup> adopted by the UN Human Rights Council (UNHRC) titled on ‘Promoting reconciliation, accountability and human rights in Sri Lanka’. Since Sri Lanka was unable to fulfil certain commitments undertaken under the resolution it requested in 2017 for an extension of time to discharge pending obligations of Resolution 30/1/2015.<sup>97</sup>

UNHRC resolution 30/1 required Sri Lanka to establish a judicial mechanism to investigate allegations of violations and abuses of human rights and violations of international humanitarian law. It further required ensuring a credible justice process, which should include independent judicial and prosecutorial institutions led by individuals known for their integrity and impartiality. This proposed judicial mechanism emphasized the importance of participation in a Sri Lankan judicial mechanism of Commonwealth and other foreign judges, defence lawyers and authorized prosecutors and investigators.<sup>98</sup> The Sri Lankan community in general highly opposed a hybrid tribunal or a judicial mechanism which is comprised of foreign judges.<sup>99</sup>

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93 The Plan drafted by a committee headed by the Secretary to the President Lalith Weerunga who was appointed by the Cabinet to oversee the implementation of LLRC recommendations.

94 The Plan lists out implementation of recommendations according to Activity, Key Responsible Agency, Key Performance Indicator and Timeframe.

95 The scope of this research does not allow for a detailed discussion on the outcome of this Plan.

96 UN Human Rights Council (UNHRC) Resolution 30/1/2015 on Promoting reconciliation, accountability and human rights in Sri Lanka, See <<https://www.mfa.gov.lk/wp-content/uploads/2018/03/RES-30-1.pdf>> accessed 6 May 2019.

97 In 2017 Sri Lanka received a two-year extension to implement its own commitments. At its fortieth session, the UNHRC adopted a new resolution on 21 March 2019 co-sponsored by the government of Sri Lanka, giving it a further two years to implement outstanding promises in full.

98 In 2015, the then UN High Commissioner on Human Rights, Zeid Ra’ad Al Hussain called for the establishment of a hybrid special court adding, ‘a purely domestic court procedure will have no chance of overcoming widespread and justifiable suspicions fueled by decades of violations, malpractice and broken promises. <<https://reliefweb.int/report/sri-lanka/sri-lanka-new-human-rights-council-resolution-must-lead-faster-progress>>

99 This has now turned to be a highly politicized matter in Sri Lanka and many politicians of opposite parties vehemently criticize this as an attempt of undue intimidation on Sovereignty of Sri Lanka.



On 20 March 2019, Sri Lanka's Foreign Minister responding to questions on Sri Lanka's implementation of resolution 30/1 stated that

The Government of Sri Lanka at the highest political levels, has both publicly and in discussions with the present and former High Commissioners for Human Rights and other interlocutors, explained the constitutional and legal challenges that preclude it from including non-citizens in its judicial processes. It has been explained that if non-citizen judges are to be appointed in such a process, it will not be possible without an amendment to the Constitution by 2/3 of members of the Parliament voting in favour and also the approval of the people at a Referendum.<sup>100</sup>

With this impasse, no further action was taken by the GOSL to probe in to the alleged IHL violations. Now Sri Lanka is heading for a series of elections including the presidential election, over-due provincial council elections and the general elections. The political climate in the country is rather unhealthy for the current ruling party to commit on UNHRC resolutions. Implementation of the commitments under these resolutions seems unattainable in Sri Lanka given the country's fragile political landscaping.

## 1.7 Conclusions

The implementation of IHL at the national level is first and foremost the responsibility of States. This holistic endeavour requires Sovereign States to take several legal and political actions. At present the four Geneva Conventions of 1949 being the universally ratified set of IHL treaties of much impact on all the categories of armed conflicts, it is pivotal for member State to take diligent and overarching actions to make the provisions of the Conventions implemented in their respective territories. As observed in the foregoing sections, this responsibility is set forth in common Article 1 of the Geneva Conventions, which requires States to respect and ensure respect for the Conventions in all circumstances. As noted above, as a State party of the Geneva Conventions of 1949 Sri Lanka is under an obligation to incorporate the provisions of the Conventions. In spite of the enactment of the Geneva Convention Act of 2006 by the legislature of Sri Lanka, this Act is not yet operationalised due to the failure of the relevant Minister to duly issue the required Gazette notification with the date of operation of the Act. Nevertheless, it was further noted that Sri Lanka has taken several positive steps to disseminate the knowledge of IHL among many of the stakeholders with the assistance of the ICRC and set up a Directorate of Human Rights and Humanitarian Law in the Sri Lanka Army, attempted to fulfil some of the requirements included in the Resolutions adopted by the Human Rights Council with regard to the breaches and violations alleged to be committed during the non-international armed conflict occurred in Sri Lanka.

Sri Lanka is neither a party to Protocol I nor Protocol II additional to the Geneva Conventions. The growing numbers of member States to these two instruments demon-

100 See, <<https://www.amnesty.org/en/latest/news/2019/03/sri-lanka-new-human-rights-council-resolution-must-lead-to-faster-progress/>> accessed 12 June 2019.

strate the enthusiasm shown by States to be bound by the updated provisions of IHL. In particular, on becoming party to Protocol I additional to the Geneva Conventions a State accepts the additional grave breaches provisions to be incorporated to their penal laws. According to Article 90 of the Protocol I, they also can accept the competence of the International Humanitarian Fact-Finding Commission. Therefore, Sri Lanka is currently not in a position to include any legal position to give effect to these important provisions set out in the Protocol I. Sri Lanka's reluctance of being a State party to the Protocol II may reflect the lack of political will to accept the legal obligations stipulated in the Protocol, which regulate the non-international armed conflicts. Sri Lanka as a country which was affected by an armed conflict of this character may have a fear about the political consequences than the legal consequences. However, lobbying the governments in power to consider being a party to these two Protocols is highlighted in this chapter.

Becoming a party to IHL treaties and related instruments and adopting appropriate implementing legislation is not sufficient enough to guarantee respect for IHL. States must prosecute and punish those who are responsible for serious violations of IHL. This is one of the greatest challenges for Sri Lanka. In the backdrop of the UN Human Rights Council Resolutions adopted on Sri Lanka, the State currently faces international and domestic ramifications on its inability to try and punish the alleged crimes committed during the armed conflicts. Unlike in the immediate aftermath of the end of hostilities, Sri Lanka has been able to improve the independence of the judiciary and the administration of justice toward the victims of crimes. Therefore, this progression could be used to apply the relevant IHL principles into practice through the domestic criminal justice system if Sri Lanka continues to deny the international calls for a hybrid tribunal composed with foreign judges and prosecutors.

Under the obligations towards effective national implementation of IHL, States must take all feasible measures to prevent and stop violations whenever they occur, especially by ensuring that effective sanction mechanisms are in place. Therefore, effective preventive measures are well in place prior to the escalation of hostilities. Sri Lanka should learn lessons from her past. As required by the relevant provisions of the Geneva Conventions, a State must take all the necessary prerequisites of outlawing the serious violations of IHL within her country. More attention must be paid to educate the parliamentarians, law enforcement officials and the judges about the need to arrest, prosecute and punish perpetrators of IHL violations. These requirements basically demands to be done through a system of retributory justice. It is wished to emphasize that the violations of IHL provisions that are not considered as grave breaches should be subjected to undergo through a system of restorative justice. Peoples need to know the truth; efforts of memorialization, right to be heard and the need to rehabilitate the wrongdoers and reintegrate them to society are some of the unfulfilled challenges.

States are required to take the following specific actions to prosecute and punish war crimes: First, a State must enact national legislation prohibiting and punishing grave breaches of the Geneva Conventions and Additional Protocol I, either by adopting a separate law or by amending existing criminal laws. Such legislation must cover

all people, regardless of nationality, who commit grave breaches or order them to be committed and must include violations that result from a failure to act when under a legal duty to do so. It must cover acts committed both within and outside the territory of the State. It must also provide sanctions scaled to the severity of the crimes. Second, a State must search for those alleged to be responsible for grave breaches. It must prosecute such people before its own courts or extradite them for trial in another State. It must investigate and, if appropriate, prosecute all war crimes allegedly committed by its nationals or armed forces, or on its territory, as well as other war crimes over which it has jurisdiction. Third, a State must require its military commanders to prevent grave breaches and other war crimes and to take action against those under their control who commit them. Fourth, States should assist each other in connection with criminal proceedings relating to grave breaches and other war crimes. Fifth, a State must also take measures necessary for the suppression of all acts contrary to the provisions of IHL other than war crimes. Suppression can, for example, take the form of penal or disciplinary sanctions.

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## 2. Implementation of IHL Obligations with Regard to Missing Persons in Post-Armed Conflict Sri Lanka

Danushka S. Medawatte<sup>1</sup>

### 2.1 Introduction

State obligations associated with missing persons continue even after the end of an armed conflict. This is one aspect in which the application of International Humanitarian Law (IHL) transcends the temporal scope of an armed conflict. It could be contended that the attempt to expand IHL's application to post-war contexts blur the lines between *lex specialis* and *lex generalis*. However, continuing humanitarian requirements of those affected by an armed conflict justifies recourse to *lex specialis*, which is IHL. In the Sri Lankan context, the issue of missing persons remains a predominant humanitarian requirement. This has given rise to many psycho-social and socio-legal consequences including the right to know the truth concerning the fate and whereabouts of the missing loved one. Multiple concerns arise not only in respect of missing persons but also with regard to their family members and loved ones. Moreover, the entirety of the social fabric is gravely affected when it is incapacitated from moving towards reconciliatory efforts and sustainable peace by preventing the guaranteeing of rights of missing persons as well as their family members.

Over the years, Sri Lanka has appointed various Commissions of Inquiry (CoI), and compiled multiple reports on missing persons as well as other violations of international human rights law (IHRL) and IHL. This has resulted in the proliferation of documents which record details of missing persons. No consistency can be observed among these reports in terms of factual records, legal analysis, or the proposed recommendations. Therefore, an accurate count of missing persons in Sri Lanka is impossible to ascertain. This difficulty is further aggravated by the interchangeable use of the terms 'enforced disappearances' and 'missing persons' which possess different legal connotations. As per Article 32 and 33 of Additional Protocol I of the Geneva Conventions, missing persons are those whose whereabouts become unknown in connection with an armed conflict. Enforced disappearances have been defined as:

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a set of particularly invidious violations of human rights, not only for the victims, who are deprived of their liberty, frequently tortured, and in fear for their lives, but also for their families and friends, who are left in ignorance regarding the fate of their disappeared loved one.<sup>2</sup>

In Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearances, the phrase has been defined as:

arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorisation, support or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.<sup>3</sup>

The striking distinction between ‘missing’ and ‘enforced disappearance’ thus appears to be the context in which such disappearance occurs and therefore the nature of the legal regime within which it is sought to be addressed. Accordingly, persons become ‘missing persons’ within conflict contexts due to reasons connected with the armed conflict whereas enforced disappearances can occur within ‘peace’ contexts that *may* not have any relationship whatsoever to an armed conflict. Thus, IHL applies to the former whereas IHRL may apply to the latter. In this chapter the terms ‘missing persons’ the ‘disappeared’ or ‘disappearances’ have been used intending similar meaning and is taken in contradistinction to the definition of ‘forcibly disappeared’ or ‘enforced disappearances’ that has been stated above.

Reports of the Sri Lankan CoIs do not clarify the circumstances that led to such disappearances. Nor do they explicitly deal with the legal processes and remedies available to those affected thereby. This lack of clarity pose questions as regards the terminology that ought to be utilised as well as the legal regime that should be applied. It is further complicated by the mechanisms proposed for dealing with issues concerning missing persons not being aligned with existing laws. Nor have the recommendations been formulated in a manner that enables the utilisation of existing laws to their maximum capacity to create humanitarian responses.

Despite the work of many CoIs, an alarming number of persons remain missing and their fate and whereabouts remain unknown to date. Family members of missing persons are unaware of the circumstances surrounding the disappearance of loved ones. Thus, their grief continues in a state of ambiguity. When unaddressed and under redressed, emotional wounds caused by the continuity of grievances multiplied by the ambiguity of the loss leads to socio-political turmoil. This contributes to perpetuating

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2 Markus Schmidt, *Encyclopedia of Genocide and Crimes against Humanity* (2005) Vol 3, 259.

3 International Covenant on the Protection of All Persons from Enforced Disappearances (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPPED).

instability thereby stalling the process to reconciliation. Even though it appears that these are problems that are prevalent at present in Sri Lanka which is void of an armed conflict, these issues and their consequences are inherently interlinked with the armed conflict thus necessitating the application of IHL. Therefore, this is an instance which justifies the extension of application of IHL to post-war contexts. This humanitarian necessity has also been identified in the contemporary constitution-making process of Sri Lanka.<sup>4</sup> It is hence justifiable to draw on applicable principles and provisions of IHL to cater to the humanitarian requirements concerning missing persons.

This chapter is strictly written in a humanitarian sense in that it makes no attempt to assess whether the State or any other actor should bear criminal liability concerning missing persons. This however does create a pathway for continuing application of IHL to ensure repression of IHL violations. An attempt is made to assess Sri Lanka's continuing IHL obligations towards the missing with reference to treaty obligations, domestic implementation of such obligations, case law, and obligations arising on a premise of customary international humanitarian law. Accountability that rises in connection with IHL obligations has also been highlighted in the recent United Nations Security Council Resolution 2474.<sup>5</sup> In that light, the chapter further seeks to evaluate the nature of obligations that Sri Lanka has undertaken or been vested with according to the findings of Commissions of Inquiry, and Reports of UN bodies.

The primary challenge to resolve when assessing the applicability of IHL to missing persons in contemporary Sri Lanka is whether IHL could continue to apply in post-war or post-conflict settings. What qualifies as a post-war / conflict context should thus be inquired into. Further, it is necessary to examine the conditions that need to be met for the end of application of IHL.<sup>6</sup> At the outset of this assessment, it needs to be noted that the obligations, for instance, laid down by Article 33(1) of AP I, requires parties to a conflict to fulfil their obligations with regard to missing and dead persons as soon as circumstances permit, and at the latest from the end of active hostilities.<sup>7</sup> Milanovic contends that

[...] obligations with regard to missing and dead persons, such as facilitating access to gravesites, will continue applying after the end of the conflict, as would the obligations to investigate and prosecute grave breaches of the Conventions and AP I.<sup>8</sup>

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4 Parliamentary Debates, 11 August 2016, col. 1321.

5 UNSC Res 2474 (11 June 2019) UN Doc S/Res/2474 (2019.) This resolution called upon the States by virtue of clause 6 'to take measures, as appropriate, in order to ensure thorough, prompt, impartial and effective investigations and the prosecution of offences linked to missing persons as a result of armed conflict, in accordance with national and international law, with a view to full accountability'.

6 See in this respect, Marko Milanovic, 'The end of application of international humanitarian law' (2014) *International Review of the Red Cross* 96 (893), 163 - 188.

7 *Ibid.*, p. 174.

8 *Ibid.*

While this obligation arises in connection with international armed conflict, it has long been an obligation that has seeped into customary international laws pertaining to armed conflicts irrespective of the nature of the conflict.

According to the Human Rights Council, post-conflict situations are where ‘open warfare has come to an end [... even though] such situations remain tense for years or decades and can easily relapse into large scale violence’.<sup>9</sup> Frère and Wilen contend determination of the length and duration of post-conflict situations is challenging and post-conflict contexts continue ‘because one or several actors are either excluded or not content with the peace agreement’.<sup>10</sup> In the Sri Lankan context, it is apparent that there is limited socio-political harmony and that people are far from satisfied with reconciliatory efforts, available legal remedies and avenues of reparation. Political instability and ethno-religious disharmony that has prevailed despite the ending of open warfare has aggravated ethno-religious issues. The tension that remains as a result presages the possibility of the Sri Lankan society relapsing into large scale violence. This indicates that Sri Lanka has not transitioned into a completely peaceful and stabilised State devoid of the impact created by the end of the armed conflict. It is possible therefore, to contend that IHL continues to apply to selected issues of which the roots lie in the armed conflict. The issue of missing persons remains embedded in the armed conflict thus justifying the application of IHL to its contemporary manifestation of the right of family members to know what fate befell their loved ones, and in case of death – the right of families to receive the identified remains of the deceased for proper burial. Accordingly, the assessment of IHL in relation to missing persons of post-war Sri Lanka is premised on this line of argumentation.

## 2.2 Sri Lanka and Missing Persons: The Backdrop

A ‘missing person’ is someone whose whereabouts become unknown ‘as a direct result of, or in connection with armed conflicts, and other situations of violence’.<sup>11</sup> The political instabilities of the 1980s, followed by the full-scale armed conflict that prevailed in Sri Lanka for nearly three decades created an environment where the fate and whereabouts of many individuals became unknown. Various factors such as the proliferation of official documents pertaining to the missing, lack of conceptual clarity on the use of terms such as ‘missing’ and ‘forcible disappearances’, and the lack of mechanisms to assess the veracity of records has contributed to conflicting reports concerning the number of individuals regarded as missing persons in Sri Lanka. The numerical statistics presented below are thus to be interpreted in the light of their socio-political settings. In the interest of the legal analysis, no assumptions have been made of the impartiality of Commissions or lack thereof. Nor has an attempt been made to assess the evidentiary value attached by each of the investigating authorities to the facts recorded. It is however submitted that hinders the authorities from accurately accounting for war related casualties and violations. This possibility may

9 Human Rights Council, A/HRC/28/76 (10 February 2015) para. 15.

10 Marie-Soleil Frère and Nina Wilen, *INFOCORE Definition: Post-Conflict* (2015).

11 International Committee of the Red Cross, ‘Living with Uncertainty: Needs of the Families of Missing Persons in Sri Lanka’ International Committee of the Red Cross, ‘Living with Uncertainty: Needs of the Families of Missing Persons in Sri Lanka’, (July 2016).

insinuate that many more individuals have become missing persons than is accounted for by various CoIs.

The first CoI mandated to inquire into disappearances was appointed in 1998. The All Island Commission of Inquiry into Involuntary Removal and Disappearances of Certain Persons was appointed to inquire into 10,136 complaints of disappearances recorded by the three Zonal Commissions.<sup>12</sup> Its task was limited as it was only mandated to examine formerly reported disappearances. When it completed its final report in 2001, it had only investigated 4,473 complaints of disappearances.<sup>13</sup> Some of its findings were referred to the Missing Persons Unit (MPU) set up under the recommendation of the Zonal Commissions.<sup>14</sup> However, the effectiveness of the MPU was in question and it was disbanded after 2006. Zonal Commission Recommendations further led to the establishment of an MPU and the Disappearances Investigation Unit of the Police. In July 1998, an MPU was set up as a separate unit in the Attorney General's Department. By October 1999, the MPU of the Attorney General's (AG's) Department had received information on 890 cases of disappearances and it had initiated proceedings against 486 individuals in relation to 270 cases.<sup>15</sup>

According to the United Nations Working Group on Enforced and Involuntary Disappearances (UNWGEID), the GoSL has been informed of over 12,000 cases of 'enforced disappearances'. At the time of the completion of its report in 2016, over 5,750 cases remained outstanding.<sup>16</sup> The work of the UNWGEID captures both 'enforced' and 'involuntary' disappearances. Thus, the numbers recorded by the UNWGEID encapsulates individuals regarded as missing and those who are regarded as forcibly disappeared. The UNWGEID's work does not provide a guideline on distinguishing between missing persons and those considered to be forcibly disappeared. Thus, it is impossible to ascertain with numerical accuracy the number of individuals considered to be missing persons by the UNWGEID.

Subsequently, the Presidential Commission to Investigate into Complaints regarding Missing Persons (PCICMP – or more commonly referred to as the 'Paranagama Commission') directly dealt with the issue of missing persons in Sri Lanka. During its working period, the records published on its official webpage<sup>17</sup> indicated that a total number of 19,006 civilians were reported missing while the total number of members of the security forces reported missing in action were 5,000.<sup>18</sup> It has also been reported

12 Report of the OHCHR Investigation on Sri Lanka (OISL), 16 September 2015, A/HRC/30/CRP.2, para. 483.

13 Ibid.

14 Ibid.

15 Ibid., para. 501.

16 Human Rights Council, 'Report of the Working Group on Enforced or Involuntary Disappearances on Its Mission to Sri Lanka', 8 July 2016, A/HRC/33/51/Add.2, para. 7.

17 The original source bearing address <http://www.pcicmp.lk/> which was accessed in 2016 is no longer available online.

18 Danushka S. Medawatte, 'Office on Missing Persons Sri Lanka: Taking Women into Account' [Position Paper] 2016 <http://www.fokuswomen.lk/reports/Trans-Just/E-Office-on-Missing-Persons.pdf> accessed on 03 October 2018.



that over 4,000 security personnel and police officers have been reported missing.<sup>19</sup> According to the Paranagama Commission, around 2275 of the initial complaints it received were concerning the abductions committed by the Liberation Tigers of Tamil Eelam (LTTE). In its Report issued under the second mandate, the Commission states that it received over 21,000 complaints concerning missing persons and the work pertaining to the same is ongoing.<sup>20</sup> A final report of the Commission has never been released to the public domain and nor has a report on its first mandate ever been released.

According to statistics maintained by the International Committee of the Red Cross (ICRC), 'out of over 34,000 persons that were at some point during the armed conflict considered unaccounted for by their families and reported to the ICRC since 1989, over 16,000 persons are still considered missing by their families'.<sup>21</sup> There is no clarity of records as regards the number of children that are missing. Statistics have been provided, to the Office of the High Commissioner for Human Rights (OHCHR) during its investigation on Sri Lanka, that the bodies of child soldiers recruited forcibly by the LTTE who died in battle had been sent to their families.<sup>22</sup> However, towards the end of the war, this practice is alleged to have been abandoned (possibly due to the dire circumstances associated with armed conflict). Most of the parents who lodged complaints with the Paranagama Commission had stated that their children were taken by the LTTE and nothing has been heard of them since.<sup>23</sup> Report of the OHCHR Investigation in Sri Lanka highlighted the necessity for carrying out an investigation 'to determine the full extent of the recruitment of children and the fate of all those who remain unaccounted for'.<sup>24</sup> However, this is yet to be adopted in Sri Lanka and its absence also indicates the absence of age segregated data pertaining to missing persons.

One of the primary questions that arise in connection with missing persons as has been mentioned elsewhere in the chapter is whether the numbers recorded are accurate.<sup>25</sup> Furthermore, it is also questionable whether the family members of missing persons have been adequately redressed or whether they have even been allowed to meet with representatives of CoIs, non-governmental organisations or representatives of international entities to express their grievances. Evidencing this reality, the Centre for Policy Alternatives (CPA) – a Colombo based think-tank and non-governmental entity, has narrated in their commentary on the Paranagama Commission, that the Terrorism Investigation Division (TID) had visited family members of the missing between 16<sup>th</sup> – 19<sup>th</sup> of January 2014 and offered them tokens to attend a meeting in Kilinochchi (a District in the Northern Province of Sri Lanka) on the 20<sup>th</sup> of January 2014 – the same day on which the Paranagama Commission was expected to conduct hearings

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19 Parliamentary Debates, 11 August 2016, col. 1324.

20 Report on the Second Mandate of the Presidential Commission of Inquiry Into Complaints of Abductions and Disappearances (August 2015) p. xviii.

21 ICRC, 'Living with Uncertainty' (Note 11) 3.

22 OISL Report, (Note 12) para. 700.

23 Ibid.

24 Ibid.

25 See for instance the commentary on UNWGEID records.

in Kilinochchi.<sup>26</sup> In addition to the tokens, families of the missing persons had been incentivized to attend the alternative meeting in exchange for items for children's education and other aid.<sup>27</sup> Families which are socio-economically affected due to the disappearance of family members may have opted to attend the alternative meeting purely to receive trivial economic aid despite their pressing need for the truth. The pressure exerted by socio-economic conditions should therefore be taken into cognizance when assessing the requirements of the family members of the missing. In addition to the alleged State interferences with the work of the State's own CoI, another factor that affected the success of this Commission was the lack of awareness amongst affected communities of the Commission itself 'let alone its mandate and objective'.<sup>28</sup>

There remains an urgent necessity of delving into the circumstances to uncover the truth pertaining to disappearances that have occurred in Sri Lanka. During the Parliamentary debates concerning the enactment on the Office on Missing Persons Act, the need to ensure the right to know what happened to the missing persons was referred to as a 'humanitarian exercise'.<sup>29</sup> The following has been extracted from the speech tabled by Hon. Mangala Samaraweera:

[...] for long years, this nation has suffered the phenomena of our citizens going missing from all parts of our country. Today, we have before us a Bill to establish a Permanent Office on Missing [P]ersons. This is an opportunity for all of us, as elected Representatives, to show that we care about our citizens' grief and that we uphold their basic human right to know what happened to their loved ones. *This is a humanitarian exercise* [Emphasis added]. This is an opportunity for our nation to unite in our empathy towards our own citizens, an opportunity for us, as a nation, to set an example to the whole world that we care about our citizens and that we are a nation that is capable of compassion, even after two insurrections in the South and a prolonged conflict in the North. It is also an opportunity for us to make a pledge to our own citizens and future generations that, as a responsible State, we will take measures at all times to ensure that no citizen of our country, whether Sinhala, Tamil or Muslim, will have to go missing ever again.<sup>30</sup>

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26 Centre for Policy Alternatives, 'A Commentary on the Presidential Commission to Investigate Missing Persons During the Period of June 1990 – May 2009 in the Northern and Eastern Provinces' (March 2014) p. 8.

27 Ibid.

28 Centre for Policy Alternatives, 'The Presidential Commission to Investigate into Complaints Regarding Missing Persons: Trends, Practices and Implications' (December 2014) p. 4.

29 Parliamentary Debates, 11 August 2016, col. 1322.

30 Ibid.

The right to know is both founded on and thrived by the humanitarian requirements of family members to know the truth and to achieve closure by learning the fate and whereabouts of the loved one. Inquiries have revealed that for the families of the disappeared, ‘the search for truth was paramount’ over and above justice, reparations, and other measures such as the issuance of Certificate of Absence.<sup>31</sup> The same view was held by the families of combatants who were considered Missing in Action (MIA) even though most such families have received and / or accepted Death Certificates on behalf of those MIA.<sup>32</sup> Moreover, it has been determined that the Certificate of Absence could help alleviate practical problems pertaining *inter alia* to inheritance, widow’s benefits, and access to bank accounts. The recipients of such certificates should also be reassured that the issuance of the certificate is a mere recognition of the fact that the loved one is a missing person and that efforts would be continued to ascertain the fate and whereabouts of such person.<sup>33</sup>

Sri Lanka’s duty to ascertain the whereabouts of missing persons has further been complicated due to the presence of unmarked and / or mass graves.<sup>34</sup> Accordingly, the possibility of ascertaining whether a person who was formerly regarded missing is deceased has been rendered complicated, and in some instances, impossible. This has contributed to the continuing suffering of the family members who do not receive conclusive details from the State that, if provided, would have aided them with the healing process and provided effective closure to the ambiguity advanced by the lack of knowledge surrounding disappearances. Within this backdrop, it is mandatory to apply relevant provisions of IHL to relieve humans of their continuing suffering.

## 2.3 Sri Lanka’s Obligations

### 2.3.1 Obligations under the Geneva Conventions

Sri Lanka became a State party to the four Geneva Convention of 12 August 1949 on 28 February 1959. Article 3 Common to all IV Geneva Conventions (hereinafter CA 3) stipulate the minimum standards that ought to be met during an armed conflict ‘not of an international character’. Given that the armed conflict of Sri Lanka falls into this category, CA 3(1)(a) and (b) prohibiting violence to life and person, and taking of hostages, which seek to provide protection to persons *inter alia* from disappearing or being listed as a missing person, is applicable to the Sri Lankan context. Thus, at a minimum, the GoSL is required to guarantee that the basic humanitarian principles enshrined in CA 3 were upheld during the armed conflict. In the event there has been a failure to do so, it is necessarily implied by law that remedies are provided. This idea emanates from the Latin maxim *ubi jus ibi remedium* which means that for every

31 Final Report of the Consultation Task Force on Reconciliation Mechanisms (2016) p. 6. A Certificate of Absence is a certificate that is issued to the family members of missing persons establishing that such person’s current whereabouts are unknown. This prevents the families from being forced to accept Death Certificates.

32 Ibid., p. 6.

33 Ibid., p. 222.

34 Report of the Secretary General’s Panel of Experts on Accountability in Sri Lanka (31 March 2011) p. 61.

wrong, the law provides a remedy. Thus, in situations where a specific remedy is not defined in the law, a remedy will be implied and the law will be interpreted broadly to allow the development of a remedy. Given that the remedies should emanate from the law that governs the specific subject, remedies for grievances associated with the missing should be sought within the rich body of IHL. While it could be argued that Rule 149 and 150 of CIHL only deal with State responsibility and reparations as opposed to remedies, this argument could be countered with reference to the aforementioned legal maxim that has gained currency in law.

Article 26 of GC IV on dispersed families requires parties to the conflict to ‘facilitate enquiries made by members of families dispersed owing to the war’.<sup>35</sup> This provision is sufficiently broad to encapsulate missing persons and their families. Moreover, Protocol I Additional to the Geneva Conventions (AP I)<sup>36</sup> specifically deal with missing persons in Articles 32 – 24. Since the classification of the Sri Lankan armed conflict is considered as falling within the scope of an armed conflict ‘not of an international character’, and since GC I–IV and AP I are regarded as providing a legal regime applicable to international armed conflicts, it is unlikely that Sri Lanka would premise its obligations towards missing persons on the provisions of GC I – IV or AP I. The application of the Geneva Conventions would hence be restricted to the scope and extent of CA 3. Nevertheless, it could be contended that the customary implications of the above provisions are sufficiently broad to have established consistent State practice that would guide Sri Lanka’s obligations pertaining to missing persons.

Protocol II Additional to the Geneva Conventions (AP II) covers armed conflicts which do not come within the scope of application of Article 1 of AP I. Accordingly, armed conflicts,

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 [...]

come within the scope of application of AP II. As Sri Lanka’s armed conflict occurred on Sri Lankan territory between its armed forces and the LTTE – which was an organized armed group of terrorists – the armed conflict falls squarely within the parameters of AP II. However, Sri Lanka is not a party to AP II. Had Sri Lanka been a party to AP II, many provisions<sup>37</sup> therein may have been resorted to in order to prevent individ-

35 A descriptive analysis of the provisions of Geneva Conventions and AP I deemed to be applicable to missing persons has been deliberately avoided in this Chapter due to their direct inapplicability to the Sri Lankan armed conflict characterized as a conflict ‘not of an international character’. However, a brief descriptive Factsheet on Missing Persons can be accessed at <<https://www.icrc.org/en/document/missing-persons-and-their-families-factsheet>> accessed 22 August 2019.

36 Protocol I Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts (Protocol I) (entered into force 7 December 1978) 8 June 1977, 1125 UNTS 3.

37 See for instance Article 4, 5, 8, and 17 of AP II.

uals from becoming missing persons and to look for such persons listed as missing, convey information to family members, and if deemed deceased, find the remains of such persons. Irrespective of technical pro-sovereign legal interpretations that may seek to prevent the application of these principles and provisions, it is necessary to ascertain these provisions from their humanitarian perspective and provide the broadest possible safeguards to individuals affected by armed conflicts. It is further impossible to contend that these principles remain inapplicable to a State party merely due to non-ratification of AP II, as, much of the body of IHL has consistently been practised by States. This has formed a rich customary body of IHL that encapsulates matters pertaining to missing persons as well.

### 2.3.2 Customary Law

Rule 117 of Customary International Humanitarian Law (CIHL) relates to accounting for missing persons. The foundation of the duty of the States to account for missing persons is entrenched in the right of the family members to know the fate of their missing loved ones.<sup>38</sup> According to CIHL, States bear responsibility to account for persons that have become ‘missing persons’ as a result of armed conflict. States are responsible for establishing institutional and functional frameworks that are adequately equipped with the capacities – both technical and legal – to search and account for missing persons. It is further established in CIHL, that deliberately withholding information regarding missing persons may amount to inhuman treatment<sup>39</sup> and may also be regarded as obstruction of justice. Irrespective of whether the conflict is one of international character or not, the rules pertaining to missing persons applies. Rule 117 should be read in conjunction with Rule 98 on the prohibition of enforced disappearances and Rule 105 relating to respect for family life. The effect of the conjunctive reading of the three provisions lead to the conclusion that States are obligated to prevent disappearances even during armed conflicts, and in cases where such disappearances occur, there is a legal obligation to trace such missing persons and guarantee the right to know of family members thereby safeguarding respect for family life.

CIHL Rule 116 provides for the identification of the dead. According to this rule, the parties to the conflict ‘must record all available information prior to disposal and mark the location of the graves’ to facilitate the identification of the dead. Due to unfortunate circumstances surrounding armed conflicts, many individuals may lose their lives of which some would be regarded as missing persons in the event of non-discovery of their bodily remains. However, if these customary principles are adhered to by the parties to the conflict, carrying out searches, and accounting for the missing subsequent to the end of the armed conflict would be much less problematic and time consuming.

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38 CIHL Rules, p. 423.

39 CIHL Rules, p. 382.

### 2.3.3 International Convention on the Protection of All Persons from Enforced Disappearances

Sri Lanka became a signatory to the International Convention on the Protection of All Persons from Enforced Disappearances<sup>40</sup> (hereinafter ICPPED) on the 10<sup>th</sup> of December 2015 and ratified the same on the 25<sup>th</sup> of May 2016.<sup>41</sup> This is the pioneering and specialised instrument of international human rights law that deals with enforced disappearances. At the time of ratification, the Government of Sri Lanka (GoSL) declared by virtue of Article 32 of the Convention that ‘it recognizes the competence of the Committee to receive and consider communication in which a State Party claims that another State Party is not fulfilling its obligations under this Convention’.<sup>42</sup> Apart from this declaration, no other reservation, understanding, or declaration was made by the GoSL. This is indicative of the present commitment that GoSL has undertaken to prevent disappearances in Sri Lanka and to protect individuals from such disappearances in the future.

Due to Sri Lanka being considered a dualist State, it is necessary to adopt a domestic legislation implementing the protections and prohibitions embedded in the ICPPED. Adopting the enabling legislation on ICPPED will also have nuances associated with the possibility of effectively applying IHL in Sri Lanka despite the Convention being strictly regarded as falling within the regime of human rights law. Accordingly, the draft bill on the ICPPED was presented to Parliament for its second and third readings on 07 March 2018.<sup>43</sup> The debate did not consider any substantive aspects of the ICPPED as the primary focus of the Parliament at the time was on the state of emergency that was declared due to the religious violence that occurred in Kandy, Central Province - Sri Lanka.<sup>44</sup> It was more or less restricted to assessments of contextual realities within which disappearances occurred and expressions of apprehension concerning the alleged vindictive approaches that could be set in motion against ‘war heroes’.<sup>45</sup> Except with respect to one clause which raised the question as to whether the GoSL is bound to extradite a particular alleged offender to a foreign State upon so being requested by the said State, a substantial debate did not occur with respect to the content of the ICPPED Bill.<sup>46</sup> All Parliamentarians who expressed their views on the draft bill sought to merely re-narrate instances of political instability and armed conflict which had created a conducive environment within which the whereabouts

40 2716 UNTS 3, entry into force 23 December 2010.

41 United Nations, ‘International Convention for the Protection of All Persons from Enforced Disappearances’ (*United Nations Treaty Collection*) <[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-16&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&clang=_en)> accessed 05 November 2018.

42 United Nations, ‘International Convention for the Protection of All Persons from Enforced Disappearances’ (*United Nations Treaty Collection*) <[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-16&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&clang=_en)> accessed 05 November 2018.

43 Parliamentary Hansard, 07 March 2018 Col 148.

44 Ibid. Col 150.

45 Ibid. See generally Col 178 onwards.

46 Ibid. Col 179 – 182.

of many individuals became unknown. At the end of the second reading, the Speaker of the Parliament – Hon. Karu Jayasuriya, moved for a vote to adopt the Bill. In the first instance, 53 votes were cast in favour with 19 votes against and 1 abstention.<sup>47</sup> When moved for the final vote, 53 votes were cast in favour, 16 votes against,<sup>48</sup> with 4 parliamentarians abstaining.<sup>49</sup> Accordingly, the Bill was adopted subsequent to the third reading<sup>50</sup> and the International Convention for the Protection of All Persons from Enforced Disappearances Act No. 05 of 2018 was certified on 21 March 2018. Eighteen months from the date of adoption of the Act, it remains to be seen how this Act would be utilised to cater to disappearances in Sri Lanka.

## 2.4 Application of IHL to Missing Persons in Sri Lanka

### 2.4.1 Legislative Enactments

#### 2.4.1.1 *The Office on Missing Persons Act*

The Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act No. 14 of 2016<sup>51</sup> was certified on 23 August 2016. The preamble of the Act is premised on IHL in that it refers to the rights of relatives to know the circumstances in which their loved ones went missing. The Act also establishes the need for searching and tracing of missing persons. It further states that it is necessary to ‘take all measures to search and trace missing persons; to protect the rights and interests of missing persons and their relatives; and towards ensuring non-recurrence’. The establishment of the OMP was further justified with reference to its capacity to transcend the scope of temporally and geographically restrained commissions. This would therefore lead to the possibility of employing best technical and forensic expertise to ‘find the kind of answers that will help the families find closure or psychological and psychosocial support required’.<sup>52</sup>

This Act comprises of 28 sections. The objectives of the Act are specified in Section 2 while the mandate of the OMP is stated in Section 10. The following have been identified as the objectives of the Act:

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47 Ibid. Col. 262 – 263.

48 Ibid. Col. 265 – 266. The following honourable members of the Parliament voted against the adoption of the ICPPED Act of Sri Lanka: Pavithradevi Wanniarachchi, Salinda Dissanayake, Wimal Weerawansa, SC Muthukumarana, Wimalaweera Dissanayaka, Jayantha Samaraweera, T Ranjith de Zoysa, Vijitha Berugoda, Namal Rajapaksa, Janaka Wakkumbura, Kanaka Herath, Udaya Prabhath Gammanpila, DV Chanaka, Sisira Jayakody, Piyal Nishantha de Silva, and Indika Anuruddha Herath.

49 Parliamentary Hansard (Note 43) Col. 265 – 266. The following honourable members of the Parliament abstained from casting the vote: Lucky Jayawardana, Dinesh Gunawardana, Vasudeva Nanayakkara, Chandrasiri Gajadeera.

50 Ibid. Col. 267.

51 Hereinafter the OMP Act.

52 Parliamentary Debates, 11 August 2016, col. 1322.

- (a) to provide appropriate mechanisms for searching and tracing of missing persons, and to clarify the circumstances in which such persons went missing, and their fate;
- (b) to make recommendations to the relevant authorities towards reducing the incidents of ‘missing persons’ within the meaning of this Act;
- (c) to protect the rights and interests of missing persons and their relatives as provided for in [the] Act;
- (d) to identify proper avenues of redress to which such missing persons or their relatives may have recourse.

These objectives can be interpreted in connection with IHL and they reiterate the need for ascertaining the truth and providing remedies. The objectives of the Act set out in Section 2 are premised on IHL principles pertaining to missing persons and reiterates the need for ascertaining the truth and providing remedies to family members. The mandate of the OMP provided for by virtue of Section 10 capacitates the OMP *inter alia* to clarify the circumstances in which the persons went missing and to make recommendations to the relevant authorities towards addressing the incidence of missing persons. Further, the provision creates a mandate to protect the rights and interests of missing persons as well as their relatives. The right to be informed of relatives has been recognized as a form of redress and the duty to inform relatives of the fate of the missing person has been vested on the OMP through Section 10(1)(d). Significantly, this Act, by virtue of Section 10(1)(e) was able to vest on the OMP the duty of collating data obtained by processes that were formerly carried out by multiple organizations, Government Departments, Commissions of Inquiry and Special Presidential Commissions of Inquiry. Vesting on one entity the responsibility to collate data can be regarded as a positive feature as it enables consistency, specialization, and accuracy.

The OMP Act provides in Section 13(1)(a)(ii) that if an individual is found to be missing or deceased, a report to that effect will be released to the relatives of the missing person to enable the Registrar General to issue a Certificate of Absence or a Certificate of Death. Furthermore, Section 13(1)(d)(i) requires the OMP to inform the relatives of the circumstances in which a person went missing and his fate. As per Section 13(1)(k)(iii) the OMP is also vested with the power to make recommendations to the relevant authorities on the handling of unidentifiable and identifiable remains. The link of the OMP to IHL has been expressly provided for by Section 4(2)(b). This provision provides that ‘the members of the OMP shall be persons with previous experience in the fact finding or investigation, human rights law, international humanitarian law, humanitarian response or possess other qualifications relevant to the carrying out of the functions of the OMP’.

Thus, the GoSL has made a commitment under its domestic laws to give effect to principles of IHL.



#### **2.4.1.2 The ICPPED Act**

The International Convention for the Protection of All Persons from Enforced Disappearances Act No. 05 of 2018 was certified on 21 March 2018. The Act comprises of 25 provisions whereas the ICPPED comprises of 45 provisions. While the complete gamut of provisions contained within the ICPPED have not been incorporated into the domestic law, the substantive purposes that were sought to be achieved through the domestic enactment can be said to have been fulfilled as the Act prohibits wrongful arrests, detention, confinement, abduction, kidnapping, refusal to acknowledge detention,<sup>53</sup> aiding, abetting, and conspiring to commit enforced disappearances,<sup>54</sup> and has ensured that the offences under the Act are cognizable and non-bailable offences.<sup>55</sup> The Act further spells out the obligations concerning deprivation of liberty,<sup>56</sup> and rights of relatives, representatives, and Attorneys – at – Law.<sup>57</sup> Interference with and influencing investigations, and the failure to record or refusal to provide information are considered offences under the Act.<sup>58</sup> By virtue of Section 18, the Act has also sought to prevent the commission of disappearances subsequent to a person being extradited. Section 18 provides that no person shall be extradited where there is a possibility for such person to be subjected to disappearances.

The complete effect of the protection sought to be provided by the Act has been ensured through Section 23 which makes the provisions of the Act effective ‘notwithstanding anything to the contrary in any other written law and accordingly in the event of any inconsistency or conflict between the provisions of this Act and such other written law, the provisions of this Act shall prevail’. It remains to be seen how these provisions will be utilised with reference to addressing the concerns of the family members of missing persons who seek to mobilise the court under this Act. Furthermore, it is yet to be seen how the courts of Sri Lanka will interpret the extent of application of the ICPPED Act and whether it would make references to IHL and IHRL in interpreting the provisions of the ICPPED.

#### **2.4.1.3 Office for Reparations Act**

The Office for Reparations Act No. 34 of 2018 was certified on 22 October 2018. The preambular statement of the Act provides that it seeks to provide individual and collective reparations to aggrieved persons. It further identifies that ‘a comprehensive reparations scheme anchored in the rights of all Sri Lankans to an effective remedy will contribute to the promotion and reconciliation’ in Sri Lanka. In its Bill stage, the draft dated 22 June 2018 specifically referred to the Geneva Conventions of 1949.<sup>59</sup> As per Section 27 of the draft Bill, the phrase ‘aggrieved persons’ was interpreted as ‘persons who have suffered a violation of human rights or humanitarian law (as

53 Section 3, ICPPED Act [Sri Lanka].

54 Ibid. Section 4.

55 Ibid. Section 5

56 Ibid. Section 15.

57 Ibid. Section 16.

58 Ibid. Section 17.

59 Gazette of the Democratic Socialist Republic of Sri Lanka issued on 25. 06.2018.

contained in the First, Second, Third and Fourth Geneva Conventions of 1949).<sup>60</sup> However, the enacted version of the Act, in Section 27(a) interprets ‘aggrieved persons’ as ‘persons who have suffered damage as a result of loss of life or damage to their person or property’. It is questionable why references to IHRL and IHL were removed from the Act.

Under the powers and functions of the Office for Reparations, the office is capacitated to receive recommendations from the OMP regarding the reparations that should be made available to aggrieved persons.<sup>61</sup> Section 27(b) specifies that the relatives of a deceased person or a missing person can also be regarded as aggrieved persons for the purposes of the Act. The Act further specifies that ‘relatives’ of a missing or a deceased person are the spouse, children, parents, brothers or sisters, parents – in law, brothers / sisters – in – law, sons / daughters – in – law.

Even though the Act has removed express references to the application of IHL or IHRL, it is undeniable that reparations are premised on aforementioned legal regimes. Especially, from an IHL perspective, the above assertion could be supported with reference to CIHL Rules 149 and 150. In describing who is regarded as an ‘aggrieved person’, Section 27(a)(i) states that *inter alia* it is a person who has suffered loss or damage to person or property ‘in the course of, consequent to, or in connection with the armed conflict which took place in the Northern and Eastern Provinces or its *aftermath*’ (emphasis added). This not only warrants the application of IHL but also responds in the affirmative to the question whether IHL continues to apply in post-war Sri Lanka.

## 2.4.2 Case Law

Case law on disappearances in Sri Lanka are few and far between despite the number of recorded disappearances being at an alarming rate. Perhaps the lacunae in jurisprudence is aggravated by the lack of a specific mechanism within which such cases ought to have been filed. This lacuna was only addressed through the establishment of the Office on Missing Persons and the Office for Reparations and the enactment of the ICPPED Act. Due to the novelty of these enactments, all enacted in and after 2016, it is yet to be seen what outcomes these enactments would introduce to the case law of Sri Lanka concerning missing persons. In the absence of a specific mechanism, there are two paths on which one may attempt to ascertain the jurisprudence pertaining to Sri Lanka. The first relates to the writ of *habeas corpus* which has in certain circumstances been drawn on to demand redress for missing persons. The second relates to measures that are sought outside the territorial boundaries of Sri Lanka where individuals aggrieved by the lack of response or undue delays inherent to the legal matrix of Sri Lanka, have sought redress from Treaty Bodies of the United Nations through individual communications.

Burden of proof that the petitioner ought to satisfy in cases of disappearances is one of the practical impediments barring the filing of court cases concerning missing persons. Chaos prevalent in armed conflicts or political instabilities often create a climate

60 Ibid.

61 Office for Reparations Act, Section 11(1)(a).

that prevents a potential petitioner from knowing the exact details pertaining to disappearances. Lack of knowledge concerning the circumstances surrounding disappearances becomes both the rationale justifying rights such as the right to truth concerning the fate of the missing, as well as the cause that hinders the process of realizing those rights.

Even if a person is claimed to have disappeared subsequent to having been taken into custody or having surrendered, the burden of proof ought to be satisfied *beyond a reasonable doubt*. This standard of proof which is common to criminal cases has been adopted in relation to writs of *habeas corpus* as well. For instance, this approach was adopted by the Sri Lanka's Court of Appeal (CA) in *Kodippilige Seetha v. Saravanathan and Others*.<sup>62</sup> This two-bench judgment concerned the alleged illegal arrest and detention of the petitioner's husband. The CA held that the burden of proof must be imposed 'fairly and squarely' on the petitioner,<sup>63</sup> and that 'an ordinary citizen making a serious allegation concerning illegal custody which would amount to a crime must prove the allegation beyond reasonable doubt'.<sup>64</sup> Given that circumstances surrounding illegal custody are often shrouded with secrecy it is questionable why the CA adopted the higher burden of proof without resorting to adopt the standard of balance of probabilities which would have been fair and just by petitioners affected by illegal arrests and detentions. Given the allegations against the State that many individuals arrested and detained especially in connection with the armed conflict had subsequently been listed as missing persons, altering the standard of burden of proof could have facilitated families affected by disappearances to more easily seek redress from law. In explaining how burden of proof is applied to cases of *habeas corpus*, Dheeraratne J. states in *Kodippilige Seetha* that the burden of proof would rest with the respondents 'had the [...] respondents admitted that the corpus was in fact taken into their custody'.<sup>65</sup> It is unrealistic to expect that respondents who face allegations of this nature would admit that a person who is now missing was previously in their custody. The threshold is thus too high to be possibly met by family members of missing persons who wish to file an application to obtain a writ of *habeas corpus* concerning their missing loved one. Moreover, the writ is only issued in circumstances where the detention is proven to be unlawful.<sup>66</sup> This seems to insinuate, rather erroneously that if a person disappears subsequent to being detained lawfully, this remedy would not be made available to family members.

A salient Sri Lankan case in which disappearances was directly dealt with was *Mahinda Rajapaksa v. Kudahetti and Others*.<sup>67</sup> The case was about the petitioner's attempt to take with him documents related to disappearances to Geneva with a view to submitting the same to the 31<sup>st</sup> session of the UNWGEID. The allegation was that the respondent prevented the petitioner from taking the said documents on the prem-

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62 [1986] 2 Sri LR 228.

63 *Ibid.*, 228.

64 *Ibid.*

65 *Ibid.*, 232.

66 *Juwani v. Lathiff, Police Inspector, Special Task Force, and Others* [1988] 2 Sri LR 185

67 [1992] 2 Sri LR 223.

ise that they were ‘fabricated documents which were likely to be prejudicial to the interests of national security and which were likely to promote feelings of hatred or contempt to the Government [...]’.<sup>68</sup> The case refers to eleven bundles of paper retrieved from the petitioner’s bag which he had declared as containing ‘photographs and particulars of the missing persons’.<sup>69</sup> Due to the technical nature of fundamental rights jurisprudence under which this case was filed, no detailed analysis pertaining to missing persons and the need to ascertain their whereabouts occurred. The entire case focused on whether the petitioner had been invited to address the UNWGEID and whether him having to leave behind the documents had resulted in the infringement of freedom of speech. It was finally determined that the rights of the petitioner had not been violated. This case, though factually connected to missing persons, does not contribute to the legal jurisprudence pertaining to the same as the reasoning and the decision of the case have only been considered in relation to the fundamental rights jurisprudence of Sri Lanka.

In 1994, the Court of Appeal of Sri Lanka considered another landmark case entitled *Leeda Violet and Others v. Vidanapathirana, OIC, Police Station Dickwella and Others*.<sup>70</sup> This case concerned the denial of the arrest and custody of an individual which compelled the court to discuss disappearances. In response to a jurisdictional challenge, the then Justice SN Silva stated *obiter* that Article 141 of the Constitution vests the Court of Appeal with the power to issue writs of *habeas corpus* ‘intended to safeguard the liberty of the citizen’<sup>71</sup> and further contended that

‘[t]he rule of law, freedom and the safety of the subject would be completely nullified, if any person in authority can cause the disappearance of an individual who has been taken into custody and blandly deny [to the Court of Appeal] having jurisdiction to safeguard the liberty of the subject, any knowledge of the whereabouts of such individual’.<sup>72</sup>

It was further stated herein that several hundreds of applications for writs of *habeas corpus* had been filed in the Court of Appeal in respect of persons whose arrest and custody were denied by respondents who were personnel of Sri Lanka Police or the armed forces.<sup>73</sup> It was held that there was no basis to arrest or keep the person in custody and that the denial of arrest and detention was not acceptable. As a redress measure, the court imposed exemplary costs in respect of each of the disappeared individuals. Even though the case directly dealt with disappearances, the final outcome of the case cannot be regarded to be adequately responding to the gravity of the offence. The case does not refer to the applicability of IHL. Nor is its final outcome compatible with the gravity of the offence. Incidentally, none of these cases refer to the applicability of IHL to disappearances irrespective of whether such disappearanc-

68 Ibid., 227.

69 Ibid., 228.

70 [1994] 3 Sri LR 377.

71 Ibid., 377.

72 Ibid., 378.

73 Ibid., 381.

es had been caused by consequences associated with the armed conflict or through denied arrests and detentions that had created a conducive environment for impunity.

On 25 October 1999, Mr. Jegatheeswara Sarma, a citizen of Sri Lanka communicated to the Human Rights Committee of the United Nations that his son was removed from their residence and was handed over to the members of the military on the alleged suspicion of him being a member of the LTTE.<sup>74</sup> His whereabouts had then become unknown thereby leading to his parents to form the belief that he is a missing person. Mr. Sarma states that he and other arrested individuals were paraded before his son whose face was covered by a hood by then, and, that he informed the ICRC and several human rights groups of these incidents. This arrest and detention have later been denied.<sup>75</sup> Subsequently, Mr. Sarma has been informed that his son was dead.<sup>76</sup> The State raised a preliminary objection in this matter stating that Mr. Sarma has not exhausted domestic remedies and that he ought to have requested the issuance of a writ of *habeas corpus* 'which gives the possibility for the Court to force the detaining authority to present the alleged victim before it'.<sup>77</sup> However, in the light of subsequent case *Rosalin v. Sundaralingam and Others* where it was stated that a request for a writ of *habeas corpus* cannot be made in circumstances when there is no corpus in existence or when the corpus has ceased to exist,<sup>78</sup> it is unlikely that the Court of Appeal would have granted the said writ in the *Sarma* matter.

Subsequent to carrying out a criminal investigation, Sri Lanka informed the HRC, that a Corporal of the Sri Lankan Army and two other persons had 'involuntarily removed' Mr. Sarma's son.<sup>79</sup> The Committee concluded by stating that:

the State party is under an obligation to provide the author and his family with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the [Mr. Sarma's] son, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the violations suffered by the author's son, [Mr. Sarma] and his family. The Committee considers that the State party is also under an obligation to expedite the current criminal proceedings and ensure the prompt trial of all persons responsible for the abduction of the author's son under section 356 of the Sri Lankan Penal Code and to bring to justice any other person who has been implicated in the disappearance.

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74 *Mr. S. Jegatheeswara Sarma v. Sri Lanka*, Communication No. 950/2000, UN Doc. CCPR/C/78/D/950/2000 (2003).

75 *Ibid.*, para. 2.5.

76 *Ibid.*, para. 2.3.

77 *Ibid.*, para. 4.2.

78 [2005] 1 Sri LR 260, 262.

79 *Jegatheeswara* (Note 74) para. 7.4.

In *Machchavallavan v. OIC Army Camp, Plantain Point, Trincomalee and Others*<sup>80</sup> the petitioner sought two writs of *habeas corpus* from the CA in respect of his two sons who had allegedly disappeared after a cordon and search by Army officers.<sup>81</sup> As this case concerns disappearances that have occurred directly in connection with the armed conflict of Sri Lanka, attention ought to have been paid to IHL. However, the analysis of the case is confined to the *habeas corpus* jurisdiction of Sri Lanka. The case makes no reference to IHL and armed conflict or the contemporary socio-political realities. Focus of the case purely rests on whether the application ought to have been one of *writ of habeas corpus* or whether the CA was under obligation to have referred the matter to the Supreme Court as a matter of fundamental rights. This is a common lacunae that can be observed in cases concerning *habeas corpus* irrespective of whether the disappearance has been reported in connection with IHL. Perhaps, it is a result of the Sri Lankan legal system not having recognised specific provisions pertaining to disappearances and missing persons up until recently. Therefore, Sri Lanka is yet to produce case laws concerning missing persons which make direct references to the applicability of IHL and the ICPPED. This is not only a lacuna of the legislative duty to take adequate cognizance of the applicability of IHL when drafting related laws, but is also a lacunae on the part of the Sri Lankan judiciary which has played a passive role thereby abstaining from purposively interpreting existing laws of Sri Lanka to give effect to IHL's humanitarian benefits.

#### **2.4.2 Commission Reports, the OISL Report and the CTF Report**

Over the years, Sri Lanka has experimented with truth-ascertainment and discovery of circumstances surrounding disappearances. In this exercise, various Commissions of Inquiry (CoI) have played a determinant role. While several CoIs were mandated during the armed conflict, for this chapter's purposes of ascertaining the continuing significance of IHL in Sri Lanka, the analysis has been restricted to CoIs that were commissioned and mandated after the end of the armed conflict in 2009. The first of such commissions was named the Commission of Inquiry on Lessons Learnt and Reconciliation (LLRC). The report of the said commission was issued in November 2011. Chapter 4 of the report was entirely dedicated to issues arising in connection with IHL.

The LLRC Report also consists of a list of persons who have allegedly surrendered to the armed forces in May 2009 and are then alleged to have disappeared.<sup>82</sup> However, the list has not been released to the Public even though the rest of the Report is available in the public domain. As per the representations that were made to the Commission, the disappearances were results of abductions, unlawful arrests, arbitrary detentions, and involuntary disappearances.<sup>83</sup> It was also noted that a substantial

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80 [2005] 1 Sri LR 341.

81 Ibid.

82 Report of the Commission of Inquiry on Lessons Learnt and Reconciliation (November 2011) (LLRC Report), p. 114.

83 Ibid., p. 157.

amount of disappearances were reported as having been committed by the LTTE, especially in Batticaloa, Jaffna, and Muttur.<sup>84</sup> Moreover, the need to adopt specific measures to redress families living without certainty concerning their missing loved ones was highlighted during the hearings of the Commission.<sup>85</sup> It has further been noted that it is a prerequisite for achieving reconciliation within a post-war context.<sup>86</sup> Those who made representations further noted that the ambiguity pertaining to the loss remains as there is no conclusive proof to determine whether the missing persons are dead or alive.<sup>87</sup> The LLRC Report also noted that ‘Mothers and Friends of Missing Persons in Batticaloa’ requested the setting up of a mechanism exclusively dedicated to addressing the issues concerning missing persons.<sup>88</sup> The recommendations of the Commission are focused on the establishment of an entity dedicated to recovering information pertaining to missing persons mainly with the involvement of law enforcement authorities.<sup>89</sup> There is limited reference to the necessity of continuing application of IHL despite the report stating that cooperation is necessary with agencies such as the ICRC ‘to trace the whereabouts of the missing persons and ensure reunification with the families’.<sup>90</sup> While the report does contain an entire chapter on IHL, it does not specifically deal with IHL’s application to missing persons, their families or to the obligations that a State bears in respect of individuals who are arrested and / or detained. If arrests and detentions are said to have led to ‘disappearances’, and if surrendees, as have been stated in the LLRC Report, have become ‘missing persons’ it cannot be argued that IHL’s application has ended at the close of the war. Even though the application of IHL to missing persons has not been expressly dealt with in the report, from an implementation perspective, it could be contended that the report’s references to IHL do indicate the potentials and avenues for implementation of international law at the domestic level. Especially given the legal significance attributable to reports of this nature, subsequently courts and authorities may rely on the content of such reports to aid an interpretation premised on IHL. Thus, these analyses are significant for the advancement of IHL’s application and implementation in Sri Lanka.

The LLRC Report also states that not only should the State adopt ‘definitive action against alleged cases of disappearances, but that the State should also adopt ‘preventive measures [which] would have a significant impact on the reconciliation process.’<sup>91</sup> It is therefore necessary to assess whether IHL’s application is restricted to inquiring into the whereabouts of missing persons or whether it is capable of playing a more expansive role that would also determine the scope, extent, and success of reconciliation mechanisms. Government Agent for Vavunia and the Probation and Child Care Commissioner (Northern Province) had established a Family Tracing and Reunification (FTR) Unit for unaccompanied and separated children in response to

84 Ibid., p. 160.

85 Ibid., p. 157.

86 Ibid., p. 157. See also, Parliamentary Debates, 11 August 2016, col. 1328.

87 LLRC Report, p. 158 - 159.

88 Ibid., p. 162.

89 Ibid., p. 163 onwards.

90 Ibid., p. 164.

91 Ibid., p. 157 and also p. 339.

complaints concerning missing children filed by parents alleging that the LTTE had abducted children to be conscripted into the armed group.<sup>92</sup> This initiative was commended by the Commission. As per the FTR Unit, by the time it made its representation to the commission, it had received 2,564 tracing applications out of which 676 were concerning missing children.<sup>93</sup>

The LLRC Report further highlighted the need to consider the issuance of death certificates and monetary compensation as matters of priority where necessary.<sup>94</sup> The legal provisions that have enabled next of kin to apply for Certificates of Death concerning missing persons was commended by the Commission.<sup>95</sup> However, the representations that were made to the Commission revealed that the inability to obtain Death Certificates, if so wished by the next of kin, concerning missing persons has posed impediments to the continuity of ordinary lifestyles as well as obstructing the next of kin from availing themselves of compensation and other rehabilitation facilities offered.<sup>96</sup> The LLRC Commission has also emphasised that the relatives of missing persons are entitled to know where their loved ones are, and that they possess the right to know the truth regarding the fate that befell the loved one. This has been identified as a factor leading to closure.<sup>97</sup>

The Report of the United Nations Secretary General's Panel of Experts on Accountability in Sri Lanka, more commonly known as the 'Darusman Report', was issued on 31 March 2011. The panel was mandated to advise the Secretary General regarding the process that should be adopted in Sri Lanka to create accountability 'having regard to the international humanitarian, and human rights law during the final stages of the armed conflict in Sri Lanka'.<sup>98</sup> Even though the LLRC Report had not been released by then, the Darusman Commission expressed concern regarding the resourcefulness of such commissions, *inter alia*, to cater to the needs of missing persons, and regarding the possibility of such CoIs to create the political will to effectively implement the recommendations of such commissions.<sup>99</sup> In hindsight, this apprehension has proven true. In its recommendations, the Panel of Experts requested that the government provide 'death certificates for the dead and missing, expeditiously and respectfully, without charge, when requested by family members, without compromising the right to further investigation and civil claims'.<sup>100</sup> Exposing another facet of disappearances, the Darusman Report expounds that within camps of internally displaced persons (IDPs) where unrelated individuals are compelled to live in the same tent, women, whose husbands were missing, became vulnerable to abuse.<sup>101</sup>

92 Ibid., p. 178 – 179.

93 Ibid., p. 179.

94 Ibid., p. 164.

95 Ibid., p. 164.

96 Ibid., p. 268.

97 Ibid., p. 339.

98 Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka (Note 34) p. i.

99 Ibid., p. vi.

100 Ibid., p. vii.

101 Ibid., p. 45.



Subsequent to the LLRC, the next major Commission that inquired into missing persons was the Paranagama Commission. The Presidential Commission to Investigate into Complaints Regarding Missing Persons - the 'Paranagama Commission', was established by former President Mahinda Rajapaksa on 15 August 2013.<sup>102</sup> Under its first mandate,<sup>103</sup> the Commission was expected to inquire into missing persons and associated circumstances that have occurred between 10 June 1990 and 19 May 2009.<sup>104</sup> The first mandate required the Paranagama Commission to receive complaints and inquire into abductions and disappearances that have occurred in the North and the East within the aforementioned temporal scope. The Paranagama Commission was required by the President to report on seven issues<sup>105</sup> out of which ascertaining the whereabouts of missing persons, measures that should be adopted to prevent recurrence, and relief to be granted to family members were directly linked with IHL.

A report has been issued to the public concerning the Commission's second mandate to address the facts and circumstances surrounding civilian loss of life and the question of the responsibility of any individual, group or institution for violations of international law during the conflict that ended in May 2009'. Neither has a final report ever been released and nor has a report been released on its first mandate. There are minimal references in the report on the second mandate to missing persons and disappearances. However, the report takes cognizance of the fact that an inquiry may establish that disappearances have occurred in a widespread or systematic manner.<sup>106</sup>

102 Report on the Second Mandate of the Presidential Commission of Inquiry Into Complaints of Abductions and Disappearances (Note 20) p. xii.

103 Its mandate was expanded and a second mandate was thereby designed to assess facts and circumstances surrounding the loss of civilian lives, and to ascertain responses to the question of responsibility.

104 Report on the Second Mandate of the Presidential Commission of Inquiry Into Complaints of Abductions and Disappearances (Note 20) p. xviii.

105 Gazette Extraordinaire of the Democratic Socialist Republic of Sri Lanka No. 1823/42 (15 August 2013). The Commission was required to report on:

Whether any persons resident in the Northern and Eastern Provinces during the period June 10, 1990 to May 19, 2009 have been abducted or have disappeared from their places of residence;

Evidence in proof of the fact that such persons have been abducted or have disappeared;

Who are those so abducted or have disappeared and their present whereabouts;

Cogent factors or evidence that would help form an idea about the person or persons responsible for the said abduction or disappearances;

Legal action that could be instituted against the person or persons who are found to be responsible;

Measures that should be taken to ensure that there will be no recurrence of such acts in the future;

If there is any reasonable relief to be granted as an obligation on the part of the Government to the parents, spouses and dependants of those alleged to have been so abducted or have disappeared.

106 Report on the Second Mandate of the Presidential Commission of Inquiry Into Complaints of Abductions and Disappearances (Note 20) p. 105.

Systematic and widespread disappearances, if proven to have been committed, are regarded by the Commission as crimes against humanity.<sup>107</sup> It is further noted that in cases where disappeared individuals are subsequently found to have been mistreated and / or killed, such practices amount to violations of Article 3 common to the Geneva Conventions.<sup>108</sup> The report also inquires into ‘whether the LTTE as a non-state actor was subject to international humanitarian law in the conduct of its military operations’ and establishes that the LTTE could also be held liable for similar violations of IHL.<sup>109</sup>

In 2015, OHCHR issued its report entitled Report of the OHCHR Investigation in Sri Lanka (OISL Report). This report was a result of OHCHR’s comprehensive investigation into alleged serious violations and abuses of human rights and related crimes.<sup>110</sup> However, the lack of an enabling legislation then to domestically implement the International Convention for the Protection of All Persons from Enforced Disappearances was highlighted by the OISL Report.<sup>111</sup> It was further pointed out that ‘it is crucial that this legislation be enacted by the time the Office of Missing Persons becomes functional’.<sup>112</sup> The legal framework pertaining to both of these have presently been laid out by the GoSL and it remains to be seen how the laws are utilised by the people for invoking their redresses.

The OISL Report states that:

the Government has a duty to make every effort to trace the whereabouts of [disappeared / missing] persons, to inform the

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107 Ibid., p. 105.

108 Ibid., p. 105. Para. 435 of the report states as follows:

[T]he Commission’s first Mandate overlaps with its Second Mandate to the extent that complaints of disappearances during the final phase of the conflict, in addition to invoking international human rights law, may amount to allegations of the crime against humanity of forced disappearances. In this respect, the Commission is concerned to establish whether a discernible pattern of widespread or systematic conduct emerges. Furthermore, where there is evidence that persons who went missing were subsequently mistreated and / or killed, this may constitute an allegation of a violation of Common Article 3 to the Geneva Conventions, namely murder, cruel treatment, torture or the carrying out of executions without prior judgment, as war crimes.

109 Ibid., p. xii. See also p. 65 – 66. Paragraphs 302 – 304 state as follows:

The LTTE, as non-state actors engaging in armed conflict, are liable for any transgressions of IHL. Three theories support this conclusion. The first holds that non-state actors are bound by IHL ‘by reason of their being active on the territory of a Contracting Party’ [...] Under the second theory, armed groups are bound by rules of IHL when they exercise control over territory sufficient to enable them to mount sustained military operations. [...] The third theory is that international humanitarian treaty and customary law create rights and obligations for individuals, including non-state actors. Thus, individuals are bound by these rules directly under international law and may be held individually criminally responsible for violations amounting to war crimes.

110 OISL Report (Note 12) para. 13.

111 Ibid., para. 15.

112 Ibid.

families of any progress in locating the missing, to ensure reunification with their families if appropriate, or to hand over the body of the person, if confirmed as deceased.<sup>113</sup>

The content of the OISL Report read in conjunction with the provisions of the OMP Act indicates that the government of Sri Lanka (GoSL) has accepted the continuing nature of IHL obligations. The OISL Report notes that families which were looking for their missing loved ones were being sent from place to place without being given any information which ‘made the search psychologically as well as financially onerous’.<sup>114</sup>

OISL report notes that when questioned regarding missing persons, the Sri Lanka army claimed to have acted lawfully at all times and that the army had declared that ‘many of those missing either died during confrontation with the military or fled the country illegally and were living in western countries’.<sup>115</sup> In this respect, it seems necessary to highlight that humanitarian law’s purposes are different from those of international criminal law or that of any *ad hoc* tribunal which is set to ascertain criminal responsibility. IHL’s purpose is primarily humanitarian. Thus IHL’s interest in alleviating human suffering precedes its potential of functioning as a tool of retributive justice. While IHL can be used to prosecute and penalise individuals responsible for committing violations, the process would be framed within a humanitarian mandate as opposed to a retributive mandate that appears to have gained momentum in international criminal law. Irrespective of who has violated the legal principles under IHL, at the end of an armed conflict which has occurred between the State armed forces and non-State actors, the State bears a responsibility, *inter alia*, to search for missing persons, ascertain their whereabouts and to reunify families. If some of the missing persons are deceased as a result of the armed conflict, the State bears the duty to ascertain who died in such circumstances, hand over human remains to family members and aid the families with their healing process leading to closure. It is impossible to merely make unsubstantiated claims concerning the whereabouts of missing persons. Quoting a written submission, CTF has taken cognizance of the reality that the humanitarian goal of identification of human remains takes a back seat within processes of which the primary goal is criminal prosecution.<sup>116</sup> It states:

This type of investigation [a complicated forensic investigative process] is often a slow and very lengthy process; although it may also strive to provide victim identification for those of the missing who are deceased and return their mortal remains to their families, the primary goal of the investigators is usually criminal

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113 Ibid., para. 391.

114 Ibid., para. 448.

115 Ibid., para. 438.

116 Final Report of the Consultation Task Force on Reconciliation Mechanisms (Note 31) p. 397.

prosecution. This, and many other factors, may result in the delay of the humanitarian goal of identification.<sup>117</sup>

Thus, it is necessary to grant primacy to tracing missing persons. If remains are found of a person deemed to have been missing, a forensic analysis could be carried out to ascertain the cause of death and circumstances surrounding death. Such approaches could also lead to the finding of perpetrators, if any. Furthermore, this approach could also aid in supporting or disproving the claims made by different entities concerning the circumstances in which the disappearances occurred.

The CTF consisted of a panel of eleven members drawn from civil society organisations appointed to ‘seek the views and comments of the public on the proposed mechanisms for transitional justice and reconciliation [...]’.<sup>118</sup> This panel was appointed in late January 2016. A final and comprehensive report of the CTF has been issued to the public. The CTF report highlights that an ‘overwhelming majority’ of the participants at public meetings were from the families of the disappeared.<sup>119</sup> It has been noted that ‘[t]his reveals their fervent hope for truth and closure and also for confirmation of a deep and abiding belief that a loved one is still alive’.<sup>120</sup> The CTF notes that the above sentiment has, at present, also led to the refusal of reparations.<sup>121</sup> This report contains a separate chapter on the OMP and makes references to the necessity to urgently redress requirements of family members of missing persons. This report has amply highlighted the necessity of redressing issues concerning the missing which can also have an impact on reconciliation efforts of Sri Lanka.

The reports that have been analysed in this segment of the chapter lead to some interesting conclusions. First is that IHL’s continued validity and applicability in Sri Lanka in relation to missing persons has been recognized, if not expressly, by implication in all such reports. This recognition has been used to support IHL’s premise that the family members of a missing person are entitled to know the fate of the loved one as well as the circumstances in which such person disappeared. Further, the reports establish the rights of the family members to have access to the remains of deceased loved ones if discovered thereby enabling them to conduct a proper burial that will guarantee their entitlement to truth as well as closure. The crux of these arguments lead to the conclusion that the body of literature that has been produced in Sri Lanka through various reports indicate the continued relevance of IHL in Sri Lanka to missing persons as well as their family members.

## 2.5 Conclusion

Despite the end of the armed conflict in 2009, the consequences that have arisen in relation to the armed conflict continue to remain and affect the entirety of Sri Lanka which is currently grappling with transitional processes. One of the primary goals of

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117 Ibid.

118 Ibid., at p. VII.

119 Ibid., p. 4.

120 Ibid., p. 4.

121 Ibid., p. 44.

such a transitional process is to redress past violations and to take cognizance of the mammoth impact that some such violations have effected on the contemporary society. Undoubtedly, the impact of missing persons continues to remain unless and until the right to know of the families is addressed and effective remedies are provided. As per the general body of IHL that has been analysed in detail in this chapter, effective remedies pertaining to missing persons include searching for missing persons, ascertaining the truth pertaining to the circumstances in which a person's whereabouts became unknown, ascertaining whether the missing person is alive or dead, and if dead, searching for remains and handing them over to the family members for proper burial. All of these aspects are covered by IHL and this chapter propounds that IHL's application is not restricted to the exact temporal scope of the armed conflict as there remains continuing impacts that can only be fully redressed through IHL's effective application. Hence, it is contended that IHL can and should apply in relation to issues pertaining to missing persons in Sri Lanka in the post-war context.

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## 3. Protecting the Rights of Detainees in Sri Lanka

Rajiv Goonetilleke<sup>1</sup> and Yanitra Kumaraguru<sup>2</sup>

### 3.1 Introduction

Sri Lanka experienced a period of non-international armed conflict between 1979 to 2009, during which time the intensity and geographic spread of the armed conflict increased, involving at one time the presence of foreign military personnel (Indian Peace Keeping Force – IPKF) in Sri Lanka. Detainees as a result of the armed conflict were seen on the sides of the State actors as well as the non- state actors.

While the Geneva Conventions<sup>3</sup> contain more than 175 rules regarding the deprivation of liberty in relation to international armed conflicts, no comparable legal regime applies to non-international armed conflicts (NIACs)<sup>4</sup> except for the standard minimum treatment stipulated under the Common Article 3 and the Additional Protocol II<sup>5</sup> with regard to those States that have ratified it. This raises concerns for detainees who may be subject to extrajudicial killings, enforced disappearances, torture and forms of ill-treatment. State actors nevertheless are subject to national and international human rights laws during periods of non-international armed conflict and there are many instances in which the jurisdiction of national courts have been invoked in habeas corpus applications for persons who had been abducted and detained, as well as in fundamental rights applications to the Supreme Court in respect of torture, inhumane and

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3 12 August 1949, 75 UNTS 287.

4 Common Article 3 however, applies to NIACs in relation to humane treatment to persons taking no part in hostilities. Further Article 5 of Additional Protocol would also be applicable (though not every state has ratified it).

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

degrading treatment<sup>6</sup>. No such legal regime was in place in respect of non-state actors that were parties to the armed conflict; such armed groups do not possess judicial institutions nor adequate infrastructure nor any procedure for international accountability. These concerns regarding detention in non-international armed conflict were evident during meetings convened by the ICRC on strengthening legal protection for persons deprived of liberty in relation to NIACs which included the Thematic Consultations with government experts (2012 -2014) and a meeting with all States (2015).<sup>7</sup>

With the end of the armed conflict in 2009, there has been a decline to virtual non-existence of extra judicial killings and enforced disappearances<sup>8</sup>. However, as reported by the UN High Commissioner for Human Rights during the 24<sup>th</sup> session of the UNHRC there had been approximately fifty cases of arrest and detention under the Prevention of Terrorism Act between 2009 and 2013<sup>9</sup>. These cases of post conflict arrest and detention demonstrate that concern for standards in relation to detention does not and should not come to an end with the termination of an armed conflict but should continue to be monitored in post conflict situations to ensure that those detained as a result of the conflict have standard minimum treatment. In all cases of post conflict detention rights guaranteed by human rights treaties apply.

This paper will proceed to discuss the background and framework for IHL in non-international armed conflict, the International legal regime for detainees, Sri Lanka's treaty obligations, the application of the legal regime for IHL in post conflict Sri Lanka and the conclusions that could be drawn therefrom.

## 3.2 Background

The role of International Humanitarian Law in safeguarding the rights of detainees is crucial in times of armed conflict. The framework of International Humanitarian Law pertaining to detention is not only limited in its operation to the strict duration of an armed conflict, but also continues to remain relevant to the protection of the rights of detainees even in a post armed conflict situation.

Detainees are those persons who are deprived of their liberty under the control or with the consent of the State or in the context of non-international armed conflicts detained by non-State actors<sup>10</sup>.

International standards pertaining to the rights of detainees are therefore not just relevant to persons detained for reasons relating to the armed conflict and during an armed conflict but such standards also remain relevant in the post conflict period in relation

6 Law and Society Trust, "Sri Lanka: State Human Rights 2000-2009".

7 Tilman Rodenhäuser "Strengthening IHL protecting persons deprived of their liberty: Main aspects of the consultations and discussions since 2011" (2016) 98 International Review of the Red Cross, 941, 956-958.

8 Law and Society Trust, "Sri Lanka: State of Human Rights 2014, Law and Society Trust, 11-16 .

9 Ibid, 17-18.

10 International Committee of the Red Cross, 'Detention' (How Does Law Protect in Law) <<https://casebook.icrc.org/glossary/detention>> accessed on 25 August 2019.

to two more categories of persons: first, those persons who have been detained during the conflict and have remained in detention following the cessation of the conflict; and second, those persons who were taken into detention in the period following armed conflict, for reasons related to the armed conflict. It is of paramount importance that International Humanitarian Law principles are acknowledged as relevant and are continued to be upheld in relation to these persons even in the post conflict period, especially as detainees arrested in relation to the conflict may often be vulnerable to ill-treatment and neglect during the post conflict period.

The armed conflict in Sri Lanka that took place between 1979 and 2009 is accepted as falling within the classification of a non-international armed conflict.<sup>11</sup> The application of international humanitarian law to the rights of detainees therefore is by means of the legal framework specific to non-international armed conflicts; primarily comprising Common Article 3 to the Geneva Conventions<sup>12</sup>, the Second Additional Protocol to the Geneva Conventions<sup>13</sup> and customary international humanitarian law. It is the same framework of International Humanitarian Law that continues in relevance and thus applies to conflict related detainees even in the post armed conflict period.

Two aspects about this legal regime are noteworthy. The first, is that the international humanitarian law framework laid down in relation to non-international armed conflicts pales in comparison to the extensive and detailed regulations governing international armed conflicts.<sup>14</sup> The lacuna in legal protection in itself may operate as an impediment to the guarantee of rights for detainees and there is therefore a need to strengthen this legal framework in furtherance of greater protection for detainees of non-international armed conflicts.<sup>15</sup> The second, is that the legal framework applicable to conflict related detention is one that is illustrative of the interplay between international humanitarian law and international human rights law. The relatively weak structure of international humanitarian law in place for detention in non-international armed conflicts therefore is supplemented by several international human rights instruments in protecting the rights of detainees.

The protection of the rights of detainees in the post armed conflict situation in Sri Lanka, for these reasons, must be examined not only through the law in relation to Common Article 3 of the Geneva Conventions, the Second Additional Protocol to the Geneva Conventions and relevant customary international humanitarian law but also through all relevant international human rights law instruments and applicable international standards.

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11 Isabelle Lassez, 'Last stages of the war: Clarifying the application of IHL' (South Asian Centre for Legal Studies, 2015) 12.

12 Common Article 3 to the Geneva Conventions of 12 August 1949.

13 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977

14 Rodenhäuser (n.7) 941.

15 Ibid.



### 3.3 Sri Lanka's Treaty Obligations

#### 1.3.1 The Geneva Conventions

Sri Lanka is a State Party to the Geneva Conventions of 1949<sup>16</sup> and is therefore subject to the obligations set out therein. The law applicable to the non-international armed conflicts within the text of the four Geneva Conventions themselves however is limited to Article 3, common to all four Geneva Conventions.

Described as a convention in miniature<sup>17</sup> and functioning as a minimum yardstick of humanitarian considerations<sup>18</sup>, Common Article 3 binds each party to a non-international armed conflict taking place in the territory of one of the High Contracting Parties, to the provision of several minimum protections.

The application of the Article however, in certain instances, extends after the end of the non-international armed conflict. While the text of Common Article 3 in itself does not contain indication to this respect<sup>19</sup>, according to the Commission of Experts convened by the ICRC to study humanitarian aid to victims of internal conflicts, the settlement of an internal conflict does not in and of itself and of full right conclude the application of Common Article 3. Common Article 3 obligations must be respected in all circumstances, times and places and will therefore continue to apply to situations arising from the conflict and to the participants in that conflict.<sup>20</sup> Those persons who remain within a scenario provided for by Common Article 3 as a result of the non-international armed conflict therefore, will continue to be afforded vital protections under the Article despite the end of the armed conflict in question.<sup>21</sup> The 2016 Commentary to Article 3 cites as an example the humane treatment, inclusive of a fair trial, that must continue to be afforded even after the end of the armed conflict to those who were detained in relation to the conflict.<sup>22</sup>

The Article provides that persons taking no active part in hostilities including those rendered hors de combat by detention shall be treated humanely at all times and without adverse distinction on grounds such as race, colour, religion/faith, sex, birth and wealth.<sup>23</sup> The prohibition on differential treatment based on adverse distinction applies regardless of whether persons were singled out and subject to adverse distinction in treatment or instead subject to adverse distinction and treatment as a consequence

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16 International Committee of the Red Cross, 'Treaties, State Parties and Commentaries- Sri Lanka' (International Committee of the Red Cross) <[https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp\\_countrySelected=LK](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=LK)> accessed on 25 August 2019.

17 Commentary of 1952 on Article 3 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949.

18 Ibid., paragraphs 356, 515.

19 Common Article 3 (n.12).

20 Commentary of 2016 on Article 3 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (n.15), paragraph 498.

21 Ibid., paragraphs 500-501.

22 Ibid., paragraph 501.

23 Common Article 3 to the Geneva Conventions of 12 August 1949.

of a general measure<sup>24</sup>. This does not however, in any way affect the obligation to afford differential treatment in the instances where such differentiation is required in order to ensure humane treatment.<sup>25</sup>

In furtherance of ensuring such humane treatment, the Article lays out prohibitions in relation to violence to life and person (inclusive of both physical and mental integrity<sup>26</sup>) with particular emphasis on murder, mutilation, cruel treatment and torture, the taking of hostages and outrages on personal dignity with particular emphasis on humiliating and degrading treatment.<sup>27</sup> Examples of degrading treatment, in the jurisprudence of international criminal tribunals in the past, have included unsuitable conditions of detention and unceasing fear of being subject to violence.<sup>28</sup> Humane treatment would instead, as positive obligations, include adequate food, water and clothing, health, hygiene, medical care, respect for beliefs and religious practices, due regard for a person's gender as well as appropriate communication with persons outside the confines of their place of detention and security.<sup>29</sup>

Of specific relevance to questions of detention, prohibition is also placed on passing sentences and carrying out executions in the absence of a previous judgment by a regularly constituted court, with all judicial guarantees recognised as indispensable by civilised persons.<sup>30</sup> Judicial guarantees accepted as indispensable include the rights of the accused to be informed of the nature and cause of the offence without delay, to have the necessary rights and means of defence, to be presumed innocent, to only be convicted of an offence on the basis of individual penal responsibility, to be tried in one's own presence, to be advised of judicial remedies and the relevant time limits, to not be made to forcibly confess guilt or testify against oneself and to be tried in acknowledgment of the principle that there shall be no crime or punishment without law and that there shall be no penalty heavier than that provided for at the time of offence.<sup>31</sup> The impact of undue delay on the fairness of a trial must also be noted.<sup>32</sup>

Common Article 3 and the second Additional Protocol to the Geneva Conventions do not have adequate safeguards in regard to internment, or the non-criminal detention of persons for reason of threat to security in relation to the armed conflict; of particular

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24 Commentary of 2016 on Article 3 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (n.15), paragraph 573.

25 Ibid., paragraph 576.

26 Ibid., paragraph 590.

27 Common Article 3 (1)( a),(b) and (c) to the Geneva Conventions of 12 August 1949.

28 Commentary of 2016 on Article 3 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (n.17), paragraph 672.

See for example *Prosecutor v. Miroslav Kvočka Milojica Kos Mla\O Radij Zoran Žigić Dragoljub Prca* (2001) IT-98-30/1-T (ICTY) (also referred to as the *Kvočka* Trial Judgment)

29 Ibid., paragraphs 558,593.

30 Common Article 3 (1) (d) to the Geneva Conventions of 12 August 1949.

31 Commentary of 2016 on Article 3 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (n.17), paragraph 685.

32 Ibid., paragraph 688.

concern are the insufficient grounds for detention and procedure thereafter.<sup>33</sup> The International Committee of the Red Cross however adheres to ‘imperative reasons of security’ as the minimum legal requirement in order to intern in non-international armed conflicts.<sup>34</sup> The fact that the purpose of internment is that of protecting the security of the detaining party, and not that of punishment, dictates that the internment cannot last for any longer than what is absolutely necessary to protect security. In order to address this concern, it is essential that a review mechanism that is both prompt and of regular frequency be put in place to ascertain whether the security reasons that resulted in the administrative detention were still prevalent. A minimum frequency of every six months is recommended in this regard.<sup>35</sup> The requirement is echoed in human rights law as seen, for example, in General Comment 35 to the ICCPR.<sup>36</sup>

Thus, while preserving the State’s right to prosecute, sentence and punish in accordance with the law by stating that the “application of the preceding provisions shall not affect the legal status of the Parties to the conflict” Common Article 3 ensures that safeguards for the purposes of reducing errors in the course of administration of justice are still adhered to during times of and in relation to non-international armed conflicts.<sup>37</sup> The contents of the article must be adhered to without condition of reciprocity.<sup>38</sup>

The Article also draws attention to the obligations present in the remainder of the Geneva Conventions by encouraging parties to bring into force all or part of the remaining provisions of the Conventions by way of special agreements.<sup>39</sup> Additionally, the Article also provides that an impartial humanitarian body such as the International Committee of the Red Cross, may offer its services to the parties to the conflict.<sup>40</sup> It is of relevance to note here that parties to the conflict may not refuse such services on an arbitrary basis, especially in instances where the party in question is either unwilling or unable to guarantee the basic humanitarian needs of those affected by the armed

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33 Ibid., paragraphs 718-720.

34 Ibid., paragraph 721.

35 Jelena Pejic, ‘Procedural principles and safeguards for internment/ administrative detention in armed conflict and other situations of violence’ (2005) 87 *International Review of the Red Cross*, 375.

36 UN Human Rights Committee (HRC), *General comment no.35, Article 9 (Liberty and security of person)* 16 December 2014, CCPR/C/GC/35.

37 Commentary of 1952 on Article 3 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; Commentary of 1960 on Article 3 of Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949.

38 Commentary of 1952 on Article 3 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 ; Commentary of 2016 on Article 3 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, paragraph 562.

39 Common Article 3 (n.12).

40 Ibid.

conflict itself.<sup>41</sup>

The Second Additional Protocol to the Geneva Conventions contains more detailed protections applicable in the context of a non-international armed conflict that supplement those provided for in Common Article 3 of the Conventions. Article 4 of the Additional Protocol provides fundamental guarantees to all those not taking a direct part in hostilities and those who have ceased to take part in hostilities, inclusive of those who have been deprived of liberty.<sup>42</sup> It is followed by Article 5 which provides detailed and specific minimum protection to those persons who have been deprived of their liberty, whether by way of detention or internment, for reasons related to the armed conflict.<sup>43</sup> Article 6 goes on to state the protections guaranteed in relation to the prosecution and punishment of criminal offences related to the armed conflict.<sup>44</sup> Sri Lanka however is not a party to this Protocol and is therefore not bound by its contents except in so far as any provisions that are accepted as customary international law.

Article 2 of the Protocol however is worth noting in relation to the continuing relevance of international humanitarian law in protecting the rights of detainees consequent to the end of the armed conflict itself. The Article states that even at the end of an armed conflict, the protection afforded by Articles 5 and 6 will continue to apply to those deprived of or restricted in liberty for reasons related to the armed conflict and even to those deprived of or restricted in liberty at a time after the armed conflict for reasons related to the armed conflict. Such protection will continue until the end of the deprivation or restriction of the liberty of such persons.<sup>45</sup>

### 3.3.2 Other Relevant Treaties and Non-binding International Instruments

The sources of International Humanitarian Law protecting the rights of detainees discussed above are supplemented by several other instruments of International Human Rights Law.

The Universal Declaration of Human Rights<sup>46</sup> stipulates that every person is entitled to the right to life and liberty<sup>47</sup> and may not be subject to arbitrary arrest or detention<sup>48</sup>. Additionally, no-one may be subjected to torture or cruel, inhuman or degrading treatment or punishment.<sup>49</sup> The Declaration also enshrines the right to a fair and public

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41 Commentary of 2016 on Article 3 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (n.15) paragraphs 833-835.

42 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (n.11), Article 4.

43 Ibid., Article 5.

44 Ibid., Article 6.

45 Ibid., Article 2(2).

46 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

47 Ibid., Article 3.

48 Ibid., Article 9.

49 Ibid., Article 5.

hearing by an independent and impartial tribunal<sup>50</sup> together with the presumption of innocence and the understanding that there shall be no penal offence without pre-existing law to that effect and that there shall not be a heavier penalty than that which was applicable at the time of the offence.<sup>51</sup> The Declaration further provides the right to an effective remedy for violations of fundamental rights.<sup>52</sup> These same rights are enshrined and given effect to in the International Covenant on Civil and Political Rights<sup>53</sup> (to which instrument Sri Lanka is a party<sup>54</sup>) and the corresponding General Comments made by the Human Rights Committee.

In addition, subject specific treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination<sup>55</sup>, the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment<sup>56</sup> and the Convention on the Rights of Persons with Disabilities<sup>57</sup> also contribute in content to the protection of the rights of detainees.

Apart from the Universal Declaration of Human Rights and the Conventions mentioned above, several bodies of principles and rules also lay out standards in furtherance of protecting rights of detainees. These include the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by

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50 Ibid., Article 10.

51 Ibid., Article 11.

52 Ibid., Article 8.

53 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 See Article 6 for the right to life; Article 9 for the right to liberty and the right to be free from arbitrary arrest or detention and corresponding procedural safeguards; Article 7 for the right to be free from torture and cruel, inhuman or degrading treatment or punishment; Article 10 specifically providing for the treatment of those deprived of liberty with humanity and dignity; Article 14 for the right to a fair and public hearing by a competent, independent and impartial tribunal, the presumption of innocence and minimum guarantees in the determination of a criminal charge; Article 15 on the principles that there shall be no criminal offence without pre-existing law to that effect and that there shall not be a heavier penalty than that which was applicable at the time the offence was committed and Article 2(3) for the right to an effective remedy.

54 United Nations Human Rights Office of the High Commissioner, 'UN Treaty Body Database – Ratification Status for Sri Lanka' (United Nations Office on the High Commissioner of Human Rights) <[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=164&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=164&Lang=EN)> Accessed on 25 August 2019.

55 UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195

56 UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

57 UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106.

General Assembly resolution 43/173 of 9<sup>th</sup> December 1988<sup>58</sup>, The Standard Minimum Rules for the Treatment of Prisoners now revised<sup>59</sup> and known as The Nelson Mandela Rules and the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.<sup>60</sup>

### 3.4 Relevant Customary International Humanitarian Law

A study of Customary International Humanitarian Law indicates that several rules affording protection to detainees can now be considered to have crystalized into Customary International Law that parties are bound to apply even in the context of a non-international armed conflict. Much like the provisions discussed under the section on Sri Lanka's treaty obligations under the Geneva Conventions, these rules of Customary International Humanitarian Law continue in relevance and therefore in application even beyond the end of an armed conflict in relation to those persons who have been detained during the war but have remained in detention past the end of the armed conflict and second, to those persons who were detained in the post armed conflict period for reasons related to the armed conflict.

#### 3.4.1 General Protections Applicable to Detainees

The fundamental guarantees forming part of Customary International Humanitarian Law in relation to non-international armed conflicts include humane treatment<sup>61</sup> and a prohibition on adverse distinction on grounds such as race, language and political opinion in the application of the law.<sup>62</sup> The rules also include prohibitions on murder<sup>63</sup>, corporal punishment<sup>64</sup> as well as torture, cruel or inhuman treatment and outrages upon personal dignity.<sup>65</sup>

Customary law also prohibits uncompensated and abusive forced labour.<sup>66</sup> In determining how this prohibition is interpreted it must be noted that human rights law carves out certain exceptions to the general prohibition, recognising for example that labour undertaken by prisoners within prison establishments does not constitute un-

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58 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment' adopted by General Assembly resolution 43/173 of 9th December 1988.

59 'Standard Minimum Rules for the Treatment of Prisoners' adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

60 The United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

61 International Committee of the Red Cross, Customary IHL Database, Rule 87 < [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul) > Accessed on 25 August 2019.

62 Ibid., Rule 88.

63 Ibid., Rule 89.

64 Ibid., Rule 91.

65 Ibid., Rule 90.

66 Ibid., Rule 95.

lawful forced labour.<sup>67</sup> Additional Protocol II in its application to the non-international armed conflict however, has specified that if required to work, those persons who have been subject to the deprivation of their liberty in relation to the armed conflict must still be afforded working conditions and safeguards similar to those of local civilians.<sup>68</sup>

State practice also establishes a prohibition on enforced disappearances as a rule of Customary International Humanitarian Law.<sup>69</sup> A duty to investigate alleged enforced disappearances is included in this prohibition<sup>70</sup> and continues to be of crucial significance in the period consequent to the end of an armed conflict.

Of very direct relevance to this chapter is Rule 99 of the Customary International Humanitarian Law Compilation; prohibiting the arbitrary deprivation of liberty.<sup>71</sup> Any detention that goes beyond that provided for in law will be considered a violation of this rule<sup>72</sup> and it must be remembered that in establishing a valid reason in law for detention that it is not just the initial reason for such detention that must be taken into consideration but also the reason behind the continued detention of such person.<sup>73</sup> The effective realisation of this protection therefore entails that all those persons who are detained for reasons related to the non-international armed conflict are also afforded the opportunity to challenge the legality of their detention.<sup>74</sup>

The fundamental guarantees also include the right to a fair trial as well as requisite judicial guarantees and principles prior to conviction and sentencing.<sup>75</sup> The guarantee draws on the right to a trial without delay as found in national legal systems and military manuals.<sup>76</sup>

### 3.4.2 Specific Protections Applicable to Detainees

Certain protections specific to those persons deprived of their liberty have also been recognised as constituting Customary International Humanitarian Law. Detainees must, for example, be provided with adequate food, water, clothing, shelter and medical treatment<sup>77</sup> and be accorded respect for their personal convictions and religious practices.<sup>78</sup> Pillage of personal belongings of detainees is prohibited.<sup>79</sup> Personal details of detainees must be recorded.<sup>80</sup> Those detained in relation to a non-international

67 International Committee of the Red Cross, Customary International Humanitarian Law (2005) Volume I: Rules, 332.

68 Ibid.

69 International Committee of the Red Cross, Customary IHL Database, (n.58) Rule 98.

70 International Committee of the Red Cross (n. 64) ,343.

71 International Committee of the Red Cross, Customary IHL Database, (n. 58) Rule 99.

72 International Committee of the Red Cross (n. 64) 349.

73 Ibid., 348-349.

74 Ibid., 352.

75 International Committee of the Red Cross, Customary IHL Database, (n. 58) Rules 100-103.

76 International Committee of the Red Cross, (n. 64) 364.

77 International Committee of the Red Cross, Customary IHL Database, (n. 58) Rule 118.

78 Ibid., Rule 127.

79 Ibid., Rule 122.

80 Ibid., Rule 123.

armed conflict must also be allowed personal correspondence with their families subject to reasonable restrictions and permitted visitors, with particular emphasis on close relatives, as far as is practicable.<sup>81</sup>

Women detainees must be under the direct supervision of women and must be given quarters separate to the male detainee quarters. The only exception to this rule shall be in relation to family units.<sup>82</sup> Similarly children, if deprived of their liberty, must be held in a space separate from adult quarters with the exception of family units.<sup>83</sup>

It is also part of Customary International Humanitarian Law that the International Committee of the Red Cross may offer its services to the relevant parties of a non-international armed conflict. This enables visits to those detained in relation to the armed conflict, verifying detention conditions and facilitating the restoration of contacts between detainees and their family members.<sup>84</sup>

Of specific relevance in the post armed conflict context is also the rule of Customary International Law that those detained in relation to the non-international armed conflict must be released as soon as the reasons for their detention cease to exist.<sup>85</sup> Continued detention may take place where there are pending penal proceedings or lawfully imposed sentences.

### **3.5 Application in Sri Lanka**

#### **3.5.1 Legal Framework for Arrest and Detention in Sri Lanka**

Detention is possible by the police in terms of the regular law, where the police may arrest a person for any non-cognizable offence and for a cognizable offence with judicial authority. Such detention is possible for a period of twenty-four hours without judicial order and possible thereafter only upon the suspect being produced before a magistrate<sup>86</sup>.

Article 13(2) of the Constitution of Sri Lanka guarantees due process for detainees, it states that “Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before a judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with the procedure established by law”.

The constitutional guarantee is however, diluted by the fact that two laws, namely the

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81 International Committee of the Red Cross, Customary IHL Database, (n.58) Rules 125-126; International Committee of the Red Cross, (n.64) 445.

82 International Committee of the Red Cross, Customary IHL Database, (n.58) Rule 119.

83 Ibid., Rule 120.

84 Ibid., Rule 124.

85 Ibid., Rule 128.

86 Section 65, Police Ordinance No.16 of 1865 as amended.



Public Security Ordinance<sup>87</sup>(PSO) and the Prevention of Terrorism Act<sup>88</sup>(PTA) permit detention for extended periods. Under the PTA an officer not below the rank of the Superintendent of Police may with or without a warrant arrest any person connected with or concerned with or reasonably suspected of unlawful activity in terms of the Act<sup>89</sup>. Any person so arrested should be produced before a magistrate within seventy-two hours<sup>90</sup>. Detention under the Prevention of Terrorism Act is also possible by Ministerial order whereby, the Minister may order that a person be detained for a period not exceeding three months in the first instance and extended from time to time provided that the aggregate period of detention does not exceed eighteen months<sup>91</sup>.

The Public Security Ordinance may be invoked in cases of any Emergency by the President and be operative for a period of one month unless extended by Parliament<sup>92</sup>. The President may also make Regulation under the PSO which appear to him to be necessary and expedient and such Regulations will be in force for a period of fourteen days unless extended by Parliament<sup>93</sup>. Regulation 19 made under the provisions of Section 5 of the PSO enables the Secretary to the Ministry of Defence to order detention of any person acting prejudicial to national security up to a period of one year. Any member of the Army, Navy or Air Force may carry out such order<sup>94</sup>. Any person so detained may be detained at any place authorized by the Inspector General of Police<sup>95</sup>

While the provision of the Public Security Ordinance and the regulations made thereunder are subject to approval by Parliament, the reality is that there has been during the period of armed conflict a continuous approval by Parliament of the continuation of its provisions leading to the detention of persons under such laws.

The above provisions refer to preventive detention for purposes of national security. Often many of the detainees are held without any charges and this has come in for criticism. There are however many persons detained subject to judicial process, pending further investigation and trial. These investigations may last many years and persons may continue to be detained even with judicial supervision.

The issues of post conflict detention therefore arise in regard to persons placed in detention upon judicial orders pending conclusion of investigations and possible trial. The conditions of detention, the treatment of detainees and the long periods of detention are matters that would be relevant in terms of IHL in non-international armed conflict.

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87 Public Security Ordinance No. 25 of 1947 as amended.

88 Prevention of Terrorism Act No. 48 of 1979.

89 Ibid, Section 6(1).

90 Ibid, Section 7.

91 Ibid, Section 9(1).

92 Public Security Ordinance (n.84), Section 2.

93 Ibid, Section 5(1) and 2(4).

94 Regulation 19(2) of the Regulations made under Section 5 of the Public Security Ordinance (n.84).

95 Ibid, Regulation 19(3).

### 3.5.2 Statistics on Detainees

Statistics available from the Department of Prisons indicate that there were 99,639 un-convicted prisoners in 2013, 90,251 in 2014, 89,559 in 2015, 94,655 in 2016 and 99,036 un-convicted prisoners in 2017. These prisoners were held in 23 different places of detention, in remand prisons<sup>96</sup>.

A further survey of the gender distribution of these remand prisoners indicate that there were in 2013, 6275 female detainees, 5733 female detainees in 2014, 6058 in 2015, 5926 in 2016 and 5,251 female remand prisoners in 2017<sup>97</sup>. Taken as a percentage, on average about six percent of the remand prisoners were female.

An examination of the age distribution of the remand prisoners, indicate that there were very few persons under the age of sixteen; in any given year surveyed from 2013 to 2017, the persons under 16 were less than five hundred or less than 0.5% of the remand prisoners<sup>98</sup>. Nevertheless, the fact that there were in any given year a number of persons of school going age is a factor that needs to be considered.

The majority of remand prisoners fell within the age group from thirty to forty, while the next most populous group was in the age group between twenty-two and thirty years. Taken together the age group from twenty-two to forty comprised more than sixty-three percent of the remand prisoners in any given year between 2013 and 2017<sup>99</sup>.

At the other extreme of the age distribution figures, those over sixty in any given year between 2013 and 2017 ranged from two thousand five hundred to four thousand, approximately 4% of the remand prisoners.

In terms of the periods spent in remand pending trial, statistics available for 2017 indicate that a total of 10,229 male and 718 female remand prisoners awaited trial. Of these, 648 male and 31 female remand prisoners had been waiting trial for more than two years. The numbers dwindle thereafter with 157 persons in remand between three to four years, 149 persons in remand from four to five years and 134 persons in remand for more than five years, of which 126 were male and 8 were female.

These figures indicate that while there are yet person who may be detainees or remand prisoners as a result of the armed conflict, their numbers are declining. These statistics are from the Prisons department, and it is presumed there are no detainees in military custody.

### 3.5.3 Role of the ICRC

The ICRC has had a long presence in Sri Lanka and has had the opportunity of visiting detainees in state-controlled detention centres. In 2018, the ICRC has renewed

96 Department of Prisons Sri Lanka, 'Prisons Statistic of Sri Lanka' (Volume 13, Statistics Division – Prison Department of Sri Lanka, 2018).

97 *ibid.*

98 *ibid.*

99 *ibid.*

its agreement with the government of Sri Lanka, on Cooperation and Humanitarian Activities to Benefit Persons Deprived of their Liberty, to enable it to continue visits to detention centres.

The ICRC would therefore have access to all places of detention with reasonable notice, and during all stages of detention including detainees subject to investigation, sentenced to life imprisonments, person sentenced to death whose detention is related to actions or threats pertaining to State security.

The purpose of these visits to person in detention would be to examine conditions of detention, to interview detainees, medically examine detainees where possible and to contact the families of detainees and exchange messages if necessary.

The ICRC may also submit reports to the Sri Lankan authorities together with its findings and recommendations with a view to improving conditions of detention and treatment of detainees.

In January 2015, a proposal by the ICRC to conduct a Family Needs Assessment for the families of missing persons was accepted by Sri Lankan authorities. The ICRC is to carry out an island-wide survey using a representative sample of families of the missing from the organization's caseload. From 1990, the ICRC has received more than 16,100 tracing requests from families, including approximately 5,200 from families of missing soldiers and policemen.<sup>100</sup> Access to detention centers in post conflict times therefore continues to be relevant to the work of the ICRC.

The ICRC is also assisting the Ministry of Justice Sri Lanka to examine the causes of overcrowding in prisons<sup>101</sup>.

It is thus seen that the Sri Lankan authorities have recognized the important role that the ICRC has played and continues to play in the post armed conflict period by renewing the Agreement with the ICRC and involving the ICRC in the process of addressing issues such as overcrowding of prisons and conditions of detention. These steps continue to be taken long after the end of hostilities and in a period when there is no longer a non-international armed conflict; by doing so, the principles relevant to NI-ACs such as common Article 3 and principles of customary international humanitarian law are kept alive in the work of the ICRC in its attempt to improve the conditions of detention and treatment of detainees.

### **3.6 Conclusion**

The Manual on the Law of Non-International Armed Conflict (2006)<sup>102</sup> states that any person interned or detained for reasons related to the hostilities must be treated humanely, and information about his or her status and location should be made available to his or her family.

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100 International Committee of the Red Cross (ICRC Newsletter January –June, 2014).

101 International Committee of the Red Cross (ICRC Newsletter January –March, 2015).

102 Michael N. Schmitt, Charles H.B. Garraway & Yoram Dinstein, 'The Manual on the Law of Non International Armed Conflict With Commentary' (2006).

The principle of the humane treatment of detainees requires, as a minimum, observation of the following standards: Detainees shall be: a) Provided with adequate food and drinking water and safeguarded as regards health, hygiene; b) Allowed to receive individual or collective relief; c) Allowed to practice their religion; and d) Provided with acceptable working conditions, if made to work. Common Article 3 to the Geneva Conventions also requires the humane treatment of those who are detained, although it does not set forth specific requirements. Families have a right to know the fate of their relatives. Neither armed groups nor armed forces are allowed to bring about the “disappearance” of any person who has been arrested or otherwise detained. This prohibition extends to refusal to acknowledge deprivation of freedom or give information on the fate or whereabouts of such persons.

In this context, even though Sri Lanka is not a party to the Second Additional Protocol, the obligations of Common Article 3 of the Geneva Conventions are applicable. The issue however, is whether they continue to be applicable in the post conflict scenario when human rights law may be applied. The above discussion has highlighted that there are yet persons in detention in post conflict Sri Lanka, as result of the armed conflict. Though progressively the numbers are reducing; some await trial while a very few still have investigations pending. The principles of IHL in the post conflict period therefore continues to be relevant as can be seen by the requests made to the ICRC by a number of families with missing relatives to trace their whereabouts or to receive information about them.

Therefore, while a decade has passed since the armed conflict ended, the role of the ICRC continues to be relevant in the application of minimum standards of detention, addressing the issues of overcrowding in prisons, treatment of detainees, obtaining information of person detained as well as training and educating officials on the current and relevant principles of humanitarian law. The renewal of the Agreement on Cooperation and Humanitarian Activities to Benefit Persons Deprived of their Liberty with the ICRC by the Government of Sri Lanka in 2018 strengthens this process.

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## 4. Protection of Children: Appealing for Justice in Post-Armed Conflict Sri Lanka

Nazeemudeen Ziyana<sup>1</sup>

### 4.1 Introduction

It took Sri Lanka thirty long years to officially end a protracted internal armed conflict on the 19<sup>th</sup> of May 2009. As a “successful transition from armed conflict to peace is one of the greatest challenges of contemporary warfare”,<sup>2</sup> despite limited progress, post - conflict society of Sri Lanka still languishes in unresolved challenges. Moreover, after a decade of conflict, Sri Lanka was again stunned by terrorist attacks (the “Easter Attack”) which were carried out on 21<sup>st</sup> of April 2019, and killed more than 45 children.<sup>3</sup> Thus, the protection of children in post-conflict Sri Lanka has not been straightforward and will continue to be an uneasy task. This chapter aims to reflect upon the protection of children under the rules of International Humanitarian Law (IHL) and analyse how the difficulties with child protection that ensued as a result of the conflict could be addressed in view of the applicable tenets of IHL and Human Rights Law (HRL) in the post-conflict situation in Sri Lanka.

A person who is under eighteen years of age is considered to be a child under the widely ratified United Nations Conventions on Rights of the Child (UNCRC).<sup>4</sup> Children are affected by armed conflicts in myriad ways. Formally speaking, rules governing children’s status in the context of an armed conflict could be considered from two perspectives. On the one hand, children may be engaged in conflict in a combat function

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2 Jennifer S Easterday, Jens Iverson and Carsten Stahn, ‘Exploring the Normative Foundations of Jus Post Bellum: An Introduction’ in Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds), *Just Post Bellum* (Oxford University Press 2014) 1.

3 ‘Statement by Jean Gough, Regional Director, UNICEF South Asia, and Tim Sutton, UNICEF Representative in Sri Lanka’ <<https://www.unicef.org/press-releases/unicef-statement-easter-sunday-attacks-sri-lanka>> accessed 30 June 2019.

4 United Nations Convention on Rights of the Child (adopted and opened for signature, ratification and accession 20 November 1989 UNGA 44/25 (UNCRC) There are only three countries which have not ratified the UNCRC; Somalia, South Sudan and the United States.

which requires them to participate in hostilities directly or in a supportive role. We live in a world where about 46 States are still recruiting children under the age of 18 into their armed forces.<sup>5</sup> Moreover, it has been reported that since 2016, children have participated in hostilities in at least 18 conflict situations.<sup>6</sup> On the other hand, in armed conflicts, children are among the most severely affected groups (often the prime casualties), alongside women, the aged, the sick and the disabled. Unaccompanied minors or children who are separated from their parents and families may suffer further victimisation as internally displaced persons (IDPs) or refugees. According to UNHCR data, half of the refugee population in 2017 comprised of children under eighteen years of age.<sup>7</sup> We live in an era where children like Alan Kurdi<sup>8</sup> frequently drown in the sea whilst trying to reach safer places as refugees. Even when the conflict is over children have to face hardships such as psychological trauma, inflicted by the armed conflict and related incidents, after having witnessed and sometimes participated in atrocities, as well as the cognitive distress that comes with the loss of parents, siblings and close relatives.<sup>9</sup> Besides, children who survive violent conflicts are denied precious childhood euphoria, intellectual grooming and overall development required to prepare them for a responsible adulthood.<sup>10</sup> The aforementioned atrocities, in addition to malnutrition, non-communicable diseases, and difficulty faced by ex-armed child combatants in social reintegration and reconciliation processes are just some of the challenges that children face in post-conflict situations. As such, children are considered as inherently physically and mentally vulnerable and defenceless. Therefore, children need special legal protection in times of armed conflict and in post-conflict situations. Based on these rationales, international law and domestic laws encapsulate provisions which seek to provide protection for children generally and as a special group.

Against this background, there is a need for a critical reflection on the application and implications of IHL and HRL for the protection of children in two separate contexts: during armed conflicts and in post-conflict situations. Moreover, the consideration of potential concurrence or complementarity of the application of IHL and HRL, regardless of the contexts, is also an important deliberation when seeking to find the most favourable rules for the protection of the rights of the child, both in times of conflict and in post-conflict situations. When rules of both regimes are applicable in a

5 'Child Soldiers World Index' <<https://childdsoldiersworldindex.org>> accessed 23 October 2018.

6 *ibid.*

7 'Global Trends: Forced Displacement in 2017' (United Nations High Commissioner for Refugees (UNHCR) 2018) 3 <<https://www.unhcr.org/5b27be547.pdf>> accessed 20 October 2018.

8 Alan Kurdi was the Syrian refugee child whose photograph, that this child lying dead on the beach went viral on social media and made global headlines in 2015. See generally Heide Fehrenbach and Davide Rodogno, "'A Horrific Photo of a Drowned Syrian Child": Humanitarian Photography and NGO Media Strategies in Historical Perspective' (2015) 97 *International Review of the Red Cross* 1121.

9 See generally Daya Somasundaram, *Scarred Minds* (Sage Publication 1998); Daya Somasundaram, *Scarred Communities* (Sage Publication 2014).

10 Sherry Shenoda and others, 'The Effects of Armed Conflict on Children' (2018) 142 *American Academy of Pediatrics* e20182585 see generally .

particular situation, then one regime of law becomes pre-eminent over the other as “a law governing a specific matter overrides a law governing general matters - *lex specialis derogat legi generali*.”<sup>11</sup> Nevertheless, it must be pointed out that when there is a contradiction over the application of the rules of both bodies of law, the mechanism set by the maxims of *lex specialis* and *lex posterior derogat (legi) priori*<sup>12</sup> would determine the more appropriate solution. As such, the understanding of the implications of an independent and complementary application of both bodies of law in post-conflict situations is relevant. This helps to understand the complexities and forms of violation of the rights of the child during violent conflicts and to find avenues for seeking justice for the victimised children in a post-conflict milieu. Moreover, such deliberations are vital not only in order to sensitize people to the suffering that children endured but also in order to prevent the recurrence of such events in the future by alarming the prospective violators to the consequences of such heinous acts. Hence, this chapter, which is concerned with the protection of the rights of children in post-conflict situations, explores legal avenues for restoring justice to all victimised children in post-conflict situations and advocating for upholding the best interests of the child in post-conflict Sri Lanka.<sup>13</sup>

The legal protections available to children are not merely confined to the principles of IHL but encompass wider protections under IHRL, international criminal law and international refugee law.<sup>14</sup> Basically, the hostilities conducted in an International Armed Conflict (IAC)<sup>15</sup> or Non-International Armed Conflicts (NIAC)<sup>16</sup> are subject to general principles of IHL, as stipulated in international customary law and treaty law. However, based on the nature of the conflict, rules of IHL, especially treaty law, may give rise to varied commitments. The armed conflict that occurred in Sri Lanka

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11 This means “a law governing a specific matter (*lex specialis*) overrides a law governing general matters (*lex generali*).”

12 Which means “a latter law repeals an earlier law”.

13 UNCRC Article 3. International Covenant on Civil and Political Rights (ICCPR) Act, No 56 of 2007 Article 5 (2) recognise that “in all matters concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, the best interest of the child shall be of paramount importance. ‘Sri Lanka’s Charter on the Rights on the Child’ Art 3(2) recognises the principle of the best interests of the child.

14 ‘Strengthening Protection in War: A Search for Professional Standards: Summary of Discussions among Human Rights and Humanitarian Organizations, Workshops at the ICRC, 1996-2000’, (ICRC 2001) 19.

15 International Armed Conflicts subject to 1899 and 1907 Hague Conventions and Regulations, Four Geneva Conventions (with the exception of Article 3 Common to the Conventions), First Additional Protocol to the Geneva Conventions of 1977 (AP I), Customary Law and judgments.

16 Non -International Armed Conflicts subject to the rules of Common Article 3 of the Four GCs, Additional Protocol II of the 1977 customary international law and other judicial decisions. *Prosecutor v. Dusko Tadic Case* (ICTY) – The ICTY affirmed that non-international armed conflict exists when there is “protracted armed violence between governmental authorities and organised armed groups or between such groups within a state”.



was between the State of Sri Lanka and the armed rebel group, Liberation Tigers of Tamil Eelam (LTTE). Accordingly, the Sri Lankan armed conflict is classified as a Non-International Armed Conflict (NIAC).<sup>17</sup> Although the distinction between IAC and NIAC may be relevant for political reasons, in terms of the protection of vulnerable groups, the rationale for maintaining such differentiation may not be as relevant, and it constitutes a form of discrimination against already victimised children of armed conflicts. It has been stated that “the UN Security Council, ECOSOC and the UN Commission on Human Rights do not distinguish between international and non-international armed conflicts with respect to the protection of women in armed conflicts.”<sup>18</sup> It is suggested here that this argument is tenable also in protecting the rights of children in armed conflicts. Nevertheless, as far as the recruitment and use of children in armed conflicts are concerned, the rules related to NIAC provide stronger protection compared with rules related to IAC. The rules governing NIAC are encapsulated in the Geneva Conventions and customary international law. However, a State’s obligation to protect the rights of children in times of conflict and in the aftermath of conflict may arise also from other international treaty obligations.<sup>19</sup>

## **4.2 Sri Lanka’s Obligations to Respect and Ensure Respect for Rules**

### **4.2.1 Geneva Conventions and Hague Conventions**

The treaty commitments applicable to the protection of children during and in the aftermath of a conflict are encapsulated in International Law, IHL, HRL and International Criminal Law. The rules of IHL are concerned with the protection of victims of armed conflicts and the limitations or prohibitions of means and methods of warfare. The IHL rules on protection of victims of armed conflicts are encapsulated in the “law of Geneva”, the four Geneva Conventions (4GCs / GCs I-IV).<sup>20</sup> In addition, Hague Conventions or the “law of Hague” provides the law relating to the limitations or prohibitions of specific means and methods of warfare. However, after the adoption of

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17 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) (1977) Article 1 defines the NIAC “as of having taken 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.

18 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol 1: Rules (Cambridge University Press 2005) 477.

19 See below, section 4.2.1.

20 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I) 1949. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II) (1949). Geneva Convention relative to the Treatment of Prisoners of War (Geneva Convention III) (1949). Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) (1949).

Additional Protocols (APs)<sup>21</sup> to Geneva Conventions, separate existence of these two branches becomes less evident and all these Conventions form the basic tenets of IHL.

As the conflict that prevailed in Sri Lanka was considered as NIAC, only the Common Article 3 of GCs I-IV, and the Second Additional Protocol to the Geneva Conventions (APII) would apply. Sri Lanka is a party to all four Geneva Conventions, even though it is yet to ratify the Additional Protocols. Essentially, the treaty commitments of Sri Lanka are confined to the 4GCs, and in this specific context, to Common Article 3. Sri Lanka has enacted the law on Geneva Conventions,<sup>22</sup> however, unfortunately, it does not include the Common Article 3 and only includes grave breaches recognised under the 4GCs as punishable offences. The Common Article 3 of the 4GCs applies “in the case of armed conflict not of an international character”. It is suggested here that this Article applies to Sri Lanka, not only because it has signed the 4GCs but also because the Common Article 3 is considered as customary international law. The Common Article 3 provides basic guarantees to protect human beings in times of the conflict. Contextually, persons “taking no active part” in the hostilities are entitled to humane treatment without any discrimination.<sup>23</sup> Children who are taking no active part in the hostilities are also entitled to protection under this provision. Obviously, the Article bestows on children the right to protection from “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, taking hostage, outrages upon personal dignity, in particular humiliating and degrading treatment; the passing of sentences and carrying out of execution without previous judgment pronounced by a regularly constituted court.” The implementation of this article depends on how much a State and parties to the conflict respect Geneva Conventions and how the independent organisations like International Committee of the Red Cross (ICRC) instil and sensitize the basic tenants of IHL to a particular State.

Even though Sri Lanka does not have any treaty commitment under the APII, it is important to discuss the provisions of protection available therein because it provides IHL rules governing NIAC. All persons who do not take direct part or who have ceased to take part in hostilities are protected from violence to life, murder, cruel treatment, torture, collective punishments, taking of hostages, acts of terrorism, outrages of personal dignity, slavery and pillage under the APII.<sup>24</sup> More importantly, in a broader context the APII states that “children shall be provided with the care and aid they require”.<sup>25</sup> Besides, it lists more particular norms which are instrumental for protecting children. The APII exhorts State Parties to take all necessary measures to

21 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (1977). Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) (1977).

22 Geneva Conventions Act, No. 4 of 2006.

23 Common Article 3(1) of the Four Geneva Conventions.

24 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) (1977) Art 4, Fundamental guarantees.

25 *ibid* Article 4(3) .

prohibit children who have not attained the age of fifteen from either being recruited in the armed forces or groups or allowed to take part in hostilities.<sup>26</sup> Accordingly, as far as the recruitment and use of children in armed conflicts are concerned, Art. 4(3) (c) of APII provides stronger and distinct obligations compared to Art. 77(2) of AP I. As per the APII, even if children under fifteen years of age are directly involved in hostilities, they will not lose the special protection.<sup>27</sup> The discussion of protection of children in armed conflict revolves around the topic of recruitment of children to the armed forces. However, it should be borne in mind that this is not the only issue which needs focus in upholding the rights of children during and after the conflicts. The Secretary-General for Children and Armed Conflict recognises six grave violations against children during armed conflict, namely, killing and maiming of children, recruitment or use of children as soldiers, sexual violence against children, abduction of children, attacks against schools or hospitals and denial of humanitarian access for children.<sup>28</sup> Children are protected against violence to life and person, in particular murder of all kinds and torture, which are considered as grave breaches under the Geneva Conventions<sup>29</sup> and are entitled to a humane treatment without any discrimination.<sup>30</sup> As a basic rule, civilian population and individual civilians enjoy general protection against military attacks.<sup>31</sup> Not only civilians and civilian population but also civilian objects are given general protection.<sup>32</sup> APII also prohibits a forced displacement of civilians.<sup>33</sup> Invariably, these general protections available to the civilian population and civilian objects will accommodate children. The parties to the conflict are also under obligation to ensure the safety of the children and, if required, children can be evacuated from the area in which hostilities are taking place to a safer area

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26 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) (1977) Art. 4(3) (c).

27 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) (1977) Art. 4 (3) (d).

28 Office of the Special Representative of the Secretary-General for Children and Armed Conflict, 'The Six Grave Violations Against Children During Armed Conflict: The Legal Foundation.' (United Nations 2009) 9.

29 Common Article 3 of four Geneva Conventions, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I) 1949 Art. 12 and 50 .Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II) (1949) Art. 12 and 51 .Geneva Convention relative to the Treatment of Prisoners of War (Geneva Convention III) (1949) Art. 13. Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) (1949) Art. 32 and 147.

30 Common Article 3 (3) of four Geneva Conventions.

31 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) (1977) Art. 13.

32 *ibid* Article 14.

33 *ibid* Article 17.

upon obtaining consent, whenever possible, of their parents or other guardians.<sup>34</sup> It also requires taking measures to facilitate the reunion of families.<sup>35</sup> APII also recognises the child's right to education, including religious and moral education.<sup>36</sup>

Apart from these four Geneva Conventions and their Protocols, rules of IHL contains Hague Conventions that are concerned with limiting or prohibiting means and methods of warfare. Sri Lanka has also ratified some of these important conventions.<sup>37</sup> Article 35 of the API provides that Parties to armed conflicts do not have unlimited freedom to choose means and methods of warfare, which may cause excessive injuries and have indiscriminate effects on civilian population and civilian objects. This rule is considered as an international customary rule.<sup>38</sup> Hence the use of devices and weapons that are designed to cause harm, such as firearms, projectiles, rockets, mines, explosive devices, bombs, missiles and weapons of mass destruction are either prohibited or limited. These conventions are aimed at limiting and prohibiting means and methods of warfare to protect the civilians in general. However, the 1980 Protocol on the Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II to the Convention prohibiting Certain Conventional Weapons (CCW)) specifically prohibit "use of booby-traps and other devices which are in any way, attached to or associated with: ...children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children."<sup>39</sup>

These are some of the provisions in IHL that provide general protection for children as civilians and specific protection as being children. Sri Lanka as a State Party to the 4GCs is under obligations "to respect and to ensure respect" for these Conventions in all circumstances.<sup>40</sup> Even though Sri Lanka has not signed the APII, it is bound by customary IHL, which provides basic norms for safeguarding humanity in armed conflicts.

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34 *ibid* 4 (3) (e).

35 *ibid* 4(3) (b).

36 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) (1977) Art. 4(3)(a).

37 Geneva Protocol on Asphyxiating or Poisonous Gases, and of Bacteriological Methods, 1925. Convention on the Prohibition of Biological Weapons, 1972. Convention prohibiting Certain Conventional Weapons (CCW), 1980. Protocol on Non-Detectable Fragments, 1980 (CCW Protocol (I)). Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (CCW Protocol (II)). Protocol on prohibiting Incendiary Weapons (CCW Protocol (III)). Protocol on Blinding Laser Weapons, 1995 (CCW Protocol (IV)). Convention prohibiting Chemical Weapons, 1993 Sri Lanka has adopted the Chemical Weapons Convention Act No. 58 of 2007 to give effect to Sri Lanka's obligation under this Convention. . Anti-Personnel Mine Ban Convention, 1997. Convention on Cluster Munitions, 2008.

38 Henckaerts and Doswald-Beck (n 18) Rule 17 and 18.

39 (CCW Protocol (II) Article 7(1)(e).

40 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I) 1949 Article 1.

## 4.2.2 Customary Rules of International Humanitarian Law

When there are no rules governing a situation that are recognised in the conventions, victims of armed conflicts are protected by the principles of international law which “result from the usages established between civilised nations, from the laws of humanity and the requirement of the public conscience”.<sup>41</sup> There are several norms pertaining to children which have been established in customary international law and which are applicable to both IAC and NIAC.<sup>42</sup> For example, customary international law norms do not only prohibit the recruitment of children into armed forces or armed groups<sup>43</sup> but also proscribe their engagement in hostilities.<sup>44</sup> State practice establishes that this rule is applicable to both IAC and NIAC.<sup>45</sup> However, there is an argument that a uniform practice with respect to minimum age of recruitment and allowing children to take part in hostilities is yet to be established although there is a universal consensus that it should not be below fifteen years of age.<sup>46</sup>

It is an established principle in customary law that parties to a conflict should always distinguish between civilians and combatants<sup>47</sup> and civilian objects and military objects<sup>48</sup> and attacks must not be directed against civilians or civilian objects (the Principle of Distinction). All indiscriminate attacks are prohibited.<sup>49</sup> As such, attacks which may not be able to distinguish between civilians and civilian objects and the legitimate military targets are prohibited.<sup>50</sup> Moreover, parties to the conflict are required to take all feasible precautions to avoid and minimize incidental loss of civilian population and objects<sup>51</sup> and any such expected incidental damages should not be excessive, and should be relative to the anticipated military advantage (the Principle of

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41 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899. Preamble. This is recognised as ‘Martens Clause’ which was named after the drafter and Russian diplomat Fyodor Fyodorovich Martens. 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;”, “suffix”: “Preamble. This is recognised as ‘Martens Clause’ which was named after the drafter and Russian diplomat Fyodor Fyodorovich Martens”}], “schema”: “https://github.com/citation-style-language/schema/raw/master/csl-citation.json”} Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) (1977) preamble.

42 Henckaerts and Doswald-Beck (n 18) Rule 1.

43 *ibid* Rule 136.

44 *ibid* Rule 137.

45 *ibid* 482 and 485.

46 *ibid* 485 and 488.

47 Henckaerts and Doswald-Beck (n 18) Rule 1.

48 *ibid* Rule 7.

49 *ibid* Rule 12.

50 *ibid* Rule 12.

51 *ibid* Rule 15.

Proportionality).<sup>52</sup> Customary international law requires that civilians and persons *hors de combat*, must be treated humanely,<sup>53</sup> and State practice establishes this as a norm - applicable to both IAC and NIAC.

Children, as civilians, are not only entitled to these general protections but they are included also in a special category of civilians, accorded a specific right to protection in customary international law.<sup>54</sup> Children affected by armed conflicts are entitled to special respect and protection under customary international humanitarian law<sup>55</sup> and State practice establishes that this rule is applicable to both IAC and NIAC.<sup>56</sup> What is a humane treatment is not specifically defined, however, it has been argued that it refers to respect for the “dignity” of a person or the prohibition of “ill-treatment”.<sup>57</sup> Accordingly, children as civilians are protected against all forms of murder,<sup>58</sup> torture,<sup>59</sup> corporal punishment,<sup>60</sup> mutilation, medical or scientific experiments,<sup>61</sup> and rape and other forms of sexual violence.<sup>62</sup> Moreover, civilians are protected from slavery and slave trade and abusive forced labour practices.<sup>63</sup> Customary rules also prohibit the taking of hostages and the use of protected persons as human shields.<sup>64</sup> State practice establishes that these rules, as universal humanitarian norms, are applicable to both IAC and NIAC.<sup>65</sup> Enforced disappearance<sup>66</sup> is prohibited under customary rules and enforced disappearance of a close family member has been interpreted as constituting inhumane treatment of the next-of-kin.<sup>67</sup> Therefore, it can be argued that children are protected against abduction during and after the conflict. Also, it appears that customary rules require that family life should be protected as far as possible.<sup>68</sup> When persons are missing as a result of armed conflict, parties to the conflict are under the obligation to take all feasible measures to find information about the persons and provide that information to the missing persons’ family members.<sup>69</sup> When children are deprived of their liberty, they should be held in separate and secured quarters unless they are members of the same family.<sup>70</sup> Parties to non-international armed conflicts are

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52 *ibid* Rule 14, 19 and 21.

53 *ibid* Rule 87 .

54 *ibid* Chapter 39, Rule 134 -138 .

55 *ibid* Rule 135.

56 *ibid* 479.

57 *ibid* 307.

58 Henckaerts and Doswald-Beck (n 18) Rule 89.

59 *ibid* Rule 90 .

60 *ibid* Rule 91.

61 *ibid* Rule 92.

62 *ibid* Rule 93.

63 *ibid* Rule 94 and 95.

64 *ibid* Rule 96 and 97.

65 *ibid* Chapter 32, Fundamental guarantees.

66 Sri Lanka ratified the Convention for the Protection of all Persons from Enforced Disappearance, 2006 in 2016.

67 Henckaerts and Doswald-Beck (n 18) 343.

68 Henckaerts and Doswald-Beck (n 15) Rule 105.

69 *ibid* Rule 117.

70 *ibid* Rule 120.

prohibited also from ordering the displacement of civilian population, unless there is a compelling safety reason.<sup>71</sup> “In case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated.”<sup>72</sup> Customary rules also ensures that “parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief without any adverse distinction.”<sup>73</sup> Any State, regardless of their treaty commitments, is bound to respect international customary humanitarian law<sup>74</sup> and hold perpetrators who violate these rules accountable.

### 4.2.3 International Criminal Accountability and Protection of Children

The Hague Conventions, just as other international treaties,<sup>75</sup> impose obligations and duties upon States and States’ compliance with the rules of IHL is observed by the International Committee of Red Cross (ICRC). However, these rules do not create criminal liability for individuals when they commit blatant violations of these rules. Therefore, a need for a different mechanism to hold these perpetrators accountable was recognised in the aftermath of the Second World War. The application of universal jurisdiction under international law to hold perpetrators accountable was supported by the Nuremberg and Tokyo Trials, which were established by the allied forces after the Second World War. The International Law Commission (ILC) was mandated to draft a statute of an international criminal court and a draft statute was ready in 1954. However, due to conflicting views and debates as to the definition of crimes and jurisdiction, the establishment of an international criminal justice system was delayed.<sup>76</sup> In the 1990s, the world saw the failures of national court systems to hold perpetrators individually accountable for crimes committed during an armed conflict.<sup>77</sup> In particular, it was observed that the prosecution for crimes by national courts is not effective when those culpable of these violations are still in power, and thereby making the national justice system incapable of being impartial. As a result, in accordance with

71 *ibid* Rule 129.

72 *ibid* Rule 131.

73 *ibid* Rule 55.

74 *ibid* XVI ‘...while the Geneva Conventions enjoy universal adherence today, this is not yet the case for other major treaties, including the Additional Protocols. These treaties apply only between or within States that have ratified them. Rules of customary international humanitarian law on the other hand, sometimes referred to as “general” international law, bind all States and, where relevant, all parties to the conflict, without the need for formal adherence.’

75 Vienna Convention on the Law of Treaties, concluded on 23 May 1969 Article 2 (a) “‘treaty’ means an international agreement concluded between States in written form governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;”

76 Schabas, *An Introduction to the International Criminal Court* (2nd edn, Cambridge University Press 2004) 9.

77 See generally Theodor Meron, ‘International Criminalization of Internal Atrocities’ (1995) 89 *The American Journal of International Law* 554.

the Chapter VII of the United Nations Charter, the United Nations Security Council established *ad-hoc* tribunals to investigate crimes of genocide, war crimes, crimes against humanity and other grave breaches of rules of IHL such as the International Criminal Tribunal for Former Yugoslavia (ICTY)<sup>78</sup> and International Criminal Tribunal for Rwanda (ICTR).<sup>79</sup> Moreover, the United Nations also assists and provides support for criminal tribunals, namely, the Extraordinary Chambers in the Courts of Cambodia (ECCC),<sup>80</sup> the Special Tribunal for Lebanon (STL)<sup>81</sup> and a Special Court for Sierra Leone (SCSL).<sup>82</sup> The jurisprudence of these *ad-hoc* tribunals immensely contributed to shaping the statute of the International Criminal Court (ICC) and the international criminal justice system.

The International Criminal Court (ICC) is a permanent institution which was established by the Rome Statute in 1998 in response to the millions of victims of armed conflicts which “deeply shocked the conscience of humanity”.<sup>83</sup> This Court has “the power to exercise its jurisdiction over persons”<sup>84</sup> with respect to the most serious crimes as recognised by the Statute: the crime of genocide, crimes against humanity, war crimes and the crime of aggression.<sup>85</sup> The Rome Statute recognises that among other acts, murder, torture, enslavement, deprivation of liberty, rape, enforced disappearance – all when committed as part of widespread or systematic attack directed against any civilian population - constitute crimes against humanity.<sup>86</sup> Moreover, intentionally directing attacks against the civilian population or against individual civilians not taking direct part in hostilities constitute a war crime in both IAC<sup>87</sup> and NIAC.<sup>88</sup> Accordingly, children, who are considered as innocent civilians, are protected against war crimes and crimes against humanity. Also, it should be noted that an act of forcibly transferring children of one group to another group with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, constitutes the crime of genocide.<sup>89</sup> Moreover, conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in

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78 ‘The International Criminal Tribunal for the Former Yugoslavia (ICTY) (1993-2017)’ <<http://www.icty.org/>> accessed 3 August 2019.

79 ‘International Criminal Tribunal for Rwanda (ICTR)’ <<http://unictr.irmct.org/>> accessed 3 August 2019.

80 ‘The Extraordinary Chambers in the Courts of Cambodia (ECCC) Established in 2001’ <<https://www.eccc.gov.kh/en/introduction-eccc>> accessed 3 August 2019.

81 ‘The Special Tribunal for Lebanon (STL)’ <<https://www.stl-tsl.org/en>> accessed 3 August 2019 the first international tribunal of international character to prosecute terrorists crimes established in 2009.

82 ‘Special Court for Sierra Leone (SCSL)’ <<http://rscsl.org/>> accessed 3 August 2019.

83 Rome Statute of the International Criminal Court 1998, UNITED NATIONS, TREATY SERIES, VOL 2187, No 38544 Preamble.

84 *ibid* Article 1.

85 *ibid* Article 5.

86 *ibid* Article 7.

87 *ibid* Article 8(2)(b)(i).

88 *ibid*8(2)(e)(1).

89 *ibid* Article 6(e).



hostilities, in both international<sup>90</sup> and non-international<sup>91</sup> armed conflicts, is also a war crime. The ICC provided a broad interpretation of the expression “conscripting or enlisting children under the age of fifteen” in the case of *Lubanga Dyilo*<sup>92</sup> in the context of a NIAC which took place in the Democratic Republic of the Congo (DRC). The ICC was of the view that, considering the rules of IHL and internationally recognised human rights norms,<sup>93</sup> it needed to adopt a broad interpretation of “using children to participate in hostilities” and held that protection of children against deploying them in hostilities not only encompassed child soldiers who participate in combat but included any children who actively participate in an armed conflict in any circumstance and in any role within military operations:

... “child soldiers” includes all children under the age of 18 who participate in any circumstances in an armed group or force. Therefore, it is argued that this protection is not restricted to those children who actively fight, but rather it includes any child whose role is essential to the functioning of the armed group, for instance by working as a cook, porter, messenger or when individuals are used for sexual purposes, including by way of forced marriage.<sup>94</sup>

..... “active participation in hostilities” includes direct participation in combat, as well as combat-related activities such as scouting, spying, sabotage and the use of children at military check-points or as decoys and couriers. In addition, it is argued the term includes the use of children to guard military objectives or to act as the bodyguards of military commanders...<sup>95</sup>

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90 ibid Article 8(2)(b) xxvi.

91 ibid Article 8(2)(e)vii which provides 8(2)...(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:...(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities...

92 *Situation in the Democratic Republic of the Congo, In the Case of the Prosecutor v Thomas Lubanga Dyilo* [2012] International Criminal Court ICC-01/04-01/06. The President of the Democratic Republic of the Congo (DRC) which became a State Party to the Rome Statute in 2002 referred the armed conflict which was considered as NIAC and took place in *Ituri* District in the Democratic Republic of the Congo. Thomas Lubanga Dyilo, who was the president of *Union Patriotique des Congolaise* (UPC), an armed rebellion group, recruited children regardless of the age to the UPC army and never took a measure to check the ages of the recruits. Therefore, the ICC held Lubanga responsible under the Rome Statute as co-perpetrator, for enlisting and conscripting children under the age of fifteen years and using them to participate in hostilities.

93 ibid 601 & 602 The Court referred to Article 31(1) of the Vienna Convention on the Law of Treaties and Article 21(3) of the Rome Statute in this regard.

94 ibid 574.

95 ibid 575.

Apart from the ICC cases, jurisprudence of the international *ad-hoc* tribunals has provided a number of examples as to how an international institution deals with crimes perpetrated against children. In *Prosecutor v Charles Ghankay Taylor* the Special Court of Sierra Leone found Taylor guilty of planning and aiding and abetting crimes committed by the armed groups, Revolutionary United Front (RUF) /Armed Forces Revolutionary Council (AFRC), “while holding positions of superior responsibility and exercising command and control over subordinate members.”<sup>96</sup> This concerned especially conscripting child soldiers and using children to actively participate in hostilities. It has been reported that children who could not even carry their guns were recruited and used as guards at mining sites whilst older children were used as combats and kept under the influence of narcotics and commanded to terrorise the civilian population. Accordingly, cases decided by the ad-hoc tribunals and the ICC exemplify that justice can be rendered for war crimes committed against children in armed conflicts.

Sri Lanka is not a party to the Rome Statute. Consequently, Sri Lanka does not have any treaty commitments arising from this Statute. Moreover, Sri Lanka is not obliged to follow ICC rulings or any international criminal tribunals’ decisions. Nevertheless, an argument can be put forward that even though Sri Lanka is not a party to the APII or the ICC Statute, Sri Lanka is under an obligation to adhere to its treaty commitments under the Common Article 3 of the Geneva Conventions, customary international humanitarian law and other human rights treaties. By virtue of these treaty obligations, Sri Lanka is duty bound to punish or hold perpetrators, especially violators of children’s rights, accountable through its domestic criminal law or by creating a national mechanism to prosecute such violations. Therefore, relevant cases decided by the ICC and the international *ad-hoc* tribunals on the application and interpretation of international humanitarian rules on the protection of children affected by armed conflicts are important<sup>97</sup> also in the Sri Lankan context as they could inform the domestic judicial processes.

In an interconnected world with international Conventions and treaties States cannot disregard their commitment to protect rights of the people. The State Party commitment towards rules of IHL, HRL and their implementation are therefore scrutinised through different human rights treaty mechanisms such as periodic reporting and assessments.

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96 *Prosecutor v Charles Ghankay Taylor* [2012] Trial Chamber II, Special Court for Sierra Leone SCSL-03-01-T 7.

97 Elena Baylis, ‘The Persuasive Authority of Internationalized Criminal Tribunals’ (2017) 32 *American University International Law Review* 611, 612 It is argued that ‘international and internationalized criminal tribunals have multiple aims. These include not only their core function of trying cases, but also other, broader objectives, such as developing the legal standards of the field of international criminal law, incentivizing states to pursue transitional justice mechanisms, and achieving socio-political impact in the concerned post-conflict states.’

#### 4.2.4 Other Relevant Treaties and Non-Binding International Instruments

Sri Lanka is a party to different international treaties which expressly prohibit the use of children in armed conflicts. The United Nations Convention on Rights of the Child (UNCRC)<sup>98</sup> and its Second Optional Protocol (OPCRC),<sup>99</sup> the Convention No. 182 of the International Labour Organisation on the Worst Forms of Child Labour 1999 (ILO C182),<sup>100</sup> and the International Convention on Civil and Political Rights<sup>101</sup> are some examples of such international instruments. Apart from these treaties, Sri Lanka is also a party to several non-binding international instruments, such as the Paris Commitments<sup>102</sup> and the Paris Principles.<sup>103</sup>

As indicated above, one of the important treaties that Sri Lanka is a party to is the UNCRC. As per the UNCRC, all persons below the age of eighteen years are considered children<sup>104</sup> and the Convention requires State Parties to respect and to ensure respect for rules of IHL concerning safety and rights of children in armed conflicts.<sup>105</sup> Article 38 of the UNCRC is considered as one of the progressive provisions in international treaty law for several reasons.<sup>106</sup> Firstly, it is argued that Article 38 of the CRC has a hybrid character,<sup>107</sup> as it includes an IHL provision in a human rights law treaty, which applies regardless of the existence of an armed conflict. Furthermore, it has been suggested that as the UNCRC does not have a derogation clause, Article 38 continues to apply even in times of conflict.<sup>108</sup> Moreover, the Article does not specify any distinction between IAC and NIAC but requires the State parties to undertake “to

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98 UNCRC Article 38.

99 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 and entered into force on 12 February 2002.

100 International Labour Organisation Convention No. 182 on Worst forms of child labour (1999).

101 ‘Security Council Resolution 1261 (1999)’ (Security Council 1999). ‘General Comment No. 17: Article 24 (Rights of the Child) ICCPR, Human Rights Committee, 35th Session, 1989’ also highlights the state obligation to protect children against taking part in hostilities.

102 ‘The Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups’ (UNICEF 2007) <<https://www.unicef.org/spanish/protection/pariscommitments.pdf>> accessed 10 October 2018.

103 ‘The Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups’ (UNICEF 2007) <<https://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf>> accessed 10 October 2018.

104 UNCRC Article 1.

105 *ibid* Article 38.

106 Fiona Ang, ‘Article 38, Children in Armed Conflicts’ in Andre Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff publishers 2005).

107 *ibid* 9.

108 *ibid* 12.

respect and to ensure respect for rules of international humanitarian law”,<sup>109</sup> and “take all feasible measures to ensure protection and care of children who are affected by an armed conflict”.<sup>110</sup> In this regard, an argument can be put forward that since Article 38 does not provide a definition of an armed conflict, its application is not limited to instances of an existing armed conflict. Thus, Article 38 may be triggered in occurrences of armed conflict situations that are excluded from the Article 1(2) of the APII, such as “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature”.<sup>111</sup> Consequently, Sri Lanka’s treaty obligation to protect children during and after the conflict is aptly towed by Article 38 of the UNCRC.

According to the UNCRC, a child who has attained the age of fifteen but not yet attained the age of eighteen can be recruited as members of armed forces even though there is an obligation to give priority to those who are oldest.<sup>112</sup> Ang argues that as Article 1 of the UNCRC considers a child as person under the age of eighteen, “it would be logical to conclude that it is an overall valid definition to be used in the whole of the CRC-including Article 38.”<sup>113</sup> Nevertheless, the Optional Protocol to the UNCRC on the Involvement of Children in Armed Conflicts (OPICR),<sup>114</sup> to which Sri Lanka is also a Party, ends all speculations and arguments about the age limit as it takes a progressive step in keeping persons under eighteen years of age in the protective realm. It requires that all measures be taken to preclude and prevent persons below the age of eighteen from taking direct part in hostilities<sup>115</sup> or being compulsorily recruited into the national armed forces.<sup>116</sup> It also requires State Parties to raise the minimum age for the voluntary recruitment of persons to national armed forces.<sup>117</sup> If any State allows voluntary recruitment of children under the age of eighteen, then such a State has an obligation to ensure adequate safeguards are provided to protect the rights of such a child.<sup>118</sup> Armed groups, that are distinct from the armed forces of a State, cannot recruit or use in hostilities persons under eighteen years of age and State Parties are also under obligation to take all feasible measures to prevent such groups from recruiting

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109 UNCRC Article 38 (1).

110 *ibid* Article 38 (4).

111 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) (1977) Article 1(2).

112 *ibid* Article 38(3).

113 Ang (n 106) 27.

114 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 and entered into force on 12 February 2002 According to the Child soldiers world index, 167 out of 197 UN member States have ratified this protocol. see <https://childsoldiersworldindex.org>.

115 *ibid* Article 1.

116 *ibid* Article 2.

117 *ibid* Article 18.

118 *ibid* Article 3(3). However, the Article 3(5) of the OPICR provides that the requirement to raise the minimum age of voluntary recruitment does not apply to defence training schools operated by or under the control of the armed forces of the State Parties.

children to armed groups.<sup>119</sup> Such measures are needed to effectively implement the principle of the best interests of the child.<sup>120</sup> The OPCRC also requires each State Party to prevent any recruitment of children and if it so happened, appropriate action must be taken to demobilize these children or otherwise release them from service, and “provide appropriate assistance for their physical and psychological recovery and social integration.”<sup>121</sup> Another important attribute of Article 38 and related provisions of the OPCRC is that, unlike other rules of IHL, the State Party’s compliance with this rule is scrutinised by regular reporting to the Committee on the Rights of the Child.<sup>122</sup> Although ‘concluding observations’<sup>123</sup> of the Committee on the Rights of the Child do not have enforceable authority, importantly, “they carry a strong moral and political authority, stimulating States to do better whatever needed”.<sup>124</sup>

The implementation of Article 38 of the UNCRC has been given more prominence after the Secretary of United Nations and the Security Council offered their patronage over scrutinising the status of children during armed conflicts. The report of the Expert of the Secretary-General Graca Machel on impact of armed conflict on children, presented to the United Nations General Assembly in 1996,<sup>125</sup> prompted the adoption of the General Assembly’s Resolution 51/77, which recommended the establishment of the office of the Special Representative of the Secretary-General for Children and Armed Conflict.<sup>126</sup> Consequently, the United Nations Security Council recognised the importance of the mandate of the Special Representative<sup>127</sup> and adopted several resolutions buttressing the protection standards for children.<sup>128</sup> Two important arrange-

119 *ibid* Article 4.

120 *ibid* Preamble.

121 *ibid* Article 6 and 7.

122 Article 43 of the International Convention on the Rights of the Child provides the legal basis for the establishment, composition and powers and functions of the Committee on the Rights of the Child. The Committee was created and came into force on February 27<sup>th</sup>, 1991.

123 The Committee monitors implementation of the UNCRC and its protocols. Every State Party is obliged to submit a periodic report to this committee every five years. The Committee examines each submitted report and provide its appraisal and recommendations as ‘concluding observations’. ‘The Committee on the Rights of the Child’ <<https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx>> accessed 1 August 2019.

124 Ang (n 106) 11.

125 Graca Machel, ‘Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children, General Assembly, A/51/306’, (United Nations, General Assembly 1996) A/51/306.

126 ‘Resolution Adopted by the General Assembly on the Rights of the Child, 51/77’ (General Assembly 1997) 51/77 para 35.

127 ‘Statement by the President of the Security Council, S/PRST/1998/18’ (Security Council 1998).

128 ‘Security Council Resolution 1261 (1999)’ (Security Council 1999) S/RES/1261 (1999). ‘Security Council Resolution 1314 (2000)’ (Security Council 2000) S/RES/1314 (2000). ‘Security Council Resolution 1379 (2001)’ (Security Council 2001) S/RES/1379 (2001). ‘Security Council Resolution 1460 (2003)’ (Security Council 2003) S/RES/1460 (2003). ‘Security Council Resolution 1539 (2004)’ (Security Council 2004) S/RES/1539 (2004). ‘Security Council Resolution 1612 (2005)’ (Security Council 2005)

ments that were developed through this patronage are country-specific monitoring and reporting mechanism,<sup>129</sup> and the establishment of a Working Group of the Security Council consisting of and designating all members of the Council to review the progress of this mechanism.<sup>130</sup> Accordingly, the UN Security Council Resolution 1612(2005) prescribes monitoring and reporting mechanisms which enable attention to be drawn to the UN Secretary General's "List of Shame", i.e. six grave violations against children in armed conflict, to put pressure on States and Other Armed Groups (OAGs) to fulfil their IHL obligations towards children. Moreover, not only child recruitment but also different instances of grave violations of the rights of children during armed conflict have been given broader interpretation.<sup>131</sup> As such, even after the conflict is over, Sri Lanka's obligation under Article 38 does not come to an end. Considering in particular the aftermath of the Easter Attacks in Sri Lanka, the Government of Sri Lanka (GOSL) has to take a strategic decision to protect child victims and children at perceived risk of radicalisation and recruitment to terrorist groups as well as child victims of attacks and discrimination motivated by anti-Muslim sentiments.<sup>132</sup>

### 4.3 Practical Application and Implementation of Rules in Post-Armed Conflict Sri Lanka

Apart from international obligations, Sri Lanka also has its own national commitments to protecting children. The Constitution of Sri Lanka recognises that special provisions could be made by law, subordinate legislation or executive acts for the advancement of women and children.<sup>133</sup> Moreover, the promotion of the interests of children and youth so as to ensure their full development and protect them from exploitation and discrimination is one of the express principles of the State policy, enshrined in the Constitution.<sup>134</sup> The National Child Protection Authority Act establishes the National Child Protection Authority (NCPA) in Sri Lanka, the role of which is to advise the Government on the formulation of a national policy on the prevention of child abuse and the protection and treatment of children who are victims of such abuse.<sup>135</sup> According to the NCPA Act, a child is defined as a person under eighteen

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S/RES/1612 (2005). 'Security Council Resolution 1882 (2009)' (Security Council 2009)  
 S/RES/1882 (2009). 'Security Council Resolution 1998 (2011)' (Security Council 2011)  
 S/RES/1998 (2011). 'Security Council Resolution 2143 (2014)' (Security Council 2014)  
 S/RES/2143 (2014). 'Security Council Resolution 2225 (2015)' (Security Council 2015)  
 S/RES/2225 (2015). 'Security Council Resolution 2068 (2012)' (Security Council 2012)  
 S/RES/2068. 'Security Council Resolution 2427 (2018)' (Security Council 2018) S/  
 RES/2427 (2018).

129 'Security Council Resolution 1612 (2005)' (n 128) para 2.

130 *ibid* 8.

131 Office of the Special Representative of the Secretary-General for Children and Armed Conflict (n 28).

132 See generally 'Report of the United Nations High Commissioner for Human Rights on Protection of Human Rights and Fundamental Freedoms While Countering Terrorism' (Human Rights Council 2019) A/HRC/40/28.

133 The Constitution of the Democratic Socialist Republic of Sri Lanka (1978) Article 12 (4).

134 *ibid* Article 27 (13).

135 National Child Protection Authority Act, No. 50 Of 1998 s 14 Paragraph 1.

years of age.<sup>136</sup> The NCPA considers “the involvement of a child in armed conflict which is likely to endanger the child’s life or is likely to harm such child physically or emotionally” as child abuse.<sup>137</sup> There is no legislation in Sri Lanka which provides for compulsory recruitment of persons to armed forces. The Penal Code<sup>138</sup> of Sri Lanka, as amended by the Act No. 16 of 2006,<sup>139</sup> provides that engaging or recruiting a child for use in armed conflicts is a punishable offence. This does not differentiate voluntary (enlistment) or compulsory recruitment (conscription), hence, even voluntary recruitment of children under eighteen years of age is prohibited. All recruitment to the Sri Lankan armed forces is voluntary and according to the Soldiers Enlistment Regulations of 1955, the minimum age is eighteen years. Moreover, according to the 1985 Mobilization and Supplementary Forces Act, persons enlisted into National Armed Reserve should not be below eighteen years of age.<sup>140</sup>

During the conflict, there was a serious problem of child soldiers in Sri Lanka as the LTTE was involved in the recruitment and deployment of child soldiers. It has been observed that there are three dominant child recruitment mechanisms in Asia: “forced recruitment, indoctrination, and the role of government abuses in fuelling recruitment by armed opposition groups”.<sup>141</sup> Worryingly, the LTTE used all three of these mechanisms to recruit children.<sup>142</sup> In June 2003 the GOSL and the LTTE signed an agreement to implement an Action Plan for Children Affected by War. Notably, this is considered the only human rights agreement, signed between the GOSL and the LTTE, which was facilitated by the UNICEF.<sup>143</sup> The main commitment that the LTTE undertook in pursuance of this agreement was its abrogation of all recruitment of children and the subsequent release of all children already in its ranks. The GOSL undertook the commitment to increase its support for the delivery of services for the children of the North East affected by the conflict.<sup>144</sup> As a result, within the period of January – June 2004, about 449 child soldiers were released by the LTTE and about 1,600 former child soldiers returned voluntarily to their homes and registered with the UNICEF; however, the LTTE had not issued formal release papers to them.<sup>145</sup> According to the GOSL,

136 *ibid* 39.

137 *ibid* 39, Paragraph 3 (d).

138 An Ordinance to Provide A General Penal Code for Ceylon No 2 of 1883 Section 358 A.

139 Pena l Code (Amendment) Act, No 16 of 2006 Section 7.

140 The Mobilization and Supplementary Forces Act, No. 40 of 1985 ss 4 and 5.

141 Jo Becker, ‘Child Recruitment in Burma, Sri Lanka and Nepal’ in Scott Gates and Simon Reich (eds), *Child Soldiers in the Age of Fractured States* (University of Pittsburgh Press 2010) 108.

142 To obtain a deeper understanding of the actual status of child soldiers in Sri Lanka see Lakmini Seneviratne, ‘Accountability of Child Soldiers: Blame Misplaced?’ (2008) 20 *Sri Lanka Journal of International Law* 29. Wasantha Seneviratne, ‘International Legal Standards Applicable to Child Soldiers’ (2003) 15 *Sri Lanka Journal of International Law* 39.

143 ‘Action Plan for Children Affected by War Progress Report, January - June 2004’ (UNICEF 2004) 6.

144 *ibid*.

145 *ibid* 7.

Since the child recruitment database by UNICEF was established in 2003, it does not reflect the widespread recruitment which occurred during the period from 1983 to 2002. The only information during this period is that available with the Armed Forces, that nearly 60% of the estimated 14,000 LTTE carders were child recruits. Most of the current LTTE leadership today were probably child combatants who have survived to adulthood.<sup>146</sup>

A few years later, in July 2006, the GOSL in collaboration with the UN established a Task Force for Monitoring and Reporting (TFMR) which was mandated with chronicling and reporting on monumental and objectionable violations of children's rights in armed conflict. The international community has expressed serious concerns over the problem of child soldiers in Sri Lanka. In particular, the European Parliament has adopted a number of resolutions on Sri Lanka and condemned the abuse of children through the recruitment of child soldiers by the LTTE.<sup>147</sup> During the conflict and in the aftermath of the conflict, the United Nations Secretary-General<sup>148</sup> and the Security Council Working Group,<sup>149</sup> also issued a considerable number of country-specific reports and concluding observations on children and armed conflict in Sri Lanka, in accordance with the provisions of the Security Council Resolution 1612 (2005). The reports vehemently condemned LTTE and the Karuna Faction<sup>150</sup> for continuing to recruit children into armed forces despite their previous commitments to stop such acts.<sup>151</sup> The Report of the Secretary-General on Children and Armed Conflict submitted in 2010 stated that the UNICEF had verified and documented about 397 cases of

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146 'Initial Report of Sri Lanka under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict: Initial Reports of States Parties Due in 2004' (Committee on the Rights of the Child 2008) CRC/C/OPAC/LKA/1 para 8.

147 European Parliament Resolution on Sri Lanka C 305 E/258 (2006) para 8.

148 'Report of the Secretary-General on Children and Armed Conflict in Sri Lanka, S/2006/1006' (Security Council 2006). 'Report of the Secretary-General on Children and Armed Conflict in Sri Lanka, S/2007/758' (Security Council 2007). 'Report of the Secretary-General on Children and Armed Conflict in Sri Lanka, S/2009/325' (Security Council 2009).

149 'Report of the Security Council Working Group on Children and Armed Conflict; Conclusions on Children and Armed Conflict in Sri Lanka, S/AC.51/2007/9' (Security Council 2007). 'Report of the Security Council Working Group on Children and Armed Conflict; Conclusions on Children and Armed Conflict in Sri Lanka, S/AC.51/2008/11' (Security Council 21 October 2008). 'Report of the Security Council Working Group on Children and Armed Conflict; Conclusions on Children and Armed Conflict in Sri Lanka, S/AC.51/2010/2' (Security Council 2010). 'Report of the Security Council Working Group on Children and Armed Conflict; Conclusions on Children and Armed Conflict in Sri Lanka, S/AC.51/2012/3' (Security Council 2012).

150 Vinayagamorthy Muralitharan alias Karuna Amman is a former militant attached to the LTTE. He later gave up arms and entered politics and served as a member of Parliament of Sri Lanka.

151 'Report of the Secretary-General on Children and Armed Conflict in Sri Lanka, S/2006/1006' (n 106).



child recruitment, of which 147 were girls, by the LTTE that occurred during the last stages of the conflict, i.e. from the 1<sup>st</sup> of January to the 19<sup>th</sup> of May 2009.<sup>152</sup>

Not only child recruitment but also other grave breaches of children's rights occurred during the latter phase of the war. It has been recorded that in the districts of *Killinochchi* and *Mullaitivu* (in the Northern Province of Sri Lanka) "a total of 199 cases of children killed and 146 cases of children maimed were reported."<sup>153</sup> Moreover, children were injured or killed by artillery fire from Sri Lankan Armed Forces or the LTTE.<sup>154</sup> There were also reports of rape and sexual harassment of girls. Moreover, young girls were forced by their families to get married in order to avoid forced recruitment by the LTTE.<sup>155</sup> The schooling of children was also affected as, reportedly, about 9 schools were used by the Sri Lankan Armed forces to detain "surrenderees".<sup>156</sup> It was also reported that humanitarian assistance to the conflict-affected population was curtailed by the actions of the LTTE.<sup>157</sup> As such, the scale of impact of the war on children in Sri Lanka was not a mere assumption. The records compiled in the aftermath of the war showed that "1221 separated, unaccompanied and orphaned children have been identified in the north of the country. Of those, 517 have been reunified with their families or relatives and 704 have been placed in residential homes. In addition, 162 parents have reported to probation officers that their children were missing..."<sup>158</sup> Even after several years after the conflict, people continued struggling with indelible scars left by the conflict:

She was injured in March 2009 in *Puthumathalan*. She was 6 years old at that time. It was afternoon. We were living in a temporary hut. We did not hear any sounds of shelling or rounds where we were staying, but we heard sounds far away. My daughter fell suddenly. I did not know what happened or what was happening. I later realised that she was injured in the head. The piece of shrapnel had gone through the back of her head, and the area near her ear was swollen...The doctor said that she should be operated immediately, but there was no medicine.....The doctor finally said that they cannot operate her as it would affect her nerves. She was fine for a few days after coming home. Then, she started getting fits...Now I take her to the *Mallakam* hospital every month, where they give tablets for the fits.<sup>159</sup>

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152 'Report of the Secretary-General on Children and Armed Conflict, A/64/742- S/2010/181' (United Nations, General Assembly and Security Council 2010) A/64/742-S/2010/181 para 148.

153 *ibid* 150.

154 *ibid*.

155 *ibid* 151.

156 *ibid* 152.

157 *ibid* 153.

158 *ibid* 156.

159 Selvaraja Rajasegar, 'Traces of War on Their Bodies' [2019] *Groundviews* <<https://groundviews.org/2019/08/06/traces-of-war-on-their-bodies/>> accessed 6 August 2019.

The victims of the conflict not only suffer physically but are also scarred with psychological traumas which they bear in silence - “a silence that is often individual as well as collective.”<sup>160</sup>

### 4.3.1 Transitional Justice Mechanisms

In considering the scale of the violations of the rights of children during the armed conflict, Sri Lanka cannot overlook its obligation to deliver justice to the child victims in the aftermath of the conflict. Indeed, it has been rightly argued that “justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives.”<sup>161</sup> As such, in order to establish democracy and build sustainable peace, Sri Lanka has an obligation to establish mechanisms for “transitional justice”. According to the Secretary-General’s Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, the notion of “transitional justice”:

Comprises the full range of process and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.<sup>162</sup>

Accordingly, truth seeking process, accountability mechanisms, reparations and institutional reforms are considered as four pillars of transitional justice. These pillars should be included in any transitional justice mechanism aimed to uphold the rule of law and justice in a transitional society. As the Secretary General pointed out, “we must learn to eschew one-size-fits-all formulas and importation of foreign models, and instead, base our support on national assessments, national participation and national needs and aspirations.”<sup>163</sup> Consequently, the United Nations recognised people’s right to participation in transitional justice process and national consultation has been recognised as the fifth pillar of transitional justice.<sup>164</sup> However, it has been argued that national consultation should not be treated as a one-off event but should enable continuous engagement of the civil society in the designing and implementing of transitional justice mechanisms.<sup>165</sup> Moreover, a child-sensitive approach is recog-

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160 Somasundaram, *Scarred Communities* (n 9) iii.

161 ‘Report of the Secretary- General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, S/2004/616’ (Security Council 2004).

162 *ibid* 8.

163 *ibid* 1.

164 ‘Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice’ (United Nations 2010) 9 <[https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf)> accessed 6 August 2019.

165 Wendy Lambourne, ‘What Are the Pillars of Transitional Justice? The United Nations, Civil Society and the Justice Cascade in Burundi’ (2014) 13 *Macquarie Law Journal* 41, 50.

nised as one of the guiding principles of the United Nations approach to transitional justice process and mechanisms.<sup>166</sup> This requires that “transitional justice process and mechanisms should investigate and prosecute international crimes against children, offer effective remedies to children and strengthen government institutions to protect and promote the rights of children.”<sup>167</sup>

A number of resolutions have been adopted by the different organs of the United Nations, calling to promote reconciliation, accountability and human rights in Sri Lanka.<sup>168</sup> In 2015, Sri Lanka co-sponsored the United Nations Human Rights Council Resolution 30/1 on promoting reconciliation, accountability and human rights in Sri Lanka. It encouraged the GOSL to expedite measures aimed at achieving transitional justice. Despite many obstacles, Sri Lanka has made a significant progress towards implementing the commitments made in the Resolution 30/1. However, in 2019 the Human Rights Council (HRC) observed that the implementation by the GOSL of some of the commitments set out in the Resolution 30/1 is still outstanding.<sup>169</sup>

#### 4.3.1.1 Right to Know (truth-seeking)

In the aftermath of the conflict the president of Sri Lanka issued a proclamation appointing the Lessons Learnt and Reconciliation Commission (LLRC) to reflect on the conflict. In 2011, the Commission produced a report which, among other issues, explored also the problem of conscription of children by the LTTE.<sup>170</sup> The report revealed that during the conflict the LTTE carried out their conscription campaign very aggressively, targeting in particular young children, and abducted and conscripted young children to the armed forces.<sup>171</sup> The Commission declared that this was one of the worst crimes committed by the LTTE in violation of the core principles of IHL.<sup>172</sup>

166 ‘Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice’ (n 164) 5.

167 *ibid.*

168 For example see ‘Resolution Adopted by the Human Rights Council: “Promoting Reconciliation, Accountability and Human Rights in Sri Lanka” [A/HRC/RES/25/1]’ (United Nations, General Assembly 2014). ‘Resolution Adopted by the Human Rights Council: “Promoting Reconciliation, Accountability and Human Rights in Sri Lanka” [A/HRC/RES/30/1]’ (United Nations, Human Rights Council 2015).

169 ‘Promoting Reconciliation, Accountability and Human Rights in Sri Lanka [A/HRC/40/L.1]’ (Human Rights Council, United Nations 2019) para 1. It has been argued that 30/1 resolution contains 36 distinct commitments and as at March 2019, the GOSL has fully implemented only 6 out of 36 commitments. ‘Sri Lanka, Resolution 30/1 - Implementation Monitor’ (Verité Research 2019) <[https://www.veriteresearch.org/wp-content/uploads/2019/03/Verite-Research\\_UNHRC-Monitor-No4-March-2019.pdf](https://www.veriteresearch.org/wp-content/uploads/2019/03/Verite-Research_UNHRC-Monitor-No4-March-2019.pdf)> accessed 6 August 2019. See also Matthias Vanhullebusch and Nadarajah Pushparajah, ‘The Politics of Prosecution of International Crimes in Sri Lanka’ (2016) 14 *Journal of International Criminal Justice* 1235.

170 ‘Report of the Commission of Inquiry on Lessons Learnt and Reconciliation’ (The Commission of Inquiry on Lessons Learnt and Reconciliation appointed by the President of Sri Lanka 2011) 22.

171 *ibid* 59, Paragraph 4.61.

172 *ibid* 129, paragraph 4.321 and p. 175 paragraph 5.79.

It also observed that in the conflict areas there were many cases where young children went missing or were lost<sup>173</sup> and no accurate information about the numbers of the missing children was available.<sup>174</sup> Moreover, the Commission recommended that “the rehabilitation of the ex-child combatants should be the utmost priority of the government in the immediate post-conflict phase.”<sup>175</sup>

The Panel of Experts (“The Darusman Committee”) appointed by the Secretary-General of the United Nations in order to advise on the progress of the implementation of Sri Lanka’s commitment to post conflict accountability stated that “...women, children and the elderly usually bear the brunt of suffering and loss in wars, and the Sri Lankan case is no exception.”<sup>176</sup> It confirmed that the LTTE had implemented a policy of forced recruitment of children throughout the war.<sup>177</sup> Moreover, it revealed that the LTTE exposed women and children to armed attacks and documented how members of these vulnerable groups were shot by the LTTE when they tried to escape.<sup>178</sup> The Panel of Experts argued that “this forced recruitment, as well as the separation of young people from their families, when recruits had a high likelihood of dying in the final battles, could also amount to cruel treatment as a violation of Common Article 3.”<sup>179</sup>

The Committee on the Rights of the Child has also issued a number of concluding observations concerning the implementation of the UNCRC in Sri Lanka.<sup>180</sup> In 1995, the Committee noted with regret that the initial periodic report on Sri Lanka did not give comprehensive information as to the effect of the armed conflict on children.<sup>181</sup> There are also other general commitments which the GOSL promised to implement to seek the truth about the conflict and its consequences. According to the Resolution 30/1, the GOSL promised to establish a commission for truth, justice reconciliation and non-recurrence and an office on missing persons.<sup>182</sup> Recently, as an important

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173 *ibid* 156 Paragraph 5.7.

174 *ibid* 159 Paragraph 5.20.

175 *ibid* 179 Paragraph 5.94.

176 Marzuki Darusman, Steven Ratner and Yasmin Sooka, ‘Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka’ (United Nations 2011) ii.

177 *ibid* iii.

178 *ibid* 1.

179 *ibid* 65, para 240.

180 ‘1995 Concluding Observations of the Committee on the Rights of the Child: Sri Lanka’ (United Nations 1995) CRC/C/15/Add.40. ‘2003 Concluding Observations of the Committee on the Rights of the Child: Sri Lanka’ (United Nations 2003) CRC/C/15/Add.207. ‘2010 Concluding Observations of the Committee on the Rights of the Child: Sri Lanka’ (United Nations 2010) Concluding Observations CRC/C/LKA/CO/3-4. ‘2018 Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Sri Lanka’ (United Nations 2018) Concluding Observations CRC/C/LKA/CO/5-6.

181 ‘1995 Concluding Observations of the Committee on the Rights of the Child: Sri Lanka’ (n 180) para 24.

182 ‘Resolution Adopted by the Human Rights Council: “Promoting Reconciliation, Accountability and Human Rights in Sri Lanka” [A/HRC/RES/30/1]’ (n 168) para 4.

progressive step, Sri Lanka established the Office on Missing Persons (OMP).<sup>183</sup> The Resolution also requires the issuance of certificates of absence to the families of missing persons as a temporary measure of relief.<sup>184</sup> In pursuance of this aim, the Registration of Deaths (Temporary Provisions) Act, no 19 of 2010, was amended by the Act no 16 of 2016 and renamed to the “Registration of Deaths and Missing Persons (Special Provisions) Act”. This amendment establishes a process which enables a relative to obtain a Certificate of Absence of a missing person in lieu of a death certificate. It has been reported that “by end April 2018, the Registrar General’s Department had received 827 applications for certificates of absences and had issued 616 certificates to applicants.”<sup>185</sup> This enabled the families of missing persons to enjoy and utilise properties of missing person. From the child’s rights perspective, encouragingly, this process would have helped many children who have lost their parent/s to come to terms with the reality and move on with their lives.

#### **4.3.1.2 Right to Justice (accountability and reconciliation)**

One of the important elements in transitional justice is accountability. This requires the State to ensure accountability, serve justice and achieve reconciliation through judicial and non-judicial mechanisms. The transitional justice process does not endorse capital punishment but requires establishing an effective mechanism to ensure that perpetrators of human rights violations do not go unpunished.

The Resolution 30/1 requires parties to establish a judicial mechanism with a special counsel, commonwealth and other foreign judges, defence lawyers and authorised prosecutors and investigators to investigate allegations of violations and abuses of human rights and violations of international humanitarian law during the armed conflict in Sri Lanka.<sup>186</sup> In particular, the Resolution 30/1 requires to hold accountable those responsible for torture, rape and sexual violence.<sup>187</sup> Moreover, it recognises the need for a process of accountability and reconciliation for the violations and abuses committed by the LTTE.<sup>188</sup>

In 2003, the Committee on Rights of the Child welcomed the ratification of OPCRC by Sri Lanka and noted that twenty years of civil conflict had had an extremely negative impact on the implementation of the UNCRC in that country.<sup>189</sup> It further rec-

183 Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14 of 2016.

184 ‘Resolution Adopted by the Human Rights Council: “Promoting Reconciliation, Accountability and Human Rights in Sri Lanka” [A/HRC/RES/30/1]’ (n 168) para 13.

185 ‘Consideration of Reports Submitted by States Parties under Article 40 of the Covenant Sixth Periodic Reports of States Parties Due in 2017- Sri Lanka’ (2018) para 64 <[https://www.mfa.gov.lk/tam/wp-content/themes/mfr/img/ICCPR\\_Eng\\_Sin\\_Tam.pdf](https://www.mfa.gov.lk/tam/wp-content/themes/mfr/img/ICCPR_Eng_Sin_Tam.pdf)> accessed 6 August 2019.

186 ‘Resolution Adopted by the Human Rights Council: “Promoting Reconciliation, Accountability and Human Rights in Sri Lanka” [A/HRC/RES/30/1]’ (n 168) para 6.

187 *ibid* 17.

188 *ibid* 5.

189 ‘2010 Concluding Observations of the Committee on the Rights of the Child: Sri Lanka’ (n 180).

ommended prioritizing the demobilization and reintegration of all combatants under eighteen years of age.<sup>190</sup> Sri Lanka submitted its State report under the OPCRC in 2008<sup>191</sup> and the UNCRC Committee provided concluding observations on this report.<sup>192</sup> It welcomed certain progressive steps that had been taken by Sri Lanka but noted with concern the bureaucratic and institutional bottlenecks that underlie some of the general measures that need immediate implementation. The report also recommended establishing a bureau for children's rights within the National Human Rights Commission, which would be vested with the power to receive, investigate and address complaints by children, particularly, those affected by the conflict.<sup>193</sup> Moreover, the Committee supported the UN Secretary General's advisory panel's recommendation concerning the introduction of a credible and efficient accountability mechanism and strongly urged the State Party to ensure that "prompt, independent and impartial investigations are conducted, that those responsible for the killings of children are duly prosecuted and sanctioned with appropriate penalties and that further killings of children do not take place".<sup>194</sup>

Recently, the Prime Minister of Sri Lanka established a Consultation Task Force (CTF) to seek the views and comments of the public on the proposed reconciliation mechanism in 2016 and this report was published in 2017. It recommended that a hybrid Court consisting of a majority of national judges and a number of international judges be established to adjudicate the crimes committed in violation of customary international law, including the crime of the use of civilians as human shields and the forcible recruitment of child soldiers.<sup>195</sup> It also recommended that the proposed Special Court should pay particular attention to crimes of sexual violence and crimes against children.<sup>196</sup> However, the United Nations High Commissioner for Human Rights noted that a comprehensive transitional justice strategy, including a clearly defined timeline for implementation, is yet to be established.<sup>197</sup> Moreover, it was emphasised that the Sri Lankan authorities had not yet demonstrated the capacity or willingness to address gross violations of the rules of IHL and HRL.<sup>198</sup> It was suggested that

190 '2003 Concluding Observations of the Committee on the Rights of the Child: Sri Lanka' (n 180).

191 'Initial Report of Sri Lanka under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict: Initial Reports of States Parties Due in 2004' (n 146).

192 'Consideration of Reports Submitted by State Parties under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict \_ Concluding Observations: Sri Lanka' (United Nations 2010) Concluding Observations CRC/C/OPAC/LKA/CO/1.

193 *ibid* 6 & 7.

194 *ibid* 13.

195 'Final Report of the Consultation Task Force on Reconciliation Mechanisms: Executive Summary and Recommendations' (2016) 94 paragraph 24 and 25.

196 *ibid* 114 and 115 Paragraph 6.8.

197 'Promoting Reconciliation, Accountability and Human Rights in Sri Lanka: Report of the Office of the United Nations High Commissioner for Human Rights [A/HRC/37/23]' (United Nations, General Assembly 2018) para 12.

198 *ibid* 29.

any cogent accountability mechanism that is to be established in order to address these violations would require a substantial degree of external support before it can be considered credible and trusted by victims.<sup>199</sup> Undoubtedly, Sri Lanka faces a challenge in ensuring that justice is delivered to the child victims in the aftermath of the conflict.

#### 4.3.1.3 Right to Reparations

The right to reparations is one of the essential elements of transitional justice<sup>200</sup> and is realised through a range of full and effective reparation strategies including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>201</sup> The Darusman Committee recommended that “the Government of Sri Lanka should institute a reparation programme, in accordance with international standards, for all victims of serious violations committed during the final stages of the war, with special attention to women, children and particularly vulnerable groups.”<sup>202</sup> One of the progressive steps that was taken towards reparation in post-conflict Sri Lanka was establishing the Office for Reparations (OFR).<sup>203</sup> One of the objectives of the OFR is to facilitate and implement policies on reparations including specialized policies on children.<sup>204</sup> The Act requires that the OFR takes into consideration the special needs of children in formulating policies on reparations.<sup>205</sup> There is an ongoing public backlash against this law in Sri Lanka as some dissidents point out that the Act provides reparation for former LTTE cadres who perpetrated the violations. However, it is argued here that providing reparation for conscripted children and child victims aggrieved by the conflict on either side of the conflict, should not be seen as a useless endeavour. As a minimum, such endeavour sends a signal to those children saying that we, as the society, take into serious consideration and are deeply concerned about the violation they have suffered. Moreover, a question has been raised whether Sri Lankan child soldiers should be provided reparations. A number of arguments has been made against such reparations. First, as the Sri Lankan army did not recruit child soldiers, why should the State provide compensation? In response to this argument it is suggested here that the State has an obligation to prevent any persons from violating the rights of children within its jurisdiction, and, if failing to meet this obligation, should provide reparations to the victims. Indeed, the OPCRC requires State Parties to take all measures, including adopting necessary laws to prevent, prohibit and criminalise recruitment or use of children in hostilities by armed groups that are distinct from

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199 *ibid* 40.

200 ‘Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice’ (n 164) 8.

201 ‘Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Resolution Adopted by the General Assembly on 16 December 2005. [A/RES/60/147]’ (United Nations, General Assembly 2006) para 18.

202 Darusman, Ratner and Sooka (n 176) viii.

203 Office for Reparations Act, No.34 of 2018.

204 *ibid* 2(b).

205 *ibid* 12.

the armed forces of the State.<sup>206</sup> In addition, Article 7 of the OPCRC requires State Parties to cooperate in the rehabilitation and social reintegration of children who are victims of acts, contrary to this protocol, that is, recruitment and use of children in armed conflicts. Hence, Sri Lanka does not have to be the party using or recruiting children but still has an obligation to ensure that children are protected. In this context, Sri Lanka should be commended for having given assurance to the Committee on the CRC that “children formerly associated with armed conflict, including those detained on security and terrorism related charges, will never face prosecution”.<sup>207</sup> The second argument against the providing reparations to former child soldiers is that, after eight years since the end of the conflict, it can be assumed that most of the child soldiers have attained the age of majority by now. So technically speaking, once armed groups are demobilised, they are no longer members of such forces or groups, hence, there are no child soldiers. On the other hand, however, the State has a responsibility to provide reparation and compensate these victims for losing their most valuable part of life – childhood, including the opportunity to receive love and care as a child, which is inevitable in one’s development as a person.

#### 4.3.1.4 Guarantees of Non-recurrence (institutional reforms)

Establishing law and order and reforming institutions which would establish a society with respect for human rights is a prerequisite for transitional justice. This will provide assurance for non-recurrence of human rights violation in the post-conflict society and in future. Therefore, the Resolution 30/1 requires a number of reforms to be made to Sri Lankan institutions. In response to these requirements, the GOSL ratified the International Convention for the Protection of All Persons from Enforced Disappearance in 2016 and enacted an enabling act No. 5 of 2018, giving effect to the Convention.<sup>208</sup> Sri Lanka has also enacted an act to assist and protect victims of crime and witnesses<sup>209</sup> and established the National Authority for the Protection of Victims of Crime and Witnesses in 2016. However, there is a criticism that victims or witnesses will be left out of the transitional justice process if the alleged violation does not constitute a crime under domestic laws.<sup>210</sup> Additionally, as mentioned above, two more important progressive steps have been taken by Sri Lanka in the recent years. The first is

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206 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 and entered into force on 12 February 2002 Art. 4.

207 ‘Consideration of Reports Submitted by State Parties under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict \_ Concluding Observations: Sri Lanka’ (n 192) para 38.

208 International Convention for the Protection of All Persons from Enforced Disappearance Act, No.5 of 2018.

209 Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015.

210 ‘Amending the Victim and Witness Protection Act- Submission by the South Asian Centre for Legal Studies’ (4 September 2017) <[http://sacls.org/index.php?option=com\\_k2&view=item&id=261:amending-the-victim-and-witness-protection-act-submission-by-the-south-asian-centre-for-legal-studies&Itemid=809](http://sacls.org/index.php?option=com_k2&view=item&id=261:amending-the-victim-and-witness-protection-act-submission-by-the-south-asian-centre-for-legal-studies&Itemid=809)> accessed 6 August 2018.



establishing the Office on Missing Persons (OMP)<sup>211</sup> and the second is designating an Office for Reparations (OFR).<sup>212</sup> These institutional reforms are to be assessed positively as they provide a supportive environment to achieve transitional justice objectives. However, for a sustainable peace, a political settlement by way of a constitutional reform is needed in Sri Lanka. Recently, the Parliament established itself as a Constitutional Assembly by a Parliamentary Resolution and appointed a Steering Committee to lead the process of drafting a new constitution for Sri Lanka. The interim report of the Steering Committee was published in 2017,<sup>213</sup> and on 11 January 2019 a discussion paper prepared by the Panel of Experts was tabled by the Prime Minister in the Constitutional Assembly.<sup>214</sup> This document is structured as a draft Constitution and it recognises children’s rights as fundamental rights under Article 35, Chapter III on Fundamental Rights and Freedoms. It also states that the best interests of the child should be of paramount importance in all matters concerning children and provides that every child shall have the right not to be used in armed conflict and the right for protection in times of armed conflict. It is very likely that this section was drafted to reflect Sri Lanka’s obligation under Article 38 of the UNCRC and the OPCRC. While the expansion on the scope of civil and political rights has been welcomed by the commentators, it has been suggested that provisions concerning socio-economic rights were “designed more with idealism than practicality.”<sup>215</sup> It is, however, argued here that, in a post-conflict situation, a mere reparation for past violation is not sufficient. Rather, an aspiration to uphold socio-economic rights is an essential prerequisite for ensuring a meaningful participation in the process of transitional justice and building the trust of communities as to a fair distribution of wealth in the future.

#### 4.3.1.5 Right to Participation (national consultations)

One of the fundamental components in transitional justice is participation. Indeed, providing meaningful opportunities to victims of the conflict and general public to participate in designing and implementing the transitional justice process is vital. Any transitional justice strategy should adopt child sensitive approach and children should be given an opportunity to express, depending on their evolving capacities, their opin-

211 Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14 of 2016.

212 Office for Reparations Act, No.34 of 2018.

213 ‘The Interim Report of the Steering Committee’ (The Constitutional Assembly of Sri Lanka 2017) <<https://english.constitutionalassembly.lk/images/pdf/interim-report/ReportE%20CRR.pdf>> accessed 3 August 2019.

214 ‘A Report Prepared by the Panel of Experts for the Steering Committee, which is based on the Interim Report, Six Sub Committee Reports, the Report of the Ad Hoc Sub Committee Set up by the Steering Committee to Look into the Relationship between the Parliament and the Provincial Councils.’ (The Constitutional Assembly of Sri Lanka 2019) <<https://english.constitutionalassembly.lk/images/pdf/2019/01C-Report-English-AA.pdf>> accessed 3 August 2019.

215 Asanga Welikala, ‘Sri Lanka’s (Un)Ending Road to a New Constitution: Technical Progress, Political Collapse’ (*CONSTITUTIONNET*, 29 January 2019) <<http://constitutionnet.org/news/sri-lankas-unending-road-new-constitution-technical-progress-political-collapse>> accessed 3 August 2019.

ion on past violations, and to suggest innovative approaches to enhancing the transitional justice process.

#### 4.4 Conclusion

There are adequate prevention and protection standards available in international law as well as in Sri Lankan domestic law to protect children from the involvement in armed conflicts and the adverse effects of such involvement. The rules concerning NIACs are stronger than the rules on IACs as far as the recruitment and use of children in armed conflicts are concerned. Further, the Optional Protocol to the UNCRC does not distinguish between IAC and NIAC and it provides for rehabilitation and social integration of persons who are victims in Article 7. Nevertheless, a problem remains as to the practical realization of these standards beyond the prevailing underestimation of these standards and because of the culture of impunity among those who commit grave violence against children.<sup>216</sup> Moreover, with regard to NIAC, one of the problems is that even though the State Parties to the Optional Protocol are under the obligation to prevent recruitment and use of children by other armed groups, implementing such standards poses a challenge as non-state actors are not parties and are not bound by treaty obligations and mechanisms. Therefore, it is inevitable that in addition to customary international law other mechanisms are developed to prevent non-state actors from recruiting and using children in armed conflicts. For example, signing a memorandum of understanding by a State with non-state armed groups, facilitated by independent authority, as took place in Sri Lanka. Additionally, other organizations which work in the area of armed conflict can create different tools to persuade non-state actors to respect the norms of IHL. Even though these mechanisms cannot be used to hold non-state actors accountable for human rights violations, they can be used to demonstrate that these groups were aware of IHL and their violations as they signed the deed. One of such innovative mechanisms was developed by the Geneva Call, a non-governmental organization which works with armed non-State actors (ANSAs), in order to establish “the Deed of Commitments”. This allows ANSAs to pledge to uphold the selected international humanitarian norms. The Deed of Commitment protecting children in armed conflict, which was launched in 2010 and duly signed by 26 ANSAs, is a good example.<sup>217</sup>

In the aftermath of the conflict Sri Lanka has taken number of measures to achieve the objectives of transitional justice. However, the criticism remains as to the failure in formulating a time-bound strategic mechanism for accountability and reconciliation process in the post-conflict Sri Lanka. The people of Sri Lanka are deceived by different political groups and these groups portray a State’s treaty obligations towards its own citizens as a threat to sovereignty of the State. Hence, these reasons have served

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216 Tonderai W Chikuhwa, ‘The Evolution of the United Nations’ Protection Agenda for Children’ in Scott Gates and Simon Reich (eds), *Child Soldiers in the Age of Fractured States* (University of Pittsburgh Press 2010) 37.

217 ‘Deed of Commitment’ <<https://genevacall.org/how-we-work/deed-of-commitment/>> accessed 20 November 2018. <https://www.genevacall.org/what-we-do/>> accessed 13 August 2019.

as a justification to bypass treaty obligations and to disregard the obligation to establish a clear strategy to achieve a long-lasting peace in Sri Lanka. Therefore, the lack of visionary leadership and political willingness to bring a sustainable mechanism to achieve justice and peace has been perceived by the international community as a political black hole in Sri Lanka. Finally, it is true that Sri Lanka's accountability process in the aftermath of the conflict has been a slow process. Nevertheless, with the support of independent organisations such as the International Committee of the Red Cross and international organisations, especially human rights treaty bodies such as the United Nations Committee on the Rights of the Child, a theoretical framework can be provided for advocacy concerning necessary awareness programmes and national consultations, in order to ensure that justice is delivered to the children who are affected by the conflict and set a precedent for future generations.

## 5. Protection of Women under International Humanitarian Law and Sri Lankan Law

Hasini Rathnamalala<sup>1</sup>

### 5.1 Introduction

How women face war is multi-faceted.<sup>2</sup> For example, women experience armed conflicts as combatants, civilians-mothers of young children, pregnant mothers, lactating mothers, widows, prisoners of war, heads of the households and single parents. In certain cases, women as combatants or women prisoners of war also experience the battlefields and detainment respectively. Rape and sexual violence against women can occur in these stages. However, it does not put an end to the roles played by women in conflicts. When it comes to the post-conflict societies, yet again women play roles such as head of households, single mothers and participate as agents in peace processes. Sri Lankan women also have played most of the roles indicated above during and after the conflict. Sri Lanka is currently completing its first decade after completion of the internal armed conflict; however, it is still uncertain whether Sri Lanka is on its post-war situation or beyond post-conflict period.

The areas of focus of this paper are limited to addressing the alleged violations that occur during armed conflict and some selected set of women's rights in post-conflict Sri Lanka. Moreover, the continuing relevance of International Humanitarian Law and other applicable human rights law framework will be discussed. Accordingly, protection of women in conflict situations will be analysed based on relevant International Humanitarian Law provisions, Committee on the Elimination of all forms of Discrimination against Women and other applicable U.N. Charter Based Human Rights Mechanisms such as U.N. Security Council Resolutions; generally on the protection of women in conflict and post-conflict situations and resolutions specifically on Sri Lanka. Moreover, under the principles of *lex generalis* and *lex specialis*, final part of the paper makes proposals on how to overcome the gaps in law. In other words, mutual reinforcement of IHL and Human Rights without contradicting each other could be utilized for the better protection for women in post conflict societies.

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2 See generally, Charlotte Lindsay, Women Facing War, ICRC study on the impact of armed conflict on women (ICRC, October 2001).

This leads this paper to examine Sri Lanka's adherence to its treaty obligations. The paper will evaluate further Sri Lanka's commitment to implement domestic laws for the benefit of conflict affected communities and to the nation as whole, in particular by addressing alleged violations of international humanitarian law and human rights law. The process of "securing" peace has no bright lines or demarcations, and so guaranteeing immediate peace often leads to a longer-term phase of stabilizing the country through post-conflict reconstruction processes and development.<sup>3</sup> In light of the above, this paper on protection of women in conflict and post-conflict Sri Lanka will evaluate Sri Lanka's adherence to its legal obligations.

## 5.2 Treaty Obligations of Sri Lanka

Sri Lanka is a party to all four Geneva Conventions;<sup>4</sup> the Geneva conventions have been incorporated into domestic law through the Geneva Convention's Act No 04 of 2007.<sup>5</sup> The conflict that occurred in Sri Lanka between the Sri Lankan Armed Forces and the LTTE could be analysed as an internal armed conflict according to Geneva Conventions and Additional Protocols.<sup>6</sup> International humanitarian law gives expression in law to the fundamental principle of the equality of men and women, specifying this principle in clauses forbidding discrimination.<sup>7</sup> Common Article 3 of all four Geneva Conventions<sup>8</sup> could be recognized as providing fundamental protections in cases of Non-International Armed Conflicts such as that of Sri Lanka. Sri Lanka being a party to all four Geneva Conventions is bound by Common Article 3. In a non-in-

3 Dina Francesca Haynes; Naomi Cahn; Fionnuala Ni Aolain, Women in the Post-Conflict Process: Reviewing the Impact of Recent U.N. Actions in Achieving Gender Centrality, 11 Santa Clara J. Int'l L. 189 (2012) at 192.

4 "WHEREAS Sri Lanka is a State Party to the First, Second, Third and Fourth Geneva Conventions relating to Armed Conflict and Humanitarian Law having ratified the said Geneva Conventions on February 28, 1959" Preamble of Geneva Conventions Act, No. 4 of 2006.

5 Geneva Conventions Act, No. 4 of 2006.

6 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force Oct. 21, 1950, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force Oct. 21, 1950. Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950. Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force Oct. 21, 1950. Further, this has been recognized to be so by the Government of Sri Lanka in its LLRC report and by the UN in on Sri Lanka. "There is no doubt that an internal armed conflict was being waged in Sri Lanka with the requisite intensity during the period that the Panel examined. As a result, international humanitarian law is the law against which to measure the conduct conflict of both the Government and the LTTE." (Darusman Report, see infra note at 35) The LLRC report is somewhat ambiguous in interpreting the legal nature of armed conflict, see further paras 4.3 and 4.4 (see infra note at 34).

7 Françoise Krill, The Protection of Women in International Humanitarian Law, International Review of the Red Cross, No. 249, 1985.

8 Article 3 Common to Geneva Conventions refers to armed conflict not of international character.

ternational armed conflict, women are protected by the protections as are contained in Article 3, granted to persons not taking part in hostilities.<sup>9</sup> However, Common Article 3 does not provide specific protection for women than those common to all men and women regardless of sex. Protocol II complements and develops this provision.<sup>10</sup> Regrettably, Sri Lanka is not a party to Additional Protocol II<sup>11</sup> to the Geneva Conventions.

Further, the Geneva Conventions of 1949 and its protocols generally protect women in situations that occur during armed conflicts based on two grounds; firstly purely in their capacity as women who face conflict situations and are subject to acts such as sexual violence and rape.<sup>12</sup> Secondly this protection extends to mothers of young children or to pregnant mothers.<sup>13</sup> Though there are number of provisions in IHL to

9 Françoise Krill, *The Protection of Women in International Humanitarian Law*, International Review of the Red Cross, No. 249, 1985.

10 Humane Treatment, Article 4-Fundamental Guarantees, e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; Article 5 - Persons whose liberty has been restricted 2. Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons: a) except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women; Article 6-Penal prosecutions The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children. (Infra note at 11).

11 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims in Non-International Armed Conflicts (Additional Protocol 2), 1125 U.N.T.S. 609, entered into force Dec 7,1978.

12 “Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault “. (Protocol II, Art.4). Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault (Art. 27, para 2, C. IV; Art. 75 and 76, P.I) “Whenever it is necessary, as an exceptional and temporary measure, to accommodate women internees who are not members of a family unit in the same place of internment as men, the provision of separate sleeping quarters and sanitary conveniences for the use of such women internees shall be obligatory” (Art. 85 C IV) “They shall be under the immediate supervision of women” (Art.75, para 5,C IV). ”Account shall be taken of the internees age, sex and state of health” (Art. 119, C IV). “shall be confined in separate quarters and shall be under the direct supervision of women” (Arts.76 and 124, C. IV and Art. 75, para 5, P.I). “Women shall be treated with all the regard due to their sex”. Article 25, “in any camps in which women prisoners of war, as well as men, are accommodated, separate dormitories shall be provided for them “(Article 25 C III). See further, Françoise Krill, *The Protection of Women in International Humanitarian Law*, International Review of the Red Cross, No. 249, 1985.

13 “Pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned” (Art. 38, C. IV). Likewise, “The Occupying Power shall not hinder the application of any preferential measures... which may have been adopted prior to the occupation in favour of children under fifteen years, expectant mothers, and mothers of children under seven years” (Art. 50, C. IV). “pregnant

protect women, there is an on-going debate on the concept of protection of women in conflict situations in international humanitarian law and how this body of law mainly focuses not on protecting “women” but protecting women as “mothers.”<sup>14</sup> Furthermore there is an impact of the biological role of women as mothers, as well as socially constructed gender roles such as being primary caregivers of children.

As indicated above, IHL provides the relevant legal framework for protection of women in conflict situations. However, due to the lack of IHL treaty ratification as well as insufficiencies when incorporating into domestic mechanisms such as non-incorporation of the common Article 3 (The common Article 3 of Four Geneva Conventions, 1949) Sri Lankan legal system is incompetent in providing relevant protection in a non-international armed conflict. Therefore it is important to focus on relevant human rights law mechanisms on women in armed conflicts, particularly as applicable in Sri Lanka.

Convention on the Elimination of all forms of Discrimination against Women<sup>15</sup> (Herein after referred to as Women’s Convention) could be recognized as the corner stone for women’s rights. Article 17 of Women’s Convention authorises the appointment of the Committee on the Discrimination Against Women (Women’s Committee) and its role in the implementation process. It is one of the U.N. Treaty Based Mechanisms. Women’s Committee also utilizes certain mechanisms to oversee/ supervise treaty implementation process by State parties. The main terminology of CEDAW is equality and non-discrimination against women. Concluding Observations issued by the Women’s Committee respectively on Sri Lanka during and after the conflict situation and General Recommendations (GR), particularly General Recommendation 30 on Women in Conflict Prevention, Conflict and Post-conflict Situations could be discussed and applied to current unresolved areas under Women’s Committee’s purview in terms of the Sri Lankan conflict.<sup>16</sup>

Apart from its most recent periodical review/ Concluding Observation on Sri Lanka in 2017<sup>17</sup>, the Women’s Committee has issued three periodical reviews during the conflict and post conflict situations in Sri Lanka, respectively in years 1994, 2002, 2011

women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority,(Art. 76, para 2,C IV). “expectant and nursing mothers in occupied territories shall be given additional food, in proportion to their physiological needs” (Art. 89,C IV). “maternity cases must be admitted to any institution where adequate treatment can be given and shall receive care not inferior to that provided for the general population” (Art. 91, C IV). “mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict shall have their cases considered with the utmost priority” (Art. 76, para 2, C IV).

14 See generally, Charlotte Lindsay, Women Facing War, ICRC study on the impact of armed conflict on women, (ICRC, October 2001)at p.26.

15 G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981.

16 General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, Committee on the Elimination of Discrimination against Women (2013) CEDAW/C/GC/30.

17 Concluding observations of the Committee on the Elimination of Discrimination against Women on Sri Lanka, U.N. Doc. CEDAW/C/LKA/ CO-8 (2017).

and the most recent concluding observation issued in year 2017.<sup>18</sup> In 2011, Women’s Committee indicates in the part of report’s impact of conflict on women as “the Committee remains deeply concerned about the reports of gross violations of human rights of women on both sides, particularly the Tamil minority group, the internally displaced women and the female ex-combatants.”<sup>19</sup> Further, it explicitly indicates that “the Committee is particularly concerned about the reports of sexual violence allegedly perpetrated also by the armed forces, the Police and militant groups.”<sup>20</sup> It should be noted that it is the very first instance that Women’s Committee urges the government of Sri Lanka to carry out investigations on sexual violence against women in the context of the Sri Lankan conflict.<sup>21</sup> Moreover, the Women’s Committee recommends Sri Lanka to provide psychological support to those who were subjected to sexual violence during the conflict in the same.<sup>22</sup> In the Concluding Observation issued on Sri Lanka in 2017, the Committee does not discuss sexual violence against women during the conflict, yet, it discusses extensively on post-conflict engagement of women to be implemented by the government of Sri Lanka.<sup>23</sup>

General Recommendation 30 (Herein after referred to as GR)<sup>24</sup> on women in conflict prevention, conflict and post conflict situations covers all aspects on women in conflict situations. Through adoption of this particular GR, Women’s Committee breaks its long-term silence on women in conflict and post-conflict societies. The theory of complementarity between International Humanitarian Law and Human Rights Law is the key concept, recognized by this GR in order to achieve full realization of human rights by women in conflict and post conflict situations. Human rights law and International humanitarian law do not contradict each other but, being based on the same principles and values can influence and reinforce each other mutually at times as gap-fillers. This concept is called “theory of complementarity”. In this instance, *lex generalis* or the general law is human rights law and IHL plays the *lex specialis* or the special law in conflict situations.<sup>25</sup> Women’s Committee adopts the theory of complementarity in order to achieve its objectives in GR 30 as an effective tool to remedy the situations of women in armed conflicts. While covering almost all the aspects to

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18 Committee on the Elimination of Discrimination Against Women, Concluding Observations: Sri Lanka (2002) (1998), (2002), (2011) and 2017.

19 Concluding observations of the Committee on the Elimination of Discrimination against Women on Sri Lanka, U.N. Doc. CEDAW/C/LKA/ CO-7(2011).

20 Ibid.

21 Concluding observations of the Committee on the Elimination of Discrimination against Women, Sri Lanka, U.N. Doc. CEDAW/C/LKA/CO/7 (2011).

22 Ibid.

23 Concluding observations of the Committee on the Elimination of Discrimination against Women on Sri Lanka, U.N. Doc. CEDAW/C/LKA/ CO-7(2017).

24 General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, Committee on the Elimination of Discrimination against Women, CEDAW/C/GC/30.

25 See generally, Cordula Droege, The interplay between International Humanitarian Law and International Human Rights Law, 40 *Isr.L.Rev.*310(2007).



protect substantive equality between men and women in conflict situations, this GR has two main focuses. Firstly, it covers criminal law dimensions on enforcing penal laws to prosecute violations on women's human rights in armed conflicts, thereby enforcing individual liability. Secondly, it focuses on protection of and implementing the rights of women in post conflict societies. It could be concluded that GR 30 could be adopted as an effective interpretative tool to remedy situations of violence against women in armed conflict in Sri Lanka.

### 5.3 Other Relevant Treaties and Non-binding International Instruments

Further, there are other relevant treaties such as International Covenant on Civil and Political Rights (ICCPR)<sup>26</sup>, International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>27</sup> and Convention against Torture that can be used to protect the rights and security of women during and after armed conflicts.<sup>28</sup> Their applicability could be divided based on conflict situations and post-conflict period. The final Concluding Observations issued by the Human Rights Committee in year 2001 raised attention on sexual violence on women.<sup>29</sup> Committee against Torture, too, in its Concluding Observations pays attention to the Sri Lankan situation, specifically on the sexual violence against women during the conflict situation and in post-conflict situation.<sup>30</sup> Further, the Committee on the Economic and Social Rights in its most recent concluding observation specifically focuses on drawing attention of the government to the psychological health issues of conflict-affected persons in general, without special reference to gender.<sup>31</sup> In its previous Concluding Observations, it interpreted IHL

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26 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

27 International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

28 G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987.

29 Furthermore, it is concerned about allegations of sexual violence against women in the context of detention, resettlement and other situations that require contact with security forces (arts. 2, 3, 6 and 7). Human Rights Committee, Concluding observations on the fifth periodic report of Sri Lanka, CCPR/C/LKA/CO/5.

30 The State party should provide the Committee with information on the investigations of cases of war-time rape and other acts of sexual violence that occurred during the last stages of the conflict and in the post-conflict phase, and the outcome of such trials, including information on the punishments meted out and the redress and compensation offered to the victims. Concluding observations of the Committee against Torture, Sri Lanka, U.N. Doc. CAT/C/LKA/CO/3-4 (2011).

31 The Committee is concerned that, despite measures taken, the mental health-care system is inadequate and insufficiently available and accessible, while the need for mental health and psychosocial services is acute for many, in particular those in conflict-affected areas who suffer from conflict-related post-traumatic disorders. . Concluding observations of the Committee on the Economic and Social Rights, Sri Lanka E/C.12/LKA/CO/5.

in its respective domain, yet without any reference to gender.<sup>32</sup> Committee on Racial Discrimination has not yet issued a Concluding Observation since ending of Sri Lankan conflict and its final Concluding Observation on Sri Lanka in 2001 has a simple indication on incorporation of demographic details to the next report based on gender.<sup>33</sup>

## **5.4 Non-Binding Guidelines and Relevant Customary IHL Rules and their Applicability in Sri Lanka**

This part of the research will focus on the Report of the Commission of Inquiry on Lessons Learnt and Reconciliation<sup>34</sup> (Herein after referred to as the LLRC report), Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka<sup>35</sup>, (herein after referred to as Darusman report) and relevant resolutions of the Human Rights Council on women in conflict and post-conflict Sri Lanka. LLRC report's Chapter 4 has been allocated for IHL issues. However, reported issues on sexual violence against women in the Channel 4 video were not given prominence as there were issues on the credibility of the above video.<sup>36</sup> Further, in the section on Human Rights,<sup>37</sup> the Commission heard several accounts of women specific post conflict issues,<sup>38</sup> such as right to education, right to information (particularly on missing persons), economic rights, freedom of movement and land rights were discussed and women's engagement in Post-conflict development and reconciliation efforts were legitimized based on CEDAW's State obligations.<sup>39</sup> However, under IHL obligations, post-conflict women were not given weightage in comparison to that of Human Rights section as discussed above. It should be noted that LLRC report does not focus extensively on women's rights during the conflict or on post conflict situations. At the same time, domestic implementation of LLRC report itself is becoming an unfulfilled goal

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32 In light of its general comment No.12 (1999) on the right to adequate food, the Committee draws the attention of the State party to the fact that the prevention of access to humanitarian food aid in internal conflicts constitutes a violation of article 11 of the Covenant as well as a grave violation of international humanitarian law. Committee on the Economic and Social Rights, Sri Lanka, E/C.12/LKA/CO/2-4.

33 Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, Sri Lanka, U.N. Doc. A/56/18, paras. 321-342 (2001).

34 Report of the Commission of Inquiry on Lessons Learnt and Reconciliation, November, 2011. Available at <http://slebassyausa.org/downloads/LLRC-REPORT.pdf> last accessed on the 05<sup>th</sup> December, 2018.

35 Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka (31st March 2011), available at [http://www.un.org/News/dh/infocus/Sri\\_Lanka/POE\\_Report\\_Full.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf) last accessed on 09<sup>th</sup> December, 2018.

36 LLRC Report, Section IV (4.361-4.371).

37 LLRC Report, Section V (5.111-5.117).

38 Ibid at p.182.

39 Post-conflict development and reconciliation efforts and their implementation must take into account the gender balance and rights of women as well as relevant provisions of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the UN Security Council resolution 1325 on women peace and security. (5.104 at p. 183).

to Sri Lankan government based on various reasons. This concern has been indicated by U.N. Human Rights Council Resolution 30/1 of 2015.<sup>40</sup>

The Darusman Report is one of the important official documents to be analysed in relation to Sri Lanka's women in conflict and in its aftermath. Darusman Report is based on the opinion of the application of customary international humanitarian law to the Sri Lankan situation in absence of the treaty obligation of Additional Protocol II to the Geneva Conventions.<sup>41</sup> Further in relation to women in conflict situations and post-conflict situations, it has certain observations with regard to gender based violence that had been prevailing during the conflict in Sri Lanka<sup>42</sup> and during the post conflict situations (particularly in camps where internally displaced persons were kept).<sup>43</sup>

The UN Security Council Resolutions 1820<sup>44</sup>, 1888<sup>45</sup> and 1325<sup>46</sup> address gender equality in conflict and post conflict situations. The aforesaid resolutions share specific similarities on the concept of protecting women in armed conflict. Mainly, the resolutions are based on International Humanitarian Law and Human Rights Law.<sup>47</sup> U.N. Security Council Resolutions are applicable in both conflict and post conflict societies and governments could make use of such soft laws to adopt State policies on women in conflict and post conflict societies.

It is essential to analyse the U.N. Human Rights Council Resolutions as a significant charter-based human rights protection mechanism accepted universally. Recent U.N. Human Rights Council Resolutions on Sri Lanka<sup>48</sup> to promote reconciliation and State

40 Encourages the Government of Sri Lanka to reform its domestic law to ensure that it can implement effectively its own commitments, the recommendations made in the report of the Lessons Learnt and Reconciliation Commission, as well as the recommendations of the report of the Office of the High Commissioner, including by allowing for, in a manner consistent with its international obligations, the trial and punishment of those most responsible for the full range of crimes under the general principles of law recognized by the community of nations relevant to violations and abuses of human rights and violations of international humanitarian law, including during the period covered by the Lessons Learnt and Reconciliation Commission including members of the security and intelligence units; and also to increase training and incentives focused on the promotion and protection of human rights of all Sri Lankans.

41 In order to determine the content and meaning of customary international law, the Panel relies upon various sources, including the ICRC's study, Customary International Humanitarian Law (2005), which comprehensively analyses state practices and attitudes as well as international and national judicial decisions, and the statute and jurisprudence of international criminal tribunals. Legal Evaluation of Allegations, para. 183 at p. 53.

42 Legal Evaluation of Allegations, Rights of Women, para 226 at p. 63.

43 Legal Evaluation of Allegations, para. 227 at p.63.

44 U. N. Doc. S/RES/1820 (2008).

45 U. N. Doc. S/RES/1888 (2009).

46 U.N. Doc. S/RES/1325(2000).

47 Hasini Rathnamalala, "Achieving Gender Equality in Humanitarian Assistance: A Contest of Athena and Poseidon?" 25 Sri Lanka Journal of International Law 103(2016-2017).at p.118.

48 A/HRC/RES/30/1 (2015) and A/HRC/37/23 (2018).

accountability share certain commonalities. It should be noted that the main objective of U.N. Human Rights Council Resolution 37/23 is to supervise and to evaluate the State obligation and accountability measures taken by the Sri Lankan government with respect to previous U.N. Human Rights Council Resolutions on Sri Lanka.<sup>49</sup> Firstly, on women in conflict and post-conflict situations, both the above stated Human Rights Council Resolutions broadly interpret the State obligation of Sri Lanka under International Humanitarian Law.<sup>50</sup> Secondly and most importantly, this leads to protection of women in post-conflict situations in another dimension; U.N. Security Council Resolution 30/1 indicates that violence against women, sexually or in general is a grave violation of International Humanitarian Law. The U.N. Human Rights Council urges the State to take full commitment towards ensuring justice to victims of sexual violence:

“Also welcomes the commitment of the Government of Sri Lanka to issue instructions clearly to all branches of the security forces that violations of international human rights law and international humanitarian law, including those involving torture, rape and sexual violence, are prohibited and that those responsible will be investigated and punished, and encourages the Government to address all reports of sexual and gender-based violence and torture...<sup>51</sup>”

49 “Pursuant to Human Rights Council resolution 34/1, the present document is an update on progress made in the implementation of resolution 30/1 on promoting reconciliation, accountability and human rights in Sri Lanka during the period from March 2017 to January 2018, in particular with regard to the Government’s commitment to put in place transitional justice measures.” Summary of A/HRC/37/23 (2018).

50 For example, Encourages the Government of Sri Lanka to develop a comprehensive plan and mechanism for preserving all existing records and documentation relating to human rights violations and abuses and violations of international humanitarian law, whether held by public or private institutions.

Reaffirming also that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights law, international refugee law and international humanitarian law, as applicable... (A/HRC/RES/30/1 (2015).

Also encourages the Government of Sri Lanka to introduce effective security sector reforms as part of its transitional justice process, which will help to enhance the reputation and professionalism of the military and include ensuring that no scope exists for retention in or recruitment into the security forces of anyone credibly implicated through a fair administrative process in serious crimes involving human rights violations or abuses or violations of international humanitarian law (A/HRC/RES/30/1 (2015).

The authorities have not yet demonstrated the capacity or willingness to address impunity for gross violations and abuses of international human rights law and serious violations of international humanitarian law. Para.7,A/HRC/37/23 (25 January 2018).

51 Para 17 ( A/HRC/RES/30/1 (2015). See further “while expressing concern at reports of ongoing violations and abuses of human rights, and recognizing the expressed commitment of the Government of Sri Lanka to address issues, including those involving sexual and gender-based violence and torture, abductions...”( A/HRC/RES/30/1 (2015).

Moreover, Human Rights Council Resolution 37/23 reminds Sri Lanka of its continuing obligation on ending of impunity on unresolved areas in sexual violence against women.<sup>52</sup>

Thirdly, interplay between International Humanitarian Law and Human Rights Law has been emphasised significantly in both resolutions<sup>53</sup> and it could be noted that the above indicated interplay could be utilized to fill gaps in accountability in absence of recognized state responsibility in each area. In most instances, occurrences of violations of women's human rights, whether in conflict or post-conflict situation or in-general have been paid less attention among other issues. However, taking into frequent notice and through its supervisory function, Human Rights Council plays a key role to protect and promote women's human rights and to ensure protection of women in post-conflict Sri Lanka under international humanitarian law.

## **5.5 Domestic Implementation of U.N. Treaty Obligations by Sri Lankan Legal System**

### **5.5.1 Implementation through Legislature**

Sri Lanka is on its 10<sup>th</sup> year after the ending of the armed conflict. As indicated above, legal framework provided by four Geneva Conventions, treaty based human rights mechanism and charter based human rights mechanisms raised serious concerns about Sri Lanka's actions towards redressing violations against women. However, the question at stake is whether the above mentioned treaty based mechanisms and charter based mechanisms in fact, has made an impact on Sri Lanka.

As discussed above, Committee on the Elimination of Discrimination against Women has made its concerns on sexual violence against women in Sri Lanka and on the involvement of women in post conflict society. Regrettably, CEDAW itself suffers with its legal status in Sri Lanka as it still does not have an enabling statute since its ratification by Sri Lanka in 1980. Human Rights Committee and Economic and Social Rights Committee also made comments on Sri Lankan situation, specifically, on the need of improving psychological health of war-affected women in Sri Lanka.<sup>54</sup>

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52 The use of torture remains a serious concern. The High Commissioner was deeply concerned over serious allegations in foreign media about ongoing abductions, extreme torture and sexual violence, as recently as in 2016 and 2017. Para.44,A/HRC/37/23 (25 January 2018).

53 See generally both HRC Resolutions 30/1 (2015) and 37/23 (2018) on its recommendations on various human rights treaty implementations and ratifications, e.g: implementation of Convention against Torture and ratification of International Convention for the Protection of All Persons from Enforced Disappearance and its adoption of its enabling statute by Sri Lankan Parliament and importance of coordinating with special Rapporteurs and other thematic mandates under U.N. Human Rights Council.

54 "The Committee recommends that the State party adopt the draft Mental Health Act of 2007 and to formulate strategies to strengthen available psychosocial assistance, especially for children and recruit more mental health workers and other specialized professionals to address post-conflict mental disorders. E/C.12/LKA/CO/2-4".

The domestic legal framework is significantly weak in providing relevant support for the protection of women in conflict and post-conflict Sri Lanka. Firstly, Additional Protocol II has yet to be ratified and secondly, there is no provision for non-international armed conflicts in the Geneva Conventions Act. This particular point of view could be supported by few observations. Usually during an armed conflict there is a special vulnerability for women due to their biological nature which causes them to be exposed to sexual violence, particularly to rape and to other kinds of violence against their biological nature. For instance, rape and sexual violence were used as a weapon in war during the Rwandese Conflict.<sup>55</sup> On the other hand, women are especially vulnerable to sexual violence and other forms of violence during the post-conflict situations. The socially constructed gender-stereotypes on recognition of women as the “weak-subordinate” plays a key role in post-conflict societies. For instance, women as single parents or as female heads of the households, resulted by an armed conflict could lead them to very peculiar vulnerabilities during post-war situations.

The special vulnerabilities during armed conflicts and that of the post-conflict situations calls for amendments in domestic penal legislations on rape and other forms of sexual violence against women in conformity with international standards to prevent the application of the ordinary criminal laws which are at times less stringent.

To bridge the aforesaid gap, domestic penal legislation is to be amended in line with international law jurisprudence. For example, applicable provisions in the Penal Code of Sri Lanka No.02 of 1883 should be amended. Rape and other forms of sexual violence against women in peacetime is to be developed to the level in which it could be applicable in the special vulnerabilities women face in conflict and post-conflict situations. The well-developed international law jurisprudence on sexual violence against women in conflict situations developed through the progressive interpretations by the judiciary could be utilized in order to apply peace time laws on sexual violence against women into conflict and post-conflict situations. Judicial interpretations created by judges of the respective ad-hoc tribunals such as the International Criminal Tribunal for Former Yugoslavia (Herein after referred to as ICTY) and the International Tribunal for Rwanda (Herein after referred to as ICTR) paved the way to amend the above laws. For instance, in order to apply the relevant legal framework to protect women in conflict and post-conflict situations domestically, there must be amendments to the definition of rape which is incorporated in Section 363 of the Penal Code of Sri Lanka.

To achieve the above task, there are guiding authorities which could be sought mainly in ICTY and ICTR jurisprudences. The jurisprudence is developed with an accurate understanding of the special vulnerabilities of women in armed conflicts having been taken into consideration. The powerless biological nature as well as the socially con-

<sup>55</sup> See generally, *When the Dust Settled: Comparative Analysis on Women’s Rights in Conflict Situations of Rwanda and Sri Lanka*, KDU International Symposium 2013. (ISBN No 978-955-0301-07-2) and Jean Paul Akayesu. *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, available at: <https://www.refworld.org/cases, ICTR,40278fbb4.html> [accessed 19 August 2019].

structured notion of women as the weaker gender during armed conflicts expose women to non-equal bargaining positions. This very norm leads women to a special vulnerability against sexual violence in times where laws are silent. ICTY in Kunarac case, considered that there might be other factors<sup>56</sup> deciding the elements of *mens rea* and *actus reus* in crime of rape.

The term “coercive situation” could again be founded in ICTR’s benchmark judgement on sexual violence against women which is Jean Paul Akayesu case.<sup>57</sup> It defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”<sup>58</sup>

In conclusion of this section it is submitted that as the Geneva Convention Act of Sri Lanka lacks the common article three, it is compulsory to amend the relevant provisions of the Penal Code of Sri Lanka which could also be applied to conflict and post-conflict situations to penalize the perpetrators of sexual violence against women. To achieve the above task, as indicated above, the penal laws, specifically the definition of rape should be amended with the aid of progressive international judicial interpretations. Further, international legal obligations could also be useful in this regard, for example, CEDAW’s State obligation extends to “any person, organization or enterprise”<sup>59</sup> and it could be applicable to the definition of the perpetrators where both State actors and non-state actors are playing key roles in armed conflicts.

### **5.5.2 Judicial Interpretations of Sexual Violence against Women in Conflict and Post Armed Conflict Sri Lanka**

“That when a woman is raped, the humanity of a human being is recognized to be violated. When the world says never again-not in war, not in peace-and this time means it.”<sup>60</sup>

During and after the armed conflict, there were reported cases on sexual violence against women in Sri Lanka. Importantly, in certain cases, international treaty obligations that have been undertaken by Sri Lanka were interpreted.

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56 “In particular, the Trial Chamber wished to explain that there are “factors [other than force] which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim-. Trial Judgement on Kunarac Case, para 458, A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force. Trial Judgement on Knarac Case, para 438” Available at <<https://casebook.icrc.org/case-study/icty-prosecutor-v-kunarac-kovac-and-vukovic#217159>> last accessed on the 19<sup>th</sup> August 2019.

57 The Prosecutor v. Jean-Paul Akayesu (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, available at: <https://www.refworld.org/cases,ICTR,40278fbb4.html> [accessed 19 August 2019].

58 Ibid at Para 1726.

59 Infra note at 67.

60 Catharine A MacKinnon, ‘Rape, Genocide, and Women’s Human Rights’ (1994) 17 HARV WOMEN’S LJ 5.

In the *Yogalingam Vijitha case*<sup>61</sup> the petitioner, *Yogalingam Vijitha* was a 27-year-old Tamil woman from Jaffna district. She was arrested based on a complaint lodged to police stating that she is an LTTE suicide bomber. She was subjected to custodial rape, using severe methods of torture.<sup>62</sup> In this case the petitioner seeks relief from the Supreme Court for the alleged infringement of the fundamental rights of the petitioner secured under Articles 11, 13(1) and 13(2) of the Constitution. <sup>63</sup> It was held that 1st, 5th and 9th respondents have violated the petitioner’s fundamental rights guaranteed under Article 11 of the Constitution. Court ordered the respondents to pay Rs.250,000 as compensation to the petitioner of which 150,000 was to be paid by the State<sup>64</sup>. The Attorney General was directed to consider taking steps against the respondents under the Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment Act No.22 of 1994. *Maradana Police Post Rape Case*<sup>65</sup> is also a reported case on custodial rape during the armed conflict. The victims are internally displaced women who admitted to have been members of LTTE or having connections with the organization.<sup>66</sup> The above cases highlight incidences of torture and rape committed by police and security forces. *Vidya Sivaloganathan case*<sup>67</sup> is also a recent case, reported

61 *Yogalingam Vijitha v Wijesekara*, Reserve Sub Inspector of Police, Negombo 2, Head Quarters Inspector Police Station Negambo and others [2001] SC FR 186.

62 She was severally beaten with clubs and wires, trampled with boots on. She was forced to lie on a table and pins were inserted under her nails of her fingers and toes. She was forced to sign a statement written in Sinhalese, when she refused to sign, a plantain tree flower sprinkled with chillie powder was inserted into her vagina. *ibid*.

63 11. No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment 13. (1) No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest. (2) Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law. Chapter III, Fundamental Rights, The Constitution of the Democratic Socialist Republic of Sri Lanka.

64 Sri Lanka: Rape in Custody, Amnesty International (2002), 28 January 2002, Index number: ASA 37/001/2002.

65 “The Police and soldiers had stopped a young Tamil woman named Velu Arshavi at a security check point at Maradana the previous night when she was returning home after work with her husband. Police had taken down her address and On the next day police had visited her place to question her of any connections with LTTE. Then she had been taken to a lonely place near the checkpoint and raped by six policemen and soldiers. After an identification parade was held by police, three police officers and threesoldiers were arrested in connection with this crime. They have since been released on bail.”See further Sri Lanka: Rape in Custody, Amnesty International (2002), 28 January 2002, Index number: ASA 37/001/2002.

66 *Ibid*.

67 <<http://www.ft.lk/news/Vidya-murder-case-appeal--SC-defers-to%C2%A013-December/56-660708>> accessed on 01st July 2019. *Vidya Sivaloganathan* an 18-year-old school girl was gang raped and murdered. Unanimous verdict was delivered on 27th September 2017 by the High Court of Jaffna by the three Judges appointed by the



in 2017 on gang raping and murder of an 18 years old school girl and the judiciary has taken much broader views on rape. Though it was not coming under the custodial rape category discussed above, when analysing the judgement, it is remarkable in accountability measures on “non-state actors” under CEDAW on post conflict women.<sup>68</sup> The above mentioned case is not directly relevant to armed conflict. However, the public concern on zero-tolerance regardless of race or ethnicity seems to be paving the way for progressive judicial interpretation of rape which would provide a positive outlook for the amendment of penal laws on the criminal offence of rape.

## 5.6 Conclusion

The post-conflict terrain, at least theoretically, provides multiple opportunities for transformation on many different levels: protecting civilians, providing accountability for human rights violations committed during hostilities, reforming local and national laws, reintegrating soldiers, rehabilitating and providing redress for victims, establishing or re-establishing the rule of law, creating human rights institutions and new governance structures, altering cultural attitudes, improving socioeconomic conditions, and transforming gender roles and women’s status.<sup>69</sup>

This notion is finely applicable to current Sri Lankan context on protecting women’s human rights. There is no question on the application of IHL. However, the threshold of the question is that to which extent it is applicable to Sri Lanka. As indicated above, it is two faceted. Firstly, there should be a strong legal mechanism in order to end impunity for perpetrators of sexual violence against women during the conflict. ICRC has to play a considerable role in this situation in supporting the implementation of IHL in relevant areas. In its recommendations to the government, the Darusman report also makes the government accountable in instituting a reparation programme, in line with international standards particularly for vulnerable groups such as women.<sup>70</sup> The ICRC could conduct policy research and make recommendations to the government on possible avenues to improve penal laws in current legal framework.

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Attorney General. Seven accused were given death sentence for the charges of abduction, rape and murder of the girl. The convicts were also ordered to serve 30 years of rigorous imprisonment. Moreover, the convicts were fined Rs.40,000 and the fourth and ninth accused were fined Rs. 70,000. Failure to pay the fines would result in additional four months of prison sentence. The seven convicts were ordered to pay a sum of one million to each family member of the girl. Failure to pay the amount would result in addition of two extra years to the prison sentence.

68 CEDAW Art.2(e) “To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise...”

69 Dina Francesca Haynes; Naomi Cahn; Fionnuala Ni Aolain, Women in the Post-Conflict Process: Reviewing the Impact of Recent U.N. Actions in Achieving Gender Centrality, 11 Santa Clara J. Int’l L. 189 (2012) at 192.

70 Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka, Recommendation 3, Long Term Accountability Measures, p.viii. Available at [http://www.un.org/News/dh/infocus/Sri\\_Lanka/POE\\_Report\\_Full.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf) last accessed on 09th December,2018.

As indicated in the introductory remarks, the theory of complementarity could be utilized for a better outcome. For instance, Sri Lankan Fundamental Rights Jurisdiction and the Human Rights Commission could be utilized in order to protect rights of women in conflict situations. Domestic criminal law could also play a key role in this regard.

Secondly, it is necessary to get full engagement of women in post conflict restructuring of society. In the Sri Lankan context, it was observed as indicated by various treaty-based committees that women's engagement in post conflict process is minimal.<sup>71</sup> Culturally and socially devalued position of women manifests itself as soon as external funding and attention falls away.<sup>72</sup> Into this balancing act must also go the recognition that local conceptions of gender issues may differ from those articulated by international organizations.<sup>73</sup> ICRC could play a vital role in this regard, possibly through policy advocacy programmes to educate its significance from grass-root levels to academia and policy makers of the country.

It could be recommended that the theory of complementarity (the interplay between IHL and human rights) should apply to situations where there is a lack of IHL protection. In this aspect, ICRC could join hands with relevant departments in order to advocate Sri Lankan Parliament to adopt enabling statutes for CEDAW and its Optional Protocol, while strengthening the provisions of Geneva Conventions Act by amending its provisions in order to legitimate ICRC's active engagement in policy issues of post conflict women. The outcome of the above process will be fruitful in many ways, as indicated below.

Firstly, IHL and Human Rights Law have commonalities.<sup>74</sup> Further, IHL and Human Rights Law share a common ideal, protection of the dignity and integrity of the person, and many of their guarantees are identical, such as the protection of the right to life, freedom from torture and ill-treatment, the protection of family rights and or social rights.<sup>75</sup> *Lex Specialis* means the specialized law to a general law.<sup>76</sup> In this context, IHL is the *lex specialia* to International Human Rights Law.<sup>77</sup> Mutual reinforcement of those two branches based on its mutual gap filling nature would ultimately benefit both branches of law and its final outcome is to protect rights of women in post conflict society.

Based on the above doctrine, various recommendations could be proposed. Firstly, through domestic human rights mechanisms such as fundamental rights jurisdiction of

71 See generally CEDAW's concluding observations on post-conflict Sri Lanka an Darusman Report.

72 Supra note at p.194.

73 Ibid.

74 Hasini Rathnamalala, The forgotten Domain, unpublished work, submitted for UoM in 2010 (Spring).

75 Cordula Droege, The interplay between International Humanitarian Law and International Human Rights Law, 40 Isr.L.Rev.310(2007).

76 Hasini Rathnamalala, The forgotten Domain, unpublished work, submitted for UoM in 2010 (Spring).

77 Ibid.

the Supreme Court of Sri Lanka and Human Rights Commission, IHL violations that occurred during the post-conflict situations could be addressed. Secondly, through utilizing the intersection between IHL, International Criminal Law and Human Rights Law, domestic court system could enforce its penal legislation against perpetrators who were engaged in penal law violations such as sexual violence or torture against women during the conflict situations in achieving transitional justice for the victims.

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## 6. Regulation of Weapons, De-Mining and Humanitarian Disarmament in Post-Armed Conflict Sri Lanka

Nishara Mendis<sup>1</sup>, Neshan Gunsekera<sup>2</sup> and Nillasi Liyanage<sup>3</sup>

### 6.1 Introduction

Sri Lanka has now experienced ten years of a post-armed conflict situation, without a need to use weapons of war. Many assume that this means that obligations under international humanitarian law are inapplicable in the current context. However, this is not the case, as there are existing obligations which continue into peacetime and also new obligations which a country in a post-armed conflict situation should adopt even during peacetime. This chapter discusses the regulation of weapons, de-mining and humanitarian disarmament and the arms trade, in terms of the international standards, Sri Lanka's experience, treaty ratifications and State practice. The chapter also discusses the implementation of weapons-related obligations in Sri Lanka, identifying the authorities currently responsible for implementation of specific obligations.

A war cannot be fought without weapons, but humanitarian law applies limitations to the use of weapons and in some instances prohibits the use of certain types of weapons altogether. The general prohibition of indiscriminate attacks under international humanitarian law is one way of limiting the use of weapons. Another limitation on the use of specific types of weapons is to prohibit the use of weapons which cause superfluous injury or unnecessary suffering. Both these principles are now considered as part of the customary international humanitarian law applicable for both international and non-international armed conflict,<sup>4</sup> and are supported by a network of international treaties and domestic enforcement mechanisms.

Two general questions that must be asked when ascertaining if a weapon is indiscriminate or whether it can be used in accordance with international humanitarian

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4 See ICRC, *Customary International Law Database: General Rules on the Use of Weapons*, available online at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter20](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter20): accessed 24 September 2018.

law are (1) whether the weapon is capable of being targeted at a military objective and (2) whether the effects of the weapon can be limited as required by international humanitarian law. Some weapons are accepted as prohibited due to being indiscriminate in effects in all circumstances, and are sometimes described as ‘weapons of mass destruction’: these are chemical, biological and nuclear weapons. To this can be added other weapons with indiscriminate effects: mines, including anti-personnel landmines; booby traps; expanding and exploding bullets; weapons that primarily injure by fragments not detectable by X-ray, including projectiles filled with broken glass; blinding laser weapons; poison; cluster bombs and environmental modification techniques which reach a certain threshold of harm. There are also some other types of weapons which are currently in a grey area of use: incendiary weapons which are not prohibited against combatants and conventional weapons with depleted uranium which are not specifically prohibited by treaty provision, but impliedly prohibited if principles of humanitarian law are applied. Thus, not all these types of weapons are clearly prohibited under customary international humanitarian law, but they all are subject to the rule prohibiting the use of indiscriminate weapons.

It is also important to note the impact of Article 36 of the Additional Protocol I to the Geneva Conventions, which provides in the case of international armed conflict that there is the following obligation concerning ‘new weapons’:

#### Article 36 - New weapons

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

The ICRC Commentary on Article 36 states that it is the responsibility of High Contracting Parties to the Geneva Conventions who are involved in developing new arms technologies to determine through internal procedures, the legality or illegality of the use of any new weapon introduced into their armed forces.<sup>5</sup> Thus, no international prohibition of such new weapons arises from the obligation under Article 36, but there could be an international agreement that can be the result of various countries deciding independently that the use of such new weapons ought to be deemed unlawful.

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5 ICRC Commentary of 1987, On the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=F095453E41336B76C12563CD00432AA1>.

Non-governmental organizations<sup>6</sup> and expert opinion<sup>7</sup> and could also add their voice to calls for international humanitarian law and weapons control treaties to be drafted to deal with a specific new weapon.

In modern times landmines are generally considered a prohibited weapon under treaties such as the ‘Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction’ (the Mine Ban Treaty)<sup>8</sup> and ‘The Amended Protocol II to the Conventional Weapons Convention’<sup>9</sup> as well as according to customary international law<sup>10</sup>. Landmines and naval mines have

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6 See for example: ‘Article 36’, which is a UK-based not-for-profit organization established in 2011 - its website is <http://www.article36.org/issue/weapons-review/>. The organization ‘Article 36’ works with a number of other similar organizations and networks in the following manner: “hosts and provides coordination for the International Network on Explosive Weapons (INEW); is on the International Steering Group of the International Campaign to Abolish Nuclear Weapons (ICAN); is a founder of and on the Steering Committee of the Campaign to Stop Killer Robots; is a member of the Governance Board of the International Campaign to Ban Landmines (ICBL) and the Cluster Munition Coalition (CMC); Is a founding member of the Every Casualty Campaign.

7 See for example: articles in the late 1980s-1990s which supported an international prohibition on blinding laser weapons, which later occurred: Anderberg, Bengt, Ove E. Bring, and Myron L. Wolbarsht, *Blinding Laser Weapons and International Humanitarian Law*, *Journal of Peace Research* 29, no. 3 (1992): 287-97; Anderberg, Bengt, and Ove Bring, *Battlefield laser weapons and international law*, *Nordic J. Int'l L.* 57 (1988): 457; Cook III, Joseph W., Maura T. McGowan, and David P. Fiely, *Non-Lethal Weapons Technologies, Legalities, and Potential Policies*, *USAF Acad. J. Legal Stud.* 5 (1994): 23; Doswald-Beck, Louise, and Gerald C. Caudey, *The development of new anti-personnel weapons*, *International Review of the Red Cross Archive* 30.279 (1990): 565-577; Cross, Frank, *Laser Weapons. The dawn of a new military age, Lasers in Medical Science* 8.4 (1993): 309-309.

For recent examples, see UN experts: ‘Group of Governmental Experts of the High Contracting Parties to the 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’ – the report on weapons review mechanisms of The Netherlands and Sweden 17 November 2017 UN.Doc CCW/GGE.1/2017/WP.5 , available online as <https://undocs.org/pdf?symbol=en/ccw/gge.1/2017/WP.5>.

8 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) hereinafter referred to as the ‘Mine Ban Treaty’.

9 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 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, <[https://treaties.un.org/doc/Treaties/1996/05/19960503%2001-38%20AM/Ch\\_XXVI\\_02\\_bp.pdf](https://treaties.un.org/doc/Treaties/1996/05/19960503%2001-38%20AM/Ch_XXVI_02_bp.pdf)> accessed 24 September 2018. Hereinafter referred to as the ‘Amended Protocol II’.

10 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Rules* (CUP 2005) Rules 14, 15, 70, 81, 82, 83. Also available online at ICRC IHL Database <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1)> accessed 24 September 2018.

separate legal regimes governing them<sup>11</sup> and landmines are further subdivided as anti-personnel landmines and anti-vehicle landmines. The Mine Ban Treaty defines a “mine” as “a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle”<sup>12</sup> and an “anti-personnel mine” as a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons”. ‘Anti-vehicle mines’ or mines that are designed to be detonated by a vehicle are distinguished from anti-personnel mines since they are equipped with anti-handling devices<sup>13</sup> and therefore are not prohibited unless they function as anti-personnel mines.<sup>14</sup> Explosive Remnants of War (ERW) are not considered mines. Improvised mines with victim-activated characteristics however, fall within the ambit of anti-personnel mines<sup>15</sup> prohibited by the Mine Ban Treaty.

Disarmament is understood (under international law) as the negotiated or voluntary reduction of military arms.<sup>16</sup> Humanitarian Disarmament, in the context of modern evolution of International Humanitarian Law, could be traced to The Hague Peace Conferences of 1899 and 1907, which some leading proponents on multilateral disarmament

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11 International Law applicable to Naval Mines, International Security Department Workshop Summary, October 2014, Chatham House , available online at:

<[https://www.chathamhouse.org/sites/default/files/field/field\\_document/20140226\\_NavalMines.pdf](https://www.chathamhouse.org/sites/default/files/field/field_document/20140226_NavalMines.pdf)> accessed 22 September 2018.

12 Article 2 of both ‘The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction’ and ‘The Amended Protocol II to the Conventional Weapons Convention’.

13 Devices that are intended to protect a mine and activate when the mine is tampered with.

14 Article 2, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999).

15 Landmine Monitor 2017 (Monitoring and Research Committee, International Campaign to Ban Landmines-Cluster Munitions Coalition, December 2017) <[http://www.the-monitor.org/media/2615219/Landmine-Monitor-2017\\_final.pdf](http://www.the-monitor.org/media/2615219/Landmine-Monitor-2017_final.pdf)> accessed 26 September 2018.

16 Bryan Garner (eds), *Black’s Law Dictionary*, (Eighth Edition, Thomson West Publications, 2004) Also, see, Weapons Law Encyclopedia, ‘disarmament is the reduction or destruction of some of a State’s weapons (or the withdrawal of armed forces).

In international weapons law it refers to treaties or initiatives that prohibit or restrict the production, stockpiling, and/or transfer of weapons. It thus overlaps with arms control, a notion that encompasses efforts between different states to building confidence that force will not be used between them by limiting or reducing certain arms or military forces’, see “Disarmament”, (2013), Geneva Academy of International Humanitarian Law and Human Rights, < <http://www.weaponslaw.org/glossary/disarmament>>, accessed 12 November 2018. More recently, the United Nations Secretary-General, Mr. Guterres at the launch of the *UN Disarmament Agenda* in May this year refers to Disarmament ‘as a tool to secure our world and our future, and included arms control, non-proliferation, prohibition, restrictions, confidence-building and elimination’, Antonio Guterres, “Remarks at the University of Geneva on the launch of the Disarmament Agenda”, (UN Secretary-General, 24 May 2018) <https://www.un.org/sg/en/content/sg/speeches/2018-05-24/launch-disarmament-agenda-remarks>, accessed 12 November 2018.

mament refers to as The Hague System.<sup>17</sup> There is resurgence on multilateral efforts on disarmament at the beginning of the 21<sup>st</sup> Century.<sup>18</sup> In this area, the objectives and principles of international humanitarian law may also overlap with the multilateral efforts at disarmament, particularly with regard to the nuclear disarmament.

## 6.2 The Sri Lankan Experience, Treaty Ratifications and State Practice

### 6.2.1 Sri Lanka and Weapons

Sri Lanka has signed, ratified and made part of law, the 1949 Geneva Conventions.<sup>19</sup> However, Sri Lanka is yet to sign the 1977 Additional Protocols. Further, Sri Lanka has signed and ratified over nineteen other Conventions and Protocols relevant to International Humanitarian Law<sup>20</sup>. Sri Lanka continues to maintain a steady engagement with the wider multilateral treaty regime relating to International Humanitarian Law. This includes, recognizing the application of the Geneva Conventions and carrying out necessary steps to educate those in the armed forces, training academics and providing institutional support for the teaching of the subject of International Humanitarian Law at tertiary educational institutions.

Sri Lanka has consistently participated in international conferences and meetings where it has conveyed its support for multilateral State-led measures for action in furtherance of international humanitarian law relating to weapons and arms control law, including nuclear non-proliferation. Sri Lanka acknowledged in a written statement submitted to the International Court of Justice (ICJ) in the *Nuclear Weapons (WHO) case*, that:

“The unacceptability of the use of weapons that fail to discriminate between military and civilian personnel is firmly established as a fundamental principle of international humanitarian law. These principles which prohibit indiscriminate killing and make the fundamental distinction between combatants and

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17 Jayantha Dhanapala, ‘Prospects for Nuclear Disarmament’, in Timothy McCormack, Micheal Tilbury, Gilian Triggs (eds.), *A Century of War and Peace: Asian-Pacific Perspectives on the Centenary of the 1899 Hague Peace Conference*, Melbourne Studies in Comparative and International Law (Kluwer Law International, 2001), 201.

18 The United Nations adopted the Treaty Prohibiting Nuclear Weapons in 2017, <<https://www.un.org/disarmament/wmd/nuclear/tpnw/>>, accessed 12 November 2018, which was built on several decades of effort going back to the 1960s but more prominently since the year 2012.

19 Geneva Conventions Act Number 4 of 2006, < [https://srilankalaw.lk/YearWisePdf/2006/GENEVA\\_CONVENTIONS\\_ACT\\_No\\_4\\_OF\\_2006.pdf](https://srilankalaw.lk/YearWisePdf/2006/GENEVA_CONVENTIONS_ACT_No_4_OF_2006.pdf)>, accessed 16 November 2018.

20 See, Treaties, State Parties and Commentaries – Sri Lanka, ICRC < [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp\\_countrySelected=LK](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=LK), accessed on 20 November 2018.



non-combatants have also found expression in the body of treaty law which have been incorporated in a series of international conventions...”<sup>21</sup>

Sri Lanka also supported the customary nature of certain international humanitarian law principles in its submission to the ICJ stating that:

“Customary law principles which have evolved in the field of armed conflict prohibit the use of weapons and the methods of warfare of a nature to cause superfluous injury or unnecessary suffering”<sup>22</sup>

Thus, Sri Lankan State practice in general supports the basic humanitarian principles relating to weapons including the fundamental principles, development of treaties and customary international law nature.

The first weapons-related treaty ratified by Sri Lanka was the Geneva Protocol on Asphyxiating or Poisonous Gases, and of Bacteriological Methods (1925), which was ratified in 1954, not long after independence. Despite a 30 year armed conflict, Sri Lanka had ratified many of the relevant treaties on weapons and disarmament, including the Convention on Chemical Weapons (1993) ratified in 1994, the Biological Weapons Convention (1972) in 1986 and ratification of Protocols I-IV of the Convention on Conventional Weapons (CCW) in 2004, and more recently the Anti-Personnel Mine Ban Convention (1997) in 2017 and the Cluster Munitions Convention (2008) in 2018. Protocol V to the CCW on explosive remnants of war has not been ratified as yet. However, of the ratified weapons-related treaties only the Chemical Weapons Convention has had enabling legislation for its domestic implementation, through the introduction of the Chemical Weapons Convention Act, No. 58 of 2007.

The Sri Lankan representative is currently the President in office for the Convention on Cluster Munitions.<sup>23</sup> Sri Lanka unfailingly participated in the meetings for the Convention on Cluster Munitions since 2011, voting in favour of the UN resolution UNGA Resolution 72/54 on the implementation of the convention in December 2017 and ratified the Convention on Cluster Munitions on 1 March 2018. Sri Lanka’s official position is that it has never stockpiled or used cluster munitions and that there

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21 Sri Lanka, *Practice Relating to Rule 70. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering*, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_lk\\_rule70](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_lk_rule70), citing the written statement of Sri Lanka submitted to the International Court of Justice in the *Nuclear Weapons (WHO) case*.

22 Sri Lanka, *Practice Relating to Rule 70. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering*, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_lk\\_rule70](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_lk_rule70), citing the written statement of Sri Lanka submitted to the International Court of Justice in the *Nuclear Weapons (WHO) case*.

23 Ministry of Foreign Affairs Sri Lanka, ‘8<sup>th</sup> Meeting of State Parties to the Convention on Cluster Munitions (CCM)’, (September 2018), < <https://www.mfa.gov.lk/sri-lanka-welcomed-as-state-party-to-the-cluster-munition-convention/>>, accessed 12 November 2018.

will be no use in the future either. In 2017 Sri Lanka also voted in favor of UNGA resolution 72/191 expressing condemnation of the use of cluster munitions in Syria.

Regarding other prohibited weapons, it has been commented that chemical weapons had been used and considered for use by the LTTE during the armed conflict<sup>24</sup>, however, the government of Sri Lanka has not expressed an official position on this matter during or after the conflict. It was stated at the Fifth Conference of States Parties to the Chemical Weapons Convention in 2000, that Sri Lanka had no chemical industry which could produce chemical weapons and did not possess any such weapons. Sri Lanka's official position since its participation in the Chemical Weapons Convention is that stockpiles should be destroyed. This was reiterated in 2017 by Sri Lanka's Permanent Representative to the OPCW, A.M.J. Sadiq at the 22nd Session of the Conference of the States Parties to the Chemical Weapons Convention in The Hague.<sup>25</sup>

In 2016, Addressing the 5th Review Conference of the Meeting of the High Contracting Parties to the Convention on Certain Conventional Weapons (CCW) the Sri Lankan government said it supports the establishment of a Group of Governmental Experts (GGE) on Lethal Autonomous Weapons Systems (LAWS), within the framework of the Convention on Certain Conventional Weapons (CCW) and to elevate the dialogue on LAWS to a State-driven formal process.<sup>26</sup>

## 6.2.2 Sri Lanka and Landmines

Sri Lanka has unfortunately had to deal with the use of landmines during the conflict and the ongoing consequences of this. Landmines continue to pose a threat to human and animal life even after a war is concluded. It denies access to basic needs, agricultural lands and infrastructure in addition to posing environmental threats such as the chemical contamination of the soil.<sup>27</sup> This is true of Sri Lanka as well which was left with a legacy of heavy landmine contamination due to the 30-year armed conflict. However, consequent to persistent mine action efforts, the special envoy to the Mine Ban Treaty Prince Mired Raad Zeid Al-Husseini during his visit to Sri Lanka in March 2018 called the landmine issue in Sri Lanka “a fixed problem that can be dealt with within a few years’ time”.<sup>28</sup>

24 Bruce Hoffman, *The first non-state use of a chemical weapon in warfare: the Tamil Tigers’ assault on East Kiran*, *Small Wars & Insurgencies*, (2009) 20:3-4, 463-477.

25 Daily Mirror, *SL calls for destruction of chemical weapons*, 2017-12-05.

26 Delegation of Sri Lanka, *Statement by Sri Lanka 12th December 2016*, available online at <https://www.unog.ch/80256EDD006B8954> ([httpAssets/7758C91A86364CD6C125808E00550B68/\\$file/Sri+Lanka.pdf](httpAssets/7758C91A86364CD6C125808E00550B68/$file/Sri+Lanka.pdf))

27 Harshi Gunawardana et al, ‘*Humanitarian Demining and Sustainable Land Management in Post-Conflict Settings in Sri Lanka: Literature Review*’ [2016] *Journal of Management and Sustainability*, vol .6.

<<https://www.researchgate.net/publication/307524684>>\_accessed 26 September 2018, 80-82.

28 Kelum Bandara, Interview with Special Envoy to the Mine Ban Treaty, Prince Mired Raad Zeid Al-Husseini: ‘Sri Lanka has made remarkable progress in mine action’ *Daily Mirror* (12 March 2018) <<http://www.dailymirror.lk/article/Sri-Lanka-has-made-remarkable-progress-in-mine-action-147116.html>> accessed 26 September 2018.

According to Sri Lanka Army estimates 1.6 million landmines have been laid in Sri Lanka.<sup>29</sup> Both the State Armed forces and the non-state armed group Liberation Tigers Tamil Eelam (LTTE) used landmines extensively during the war.<sup>30</sup> The Indian Peace Keeping Forces are also known to have emplaced mines during their involvement in the hostilities from July 1987 to January 1990.<sup>31</sup> While there is no evidence that landmines were produced by the Government of Sri Lanka, the LTTE had been in the practice of producing several types of anti-personnel mines<sup>32</sup> as well as Improvised Explosive Devices (IEDs).<sup>33</sup> The LTTE is known to have used both anti-personnel and anti-vehicle mines<sup>34</sup> to safeguard their defense positions as well as to cut off access to lands and infrastructure such as roads and buildings. Records of the minefields laid by the LTTE are unavailable<sup>35</sup> and reports state that unpredictable patterns and cluster formations that trigger multiple explosions have been utilized by them.<sup>36</sup> Command-detonated Claymore type devices that are not banned under the Mine Ban Treaty were also produced and used by LTTE.<sup>37</sup>

At the end of 2016, according to the Landmine Monitor classification Sri Lanka remained classified as a country with ‘heavy mine contamination’ i.e. with 20 to 99

- 29 Sri Lanka National Mine Action Strategy 2010  
<<http://www.slnmac.gov.lk/resources/95/National%20Strategy%20for%20Mine%20Action%20in%20Sri%20Lanka.pdf>> accessed 26 September 2018, 3.
- 30 *Clearing the Mines 2016*, Mine Action Review Report for the 15<sup>th</sup> Meeting of the States Parties to the Anti-personnel Mine Ban Convention <<http://www.mineactionreview.org/assets/downloads/NPA-Clearing-the-Mines-2016.pdf>> accessed 29 September 2018, 305.
- 31 Sri Lanka National Mine Action Strategy 2016-2020 <<https://www.gichd.org/fileadmin/GICHD-resources/rec-documents/NMAS-SriLanka-2016-2020.pdf>> accessed 26 September 2018, 6. See also; Landmine and Cluster Munition Monitor <<http://www.the-monitor.org/en-gb/reports/2016/sri-lanka/mine-ban-policy.aspx>> accessed 29 September 2018.
- 32 Landmine and Cluster Munition Monitor Website <[http://archives.the-monitor.org/index.php/cp/display/region\\_profiles/theme/538](http://archives.the-monitor.org/index.php/cp/display/region_profiles/theme/538)> accessed 26 September 2018, See also; Landmine and Cluster Munition Monitor Website <<http://www.the-monitor.org/en-gb/reports/2016/sri-lanka/mine-ban-policy.aspx>> accessed 29 September 2018.
- 33 Sri Lanka National Mine Action Strategy 2016-2020 <<https://www.gichd.org/fileadmin/GICHD-resources/rec-documents/NMAS-SriLanka-2016-2020.pdf>> accessed 26 September 2018, 6.
- 34 Landmine and Cluster Munition Monitor Website <[http://archives.the-monitor.org/index.php/cp/display/region\\_profiles/theme/538](http://archives.the-monitor.org/index.php/cp/display/region_profiles/theme/538)> accessed 29 September 2018.
- 35 Sri Lanka National Mine Action Strategy 2016-2020 <<https://www.gichd.org/fileadmin/GICHD-resources/rec-documents/NMAS-SriLanka-2016-2020.pdf>> accessed 26 September 2018, 6.
- 36 T. V. Sriram, ‘Unpredictable LTTE landmine pattern baffles mine experts’ <[https://www.business-standard.com/article/economy-policy/unpredictable-ltte-landmine-pattern-baffles-mine-experts-109122800126\\_1.html](https://www.business-standard.com/article/economy-policy/unpredictable-ltte-landmine-pattern-baffles-mine-experts-109122800126_1.html)> accessed 29 September 2018.
- 37 Landmine and Cluster Munition Monitor Website <[http://archives.the-monitor.org/index.php/cp/display/region\\_profiles/theme/538](http://archives.the-monitor.org/index.php/cp/display/region_profiles/theme/538)> accessed 29 September 2018. See also; ‘Tamil Tigers blamed as landmine attack kills 64 on bus’, *The Guardian* <<https://www.theguardian.com/world/2006/jun/16/mainsection.maseehrahan>> accessed 29 September 2018.

km of contaminated areas<sup>38</sup> despite a robust humanitarian demining process that destroyed 59,304 landmines in 2016 alone, a considerable percentage of the global count of anti-personnel mines destroyed in that year.<sup>39</sup> Out of the ten mine affected districts in Sri Lanka<sup>40</sup>, Batticaloa was declared mine-risk free by the stakeholders on 21<sup>st</sup> June 2017, the first district to be so declared.<sup>41</sup> Areas required for resettlement, followed by agricultural land, irrigation tanks and infrastructure were prioritized during demining activities<sup>42</sup> in order to expedite the return of IDPs. Consequent to demining operations since 2006, which gathered momentum after the end of the armed conflict in May 2009, it is estimated that Sri Lanka now has only 25km<sup>2</sup> of land to be cleared.<sup>43</sup>

Sri Lanka has voted in favour of all the United Nations General Assembly Resolutions on banning landmines since 1996.<sup>44</sup> As a matter of principle Sri Lanka has always

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38 Landmine Monitor 2017 (Monitoring and Research Committee, International Campaign to Ban Landmines-Cluster Munitions Coalition December 2017) <[http://www.the-monitor.org/media/2615219/Landmine-Monitor-2017\\_final.pdf](http://www.the-monitor.org/media/2615219/Landmine-Monitor-2017_final.pdf)> accessed 26 September 2018, 33, 48.

39 *ibid.*

40 *Clearing the Mines 2016*, Mine Action Review Report for the 15<sup>th</sup> Meeting of the States Parties to the Anti-personnel Mine Ban Convention <<http://www.mineactionreview.org/assets/downloads/NPA-Clearing-the-Mines-2016.pdf>> accessed 29 September 2018, 8.

41 'Batticaloa district landmine free' (*News.lk: The Official Government News Portal*, 23 June 2017) <<https://www.news.lk/news/sri-lanka/item/17213-batticaloa-district-landmine-free>> accessed 25 September 2018. See also; 'Mine-Affected Batticaloa District, Now Safe from Landmines' (*The Sri Lanka Army Website*, 22 June 2017) <<http://www.army.lk/news/mine-affected-batticaloa-district-now-safe-landmines>> accessed 25 September 2018.

Note that Demining Agencies classify areas where demining operations have been concluded as areas that have reached 'residual risk status' rather than outright 'mine free' areas as it's impossible to give a 100% guarantee that there would be no mines at all in the cleared area. However, as the term 'residual risk' does not denote clearly to a layman the fact that demining has been concluded the term 'mine risk free' is usually preferred.

42 *Clearing the Mines 2016*, Mine Action Review Report for the 15<sup>th</sup> Meeting of the States Parties to the Anti-personnel Mine Ban Convention <<http://www.mineactionreview.org/assets/downloads/NPA-Clearing-the-Mines-2016.pdf>> accessed 29 September 2018, 306.

43 Sri Lanka National Mine Action Strategy 2016 – 2020, Reviewed Version, September 2018 Ministry of Prison Reforms, Rehabilitation, Resettlement and Hindu Religious Affairs, 8; see further Sri Lanka Mine Action, updated October 2018, <http://www.the-monitor.org/en-gb/reports/2018/sri-lanka/mine-action.aspx>. See also; Vidya Abhayagunawardena, 'Post-war Sri Lanka to Finish the Job Before 2025' *The Island* (03 April 2018), <[http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=182606](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=182606)> accessed 26 September 2018.

44 International Campaign to Ban Landmines Website, <<http://www.icbl.org/en-gb/the-treaty/treaty-meetings/un-first-committee/frequently-asked-questions-regarding-the-unga-mine-ban-treaty-resolution.aspx>> accessed 26 September 2018. See also; Vidya Abhayagunawardena, 'Banning landmines in SL could pave the way to a greener nation' *Sunday Times* (31 October 2010) <[http://www.sundaytimes.lk/101031/News/nws\\_66.html](http://www.sundaytimes.lk/101031/News/nws_66.html)> accessed 26 September 2018.

supported the banning of anti-personnel mines.<sup>45</sup> However, the government considered antipersonnel mines to be “a legitimate defense weapon in the context of protecting the security forces installations against the threat caused by terrorist groups.”<sup>46</sup> During the war the government maintained that its accession to the Mine Ban Treaty would depend on whether the LTTE agreed to refrain from use and production of landmines and destroy stockpiles through a Deed of Commitment with ‘an effective foolproof verification mechanism.’<sup>47</sup> Sri Lanka was of the opinion that a ban on anti-personnel mines should extend to terrorist groups in addition to security forces.<sup>48</sup> In 1993, Sri Lanka stated that a proposed moratorium on the export of anti-personnel mines was inadequate since it did not consider the production or use of anti-personnel landmines by non-State groups.<sup>49</sup>

The use of anti-personnel mines is governed by the Mine Ban Treaty adopted in 1997. The treaty prohibits the use, stockpiling, production and transfer of anti-personnel mines in both international and non-international armed conflict in addition to establishing obligations of clearance of mined areas, stockpile destruction and measures of national implementation. Sri Lanka acceded to the Mine Ban Treaty as its 163<sup>rd</sup> state party on 13<sup>th</sup> December 2017 with the treaty provisions coming into force from 1<sup>st</sup> June 2018 onwards.

Article 4 of the Mine Ban Treaty requires the destruction of stockpiled anti-personnel mines that a State party “owns or possesses” or are “under its jurisdiction or control” within four years of entry into force<sup>50</sup>, Sri Lanka is obliged to destroy its stockpiles by 1st June 2022. Destruction of anti-personnel mines in mined areas must be carried out as soon as possible but not later than ten years after the treaty’s entry into force.<sup>51</sup> The Sri Lanka National Mine Action Strategy has set the deadline for a landmine contamination

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45 Landmine and Cluster Munition Monitor Website <[http://archives.the-monitor.org/index.php/cp/display/region\\_profiles/theme/538](http://archives.the-monitor.org/index.php/cp/display/region_profiles/theme/538)> accessed 29 September 2018.

46 Statement of the Government of the Democratic Socialist Republic of Sri Lanka, Ottawa, Canada, 2 December 1997 <[http://archives.the-monitor.org/index.php/publications/display?url=lm/1999/sri\\_lanka.html](http://archives.the-monitor.org/index.php/publications/display?url=lm/1999/sri_lanka.html)> accessed 29 September 2018.

47 Statement of Sri Lanka, Seventh Meeting of States Parties, Geneva, 18 September 2006, <[http://www.lankamission.org/disarmament-coto\\_a\\_Deed\\_of\\_Commitmentunterterrorism/631-statement-of-sri-lanka-at-the-seventh-meeting-of-the-state-parties-to-the-convention-on-the-prohibition-of-the-use-stockpiling-production-and-transfer-ofanti-personnel-mines-and-on-their-destruction-18-22-september-2006-geneva-2.html](http://www.lankamission.org/disarmament-coto_a_Deed_of_Commitmentunterterrorism/631-statement-of-sri-lanka-at-the-seventh-meeting-of-the-state-parties-to-the-convention-on-the-prohibition-of-the-use-stockpiling-production-and-transfer-ofanti-personnel-mines-and-on-their-destruction-18-22-september-2006-geneva-2.html)> accessed 29 September 2018.

48 Landmine and Cluster Munition Monitor Website <[http://archives.the-monitor.org/index.php/publications/display?url=lm/1999/sri\\_lanka.html](http://archives.the-monitor.org/index.php/publications/display?url=lm/1999/sri_lanka.html)> accessed 26 September 2018.

49 ICRC IHL Database <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_ik\\_rule81](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_ik_rule81)> accessed 24 September 2018.

50 Article 4, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999).

51 Article 5, *ibid.*

free Sri Lanka by 2020,<sup>52</sup> ahead of the ‘Finish the Job 2025’ global completion challenge issued by the International Campaign to Ban Landmines (ICBL).<sup>53</sup> However, the Mid-Term Review of the Sri Lanka National Mine Action Strategy reveals that the December 2020 deadline is feasible only if additional funding is made available for all demining agencies to expand their operations to optimal capacity.<sup>54</sup> Under Article 7 each State party undertakes to submit annual reports to the Secretary-General of the United Nations providing information about the adherence to treaty obligations by the State party and the status of its landmine problem.<sup>55</sup> Sri Lanka’s first such transparency report was due by November 28, 2018.<sup>56</sup> The national action is co-ordinated by the Sri Lanka Campaign to Ban Landmines, which is a member of ICBL and works with a dozen different local organizations.<sup>57</sup>

Other types of landmines which are not expressly prohibited under treaty law are considered to be governed by the “authoritative minimum standard” of the limited prohibitions of the Amended Protocol II to the Convention on Certain Conventional Weapons.<sup>58</sup> Sri Lanka is a State Party to the Convention on Certain Conventional Weapons as well as the Amended Protocol II having acceded to it in 2004. It has been emphasized by States as well as international Non-governmental organizations that the provisions of Amended Protocol II is insufficient to prevent the detrimental humanitarian impact of landmines especially anti-vehicle mines, and that it is a “relic

52 Kelum Bandara, *Interview with Special Envoy to the Mine Ban Treaty, Prince Mired Raad Zeid Al-Hussein: ‘Sri Lanka has made remarkable progress in mine action’*, Daily Mirror (12 March 2018) <<http://www.dailymirror.lk/article/Sri-Lanka-has-made-remarkable-progress-in-mine-action-147116.html>> accessed 26 September 2018.

53 International Campaign to Ban Landmines Website <<http://icbl.org/en-gb/finish-the-job.aspx>> accessed 26 September 2018.

54 Sri Lanka National Mine Action Strategy 2016-2020, Reviewed Version, 2018 September, 10.

55 Article 7, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999).

56 Mary Wareham, Advocacy Director, Arms Division, Statement on Stockpile Destruction to the Intersessional Meetings of the Mine Ban Treaty, Geneva. <<https://www.hrw.org/news/2018/06/08/statement-stockpile-destruction-intersessional-meetings-mine-ban-treaty-geneva>> accessed 26 September 2018.

57 Disability Organisation Joint Front (DOJF); Eastern Human Economic Development – Caritas (EHED Caritas); Jaffna Jaipur Centre for Disability Rehabilitation (JJCDR); Mannar Association for Rehabilitation of Differently Able People (MARDAP); Organisation for Rehabilitation of Handicapped in Vavuniya (ORHAN); Rural Development Foundation (RDF); Sarvodaya Sramadana Movement; Social Organisation Network for Development (SOND); South Asia Partnership-Sri Lanka (SAPSRI); South Asia Small Arms Network-Sri Lanka (SASA Net); Sri Lanka Foundation for the Rehabilitation of the Disabled (SLFRD); Valvothayam – Caritas. See further <https://www.slnmac.gov.lk/services/advocacy/advocacy/advocacy>.

58 Rule 81, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Rules* (CUP 2005). Also available online at ICRC IHL Database <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule81](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule81)> accessed 24 September 2018.

of the past”.<sup>59</sup> Following the ratification of Amended Protocol II in September 2004, all landmines laid by the State armed forces are said to have been emplaced in accordance with its provisions, in addition to the recording of the placement of anti-personnel and anti-vehicle mines which has been the State forces’ practice throughout the armed conflict.<sup>60</sup>

The number of landmine accident survivors in Sri Lanka is estimated to be in the thousands, including both the military and civilians.<sup>61</sup> Following the end of the war the number of landmine victims has decreased steadily partly due to the success of Mine Risk Education (MRE) or creating awareness among communities at risk about mine safe behaviour. The MRE policy developed with the participation of the government and NGOs is implemented at national and district level with the coordination of the UNICEF.<sup>62</sup> In the wake of the success of the demining operations in Sri Lanka, Victim Assistance (VA) remains the next hurdle. The following definition of VA is followed by the National Mine Action Centre:

Victim Assistance as commonly understood in mine action refers to all care and rehabilitation activities that aim to meet the immediate and long-term needs of landmine and ERW victims, their families, and affected communities.<sup>63</sup>

There are still some shortcomings and areas for improvement in this regard. The lack of comprehensive data on landmine survivors,<sup>64</sup> insufficient coordination between Ministries that offer services to survivors, the dearth of staff with expertise and the

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59 Steve Goose, Director of Human Rights Watch Arms Division, to the Eighth Annual Conference of States Parties to the Convention on Conventional Weapons Amended Protocol II <<https://www.hrw.org/news/2006/11/06/convention-conventional-weapons-ccw-amended-protocol-ii-largely-relic-past>> accessed 26 September 2018. See also; Joseph J. H. Yoon, ‘The Problem of Anti-Personnel Landmines and the Ottawa Treaty: Illusion or Reality?’ *Revue Générale de Droit International Public*, Volume 28 December 1998 <https://www.erudit.org/en/journals/rgd/1997-v28-n4-rgd02410/1035621ar.pdf> accessed 29 September 2018, 560.

60 Sri Lanka National Mine Action Strategy 2016-2020 <<https://www.gichd.org/fileadmin/GICHD-resources/rec-documents/NMAS-SriLanka-2016-2020.pdf>> accessed 26 September 2018, 6.

61 Landmine and Cluster Munition Monitor Website, <<http://www.the-monitor.org/en-gb/reports/2017/sri-lanka/victim-assistance.aspx>> accessed 29 September 2018.

62 Mine Action Evaluation Report, WYG International, <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/321051/Mine-Action-annexes.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/321051/Mine-Action-annexes.pdf)> accessed 27 September 2018.

63 Sri Lanka National Mine Action Strategy 2016-2020 <<https://www.gichd.org/fileadmin/GICHD-resources/rec-documents/NMAS-SriLanka-2016-2020.pdf>> accessed 26 September 2018, 17 and Sri Lanka National Mine Action Strategy 2016-2020, Reviewed Version, September 2018, 14.

64 Mine Action Evaluation Report, WYG International, available online at: <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/321051/Mine-Action-annexes.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/321051/Mine-Action-annexes.pdf)> accessed 27 September 2018.

lack of continued medical assistance<sup>65</sup> are some of the issues that need to be addressed regarding support to survivors.

In 2016 Sri Lanka acceded to the Convention on the Rights of Persons with Disabilities which is relevant to the area of victim assistance. However, enabling legislation is yet to be passed giving effect to its provisions in Sri Lanka and there is no co-ordinated mechanism to deal with needs of mine victims who have become disabled. Although there is a National Policy on Disability for Sri Lanka (2003), which has been issued by the Ministry of Social Welfare, and which acknowledges that there is a need for “comprehensive assistance” (“continuing medical care, physical rehabilitation, psychological and social support, employment and socioeconomic re-integration programmes”)<sup>66</sup> to be applied to each individual case on a holistic policy basis, the actual coordination efforts need to be improved further.

The use of anti-personnel mines in warfare is subject to the customary rules of IHL. Anti-personnel mines are violative of the principle of distinction between combatants and civilians<sup>67</sup> since they are victim-activated as opposed to command-detonated, and therefore indiscriminate. This is clear in Rules 70 and 71 of the ICRC customary international humanitarian law rules list, which state respectively that “the use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited” and that “the use of weapons which are by nature indiscriminate is prohibited”.

Customary Rule 70 which prohibits the use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is reaffirmed as applicable to landmines in the Mine Ban Treaty<sup>68</sup> as well as the Amended Protocol II regarding contexts of both International and Non-international armed conflicts. This is because landmines can kill or maim for life. State practice too has been to apply the rule in both International and Non-international armed conflict as observed by the

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65 Lakna Paranamma, ‘Aiming for a mine-free Sri Lanka’ *Daily Mirror* (08 March 2014) <<http://www.dailymirror.lk/45664/tech>> accessed 20 September 29, 2018.

66 Ministry of Social Welfare, NATIONAL POLICY ON DISABILITY FOR SRI LANKA (2003), p56-57, [https://socialemwelfare.gov.lk/web/images/content\\_image/pdf/legislation/disability\\_policy.pdf](https://socialemwelfare.gov.lk/web/images/content_image/pdf/legislation/disability_policy.pdf).

67 Rule 1, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Rules* (CUP 2005). Also available online at ICRC IHL Database <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1)> accessed 24 September 2018.

68 Preamble, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999).



ICRC.<sup>69</sup> The principle of proportionality<sup>70</sup> and the obligation to take precautions in attack to spare civilians<sup>71</sup> are also applicable to the use of landmines.

Specifically focusing on landmines, Customary Rule 81 states that “when landmines are used, particular care must be taken to minimize their indiscriminate effects”. This norm is applicable in both International and Non-international armed conflicts regarding the use of anti-vehicle mines and to States that have not banned the use of anti-personnel mines.<sup>72</sup> Rule 82 requires the recording of the placement of mines be they anti-vehicle mines or anti-personnel mines even if emplaced by States that are not party to the Mine Ban Treaty.<sup>73</sup> The recent trend, especially regarding the United Nations General Assembly Resolutions<sup>74</sup> has been to accept this rule to be applicable in both International and Non-international Conflicts.<sup>75</sup> The general rules regarding the emplacement of landmines are set out in Article 7 of the Amended Protocol II.<sup>76</sup> Furthermore, per Rule 83, parties to the conflict are required to remove, render harmless or facilitate the removal of landmines after the cessation of active hostilities.

Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices included in the Protocol II of the Convention on Certain Conventional Weapons was

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69 Rule 70, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Rules* (CUP 2005) 237. Also available online at ICRC IHL Database <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule70](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule70)> accessed 24 September 2018.

70 Rule 14, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Rules* (CUP 2005) 46. Also available online at ICRC IHL Database <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule14](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14)> accessed 24 September 2018.

71 Rule 15, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Rules* (CUP 2005) 51. Also available online at ICRC IHL Database <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule15](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule15)> accessed 24 September 2018.

72 International Campaign to Ban Landmines Website <<http://icbl.org/en-gb/finish-the-job.aspx>> accessed 26 September 2018.

73 Rule 82, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Rules* (CUP 2005) 283. Also available online at ICRC IHL Database <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule82](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule82)> accessed 24 September 2018.

74 See UN General Assembly, Resolutions 49/215, 50/82 and 53/26.

75 Rule 70, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Rules* (CUP 2005) 237. Also available online at ICRC IHL Database <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule70](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule70)> accessed 24 September 2018.

76 Article 7, 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 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, <[https://treaties.un.org/doc/Treaties/1996/05/19960503%2001-38%20AM/Ch\\_XXVI\\_02\\_bp.pdf](https://treaties.un.org/doc/Treaties/1996/05/19960503%2001-38%20AM/Ch_XXVI_02_bp.pdf)> accessed 24 September 2018.

extended to non-international armed conflicts as well through its amended Article 1.<sup>77</sup> The non-controversial adoption of this particular amendment is indicative of the existence of a customary norm that the use of landmines must be restricted to neutralize their indiscriminate effect.<sup>78</sup>

Customary International Law has not evolved to the point of prohibiting the use of anti-personnel mines but has reached a general consensus that the ‘eventual elimination’ of landmines is desirable. This was reflected in the Final Declaration adopted by consensus by States party to the Convention on Certain Conventional Weapons at its Second Review Conference in 2001,<sup>79</sup> and at the First State Party Meeting of the Mine Ban Treaty where a Declaration was adopted urging States still using or possessing anti-personnel landmines to immediately cease from so doing.<sup>80</sup> Therefore an emerging obligation to refrain from using landmines can be observed.<sup>81</sup>

### 6.2.3 Sri Lanka and Disarmament and the Arms Trade

Sri Lanka has continued to demonstrate a non-aligned foreign policy which it held during the Cold War period and this has shaped most of their international relations and foreign policy<sup>82</sup>, since being accepted to the United Nations.<sup>83</sup> Whilst the Government did not explicitly engage at the bilateral level on disarmament during the period of the protracted civil war,<sup>84</sup> there was clear leadership given within the multilateral arena with regard to nuclear disarmament, with personalities such as former Ambassador and UN Under-Secretary General Mr. Jayantha Dhanapala

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77 Amended Article 1, 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, <[https://treaties.un.org/doc/Treaties/1996/05/19960503%2001-38%20AM/Ch\\_XXVI\\_02\\_bp.pdf](https://treaties.un.org/doc/Treaties/1996/05/19960503%2001-38%20AM/Ch_XXVI_02_bp.pdf)> accessed 24 September 2018.

78 Rule 81, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Rules* (CUP 2005). Also available online at ICRC IHL Database <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule81](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule81)> accessed 24 September 2018.

79 Second Review Conference of States Parties to the Convention on Certain Conventional Weapons, ICRC Website <<https://www.icrc.org/eng/resources/documents/article/other/59kc84.htm>> accessed 26 September 2018.

80 Rule 81, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Rules* (CUP 2005). Also available online at ICRC IHL Database <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule81](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule81)> accessed 24 September 2018.

81 *ibid.*

82 Non-Alignment Movement, “Sri Lanka and the Non-Alignment Movement”, <<http://enmnw.com/sri-lanka-and-the-non-aligned-movement/>>, accessed 14 November 2018

83 United Nations Sri Lanka, <<https://lk.one.un.org/un-in-sri-lanka/>>, Sri Lanka accepted as a Member State on 14 December 1955, accessed 14 November 2018.

84 Chapter IV, Lessons Learnt and Reconciliation Commission Report, 2011, <<http://slembassyusa.org/downloads/LLRC-REPORT.pdf>>, accessed 16 November 2018.

(1998-2003)<sup>85</sup> and former Vice-President, International Court of Justice, HE Late Judge Christopher Weeramantry (1990-2002). Sri Lanka was among the first States to sign the Nuclear Non-Proliferation Treaty in 1968, the Comprehensive Nuclear-Test-Ban Treaty in 1996.

Almost a decade has passed since the military end to the war and there has been a heightened commitment by the Government of Sri Lanka in supporting the disarmament agenda. Sri Lanka has featured well in this effort, especially in 2018 during which Ravinatha Aryasinha, Permanent Representative of Sri Lanka to the United Nations, served as President of the Conference on Disarmament.<sup>86</sup> The priorities identified for the Conference were to commence negotiations on a Fissile Material Cut-off Treaty, preserve and strengthen the Treaty on the Non-Proliferation of Nuclear Weapons and promote universalization and the early entry into force of the Comprehensive Nuclear-Test-Ban Treaty.<sup>87</sup>

Whilst a consistent engagement with the wider treaty regime and adhering to a non-aligned policy is reflected by successive Governments since independence, a sharp diversion was seen in 2017, when Sri Lanka refused to sign the *Nuclear Ban Treaty*.<sup>88</sup> This diversion was met with severe criticisms by senior experts and diplomats,<sup>89</sup> with Jayantha Dhanapala being cited as saying that it was “appalling” and “an abandonment of the country’s unsullied record of adherence to the principles of the Non-Aligned Movement.”<sup>90</sup> It is uncharacteristic, especially given the position Sri Lanka took during the important *Nuclear Weapons Case*<sup>91</sup> in 1996, which included in alia:

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85 Dhanapala to receive IPS Award for Nuclear Disarmament, < <http://www.ipsnews.net/2014/11/dhanapala-to-receive-ips-award-for-nuclear-disarmament/>>, accessed 16 November 2018.

86 Ministry of Foreign Affairs of Sri Lanka, “UN Secretary General welcomes decision adopted under Sri Lanka’s Presidency to advance work of the Conference on Disarmament in Geneva, (February 2018), <<https://www.mfa.gov.lk/un-secretary-general-welcomes-decision-adopted-under-sri-lankas-presidency-to-advance-work-of-the-conference-on-disarmament-in-geneva/>>, accessed 12 November 2018, Conference on Disarmament., < <https://www.unog.ch/cd/>>, accessed 12 November 2018.

87 United Nations, *CONFERENCE ON DISARMAMENT OPENS 2018 SESSION*, 23<sup>rd</sup> January 2018, available at [https://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear\\_en\)/59E5ACD8CBEB06C9C125821E00619050?OpenDocument](https://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/59E5ACD8CBEB06C9C125821E00619050?OpenDocument).

88 Treaty on the Prohibition of Nuclear Weapons 2017, < <https://www.un.org/disarmament/wmd/nuclear/tpnw/>>, accessed 24 November 2018.

89 News Asia blog, 17 September 2017, ‘*Sri Lanka won’t sign nuclear weapons ban treaty without domestic approvals*’, < <https://newsin.asia/sri-lanka-not-sign-un-nuclear-weapons-ban-treaty/>>, accessed 20 November 2018; see also *Review Sri Lanka’s Position and sign The Treaty on Prohibition of Nuclear Weapons: Friday Forum Tells Government*, October 3, 2017, Colombo Telegraph.

90 P. K. Balachandran, *Sri Lanka likely not to sign UN nuclear weapons ban treaty*, 17 Sep 2017, available at <https://bdnews24.com/neighbours/2017/09/17/sri-lanka-likely-not-to-sign-un-nuclear-weapons-ban-treaty>.

91 Legality of the Threat or Use of Nuclear Weapons [1996] ICJ 2, < <https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>>, accessed 20 November 2018

The government of Sri Lanka is of the view that there exists a substantial corpus of principles of international humanitarian law, developed over the years based on state practice, which provides a solid legal basis for the prohibition of the use of nuclear weapons.<sup>92</sup>

Pressure on the Sri Lankan government by one or more of the nuclear weapons States, who have not supported the entry into force of the Nuclear Ban Treaty (which requires 50 ratifications to enter into force), has been speculated by media as the reason for the shift.<sup>93</sup> Furthermore, during the last few years, there has been an inconsistency in Sri Lankan State practice as with regard to *peaceful use of nuclear energy*; Sri Lanka has demonstrated its interests<sup>94</sup>. Hence, there is some evidence emerging of a departure from its traditional policy engagements.

Sri Lanka was an active participant in the negotiations on the Arms Trade Treaty (ATT) with Sri Lankan representative H.M.G.S. Palihakkara chairing the Advisory Board on Disarmament Matters in 2012 and Sri Lanka voted in favor of adopting the ATT at the UN General Assembly in 2013.<sup>95</sup> The Arms Trade Treaty came into force in 2014, but Sri Lanka has not ratified it as yet. This is not a disarmament treaty as such nor a humanitarian law treaty either, but a treaty for regulation of arms trade with the objective of increasing transparency and responsibility in the global arms trade, and it covers small arms to combat aircraft and warships. Yet is interesting to note that one of the objectives of the ATT as spelt out in Article 1, is “reducing human suffering”. Furthermore, the preamble refers to “Recognizing the security, social, economic and humanitarian consequences of the illicit and unregulated trade in conventional

92 Written Statement under Article 66 of the UN Charter by the Government of Sri Lanka, 1996 to the International Court of Justice in the deliberations of the *Illegality of Nuclear Weapons case, ibid.*, page 1.

93 Thalif Deen, *Sri Lanka not likely to sign nuclear weapons ban treaty at UN*, Sunday Times, September 17, 2017, available online at <http://www.sundaytimes.lk/170917/news/sri-lanka-not-likely-to-sign-nuclear-weapons-ban-treaty-at-un-259980.html>.

See also A Statement by the Friday Forum: *Review Sri Lanka's Position and Sign the Treaty on Prohibition of Nuclear Weapons: Friday Forum Tells Government*, Colombo Telegraph, October 3 2017, available at <https://www.colombotelegraph.com/index.php/review-sri-lankas-position-and-sign-the-treaty-on-prohibition-of-nuclear-weapons-friday-forum-tells-government/>; stating that:

“Sri Lanka voted for the resolution adopting this very same Treaty on the Prohibition of Nuclear Weapons on July 7th, when we had a different Foreign Minister and Foreign Secretary. Has there now been a change of policy after a new minister assumed office?”

94 Russia and Sri Lanka plan Nuclear Energy Cooperation, <http://www.world-nuclear-news.org/NP-Russia-and-Sri-Lanka-plan-nuclear-energy-cooperation-19011801.html>, Further, in 2015, India, Sri Lanka ink four agreements including civil nuclear cooperation, < <https://www.indiatoday.in/india/north/story/india-sri-lanka-civil-nuclear-deal-narendra-modi-maithripala-sirisenahyderabad-house-240553-2015-02-16>>, accessed 28 November 2018.

95 Vidya Abeygunawardene, *Post-War Sri Lanka & The Arms Trade Treaty*, Colombo Telegraph, June 6<sup>th</sup> 2008, <https://www.colombotelegraph.com/index.php/post-war-sri-lanka-the-arms-trade-treaty/>.

arms...” and the principle of “respecting and ensuring respect for international humanitarian law in accordance with, inter alia, the Geneva Conventions of 1949...”. Furthermore, under Article 7(1)(b)(i) of the treaty, a ratifying State must take into account in its export assessment, “relevant factors” including the potential that the conventional arms or items “could be used to ...commit or facilitate a serious violation of international humanitarian law”.

Even during the war, Sri Lanka showed that it supported the regulation of the arms trade, as it signed the multilateral U.N. Programme of Action on Small Arms and Light Weapons in 2001. An authority named the National Commission against Proliferation of Illicit Arms in All Its Aspect (NCAPISA) was established shortly afterwards, in 2004, by the then President of Sri Lanka Chandrika Bandaranaike Kumaratunga. The NCAPISA operated under the Chairmanship of the Secretary to the Ministry of Public Security, Law and Order with membership of senior officials of the Ministry of Defence, Ministry of Public Administration and Home Affairs, Ministry of Foreign Affairs, Prime Minister’s Office, Department of Police, Sri Lanka Army, Attorney-General’s Department, Department of Customs and two representatives from the civil society.<sup>96</sup> Sri Lanka’s Ambassador and Permanent Representative to the UN, Prasad Kariyawasam, presided over the UN Conference to Review Progress in the Implementation of the Programme of Action to Prevent, Combat and Eradicate Illicit Trade in Small Arms and Light Weapons in All its Aspects which was held in New York in 2006. There were plans to appoint an expert committee to advise on further amending the relevant provisions under the Firearms Ordinance No 33 of 1916 as amended by Act No. 22 of 1996. However, the NCAPISA is no longer active since the end of the war in 2009, despite illicit small arms still being an issue of concern for public security.

### **6.3 Implementation of Weapons-related Obligations in Sri Lanka**

The implementation of international treaty obligations concerning weapons in Sri Lanka through statutes and/or national authorities has been focused mainly on chemical weapons and anti-personnel mines.

The relevant authority for the implementation of obligations under the Chemical Weapons Convention National Authority for the Implementation of Chemical Weapons Convention (NACWC) is an Authority established under the Ministry of Industry and Commerce according to the chemical Weapons Convention Act No. 58 of 2007. The NACWC does not directly deal with chemical weapons as such, but with regulations for chemical safety and security in industries which are using chemicals for manufacturing purposes. Companies and business which are important peaceful industries could be using chemicals in their manufacturing processes which could be

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96 Report Submitted by the Government of Sri Lanka, *United Nations Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, 26 June – 7 July 2006, New York.

converted into chemical weapons. Such companies and businesses and the trade in certain identified 'dual use' chemicals are covered by the Act and the NACWC. The Act includes a schedule of chemicals which require registration and recommendation from the relevant Sri Lankan import/export authorities and one of the duties of the NACWC is to collect import and export data of scheduled chemicals, analyze it and inspect the facilities which use those schedule chemicals. Training of personnel who must handle scheduled chemicals and an emergency preparedness and response in case of chemical leaks is also something covered by the Act and a duty of the NACWC.

In the absence of domestic legislation governing anti-personnel mines in Sri Lanka, the government adhered to Emergency Regulation No. 34 amended by the Gazette Extraordinary No. 1651/24 dated 02 May 2010.<sup>97</sup> This regulation made it an offence to be in unauthorized possession, collect, transport; prepare, train or prepare to train anyone in the manufacture or use of "arms, ammunition, explosives or offensive weapons and other dangerous articles or substances" punishable with rigorous imprisonment not exceeding fifteen years as well as the forfeiture of all movable and immovable property of the convict.<sup>98</sup> After the accession to the Mine Ban Treaty, Cabinet approval for the drafting of enabling legislation to give effect to its provisions was granted in mid-2018.<sup>99</sup>

A National Mine Action Plan (NMAP) for Sri Lanka was first formulated in 2002 by the government with the assistance of the UN and INGOs, NGOs and donor countries.<sup>100</sup> The policy making body regarding Mine Action in Sri Lanka, the Inter-Ministerial National Steering Committee for Mine Action (NSCMA), is currently chaired by the Ministry of National Policies, Economic Affairs, Resettlement, Rehabilitation, Northern Development, Vocational Training, Skills Development and Youth Affairs. The National Mine Action Centre (NMAC) established in 2010 acts as the Secretariat of the NSCMA. Its activities include the implementation of the 2016-2020 National Mine Action Strategy (NMAS),<sup>101</sup> coordinating all stakeholders in the government and non-government sectors and endorsing mine action operators.<sup>102</sup> National Mine Action Standards (NMAS) were reviewed in 2017, awaiting finalization as of August 2018.

97 Sri Lanka National Mine Action Strategy 2016-2020 <<https://www.gichd.org/fileadmin/GICHD-resources/rec-documents/NMAS-SriLanka-2016-2020.pdf>> accessed 26 September 2018, 5.

98 Section 21(4)(10), Gazette Extraordinary No. 1651/24 dated 02 May 2010, <http://www.refworld.org/pdfid/4bf11e222.pdf> > accessed 29 September 2018, 3A-4A.

99 'Sri Lanka to draft new laws to implement Ottawa Convention' <<http://colombogazette.com/2018/06/06/sri-lanka-to-draft-new-laws-to-implement-ottawa-convention/>> accessed 26 September 2018.

100 Vidya Abhayagunawardena 'Banning Landmines in Sri Lanka' *Daily Mirror* (07 January 2013) <<http://www.dailymirror.lk/opinion/172-opinion/24825-banning-landmine-in-sri-lanka-.html>> accessed 26 September 2018.

101 *ibid.*

102 *Clearing the Mines 2016*, Mine Action Review Report for the 15<sup>th</sup> Meeting of the States Parties to the Anti-personnel Mine Ban Convention <<http://www.mineactionreview.org/assets/downloads/NPA-Clearing-the-Mines-2016.pdf>> accessed 29 September 2018, 307.

The Mid Term review of the 2016-2020 NMAS was held in 2018 to maintain its effectiveness and address the implementation of the obligations as a State party to the Mine Ban Treaty. The bodies implementing the actions at national and regional levels are the National Steering Committee for Mine Action (NSCMA), National Mine Action Center (NMAC) and the Regional Mine Action Office (RMAO) in Kilinochchi and the District Steering Committees for Mine Action. Five Demining Agencies operate in Sri Lanka as at 2018 namely, the Sri Lanka Army Humanitarian De-Mining Unit (SLA-HDU), Devlon Association for Social Harmony (DASH), Skavita Humanitarian Assistance and Relief Project (SHARP), Mines Advisory Group (MAG) and the Hazardous Area Life Support Organization (HALO Trust). It has been estimated that the cumulative impact of their operations by 31<sup>st</sup> December 2017 has been the clearance of 1,233,368 km<sup>2</sup> and the recovery of 735,444 Anti-personnel mines and 2,073 Anti-vehicle mines.<sup>103</sup>

The end of an armed conflict means that the stance in favour of strengthening of humanitarian law, weapons control and disarmament can continue and become even stronger over time. The reluctance of the political and military establishment to undertake new weapons-related or arms trade-related obligations are no longer present or not present with the same intensity after an armed conflict has ended. What can be seen in the post conflict context in Sri Lanka is that peace can have a positive impact on weapons control and disarmament efforts, and that there is a window of opportunity that has been utilized. The ratification of the Anti-Personnel Mine Ban Convention and the Convention on Cluster Munitions are such positive steps. Furthermore, since 2018 the government has been engaged in drafting enabling legislation for the Anti-Personnel Mine Ban Convention and the Convention on Cluster Munitions. The ICRC was heavily involved in providing technical assistance to the government on this.

There are also challenges in terms of the development of new weapons including autonomous weapons, and there is a need for laws at both international and domestic level to respond to their application in conflict situations. Sri Lanka as a State, as well as trained Sri Lankan experts, can participate actively in these areas, by supporting initiatives for regulating new weapons under customary international humanitarian law, IHL principles and Article 36 of the Additional Protocol I to the Geneva Conventions.

## 6.4 Conclusions

Sri Lanka has just had a somber remembrance of the 10-year anniversary of the end of the armed conflict with Tamil separatists. The post-conflict situation has not lessened the importance of the international humanitarian law relating to weapons of war. In a sense, Sri Lanka has been given the opportunity during this period to further strengthen its commitment to the international legal framework prohibiting or restricting the use of certain weapons. Although some of the other relevant weapons-control conven-

103 Camelia Nathaniel, 'Mine Free by 2020' *Daily News* (14 March 2018) <<http://www.dailynews.lk/2018/03/14/features/145420/mine-free-2020>> accessed 29 September 2018. See also the official figures from the Government of Sri Lanka, National Mine Action programme: <https://www.slnmac.gov.lk/services/achievements>.

tions were ratified during the period of the armed conflict, after the conflict ended Sri Lanka has ratified the Anti-Personnel Mine Ban Convention and the Convention on Cluster Munitions in 2017 and 2018, respectively. The main obligation that has not yet been undertaken is ratification of Protocol V to the CCW on explosive remnants of war. Despite non-ratification, there has been great efforts taken to deal with any explosive remnants of war, including demining; and to make the areas affected during the war safe for civilian life.

The post armed-conflict accession to the Mine Ban Treaty, a systematic approach to resolving demining through a National Mine Action Strategy and a dedicated Authority as well as the acceptance of the assistance of international operators has firmly set Sri Lanka on the path to becoming a landmine-threat free country. However, the continuing needs of mine-affected persons need to be addressed while keeping in mind the obligation to refrain, under all circumstances, from the use, stockpiling, production and transfer of anti-personnel landmines. Furthermore, even if the ratification of Protocol V to the CCW is postponed, the country engages with some continuing issues of explosive remnants of war in a practical sense and establishes that it is capable of taking on the obligations of the Protocol, if it is ratified.

Sri Lanka continues to demonstrate leadership within the wider multilateral humanitarian disarmament agenda. However, there is a contrast developing over the last few years, which includes the non-signature of the *Nuclear Ban Treaty* and entering several civilian cooperation agreements, perhaps marking a departure from its traditional engagements. Despite the long years of war, Sri Lanka has shown willingness to engage positively at the international level with regard to weapons control, and in the post-war context it can become a regional, if not global example of commitment to humanitarian goals. It is required that Sri Lanka revives its former policy on nuclear disarmament and non-proliferation and engages effectively with the legal frameworks for the control of the arms trade, both in the region and on the international stage.

Sri Lanka has educated and experienced civilian and military personnel with knowledge and training in international humanitarian law and weapons control and disarmament law, who are capable of making valuable contributions to humanitarian ideals and supporting the humanitarian law framework for weapons with their expertise. The Sri Lankan experience also has examples of good experiences and lessons that can be shared with other post-conflict countries. Thus, the continuing engagement with and relevance of international humanitarian law for Sri Lanka and Sri Lankans should not be underestimated.

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## 7. Sri Lanka's Obligations regarding International Humanitarian Law at Sea

Nishara Mendis<sup>1</sup> and Samya Senaratne<sup>2</sup>

### 7.1 Introduction to Humanitarian Law at Sea

#### 7.1.1 Historical Development of Conventions on IHL at Sea

The core humanitarian law principle that persons who are *hors de combat* are protected from further attack and must be cared for was confirmed in the Geneva Convention of 1864. These rules were applicable for war conducted on land, and that is what normally comes to mind when rules of humanitarian law are mentioned. However, war can be conducted by navies as well as armies and on sea as well as on land. In order to address the issue of humanitarian rules for naval warfare, four years after the first Geneva Convention, in 1868, an additional fifteen Articles were adopted to address issues of the wounded and shipwrecked at sea and hospital ships.<sup>3</sup> These Articles are the basis of modern humanitarian law at sea, and particularly the law governing hospital ships, or “vessels not equipped for fighting which, during peace the government shall have officially declared to be intended to serve as floating hospital ships” which shall be protected from attack so long as their supplies and staff are not used for anything other than their intended purpose.

Unfortunately, these Articles did not come into force since there were no ratifications, except for the United States in 1882, the same year which they signed the Geneva Conventions of 1864. However, States agreed to observe their provisions even without the Articles coming into force, notably by the United States during the Spanish-American War of 1898. The United States made a declaration of intent to adhere to the additional Articles and also equipped a hospital ship named ‘*Solace*’ to be used to render aid to the sick and wounded and “to observe in spirit” the additional Articles

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3 1868, *Additional Articles relating to the Conditions of the Wounded in War*, available online at the ICRC databases at:

<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/125?OpenDocument>.

of the Geneva Conventions.<sup>4</sup> The U.S. Navy has used two hospital ships in recent times, named ‘*Mercy*’ and ‘*Comfort*’.<sup>5</sup> It is interesting to note that Jean Pictet refers to the likelihood of ancient ships similarly named, suggesting succor rather than combat, as being hospital ships.<sup>6</sup>

In 1899 the Hague Convention III for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, was adopted at The Hague. This was the first Convention on the topic of naval warfare which was ratified by a significant number of countries. 51 States as diverse as China, Peru, Norway and Fiji ratified the Convention. It was replaced in 1907 by the *Hague Convention X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention*, which added 14 new provisions but also retained the original 14 provisions of the 1899 Articles without changes.<sup>7</sup> The 1907 Hague codifications have included issues of naval warfare in several of the Conventions. The laying of underwater mines, bombardment by naval forces and the status of merchant ships and warships were some of the issues which were tackled. The Hague Convention X was ratified by 35 States, and was applicable for the World War I and World War II until it was replaced by the Geneva Convention II of 1949.

An area which was not tackled by the Hague Conventions was the use of submarines in naval warfare. Germany is known to have originally begun U-boat attacks on merchant shipping during World War I using ‘prize rules’<sup>8</sup> and by surfacing before an attack to allow the crew and passengers to escape, but apparently abandoned this because of the British response of luring U-boats with disguised armed ships.<sup>9</sup> The

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4 Spencer Tucker Ed, Willaim R Day, Declaration of American Intent to Adhere to the Geneva Conventions, May 14, 1898, *The Encyclopedia of the Spanish-American and Philippine- American Wars: A Political, Social, and Military History, Volume 1*, ABC-CLIO, 2009, p821-822. The Spanish also expressed their willingness to shere to the Additional Articles.

5 Richard J. Grunawalt, *Hospital Ships in the War on Terror*, 2005, Naval War College Review: Vol. 58 : No. 1 , Article 6. Available at: <https://digital-commons.usnwc.edu/nwc-review/vol58/iss1/6>.

6 “Many centuries before our era, the Athenian fleet included a vessel called Therapis, while in the Roman fleet was a ship bearing the name Aesculapius. Their names have been taken by some authors as indicating that they were hospital ships.” Jean Simon Pictet et al., *Commentary on the Geneva Conventions of 12 August 1949, II Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, International Committee of the Red Cross, 1960, p. 154.

7 D.Schindler and J.Toman, *The Laws of Armed Conflicts*, Martinus Nihjoff Publisher, 1988, pp.314-318.

8 According to the Manual of the Laws of Naval War, Oxford, Adopted by the International Institute of International Law, August 9, 1913, “The word ‘ prize ‘ is a general expression applying to a captured ship or to seized goods.” Section VIII of the Manual is “On the Formalities of Seizure and on Prize Procedure” and Article 33 on the Principle of capture states that “Public and private vessels of enemy nationality are subject to capture, and enemy goods on board, public or private, are liable to seizure”.

9 Amanda Mason, *The U-Boat campaign that almost broke Britain*, Tuesday 9 January 2018, <https://www.iwm.org.uk/history/the-u-boat-campaign-that-almost-broke-britain>.

tactics of unrestrained submarine warfare that followed also resulted in the infamous sinking of the passenger ship, *The Lusitania*, which played a role in bringing in the United States into the war.<sup>10</sup>

In 1930 and 1936 two treaties were adopted in London on the regulation of submarine warfare. The *Treaty for the Limitation and Reduction of Naval Armament* otherwise known as the First London Naval Treaty, was an agreement between the United Kingdom, Japan, France, Italy and the United States. Later in 1936., France, the United Kingdom and the United States signed the Second London Naval Treaty. The recommendations were that submarines should be bound by the same rules as surface ships, with the key provision being Article 22 of the 1930 Treaty which was confirmed again by the 1936 treaty. This provision later became known as the London Submarine Protocol. These attempts at regulating submarine warfare became insufficient after the outbreak of world war II in 1939. The World War II was ridden with torpedo attacks on neutral vessels, merchant ships and hospital ships and the indiscriminate laying of underwater mines.

In 1949 the Hague Convention X of 1907 was replaced by the Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea (Geneva Convention II). At present, the Geneva Convention II of 1949<sup>11</sup> and any relevant provisions of the Additional Protocols of 1977 are the relevant treaty law on IHL at sea. The Geneva Convention II and Protocol I apply to international armed conflict which may occur at sea. The fundamental protections of Common Article 3 apply to non-international armed conflict at sea, for example, situations such as the armed conflict in Sri Lanka between the Armed forces of the State and the Liberation Tigers of Tamil Eelam (LTTE, also known as ‘Tamil Tigers’). ‘Sea’ is not defined in Geneva Convention II or Protocol I, but commentators state that “[i]t is commonly understood” that the term ‘sea’ is used to distinguish from conflict on land and that it should be interpreted broadly when applying the scope of protection, to cover both saltwater areas and internal waters such as lakes and rivers.<sup>12</sup> It should also be kept in mind that Article 49(3) of Protocol I of 1977 states that all its

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10 J. Ashley Roach, *The Law of Naval Warfare at the Turn of Two Centuries*, The American Journal of International Law, Vol. 94, No. 1 (Jan., 2000), pp. 64-77.

11 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949.

12 Bruno Demeyere, Jean-Marie Henckaerts, Heleen Hiemstra and Ellen Nohle, *The updated ICRC Commentary on the Second Geneva Convention: Demystifying the law of armed conflict at sea*, *International Review of the Red Cross* (2016), 98 (2), p 401–417 at p 406 citing the Updated Commentary: ICRC, *Commentary on the Second Geneva Convention*, Cambridge University Press, 2017 ( ICRC Commentary on GC II), Art. 12, paras 1374–1376.

provisions concerning protection against the effects of hostilities also apply to naval operations “which may affect the civilian population, individual civilians or civilian objects on land”.<sup>13</sup>

The protection of the wounded, sick and shipwrecked at sea and the conduct of hostilities at sea is at the core of the Geneva Convention II and Protocol I. According to Article 8(b) of the Protocol I, which concerns international armed conflict, “shipwrecked” means:

...persons, whether military or civilian, who are in 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.

Article 8(b) goes on to say that as long as these protected persons “continue to refrain from any act of hostility”, they shall be considered “shipwrecked” until rescue is complete and acquisition of any another status<sup>14</sup> under the Conventions or this Protocol. Protocol I expands the definition to cover “other waters” and persons in peril not because of any actual shipwreck (damage to a sea faring vessel) but also to those who fell overboard or were previously in aircraft and now find themselves “in peril at sea or other waters”.<sup>15</sup> The ICRC Commentary on Protocol I notes that those who are in distress due to their inexperience or recklessness, or even those who are on a dangerous mission but voluntarily stop the mission and give up their acts of hostilities will also enjoy the status of the “shipwrecked”.<sup>16</sup>

There are also customary practices and rules on the offering of aid to those in distress and the prohibition on attacking persons who are shipwrecked. In *The Peleus* Trial, the Judge Advocate in the case states that:

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13 Article 49(3) of Protocol I :

The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.

14 Such as being a member of armed forces who is rescued by enemy armed forces and therefore becoming a prisoner of war.

15 ICRC, Commentary on the Additional Protocols to the Geneva Conventions, 1987, para.4641 gives the example of “anyone in distress in the water who has come down from an aircraft or who has accidentally fallen overboard”.

16 ICRC, Commentary on the Additional Protocols to the Geneva Conventions, 1987, paras. 313-314.

“...it was a fundamental usage of war that the killing of unarmed enemies was forbidden as a result of the experience of civilised nations through many centuries. To fire so as to kill helpless survivors of a torpedoed ship was a grave breach of the law of nations. The right to punish persons who broke such rules of war had clearly been recognised for many years”.<sup>17</sup>

The facts of the *Peleus* case are that on the 13<sup>th</sup> March, 1944, the ship *Peleus* was sunk by the German submarine No. 852, which targeted the shipwrecked survivors in the water with machine-guns and hand grenades resulting in deaths of all but three seaman. These three men were rescued by a Portuguese steamship after 25 days, and could tell their story of the attack. It was also noted at the war crimes trial that there was no imminent threat or military necessity for the German submarine crew to continue to attack the survivors in this manner and that the submarine had apparently cruised about the site of this sinking for a further five hours.

In the ICRC Commentary on Protocol I, the “obligation to offer assistance to any shipwrecked person [a vessel] came across, in accordance with the *general law of the sea* (emphasis added)” is referred to, although it is further stated that the general law of the sea obligation does not include the “specific task of taking care of civilian wounded, sick and shipwrecked persons ... nor, in particular, that of transporting such wounded and sick civilians”.<sup>18</sup> However, Article 8 of the 1977 Additional Protocol II provides for the basic responsibility for those *hors de combat* during a non-international armed conflict stating that: “Whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked.” The current customary law as identified by the ICRC, has identified responsibility towards the shipwrecked in both international and non-international armed conflict situations, as stated in Rules 109-111 quoted below:

Rule 109. Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction.

Rule 110. The wounded, sick and shipwrecked must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. No distinction may be made among them founded on any grounds

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17 The United Nations War Crimes Commission, *Law Reports Of Trials Of War Criminals*, vol. I, 1947, pp. 1-21, The *Peleus* Trial : trial of Kapitänleutnant Heinz Eck and four others for the killing of members of the crew of the greek steamship *Peleus*, sunk on the high seas, British military court for the trial of war criminals held at the war crimes court, Hamburg, 17<sup>th</sup>-20<sup>th</sup>, October 1945, see online at <https://casebook.icrc.org/case-study/british-military-court-hamburg-peleus-trial>. The five accused were found guilty of the charge – 3 death sentences, 1 life sentence, other for 15 years.

18 ICRC, Commentary on the Additional Protocols to the Geneva Conventions, 1987, para.859.

other than medical ones.

Rule 111. Each party to the conflict must take all possible measures to protect the wounded, sick and shipwrecked against ill-treatment and against pillage of their personal property.

These customary rules have been identified in the ICRC study as being included in military and naval manuals of States, and forming customary practice.

### 7.1.2 Other Relevant Codifications and Manuals

The provisions of the Geneva Convention II and Additional Protocols must also be read in light of the codification of the international law of the sea and the 1982 UN Convention on the Law of the Sea (UNCLOS) and the treaties created and adopted through the International Maritime Organization (IMO) concerning the responsibilities towards persons in distress at sea.<sup>19</sup> The interpretation of one treaty should not be in isolation of the other related treaties on the same or similar subject matter. For example, for the legal definition of ‘warship’, we look not to the humanitarian law Geneva Conventions and Protocols but to the definitions in international law of the sea,<sup>20</sup> such as Article 8(2) of the Convention on the High Seas of 29 April 1958<sup>21</sup>, which is repeated in Article 29 of the Convention of the United Nations on the Law of the Sea (UNCLOS) of 10 December 1982, and states that:

For the purposes of this Convention, “warship” means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

Thus, it is important to connect other international treaties with the international humanitarian law, in both theory and application of IHL protections.

In addition to the IHL obligations, the International Maritime Organization (IMO) has international standards to create a system for safety and communication of distress when there is danger to life at sea. Under the Safety of Life at Sea (SOLAS) convention,<sup>22</sup> cargo ships of 300GRT and upwards and passenger ships on international

19 Bruno Demeyere, Jean-Marie Henckaerts, Heleen Hiemstra & Ellen Nohl, *The Updated ICRC Commentary on the Second Geneva Convention: Demystifying the Law of Armed Conflict at Sea*, International Review of the Red Cross, Vol. 98(2), No. 902, 2016, p142-143 (also available at 94 INT’L L. STUD. 140 (2018).

20 ICRC, Commentary on the Additional Protocols to the Geneva Conventions, 1987, para. 915.

21 This Convention was one of the four Conventions signed at the first United Nations Conference on the Law of the Sea in 1958 and entered into force on 30 September 1962. The States parties included the United States, the United Kingdom and the USSR. It is still in force.

22 SOLAS Chapter V - Regulation 33: Distress Situations: Obligations and Procedures, which

voyages must have Global Maritime Distress and Safety system (GMDSS) -compliant satellite equipment installed which meet 99.9% service availability and there are also other performance standards set out by the IMO in document A 1001(25), which is a Resolution adopted by the IMO assembly and is titled as ‘Criteria for the Provision of Mobile Satellite Communication Systems in the Global Maritime Distress and Safety System’. In 2018 the IMO addressed distress and safety at sea through the work of the IMO’s Sub-Committee on Navigation, Communications and Search and Rescue.<sup>23</sup> One task is reviewing of the GMDSS which was adopted by the IMO in 1988 and is implemented through the **International Mobile Satellite Organization (IMSO), which is the inter-governmental organization**. The plan is to have full integration of maritime radio and satellite communications which can allow for tracking of distress communications from anywhere in the world’s oceans. The IMO is also working on the International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual, alongside the International Civil Aviation Organization (ICAO) – and there is a joint working group on the Harmonization of Aeronautical and Maritime Search and Rescue.

As can be seen from the IMO and ICAO activities mentioned above, the protection of victims of naval warfare cannot be limited to legal treaty obligations, without support from other manuals and guidelines for implementation. Similarly, the development of the laws of war relating to naval warfare have not been limited to treaties. There have been developments based on the creation and revision of manuals describing agreed upon practice of States.<sup>24</sup> These include the Oxford Manual on the Laws of Naval War of 1913<sup>25</sup> and the San Remo Manual of 1994. According to Steven Haines, “[t]here is no better or more convenient summary of the existing law governing the conduct of hostilities at sea than the 183 rules contained in the San Remo Manual”<sup>26</sup> But Haines also adds that “[w]hile the San Remo Manual is a very valuable reference, it is not regarded universally as a clear and unambiguous statement of the law.”<sup>27</sup> The San Remo Manual is not legally binding but is a document that complements the rules relating to the wounded, sick, and shipwrecked, and in particular, the rules on the use

of hospital ships in the context of naval warfare which are found in Geneva Convention

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require ship masters to respond to any information received about persons in distress and the obligation to treat rescued persons humanely and to deliver them to a place of safety.

23 2018 IMO Sub-Committee addresses distress and safety at sea, see <https://safety4sea.com/imo-sub-committee-addresses-distress-and-safety-at-sea/>.

24 See W. Michael Reisman & William K Leitzau, Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict, in *THE LAW OF NAVAL OPERATIONS*, sup.

25 The full title is - *The Oxford Manual on the Laws of Naval War Governing the Relations Between Belligerents* adopted by the Institute of International Law in 1913.

26 Steven Haines, *War at sea: Nineteenth-century laws for twenty-first century wars?*, *International Review of the Red Cross* (2016), 98 (2), 419–447. War and security at sea, p444.

27 *Ibid* at p445.



## II and Additional Protocol I.<sup>28</sup>

The San Remo Manual on International Law Applicable to Armed Conflicts at Sea ('San Remo Manual of 1994') was published by the Institute for International Humanitarian Law with the participation of governmental representatives from more than 24 countries and various scholars in June 1994. The Manual attempts to take into account the post-world War II developments in international law, and combine the standards of the 1949 Geneva Conventions and Protocol I of 1977 for naval warfare. Its contents include Rules 38–77 on basic rules and target discrimination, Rules 78–111 on methods and means of warfare and Rules 159–183 covering protected persons, medical transports and medical aircraft.

The San Remo Manual of 1994 reiterates that the key principles of the law of war on land, such as principle of distinction and the requirement to take precautionary measures when launching an attack, are applicable to war at sea. The concept of "military objective" was clearly included and adapted to war at sea. The Manual also clears up certain problems specific to maritime hostilities: it contains detailed provisions on the use of certain weapons (sea mines and torpedoes) and addresses the interaction between ships and aircraft, distinctions between different kinds of maritime zones and reflects developments in the law of the sea, etc. Although the text is non-binding, it has an important role to play by providing States with a document that assists them to take account of the law of war at sea in their actions and in the reform and development of their national policies, naval manuals and legislation. It can be said that the San Remo Manual of 1994 is one of the most important documents for understanding and applying the law of naval warfare.

The San Remo Manual of 1994 seeks to clarify the situation of comprehensively identifying which persons should be given protected status and adds provisions on the treatment to be given to various categories of nationals of a neutral State on enemy and neutral ships. The Manual suggests additional information be included in the notification and identification of hospital ships, their intended route and estimated time en route and of departure and arrival as appropriate. The Manual also suggests that hospital ships may be equipped with "purely defllective means of defence, such as chaff and flares". The San Remo Manual also recommends a new provision that builds on the agreement between the United Kingdom and Argentina during the South Atlantic/ Falklands conflict in 1982 by which they established a "Red Cross Box" at sea with a diameter of about 20 nautical miles, which enabled the safe exchange of British and Argentine wounded. The Manual would permit the parties to the conflict to agree between themselves, to create such a humanitarian zone at sea. The Second Geneva Convention contains no such provision.

<sup>28</sup> The San Remo Manual of 1994 has been called "for the most part, still a valid restatement". Gregor Novak, *Wounded, Sick, And Shipwrecked*, Max Planck Encyclopedia Of Public International Law, 2015.

ment of customary and treaty international law applicable to armed conflicts at sea”<sup>29</sup> and it can be read with the ICRC customary international law study. However, there are still unclear areas, particularly with regard to the application of IHL to non-international armed conflicts at sea. Guilfoyle cites Doswald-Beck *et al* that the San Remo Manual of 1994 ‘does not expressly deal with non-international armed conflicts’ and is ‘primarily meant to apply to international armed conflicts at sea’.<sup>30</sup> Therefore, a further study was undertaken to discuss the applicability of similar principles to non-international armed conflicts.

The San Remo Manual on the Law of Non-International Armed Conflict (‘San Remo Manual of 2006’)<sup>31</sup> was a project undertaken by the Institute for International Humanitarian Law<sup>32</sup> and completed in 2006 to restate the applicable rules of customary international law for non-international armed conflict at sea. The San Remo Manual of 2006 reiterates the basic rules relating to the wounded, sick, and shipwrecked based on the foundations already given by Common Article 3(2) of the Geneva Conventions and Articles 7 and 8 of Additional Protocol II. The key section is ‘Persons under Special Protection’:

### 3.1 Wounded, sick or shipwrecked

- a) Attacking or otherwise harming the wounded, sick, or shipwrecked is forbidden.
- b) The wounded, sick, or shipwrecked must be searched for, collected, and protected against pillage and ill treatment whenever circumstances permit.
- c) The wounded, sick or shipwrecked must be treated humanely and cared for with minimum delay.

The International Institute of Humanitarian Law continued to elaborate on the topic

29 Bruno Demeyere, Jean-Marie Henckaerts, Heleen Hiemstra and Ellen Nohle, *The updated ICRC Commentary on the Second Geneva Convention: Demystifying the law of armed conflict at sea*, *International Review of the Red Cross* (2016), 98 (2), p 401–417 at p 407.

30 Douglas Guilfoyle, *The Mavi Marmara Incident and Blockade in Armed Conflict*, *British Yearbook of International Law*, Volume 81, Issue 1, 2011, Pages 171–223, citing at footnote 42, “Doswald-Beck and others (eds) *San Remo Manual (Explanation)* 63, 73 (noting the possible ‘implementation of these rules in non-international armed conflicts’ *de lege ferenda*) and 74 (unclear that rules applicable to neutrals can be invoked in any conflict ‘irrespective of its scale or duration’)” [Louise Doswald-Beck, *San Remo Manual on International Law Applicable to Armed Conflict at Sea*, *International Review of the Red Cross*, No. 30931-12-1995, available online at <https://www.icrc.org/en/doc/resources/documents/article/other/57jinst.htm>].

31 See Institute for International Humanitarian Law, *San Remo Manual on the Law of Non-International Armed Conflict (‘San Remo Manual of 2006’)*, available at [https://www.fd.unl.pt/docentes\\_docs/ma/jc\\_MA\\_26125.pdf](https://www.fd.unl.pt/docentes_docs/ma/jc_MA_26125.pdf).

32 The San Remo Manual of 2006 was prepared for the San Remo International Institute of Humanitarian Law by Yoram Dinstein, Charles Garraway and Michael Schmitt.

and in 2009 published the San Remo Handbook on Rules of Engagement for the purpose of having a shared text of best practices which will meet the requirements of military courses, and also other educational institutions and interested parties.<sup>33</sup>

The next sections of this chapter briefly discuss the continuing relevance of international humanitarian law at sea for Sri Lanka, in light of Sri Lanka's status as an island nation. The relevant treaty and customary international law will be identified and Sri Lanka's obligations and State practice will be briefly analyzed.

## **7.2 Sri Lanka and Armed Conflict at Sea**

### **7.2.1 Introduction to Geopolitical and Historical background for Sri Lanka**

Sri Lanka being an island at the heart of the East-West maritime trade routes, it holds an important geo-political position in the world, and particularly in the Indian Ocean. This caused Sri Lanka and its ports and resources to be of interest for Western naval powers for the past 500 years. Although the 30-year civil war which the country faced has been over for the past 10 years, this geopolitical reality means that there is a continuing need for maritime security in the Indian Ocean and for Sri Lanka to be an active participant in security measures and international standards and obligations, even during peacetime. The recent Islamic State linked terrorist attacks in Sri Lanka in 2019 and the superpower interests relating to Sri Lankan ports at the heart of the China's 'Belt and Road' initiative further underscore Sri Lanka's geo-political importance. Below the level of armed conflict, there are also other security risks in the Indian Ocean, which have an indirect link to conflict and terrorism including trafficking of all kinds, and piracy.

Furthermore, Sri Lanka is a country which has a naval capacity and significant experience in naval warfare in the latter half of the 20<sup>th</sup> century. There are more than 150 coastal states, but few States have had such experiences in recent years and there have been very few naval battles since the Second World War, and even those which have occurred being far below the intensity and scale of the naval battles of 1914–18 and 1940–45. While there has been no general naval war since 1945 and no war which has involved the principal naval powers in major and sustained combat operations against each other, there have been at least a dozen armed conflicts with naval dimensions. Barnard comments that despite not playing a large role in conventional warfare, navies play an important assisting role for special forces, gathering intelligence, fire

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33 International Institute of Humanitarian Law, *San Remo Handbook on Rules of Engagement 2009*, <http://ihl.org/wp-content/uploads/2017/11/ROE-HANDBOOK-ENGLISH.pdf>

power support for onshore operations etc., specifically in counterterrorism operations and also monitoring “the three dimensions of the maritime domain – submarine, surface and aerial”.<sup>34</sup>

Indeed, contemporary wars are mainly non-international conflicts, the principal actors of which always include non-State armed groups. Those groups do not have the resources or the strategic interest to obtain naval capabilities, with the notable exception of the LTTE or Tamil Tigers during the conflict in Sri Lanka.<sup>35</sup> The naval activities of the Tamil Tigers in Sri Lanka, in particular, have served as a reminder that civil wars (or non-international armed conflicts) can involve attempts towards naval power and influence. As demonstrated above, civil wars have generally not resulted in significant naval engagement between parties, with the exception of the engagements between the Sri Lankan navy and the Tamil Tigers.<sup>36</sup> There was a well-developed naval wing known as the Sea Tiger Wing which conducted operations including direct confrontations with the Sri Lanka Navy and enabled the maintenance of “sea lines of communications” for arms and supplies from its international networks.<sup>37</sup>

Between 1990 and 2009, Sea Tigers had carried out direct attacks, including the use of machine guns, grenade launchers and rockets, as well as suicide bomb attacks. Sea mines have destroyed and damaged a significant number of Sri Lanka Navy crafts and ships and targeted Trincomalee, Kankansanthuray and Galle harbours.<sup>38</sup> The LTTE also used new weapons, experimental designs for vessels and a variety of methods for naval attacks, such as improvised sea mines,<sup>39</sup> suicide explosive boats, ‘human torpe-

34 Vincent Bernard, Editor-in-Chief, EDITORIAL: WAR AND SECURITY AT SEA: WARNING SHOTS, *International Review of the Red Cross* (2016), 98 (2), 383–392. War and security at sea. See further Malaka Chandradasa, *Learning from Our Enemies: Sri Lankan Naval Special Warfare against the Sea Tigers*, CTX Journal, Vol. 2, No. 2, 2012, available at: <https://globalecco.org/learning-from-our-enemies-sri-lankan-naval-special-warfare-against-the-sea-tigers>.

35 Vincent Bernard, Editor-in-Chief, EDITORIAL: WAR AND SECURITY AT SEA: WARNING SHOTS, *International Review of the Red Cross* (2016), 98 (2), 383–392. War and security at sea. See further Malaka Chandradasa, *Learning from Our Enemies: Sri Lankan Naval Special Warfare against the Sea Tigers*, CTX Journal, Vol. 2, No. 2, 2012, available at: <https://globalecco.org/learning-from-our-enemies-sri-lankan-naval-special-warfare-against-the-sea-tigers>.

36 Steven Haines, *War at sea: Nineteenth-century laws for twenty-first century wars?*, *International Review of the Red Cross* (2016), 98 (2), 419–447. War and security at sea.

37 Ministry of Defence, Democratic Socialist Republic of Sri Lanka, *Humanitarian Operation Factual Analysis, July 2006 – May 2009*, Published July 2011, para.21. At para.74 of the same report, 17 LTTE ships supplies arms or ammunition which were detained or destroyed by the Sri Lanka Navy or foreign authorities are identified.

38 See Annex H, <http://www.internationallawbureau.com/wp-content/uploads/2015/07/Annex-H-Major-Attacks-Launched-by-LTTE-on-Sri-Lanka-Navy.pdf>.

39 AFP, *LTTE uses magnetic mines against Lankan Navy*, June 18<sup>th</sup> 2006, <https://www.dnaindia.com/world/report-ltte-uses-magnetic-mines-against-lankan-navy-1036252> ; referring to “mines, similar to limpet mines which magnetically attach to a ship’s hull and can be triggered to explode by a time-delay fuse or remotely improvised sea mines... weighing about 10 to 15 kilograms”.

does', suicide divers,<sup>40</sup> semi-submersible craft and midget submarines.<sup>41</sup> In addition to the above, Sea Tigers have also been engaged in piracy, with several instances of attacks upon merchant vessels off the coasts of Sri Lanka.<sup>42</sup> Thus, Sri Lanka has had extensive experience with defensive naval operations during the conflict, but there needs to be ongoing assessments as to whether the Sri Lankan legal system is fully prepared to implement IHL at sea.

## 7.2.2 Application in Sri Lanka: Ratifications, Statutes and Implementing Authorities

Sri Lanka ratified the Geneva Conventions on February 28, 1959. However, although it is a dualist legal system, which requires enabling legislation, no legislative provisions were enacted to give effect to Sri Lanka's obligations under the aforesaid Geneva Conventions until 2006. Following the Geneva Conventions Act, No. 4 of 2006, legal provisions concerning grave breaches of the Geneva Conventions in international armed conflict situations are part of Sri Lankan statute law. Non-international armed conflicts such as was experienced by Sri Lanka are not covered by this Act, which in any case shall only come into operation on the date appointed by the relevant Minister, through an Order published in the Gazette.<sup>43</sup>

At a legal level, there are a number of possible actions which should be taken, including introducing regulations for implementation of the Geneva Conventions Act of 2006, rechecking and revising/introducing if necessary, the current laws and regulations under the Navy Act with regard to IHL training and implementation. Until the operationalization of the Geneva Conventions through Regulations, the protection of Common Article 3 of the Geneva Conventions, and other customary provisions will be applicable. Sri Lanka has not ratified Additional Protocol II during the time of the conflict, and still has not done so.

The most relevant Statute in Sri Lanka that governs the Navy is the Navy Act No. 34 of 1950, as amended.<sup>44</sup> This Act was passed at the time when Sri Lanka was still a British Dominion and the Act was actually passed in order for the formation of the 'Royal Ceylon Navy'. The current name of *Sri Lanka Navy* came about in 1972 when Sri Lanka became a republic.

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40 Ministry of Defence, Democratic Socialist Republic of Sri Lanka, *Humanitarian Operation Factual Analysis, July 2006 – May 2009*, Published July 2011, para.56.

41 Sri Lanka Army, *First Ever LTTE Operational Submarine Taken Out From Vellamullivaikkal Sea*, <https://www.army.lk/news/first-ever-ltte-operational-submarine-taken-out-vellamullivaikkal-sea>.

42 The Ministry of Defence specifically notes 12 merchant vessels attacked between 1994 and 2007 – see Ministry of Defence, Democratic Socialist Republic of Sri Lanka, *Humanitarian Operation Factual Analysis, July 2006 – May 2009*, Published July 2011, para.59.

43 Geneva Conventions Act, Section 1(1).

44 Navy Act Amendment Acts, No.8 of 1962, No. 11 of 1962, Law No. 33 of 1976, No. 21 of 1979, No. 11 of 1993 and Amendment Act No.32 of 2011.

The most recent Amendment to the Navy Act is Act No. 32 of 2011, which amends Section 28(1) concerning option to be tried summarily or by a court martial in case of certain offences. According to Article 33 of the Navy Act, the jurisdiction of courts martial is to try and punish a person subject to naval law who has committed any naval or civil offence. Article 118 specifically mentions the civil offences of treason, murder, homicide not amounting to murder, and rape. These correspond to the IHL violations identified in Geneva Convention II Article 51 under grave breaches<sup>45</sup>, the protection against violence to life and person in Common Article 3 of the Geneva Conventions and the fundamental guarantees of humane treatment of persons not taking a direct part in hostilities provided for in Article 4 of Additional Protocol I and II. The Navy Act also affirms Rule 167 of San Remo Manual of 1994 that civilians are to be treated in accordance with the Geneva Convention IV.

While the Navy Act continues in force, when it comes to grave breaches of Geneva Convention II, it is important to note that Article 51 and Article 50 (Repression of Abuses and Infractions through penal sanctions) are incorporated into Sri Lankan law through Schedule II of the Geneva Conventions Act No. 4 of 2006. When it comes into force through order of the relevant Minister, persons charged with offences under the Geneva Convention Act (grave breaches of the Geneva Conventions) shall be triable by the High Court for the Western Province, which is in Colombo. According to Article 4(1) of the Act, every offence under this Act shall be a cognizable offence and a non-bailable offence within the meaning and for the purposes of the Code of Criminal Procedure Act, No. 15 of 1979.

With regard to training, awareness and application of the Geneva Conventions, customary IHL and San Remo Manuals, it can be noted that programmes have been conducted for the Sri Lanka Navy to educate naval officers and ratings on IHL generally. Both the Geneva Conventions and the San Remo Manuals are on the syllabus of the training courses for recruits and serving officers, as is the Navy Act. The Navy has started their own IHL Capsules within the Navy and there is also a Director-IHL of the Navy, who is a legal officer, appointed to oversee and manage this process. But these programmes by themselves were small scale and inadequate to educate the approximately 56,000 personnel.

Although the basic understanding of the existence of IHL rights and obligations is said to be high within the Navy<sup>46</sup>, in-depth understanding and discussion of the issues are not widespread. There appears also to be more education on the details of the Navy Act than on the Geneva Conventions and San Remo Manuals and operations guide-

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45 Article 51 of GC II – “Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention ; wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”.

46 Interview with Retired Navy officer Admiral (Dr.) Jayanath Colambage on 20 February 2019.

lines.<sup>47</sup> The ICRC also has regular programmes for Navy officers on the subject of IHL at sea but it remains a question as to whether officers of all ranks and the sailors are reasonably aware of the international standards. This highlights the need for more IHL dissemination and training, even during peacetime, so that the Sri Lanka Navy is fully trained in IHL.

In discussing the application of IHL obligations during the Sri Lankan armed conflict, several examples can be given on violations as well as respect for IHL. Well known violations in application of IHL were committed by the LTTE, with regard to attacks on civilian ships and on persons *hors de combat*. For instance, a Sri Lanka Navy officer described an experience during 1997/8 when a Navy vessel was sunk by the LTTE in a battle at Mullaitivu Sea and how as the ship was sinking, the Sri Lanka Navy sailors were shot at by the LTTE.<sup>48</sup> It has also been documented that in most instances that after capturing a Navy vessel, the LTTE have been known to torture and kill the captives.<sup>49</sup>

Proportionality is a basic rule to be observed in the conduct of hostilities which extends to naval warfare as well. However the LTTE employed several offensive tactics which violated the proportionality principle. LTTE tactics evolved to include the use of swarm tactics and suicide boat attacks in offensive operations against the Sri Lanka Navy.<sup>50</sup> The Sea Tigers deployed LTTE guerrillas in amphibious attacks against military bases in Pooneryn (1995), Mullaitivu (1996), Elephant Pass (2000), and the Jaffna Peninsula (2001).<sup>51</sup> In addition, the rampant suicide boats laden with explosives rammed and destroyed 19 Dvora boats out of the 51 Dvora boats of the Sri Lanka Navy during asymmetric warfare in the form of swarm attacks during which a Sri Lanka Navy vessel would be attacked with 20-30 small LTTE boats.<sup>52</sup> In keeping

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47 Interview with a Sri Lanka Navy Officer on 13 May 2019.

48 Interview with a Sri Lanka Navy Officer on 18 February 2019.

49 See the individual stories described in Ruwan M, Jayatunga, *The POWs Of The Eelam War*, *Colombo Telegraph*, June 22<sup>nd</sup> 2014, <https://www.colombotelegraph.com/index.php/the-pows-of-the-eelam-war/>

50 Tim Fish, "Sri Lanka Learns to Counter Sea Tigers' Swarm Tactics," Jane's Navy International as cited in Justin Smith, *Maritime Interdiction in Counterinsurgency: The Role of the Sri Lankan Navy in the Defeat of the Tamil Tigers*, unpublished Master's Thesis, US Naval Postgraduate School, Monterey, June 2010, available online at:

<[calhoun.nps.edu/bitstream/handle/10945/5346/10Jun\\_Smith\\_Justin.pdf?sequence=1](http://calhoun.nps.edu/bitstream/handle/10945/5346/10Jun_Smith_Justin.pdf?sequence=1)> accessed on 20 February 2019 p 55.

51 Justin Smith, *Maritime Interdiction in Counterinsurgency: The Role of the Sri Lankan Navy in the Defeat of the Tamil Tigers*, unpublished Master's Thesis, US Naval Postgraduate School, Monterey, June 2010, available online at: <[calhoun.nps.edu/bitstream/handle/10945/5346/10Jun\\_Smith\\_Justin.pdf?sequence=1](http://calhoun.nps.edu/bitstream/handle/10945/5346/10Jun_Smith_Justin.pdf?sequence=1)> accessed on 20 February 2019, p 47, 55.

52 Ibid p 48.

with San Remo Manual 1994 Rules 4<sup>53</sup> and 5<sup>54</sup> on the necessity, proportionality and intensity of attack, the Sri Lanka Navy countered these swarm and suicide tactics with large numbers of small high-speed, heavily armed inshore patrol craft (IPC)<sup>55</sup>.

In the conduct of hostilities, the principle of distinction, along with the principle of proportionality elaborated above, is considered a basic IHL rule. The principle of distinction<sup>56</sup> dictates that distinction must be made between civilians<sup>57</sup>, *hors de combat*<sup>58</sup> and combatants, and attacks must only be directed against combatants. However, the LTTE exploited the confidence invited by utilizing fishing trawlers for smuggling arms<sup>59</sup> which was in violation of international humanitarian law.<sup>60</sup> Principle of distinction was respected when in order to destroy the floating arms warehouses of the LTTE, the Sri Lanka Navy distinguished between legitimate civilian objects and military targets, through the combined efforts of domestic Human Intelligence (HUMINT) collection, Indian and Sri Lankan naval reconnaissance missions, and Signals Intelligence (SIGINT) and Imagery Intelligence (IMINT) assistance from the United States.<sup>61</sup>

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53 San Remo Manual 1994 Rule 4-“ The principles of necessity and proportionality apply equally to armed conflict at sea and require that the conduct of hostilities by a State should not exceed the degree and kind of force, not otherwise prohibited by the law of armed conflict, required to repel an armed attack against it and to restore its security”.

54 San Remo Manual 1994 Rule 5- “How far a State is justified in its military actions against the enemy will depend upon the intensity and scale of the armed attack for which the enemy is responsible and the gravity of the threat posed”.

55 Tim Fish, *Sri Lanka Learns to Counter Sea Tigers’ Swarm Tactics*, Jane’s Navy International as cited in Justin Smith, *Maritime Interdiction in Counterinsurgency: The Role of the Sri Lankan Navy in the Defeat of the Tamil Tigers*, unpublished Master’s Thesis, US Naval Postgraduate School, Monterey, June 2010 , available online at:

<calhoun.nps.edu/bitstream/handle/10945/5346/10Jun\_Smith\_Justin.pdf?sequence=1> accessed on 20 February 2019.

56 ICRC, Customary IHL 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.; Article 13(2) of Additional Protocol II.

57 ICRC, Customary IHL Rule 6- Civilians are protected against attack unless and for such time as they take a direct part in hostilities.

58 ICRC, Customary IHL Rule 47-Prohibition on attacking persons recognized to be *hors de combat*.

59 Justin Smith, *Maritime Interdiction in Counterinsurgency: The Role of the Sri Lankan Navy in the Defeat of the Tamil Tigers*, unpublished Master’s Thesis, US Naval Postgraduate School, Monterey, June 2010 <calhoun.nps.edu/bitstream/handle/10945/5346/10Jun\_Smith\_Justin.pdf?sequence=1> accessed on 20 February 2019, p 48.

60 Customary IHL Rule 65- “Killing, injuring or capturing an adversary by resort to perfidy is prohibited”; San Remo Manual of 1994 Rule 111- “Perfidy is prohibited. Acts inviting the confidence of an adversary to lead it to believe that it is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, constitute perfidy”.

61 Shanaka Jayasekara, *How the LTTE was Destroyed*, Asian Conflicts Reports, no. 6 (June, 2009), www.ristex.jp/EN/terrorism/pdf/ACR-6.pdf (accessed 09/09/2009). As cited in *supra* (n33) p 50.



Appertaining to the protection of the vulnerable, the parties to the conflict have usually cooperated with the ICRC. The procedure followed is that the International Committee of the Red Cross (ICRC) receives guarantees of safe passage from both parties and it maintains contact with the Sri Lankan military and civilian authorities such as the Ministry of Health as well as the LTTE, for humanitarian relief and evacuations.<sup>62</sup> Since its presence in Sri Lanka began, the ICRC has chartered vessels to provide relief supplies to civilians in the North of the country. The Ministry of Health continuously provided services to the wounded, even to LTTE cadres and provided free health services to all the injured who were evacuated from conflict zones. The United Nations, *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, gives a figure of 14,000 persons evacuated by sea in the care of ICRC ships between February-May 2009 during the last stages of the war.<sup>63</sup>

It is noted that the Sri Lanka Navy established secure sea corridors for civilians escaping from the LTTE-held areas and provided escort to safety on land, even with the threat of suicide boats among the escaping civilians.<sup>64</sup> Safe passage was provided to the sick and the wounded to be evacuated, beginning on February 10<sup>th</sup> with 240 patients from Puttumatalan. Both parties to the conflict assisted this process and evacuating people were not attacked nor hindered, acting in accordance with Geneva Convention II.<sup>65</sup> The Sri Lankan Ministry of Defence and Sri Lanka Ministry of Health officers were increasingly in active service in the Puttumatalan area attending to the sick.<sup>66</sup> When close to the end of the war the LTTE cadres and their families were trying to escape by the sea, the Navy rescued them and brought them to Point Pedro and Pulmudai for medical treatment by naval medical personnel at makeshift hospitals.<sup>67</sup> Even the wife and children of 'Soosai', the leader of the Sea Tigers were also rescued by the Sri Lankan Navy.<sup>68</sup>

62 Morven Murchison, *Sri Lanka: Organizing Medical Evacuations by Sea*, Interview, ICRC, 26 February 2009, available at: [www.icrc.org/eng/resources/documents/interview/srilanka-interview-260209.htm](http://www.icrc.org/eng/resources/documents/interview/srilanka-interview-260209.htm).

63 United Nations, *Report of the Secretary-Generals Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, para.2, para.106.

64 Ministry of Defence, Democratic Socialist Republic of Sri Lanka, *Humanitarian Operation Factual Analysis, July 2006 – May 2009*, Published July 2011, para.229.

65 See Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Article 21; ICRC, 'Sri Lanka: organizing medical evacuations by sea' (February 26, 2009) <<https://www.icrc.org/en/doc/resources/documents/interview/sri-lanka-interview-260209.htm>> accessed on 20 February 2019; Interview Morven Murchison coordinates the ICRC's health activities in Sri Lanka.

66 ICRC, 'Sri Lanka: ICRC carries on evacuation of sick and wounded by sea', News Release 37/09 (February 12, 2009)<<https://www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/sri-lanka-news-120209.htm>> accessed on 19 February 2019; Paul Castella, head of the ICRC delegation in Colombo.

67 Ministry of Defence, Democratic Socialist Republic of Sri Lanka, *Humanitarian Operation Factual Analysis, July 2006 – May 2009*, Published July 2011, para.233-235.

68 Interview with Retired Navy officer Admiral (Dr.) Jayanath Colabage on 20 February

### 7.2.3 Application of IHL at Sea in Sri Lanka: Comments on the ICRC Case Study, “Sri Lanka, Naval War against Tamil Tigers”

The ICRC has an online case study on Sri Lanka in relation to the international humanitarian law applicable for naval warfare titled “**Sri Lanka, Naval War against Tamil Tigers**”.<sup>69</sup> This case study presents an interesting set of situations, relevant documents and discussions. It is specifically stated that “[t]his case will discuss whether the international law applicable to armed conflict at sea governed this conflict and whether the actual hostilities were conducted according to its rules.”<sup>70</sup>

Before commencing the discussion of the incidents used for case study, it is important to clarify the classification of the conflict, which is a matter that affects the identification of applicable law. As regards the classification of this conflict, it can be classified as a Non-International Armed Conflict (NIAC) between the governmental Armed Forces of Sri Lanka which is a High Contracting Party (HCP) to the four Geneva Conventions<sup>71</sup>, and the non-State organized armed group, Liberation Tigers of Tamil Eelam (LTTE).<sup>72</sup> Due to the non-international character of the conflict, Common Article 3 of the Geneva Conventions which provides for minimum protection even in the cases of ‘conflicts not of an international character’, where one or more non-State actors are involved, is applicable to this armed conflict.

Sri Lanka has not ratified Additional Protocol II as yet. But even without ratification of Additional Protocol II by Sri Lanka, it can be noted that as per Article 1 of Ad-

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2019; Bruno Demeyere, Jean-Marie Henckaerts, Heleen Hiemstra and Ellen Nohle, The updated ICRC Commentary on the Second Geneva Convention: Demystifying the law of armed conflict at sea, International Review of the Red Cross (2016), 98 (2), p 401–417 at p 406. See also, the words of Soosai’s wife, Satyadevi – “The men in the small boat came closer to us and spoke to us in Tamil. They said “Don’t fear. We will rescue you. Then they took us to their boat and brought us to the shore.” (Chamara Lakshan Kumara, Soosai’s wife recalls drama in the high seas, <http://dbsjeyaraj.com/dbsj/archives/3891>, 30 January 2012).

69 See <https://casebook.icrc.org/case-study/sri-lanka-naval-war-against-tamil-tigers> - Case prepared by Eleonora Heim, Master student at the Universities of Basel and Geneva, under the supervision of Professor Marco Sassòli and Ms. Yvette Issar, research assistant, both at the University of Geneva.

70 See <https://casebook.icrc.org/case-study/sri-lanka-naval-war-against-tamil-tigers> - Case prepared by Eleonora Heim, Master student at the Universities of Basel and Geneva, under the supervision of Professor Marco Sassòli and Ms. Yvette Issar, research assistant, both at the University of Geneva.

71 The four Geneva Conventions were ratified by Sri Lanka in 1959 and were incorporated to domestic law by the Geneva Conventions Act No, 4 of 2006.

72 See also the generally accepted test described in the first case of International tribunal for the former Yugoslavia, *Prosecutor v Tadić*: “...an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State” (*Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para 70.).

ditional Protocol II,<sup>73</sup> the Sri Lankan civil war clearly falls within the definition of a NIAC, being a conflict between the armed forces of a HCP and a dissident armed group with a responsible command, exercising such control over most of the northern and eastern provinces of Sri Lanka, which is within the territory of a HCP. Furthermore, the LTTE is capable of carrying out sustained and concerted military operations and also of implementing the Additional Protocol II. Thus it can be said that theoretically and conceptually, the recognition of the Sri Lankan war as a NIAC is still credible, regardless of the non-ratification of Additional Protocol II.

This classification of the Sri Lankan conflict is also supported by the fact that it is not excluded from the field of application of AP II, as it was an internal conflict reaching a level of intensity above and beyond internal disturbances and tensions, such as riots, isolated and sporadic acts of violence<sup>74</sup> and requiring military deployment as per Protocol II. The LTTE, as elaborated above, qualifies as a ‘party to the conflict’ owing to its organized command structure and the capacity to sustain military operations for over a protracted period of three decades.<sup>75</sup>

The documents A and B of the ICRC case study on naval warfare in Sri Lanka depict two incidents which took place during the civil war in Sri Lanka at the beginning of 2000s.<sup>76</sup> The gist of the incidents portrayed in the documents are as follows:

#### **A. Navy Redoubles Efforts to Blockade Mullaitivu**

This document A, gives an account of how in 2001, arms and military supplies were smuggled in through the Mullaitivu coast by the Sea Tigers and how the Sri Lanka Navy decided to revamp their strategical blockade off Mullaitivu to halt arms supplies from reaching the LTTE. It also states that after the revamping, the LTTE leader has ordered Sea Tigers to come up with ways to obviate the blockade.

#### **B. Deadly Plan to Blast Colombo Port**

The document B, depicts a plan by the Sea Tigers in 2006 to use guerilla amphibious attacks on eight ships of the Sri Lankan Navy at the Colombo Port, planting them with explosives, which was rendered unsuccessful owing to the rough seas.<sup>77</sup> Several

73 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978).

74 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Article 1 (2).

75 ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para 70.

76 Eleonora Heim, ‘Sri Lanka, Naval War against Tamil Tigers’ (*ICRC, How Does Law Protect in War*, 2018) <<https://casebook.icrc.org/case-study/sri-lanka-naval-war-against-tamil-tigers>> accessed 18 February 2019.

77 See <https://casebook.icrc.org/case-study/sri-lanka-naval-war-against-tamil-tigers> - Case prepared by Eleonora Heim, Master student at the Universities of Basel and Geneva, under the supervision of Professor Marco Sassòli and Ms. Yvette Issar, research assistant, both at the University of Geneva. Document B, Para 1-3.

guerrillas and explosive packages were taken into custody by the Navy. It also relates how the LTTE Sea Tigers engaged in a gun battle with the Sri Lanka army, in the gulf of Mannar, timed so as to be a diversion to facilitate the attacks at the Colombo Port. It presents that around Eleven sailors, 25-30 LTTE guerrillas and 7 civilians were killed in the battle that ensued.

The two situations presented in Documents A and B comprise of incidents involving naval warfare to which international humanitarian law could be applied. In order to better analyze and understand its application, there are a number of prepared questions for discussion with reference to the two situations given above. The following discussion shall delve into an analysis of each question.

The first question in the case study is to identify the classification of the conflict and applicable law. This has already been discussed above. The second question is a curious one, as it asks “[u]nder what circumstances will fighting against a “guerrilla” organization amount to an armed conflict? What criteria must be fulfilled for such fighting to be regarded as an armed conflict? What law is applicable to such conflicts?”. Whether or not an organization is identified as a “guerrilla organization” is not what is important for IHL. However, the LTTE can be considered a guerrilla organization, engaging in asymmetric warfare utilizing guerrilla warfare tactics like sabotage, ambushes, and attacks on persons and property characterized by mobility, surprise, and prompt disengagement.<sup>78</sup>

The correct form of the above question is what is asked in the next question, question three – “What evidence can you find in this case to support the view that the requisite criteria to classify the fight between the Tamil Tigers and the Sri Lankan Armed Forces as a non-international armed conflict are fulfilled?”. The answer to these questions are found in the above discussion on the classification of the conflict as a NIAC. The Tamil Tigers was an organized, dissident, non-State armed group which was a party to a NIAC, exercising sustained and concerted military operations, as per Additional Protocol II.

The fourth question is as to whether Additional Protocol I would apply instead of Protocol II, to the Sri Lankan conflict: “[c]ould this situation be classified as a war of national liberation? What criteria would have to be met for the situation to be classified as such? Does Additional Protocol I of the Geneva Conventions apply to this situation?”. The answer to that requires a discussion of the definition for international armed conflicts provided for in Additional Protocol I, which includes the concept of ‘wars of national liberation’.

According to Article 1(4) of Protocol I, which lays down the scope of application of the Protocol I, it is applicable to International Armed Conflicts, as a supplement to Common Article 2 of the Geneva Conventions, and also to conflicts against colonial domination and alien occupation and against racist regimes in the exercise of their

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78 ICRC, ‘Guerrilla’ (*How Does Law Protect in War*, 2018) <<https://casebook.icrc.org/glossary/guerrilla>> accessed 19 February 2019.

right to self-determination.<sup>79</sup> Such wars of national liberation were formerly regarded as internal civil wars, but are now recognized as conflicts of international character and governed by IHL.<sup>80</sup> However the present Sri Lankan conflict is an internal insurgency within Sri Lankan territory, not a war for national liberation. The Sri Lankan civil war does not qualify as such, since the democratically elected government of Sri Lanka could not be classified as a “racist regime” against the Tamil people, especially since all Sri Lankan governments during the armed conflict have had support of Tamil representatives and predominantly Tamil political parties and there has been a multi-ethnic parliament throughout the period.

The fifth question is not specific to the Sri Lankan case study, but it inquires, “[d]o you think the legal framework applicable to blockades and armed conflicts at sea is the same for both international and non-international armed conflicts?”. This question is linked to question 13(a) which states “[i]s a blockade unlawful under the laws of war? Does IHL contain a definition of a blockade? Does this depend on its type (naval, aerial, land blockade)? Do IHL treaties regulate blockades?” In answering these questions, it must be looked at whether or not the incident of halting supplies from reaching the LTTE, depicted in document A, during the conflict of Sri Lanka is a relevant case in point to be discussed with regard to naval blockade and related obligations. The Government of Sri Lanka therefore has an obligation to protect and cater to the needs of the Tamil civilians in this instance, as they are protected persons under international humanitarian law and human rights law.

Looking back through the history of blockades, it can be observed that belligerent naval blockades are a form of economic warfare for achieving military objectives. A blockade is defined by the U.S. Department of Defence as:

...an operation by a belligerent State to prevent vessels... of all States, enemy as well as neutral, from entering or exiting specified ports, ...or coastal areas belonging to, occupied by, or under the control of an enemy belligerent State.<sup>81</sup>

However, IHL does not classify blockades as an unlawful method of warfare, yet they are restricted and regulated by IHL treaty and customary law. Though it is a traditional means of naval warfare, Haines notes that in the 1999 Kosovo conflict, a naval blockade was contemplated by NATO members to be not lawful and a controversial option at the time.<sup>82</sup> A recent use of a naval blockade was by Israel in relation to the Gaza

79 AP II Article 1(4) –[...] include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes 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.

80 ICRC, ‘National Liberation Wars’ (*How Does Law Protect in War*, 2018) <<https://casebook.icrc.org/glossary/national-liberation-wars> accessed> 15 February 2019.

81 US Department of Defense, *Law of War Manual* (Washington D.C: 2015) p 886.

82 Steven Haines, ‘War at sea: Nineteenth-century laws for twenty-first century wars?’ in ICRC, *International Review of the Red Cross: War and security at sea* (2016) p 428.

Strip in 2009 and the attack on the aid flotilla led by the ship Mavi Marmara on May 31, 2010, which has been criticized as illegal, but defended by the Israeli government and some Israeli scholars.<sup>83</sup>

There are well-established legal regulations of a naval blockade in an international armed conflict. Current understanding of blockade, including its requirements, entitlements and consequences, is largely based on the unratified London Declaration on the Laws of Naval War of 1909 and the San Remo Manual on International Law Applicable to Armed Conflicts at Sea of 1994.<sup>83</sup> Pertaining to international armed conflicts, according to Additional Protocol I, civilians must not be denied of indispensable objects for survival and starvation of civilians as a method of warfare is prohibited<sup>84</sup>. Furthermore, in IACs, a blockade as a method of warfare is allowed only in limited instances and is curtailed by the comprehensive Rules laid down in the San Remo Manual of 1994<sup>85</sup>. The Rules do not define a naval blockade, but prohibit a naval blockade if it has the *sole* purpose of starving the civilian population *or* denying them other objects essential for its survival, *or* if the damage to the civilian population is excessive in relation to the concrete and direct military advantage anticipated from the blockade.<sup>86</sup>

In answering question 13(e) which inquires “[d]o the parties involved have an obligation to allow free passage of humanitarian relief supplies?” it can be observed that parties involved indeed have an obligation to allow free passage of humanitarian relief supplies to civilians in a blockade. The San Remo Manual of 1994 provides that even if the civilian population of the blockaded territory is inadequately provided with food, medical supplies and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies.<sup>87</sup> This is in line with provisions in Article 70 of the Additional Protocol I on relief actions in IACs and Article 18 of the Additional Protocol pertaining to NIACs. The customary IHL rules as a corollary to the prohibition of starvation as a method of warfare, imposes the obligation on parties not to deny access nor to impede humanitarian relief.<sup>88</sup>

It can be observed from the above discussion that blockades pertaining to an IAC are

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83 Magne Frostad, *Naval Blockade*, Arctic Review on Law and Politics, Volume 9, 2018, Pages 195–225, at page 199.

84 Additional Protocol I, Article 54 - Protection of objects indispensable to the survival of the civilian population.

85 San Remo Manual on International Law Applicable to Armed Conflicts at Sea 1994, Rule 93-104.

86 San Remo Manual on International Law Applicable to Armed Conflicts at Sea 1994, Rule 102.

87 San Remo Manual on International Law Applicable to Armed Conflicts at Sea 1994, Rule 103, 104.

88 ICRC, Customary IHL Database <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule53](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule53)>accessed 18 February 2019, Rule 53- denying access of humanitarian aid intended for civilians in need, including deliberately impeding humanitarian aid.

covered in the San Remo Manual of 1994. However, with regard to non-international armed conflicts, it is notable that the San Remo Manual of 2006 is not referred to in the materials for discussion in the ICRC case study, since a perusal of that would show that blockade is not an issue which is covered regarding naval warfare in a NIAC. One reference to an obligation of restricting the consequences of blockades, can be found in Article 14 of Additional Protocol II, prohibiting starvation of civilians as a method of combat in a NIAC, but the paucity of regulations on blockades in NIAC raises the question whether blockades is a concept applicable to NIACs.

This context must be borne in mind when answering question 13 (b), “[d]oes your answer depend on whether the conflict is international or non-international? If you consider that the legal institution of blockade does not apply to non-international armed conflicts, could the government nevertheless prohibit ships from entering its ports and/or inspect such ships?” The lack of in-depth legal authority on blockades in a NIAC render the discussion under this topic a theoretical and academic discussion on whether the currently existing laws relating to blockades can be applied for NIACs. However, the concept has no application in the Sri Lankan situation. This was specifically mentioned by Guilfoyle, who has stated as follows with regard to the Sri Lankan situation:

“References, however, to a government naval ‘blockade’ during that conflict are strictly a misnomer. In 1984 Sri Lanka implemented ‘a special naval surveillance zone within Sri Lankan waters ... with the ... purpose of preventing illegal entry and exit... Most reported maritime interceptions appear to have occurred with Sri Lanka’s territorial sea or contiguous zone, ostensibly on suspicion the vessels were engaged in smuggling weapons or supplies to the Tamil Tigers (LTTE).<sup>122</sup> Such interdictions could be justified under ordinary customs and policing powers available within 24 nautical miles of Sri Lanka’s baselines and do not require the invocation of blockade. The practice certainly involved no assertion of rights against neutral vessels on the high seas.”<sup>89</sup>

It is crucial to make a distinction between a blockade and the Sri Lankan government’s implementation of the special naval surveillance zone, in which vessels suspected of illegal entry and exit were intercepted, as a lawful exercise of sovereign rights accorded to Sri Lanka under the United Nations Convention on the Law of the Sea.<sup>90</sup> By exercising such sovereign rights, the coastal State is authorized to exert control to prevent infringement of customs, fiscal, immigration laws and regulations of the State, within waters upto 24 nautical miles from the baseline.<sup>91</sup> Furthermore, ‘innocent passage’ granted to foreign ships under the same convention to enter the

89 Douglas Guilfoyle, *The Mavi Marmara Incident and Blockade in Armed Conflict*, *British Yearbook of International Law*, Volume 81, Issue 1, 2011, Pages 171–223.

90 Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, entered into force as the “United Nations Convention on the Law of the Sea” on Nov. 1, 1994.

91 Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, entered into force as the “United Nations Convention on the Law of the Sea” on Nov. 1, 1994, Article 33.

territorial sea and call at ports of the coastal State are strictly prohibited if it is ‘prejudicial to the peace, good order or security of the coastal State which encompasses ‘any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State’.<sup>92</sup> This right of innocent passage in its territorial sea can be temporarily suspended by the coastal State in specified areas, to protect its security.<sup>93</sup> Frostad comments on this distinction as follows:

“Naval blockades must be differentiated from situations where a coastal state uses its powers under the law of the sea to enforce restrictions on the use of its territorial sea, in that zone itself and in its contiguous zone....granted by the United Nations Convention on the Law of the Sea (UNCLOS) Art. 25 (3) to suspend innocent passage through a state’s territorial sea during ongoing hostilities. Thus, Sri Lankan restrictions, enforced in its territorial sea, on shipments to the Tamil Tigers were inherently different from a blockade.”<sup>94</sup>

Therefore, this prohibition of entry/interception of ships by the government of Sri Lanka is not encapsulated in the concept of a blockade under IHL, which is simply a method of warfare to harm belligerent States, by attempting to get the enemy to agree to terms favorable to the blockading country, by interdicting its maritime traffic.<sup>95</sup> The Sri Lankan special naval surveillance zone was an exercise of sovereign rights of the State of Sri Lanka under law of the sea and public international law, rather than a naval blockade affecting the rights of belligerent and neutral States as provided for in the San Remo Manual of 1994.

Question 10 of the case study based on document B, inquires, “[w]ere the Sri Lankan Police obliged by IHL to care for the LTTE members who had attempted to end their lives through cyanide poisoning? Who does IHL oblige to care for the wounded, sick and shipwrecked? Armed forces? Police forces? Fishermen? Is your answer the same in IACs and NIACs?”. The answer to this question focuses on the obligation of the Sri Lankan government as a party to the conflict to care for protected persons.

It can be submitted that the guerrilla swallowing cyanide comes under the category of ‘wounded, sick and shipwrecked’ who should be collected, searched for and evacuated after an engagement<sup>96</sup> and provided medical care and attention with the least possible delay<sup>97</sup> as per Customary IHL rules. The protection of the Common Article

92 Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, entered into force as the “United Nations Convention on the Law of the Sea” on Nov. 1, 1994, Article 18, 19.

93 Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, entered into force as the “United Nations Convention on the Law of the Sea” on Nov. 1, 1994, Article 25(3).

94 Magne Frostad, *Naval Blockade*, Arctic Review on Law and Politics, Volume 9, 2018, Pages 195–225, at page 196.

95 Magne Frostad, *Naval Blockade*, Arctic Review on Law and Politics, Volume 9, 2018, Pages 195–225, at page 195.

96 ICRC, Customary IHL Database < [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule109](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule109)> accessed 18 February 2019, Rule 109.

97 ICRC, Customary IHL Database < <https://ihl-databases.icrc.org/customary-ihl/eng/docs/>



3(2) of the Geneva Conventions, Article 7 of Additional Protocol II and Rule 3.1 of the San Remo Manual on the Law of Non-International Armed Conflict of 2006 further extend the protection available to the guerillas who poisoned themselves with cyanide. Accordingly, in this situation the guerrilla who was still alive after swallowing cyanide was given prompt medical attention by hospitalization.<sup>98</sup> Under IHL the Sri Lanka Police and armed forces as parties to the conflict and agents of Government of Sri Lanka, are obliged to attend to the guerilla sick from cyanide poisoning without any distinction, as they have ceased to take part in hostilities.

Document B also mentions how an Inshore Patrol Craft (IPC) of the Sri Lanka Navy was capsized at sea and three sailors were reported missing. Question 11 is based on this incident. It questions, “[i]f the capsized Navy vessel and the shipwrecked sailors were encountered by Sea Tigers, what would the obligations of the latter have been towards the former? Would the Sea Tigers have violated IHL by leaving the sailors at the mercy of the ocean? If the Sea Tigers had rescued the sailors, would they have been entitled to detain them?”. In answering these questions on the IHL obligations of the LTTE Sea Tigers towards shipwrecked sailors and their entitlement to detain them, the LTTE’s status as a party to the conflict must be established, which shall bind them to the above IHL obligations.

In discussing under what circumstances the LTTE, and its Naval Wing - the Sea Tigers, can be held bound by IHL obligations in a Non-International Armed Conflict, several bases can be observed. Firstly, by becoming a ‘party to the conflict’, they become bound by the Common Article 3 of the Geneva Conventions, accepted as customary international law<sup>99</sup> as well as customary IHL Rules and the San Remo Manual of 2006. Especially they must afford the minimum protection enshrined in Common Article 3, which is applicable to “each Party to the conflict”<sup>100</sup> and is a fundamental protection applied in the event of a non-international armed conflict.<sup>101</sup> Secondly, States implicitly confer the international legal personality necessary to have rights and obligations under IHL rules on the non-governmental forces engaged in conflicts with them. However, this application of Common Article 3 will not afford any legal status

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v1\_rul\_rule110>accessed 18 February 2019, Rule 110.

98 See <https://casebook.icrc.org/case-study/sri-lanka-naval-war-against-tamil-tigers> - Case prepared by Eleonora Heim, Master student at the Universities of Basel and Geneva, under the supervision of Professor Marco Sassòli and Ms. Yvette Issar, research assistant, both at the University of Geneva. Document B, Para 2.

99 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, p. 254–255, p. 257–258 (with respect to the Geneva Conventions) and *Case concerning Military and Paramilitary Activities in and against Nicaragua*, (Nicaragua v. United States), Merits, Judgment, 27 June 1986, ICJ Reports 1986, p. 98, p. 114 (with respect to common Article 3).

100 Article 3 common to all Geneva Conventions.

101 Bruno Demeyere, Jean-Marie Henckaerts, Heleen Hiemstra and Ellen Nohle, *The updated ICRC Commentary on the Second Geneva Convention: Demystifying the law of armed conflict at sea*, *International Review of the Red Cross* (2016), 98 (2), p 401–417 at p 406.

to the non-state armed group.<sup>102</sup>

Thirdly, LTTE may be bound under the general rules on the binding nature of treaties like the Geneva Conventions on third parties, even though the LTTE did not participate in initiatives that aimed at enabling non-State actors to incorporate IHL rules into their codes of conduct<sup>103</sup>. Fourthly they can be bound under the principle of effectiveness, implying that LTTE as an effective power in the territory of Sri Lanka is bound by Sri Lanka's obligations and fifthly, the LTTE desiring to overpower the government of Sri Lanka is bound by the international obligations of that State.<sup>104</sup>

Therefore, it can be established that the Sea Tigers have an obligation under IHL to rescue the shipwrecked sailors. The protections for the shipwrecked in Article 7 of Additional Protocol II on protection and care of the shipwrecked and Article 8 on searching, collecting shipwrecked and protecting them against pillage and ill-treatment shall be binding on the Sea Tigers. The same is reiterated under Customary IHL Rules 109 and 110, which would bind the Sea Tigers. Apart from the minimum protection afforded to the sailors under Common Article 3, the San Remo Manual Rule 3.1 also pronounces that harming the shipwrecked is forbidden and that they must be treated humanely and given due care with minimum delay. Therefore, had the Sea Tigers left the sailors at the mercy of the ocean they would be violating the aforementioned IHL obligations.

If they, however, rescue the sailors and detain them, the sailors should be protected as combatants who have fallen into the hands of the enemy. In answer to question 9, it must be observed that the same applies to the three LTTE guerrillas who were arrested in high seas by SL Navy. In the absence of a definition of a prisoner of war (POW) in NIACs, the definition found in Geneva Convention III, Article 4(A), can be used as a guideline. And a Sri Lankan Navy sailor or a LTTE member distinguishing himself from the civilians with his combatant status as required by that provision and Customary IHL Rule 106, ought to be protected under IHL. Protections under Additional Protocol II on the fundamental guarantee of humane treatment of persons not/no longer taking direct part in hostilities<sup>105</sup> and guaranteeing protections for those whose liberty has been restricted,<sup>106</sup> will protect persons *hors de combat* in a NIAC. Thus the 3 missing sailors of the capsized Inshore Patrol Craft (IPC) of SLN, if rescued by the Sea Tigers, and the 3 arrested guerrillas, must be afforded protection. But the purpose of this detention shall not be to punish them, but only to hinder their direct participation

102 Common Article 3(4) of the Geneva Conventions.

103 Initiatives like 'Geneva Call' engages with armed non-State actors (ANSAs) to encourage them to comply with international humanitarian norms, improving the protection of civilians in armed conflict. These international humanitarian norms are enshrined in the Geneva Conventions and other international treaties. It also provides International Humanitarian Law (IHL) training to ANSAs, and advice on how to incorporate IHL rules into their codes of conduct and other internal regulations. See <https://genevacall.org/>.

104 ICRC, 'Non-International Armed Conflicts' (*How Does Law Protect in War*, 2018) <<https://casebook.icrc.org/glossary/non-international-armed-conflict>> accessed 15 February 2019.

105 Additional Protocol II, Article 4.

106 Additional Protocol II, Article 5.

in hostilities and/or to protect them from further harm.<sup>107</sup> It should be noted that in the context of a non-international armed conflict, there is nothing to prevent a State from punishing those responsible for acts against the State. The sailors cannot be punished merely for their participation in armed conflict, but the LTTE combatants can be punished according to law for their mere participation itself. Therefore, while, the basic protections for the captured and detained during a non-international armed conflict are covered by IHL, domestic legal proceedings for participation in acts against the State can be implemented against the detained non-State combatants.

*The 8<sup>th</sup> question is regarding the principle of distinction- question 8(a) asks, “[a]re belligerent ships allowed to disguise themselves? By flying the flags of other countries on their ships, do the Sea Tigers violate any rules of IHL? Are the Sea Tigers obliged to distinguish their vessels from the ordinary ships that sail the international shipping lane? Is the strategy of the LTTE to mingle during the day in international shipping lanes and attacking only at night in accordance with IHL? Under which conditions would it be legal?”. Question 8(b) inquires, “[s]ince the LTTE often disguises its ships, under what conditions may the Sri Lankan forces search merchant vessels that might be LTTE vessels?”.*

Question 8 focuses on principle of distinction<sup>108</sup> which dictates that distinction must be made between civilians,<sup>109</sup> persons *hors de combat*<sup>110</sup> and combatants, and attacks must only be directed against combatants. This is considered one of the “cardinal principles” of international humanitarian law and one of the “intransgressible principles of international customary law”.<sup>111</sup>

In the case study, Document A, paragraph 5 and 6 describe how the Sea Tigers, by flying the flags of foreign States and carrying legitimate registrations, mingled with ships on the international shipping lane became impossible to detect.<sup>112</sup> They disguised themselves as civilian targets in order to take unfair advantage of principle of distinction. As per Rule 110 of the San Remo Manual of 1994, warships and auxiliary vessels are prohibited from launching attacks while flying a false flag and from simulating the status of passenger vessels carrying civilians.

Such actions also amount to perfidy under customary IHL<sup>113</sup> and the San Remo Man-

107 ICRC, ‘Combatant and POWs’ (*How Does Law Protect in War*, 2018) <<https://casebook.icrc.org/law/combatants-and-pows#chapter3>> accessed 15 February 2019.

108 ICRC, Customary IHL Database < [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1)> accessed 18 February 2019, Rule 1; Article 13(2) of Additional Protocol II.

109 Civilians are protected against attack unless and for such time as they take a direct part in hostilities (see Rule 6 *ibid*).

110 Prohibition on attacking persons recognized to be hors de combat (see Rule 47 *ibid*).

111 ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinions, ICJ Reports 1996.

112 See <https://casebook.icrc.org/case-study/sri-lanka-naval-war-against-tamil-tigers> - Case prepared by Eleonora Heim, Master student at the Universities of Basel and Geneva, under the supervision of Professor Marco Sassòli and Ms. Yvette Issar, research assistant, both at the University of Geneva, Document A, Para 5.

113 ICRC, Customary IHL Database < <https://ihl-databases.icrc.org/customary-ihl/eng/docs/>

ual of 1994<sup>114</sup>, where the Sea Tigers invited the confidence of the Navy that the ships which were actually carrying arms were entitled to protection under IHL. The San Remo Manual of 1994 further authorizes that if it is suspected that a vessel of neutral character is in fact of enemy character, it can be intercepted and searched<sup>115</sup>, and if its enemy character is affirmed through reasonable suspicion, the vessel can be captured subject to adjudication.<sup>116</sup>And according to Customary IHL, no effective advance warning of attacks which may affect the civilian population were given by the LTTE to the ships on the international shipping lane<sup>117</sup> and no precautions were taken by them to avoid, minimize incidental loss to civilian life<sup>118</sup>.

The question 12 makes reference to the gun battle that ensued between Sea Tigers and the Sri Lanka Navy in the Gulf of Mannar depicted in Document B, focusing on the principles of precaution and proportionality in conduct of hostilities. It inquires in part (a), “[d]o the basic rules on the conduct of hostilities apply to attacks from the sea that produce their effects on land? In part (b), “[b]ased on Document B, do you think that the principles of precaution and proportionality in attack have been followed by the parties involved? Part (c) questions, “[h]ow would you classify the Sea Tigers order to fishermen “not to set out on their tasks” and their order to those already in the water “to withdraw” right before their military manoeuvre?.”

Question 12 focuses on principles of proportionality and precaution. In the Gulf of Mannar gun battle which was instigated by LTTE as a diversion from their plan to attack the Colombo port,<sup>119</sup> 7 civilians were killed, 44 injured and 7000 fled their homes. In this scenario, the proportionality principle as laid down by Customary IHL was violated as the concrete and direct military advantage was not proportionate to the incidental loss of life and injury to civilians<sup>120</sup>. This principle is upheld in the San Remo Manual of 1994 pertaining to naval warfare to prevent collateral damage exceeding direct military advantage.<sup>121</sup>While Additional Protocol II does not contain

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v1\_rul\_rule20>accessed 18 February 2019, Rule 65.

114 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, Rule 111.

115 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, Rule 114.

116 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, Rule 116.

117 ICRC, Customary IHL Database < [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule20](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule20)>accessed 18 February 2019, Rule 20.

118 ICRC, Customary IHL Database < [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule15](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule15)>accessed 18 February 2019, Rule 15.

119 See <https://casebook.icrc.org/case-study/sri-lanka-naval-war-against-tamil-tigers> - Case prepared by Eleonora Heim, Master student at the Universities of Basel and Geneva, under the supervision of Professor Marco Sassòli and Ms. Yvette Issar, research assistant, both at the University of Geneva, Document B, Para 4.

120 ICRC, Customary IHL Database < [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule14](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14)>accessed 18 February 2019, Rule 14.

121 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, Rule 46(d).

an explicit reference to the principle of proportionality in attack, it has been argued that it is inherent in the principle of humanity which was explicitly made applicable to the Protocol in its preamble.<sup>122</sup> Therefore, disproportionate attacks such as these are prohibited under IHL.<sup>123</sup>

Additionally, Customary IHL Rule on advance warning requires each party to the conflict to give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit<sup>124</sup>. Even though there is no mention of all feasible precautions being taken by the parties to avoid or minimize incidental loss<sup>125</sup> there is a mention of a warning given by the LTTE to fishermen in Gulf of Mannar area. When the LTTE flotilla ordered fishermen not to set out on their tasks/ to withdraw if they were already at sea<sup>126</sup>, it qualifies as an advance warning and a precaution taken by them, when circumstances permitted it.

As the above discussion of the case study indicates, Sri Lanka is certainly an important situation to be studied and discussed with regard to the implementation of IHL at sea during the armed conflict period. But the ICRC case study could have done a more effective planning of discussion on the topic. The classification of the conflict and the difference of application for NIACs should have been presented and highlighted more. The paucity of legal regulations pertaining to naval warfare in NIACs could have been inquired into through the case study, by focusing on the complications arising in the widespread and intense confrontations at sea between the Sri Lanka Navy and Sea Tigers.

IHL at sea during a non-international armed conflict remains an area for further development in IHL. The continuing relevance of it for maritime security in Sri Lanka and the Indian ocean region is also an important area for Sri Lankan scholars to discuss. Having emerged from a 30-year conflict, Sri Lanka continues to encounter a variety of maritime security threats ranging from drug trafficking, piracy, international terrorism and super-power competition, owing to its strategic geopolitical position as an island in the Indian Ocean. Therefore, the discussion on continuing relevance of IHL at sea and its evolving face should be kept alive in the academic discourse.

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122 ICRC, Customary IHL Database < [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule14](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14)>accessed 18 February 2019, Rule 14.

123 ICRC, Customary IHL Database < [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule14](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14)>accessed 18 February 2019, Rule 14.

124 ICRC, Customary IHL Database < [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule14](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14)>accessed 18 February 2019, Rule 20; Additional Protocol I, Article 47(2) (c)- effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

125 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, Rule 46(c).

126 See <https://casebook.icrc.org/case-study/sri-lanka-naval-war-against-tamil-tigers> - Case prepared by Eleonora Heim, Master student at the Universities of Basel and Geneva, under the supervision of Professor Marco Sassòli and Ms. Yvette Issar, research assistant, both at the University of Geneva, Document B, Para 14.

### 7.3 Conclusions

This chapter introduced the history and development of humanitarian law at sea and the key documents in this area. In the first half of this chapter, the historical development of the numerous Conventions contributing to international humanitarian law applicable in naval warfare and other Codifications and Manuals were discussed. In its second half, the focus shifted from the theoretical to the practical aspect of application of humanitarian law at sea to Sri Lanka's armed conflict. Under this, the historical background and the importance of the strategic geopolitical location of Sri Lanka in the Indian Ocean was discussed. Following that, the Conventions and Statutes applicable in the said conflict and the reality of their implementation was discussed. In the final section, the ICRC Case Study on Sri Lanka's naval war against Tamil Tigers was discussed in detail with reference to legal authorities regulating non-international armed conflicts at sea.

It can be gathered from the foregoing discussion that Sri Lanka is in the position of having had experience in naval warfare relatively recently and of having to continue to play a role in maritime security in the Indian Ocean region. Even if Sri Lanka never faces another non-international armed conflict like it has with the LTTE, nor any future international armed conflict at sea, the importance of international humanitarian law knowledge and training for Sri Lanka will not fade away. In fact the key obligation of dissemination can and should be carried out during peacetime, not waiting for conflict to commence before doing so. Sri Lankan naval officers, law of the sea and IHL experts can also play a part in the training and education of regional or international actors in the area of IHL at sea, due to the wartime experiences.

Finally, reiterating the focus of this chapter, it must be highlighted that international humanitarian law at sea is a key concern to the island nation of Sri Lanka. IHL at sea is of continuing relevance to Sri Lanka. Sri Lanka must learn from the past grim experience of a civil war and adapt herself to the many new and advanced threats aiming to weaken vulnerable States of geopolitical significance like Sri Lanka, ranging from drug and human trafficking, piracy to international terrorist activities. Circulating available knowledge, creating new knowledge and improving training on IHL at sea, form a vital part of fortifying national security in order to maintain a world-class, sophisticated and updated Naval force, as Sri Lanka is poised to take on the new threats looming ahead for the Indian Ocean.



“This book is the first one of its kind published in Sri Lanka. The chapters are rich with well researched and well-reasoned arguments making the case for continued application of IHL while acknowledging the legal and practical challenges that States encounter in doing so. Having based its analysis on a case study, this book would be of immense benefit to the academic and the practitioner alike.”

**Justice Priyasath Dep**  
Former Chief Justice,  
Supreme Court of Sri Lanka