

HISTORICAL EVOLUTION OF LAWS ON ARMED CONFLICTS: PERSPECTIVES OF GENEVA CONVENTIONS

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BRIEF HISTORICAL SKETCH OF THE EVOLUTION OF MODERN LAWS OF ARMED CONFLICT:

One of the significant achievements of the international law from 19th century is the codification of laws on war.² Various factors led to their restatement and development in international conventions in the second half of the 19th century. First, the introduction of compulsory military service changed the nature of warfare. Large national armies took the place of the small professional forces which had been subject to rigid discipline. Consequently wars were fought on a different scale from before. The growing need was felt for a binding and widely accessible codification of rules governing the conduct of war.³ Second, the horrors of war, and above all, the number of victims, had greatly increased due to the enlargement of armies and the improvement of arms. This unwanted development was the decisive factor in the foundation of the Red Cross and the adoption of the Geneva Convention of 1864, which, in turn, gave the impetus to the conclusion of further conventions on the laws of war.⁴ Third, most importantly, during the second half of the 19th century, a growing conviction evolved out that there was a great need of ‘restraining the destructive force of war’.⁵

The codification of international law on armed conflicts gained momentum before the World War I. Two Hague Peace Conferences of 1899 and 1907⁶ were instrumental in compiling customary international practices that had been evolved to restrain the destructive effects of war. These conferences did best possible efforts to ‘embody principles governing the hostilities’. Some writers even argue that the Conventions adopted in the following decades were mainly intended to refine and specify the principles embodied in agreements reached in these conferences, and to adapt them to the changed contexts, especially brought about by changes in the conduct of hostilities and innovations of military technology.

The codification of international war laws in their primary condition emphasized the need of making distinction between ‘armed forces and civilians’. This was the most basic principle projected by agreements made by two conferences mentioned above. This principle was taking ground before the conference in view of ‘destructive casualties suffered by civilian population during the war’. Not only to avoid civilian as the target of military actions but also to protect civilians from war inflictions, it was

². The very first codification of what was then called ‘the laws and customs of war’ was attempted by F. Lieber, at the time of American Civil War, in 1860-63. He collected customary practices developed to restrain war, and the document was later called “Lieber Code”. This document was to serve as a field manual for the use of American Federal Troops engaged in the Civil war. But the impact of this document was far greater as most of the military manuals that were prepared around the same time in other countries, particularly in Europe, were influenced by “Lieber Code”. See on Abi-Saab, Rosemary, “Humantarian Law Internal Conflicts: The Evolution of Legal Concern” in Dellissen, Astrid J.M. and Tanja, Gerard J.1991 (eds) *Humanitarian Law of Armed Conflict Challenges Ahead*, Martinus Nijhoff Publishers, The Netherlands. PP 210-223.

³. Abhorrence of war and with it the making of plans for its abolition, prevention, or limitation is an old-age aspect of human civilization; an aspect which for the most part fitted snugly within those streams of religious and political thought classified under the heads of Utopians, Pacifism, and the Perfectibility of Human Being. Jeofferey Best writes: “It must be admitted that a particular European sub-set of plans for the establishment of a peaceful international order -from Dante and Marsilius of Padua through Dubois, Cruce, Sully, Penn, Saint-Pierre, and Rousseau to Kant- have often been and still often are presented as heartening precedents of some particular value, demonstrating, it may be supposed, that the 20th century’s endeavors in this direction have more solid foundations than simply utopian aspiration. See on Best, Jeofferey, “The Restraint of War in Historical and Philosophical Perspective” in Dellissen, Astrid J.M. and Tanja, Gerard J.1991 (eds) *Humanitarian Law of Armed Conflict Challenges Ahead*, Martinus Nijhoff Publishers, The Netherlands. P. 7.

⁴. Schindler, Dietrich and Toman, Jiri (eds), 1988. *The Laws of Armed Conflict*, 3rd ed., Martinus Nijhoff Publishers, The Netherlands, p.VII.

⁵. See at Preface to the Oxford Manual of the Institute of International Law, 1880.

⁶. These conferences were known as peace conference. These two conferences made the first steps to control war. The land war regulations introduced by these conferences were landmark of humanitarian law. However, they seriously failed in issues of disarmament issues. Supranote 2 at p. 19

considered to adopt a principle that the ‘civilian population must be separated from war activities’. **The Declaration of St. Petersburg of 1868**⁷ was the first document to ‘specifically highlight this principle’. It stated that “the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy”. This declaration outlined that persons not engaged in war or who have ceased to take part in hostilities may not be the object of attack.

Equally important principle evolved during this period was that the means of warfare and the rights belligerents to adopt such means of injuring the enemy were not unlimited. Article 12 of the Brussels Declaration of 1874; Article 4 of the Oxford Manual 1880; and Article 22 of Hague Regulations of 1899 and 1907 expressly restrained the warring parties to employ arms, projectiles or materials of a nature to cause unnecessary sufferings.⁸

The pace of codification of international war laws following the World War I was reduced while the inadequacies of regulations provided by these instruments had been fully noticed. It was viewed that the revision of existing instruments would undermine the confidence on the League of Nations. As a matter of fact, no other instruments except Geneva Convention were revised; the Geneva Convention was revised in 1929. In this period two new instruments had been added, namely the Protocols on the Prohibition of Poisonous Gases and of Bacteriological Methods (Geneva Protocol of 1925, No. 13) and the Protocol on Submarine Warfare (London Protocol of 1936, No. 74). Attempts had been made to codify laws on air warfare and the protection of civilians against modern means of warfare remained unsuccessful. In near future of these failures, the World War II broke out. The war-bound development of international situation right after the World War I made nations skeptical to generously agree to ‘adopt means of restraining war and conducted related with it’.

Even after the end of World War II, the neglect to codify international law on armed conflict continued. While the Charter of the United Nations unequivocally condemned war and defined the war of aggression as a crime against international peace and humanity, attempts to revise existing standards adopted by the laws on war did not take place in a promising way. When in 1949, the International Law Commission of the United Nations, at its first session, selected the topics for codification the majority of the members of the Commission opposed the idea. It considered that if the Commission, at the very beginning of its works, did choose to take this study, the public might take the action as an instance of lack of confidence in the effectiveness of the means at the disposal of the United Nations for peace.⁹

In the same year, however, on the initiative of the International Committee of Red Cross, the Geneva Conventions had been revised and an additional Convention relative to the protection of civilian persons in the time of war was adopted. In 1954, the Convention for the Protection of the Cultural Property in the Event of Armed Conflict was adopted on initiative of UNESCO. The Hague Conventions of 1899 and 1907, however, remained unchanged. This created a very unusual situation. Three sets of international laws, with discrepancies in many ways and on many issues, existed, namely the Revised Versions of Geneva Conventions, the Convention on Cultural Property and two Outdated Hague Conventions.

7. The main business of this Declaration was the prohibition, for the first such time, of a weapon considered to cause unnecessary or superfluous sufferings. It introduced that business however by a rehearsal of certain principles, which were understood to be declaratory of customary laws and which in fact embody the principle of discrimination between combatants and non-combatants. See on Supranote 2 at p. 17

8. Supranote 3 at p. VIII

9. See at the “Report of the International Law Commission to the General Assembly, *Yearbook of the International Law Commission, 1949*, p. 281, No. 18.

Nevertheless, the Geneva Conventions together a substantive framework of the laws on war, and their significance was gradually realized. These were as follows:

1. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, signed at Geneva, 12 August 1949.
2. Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Signed at Geneva, 12 August 1949.
3. Convention (III) Relative to the Treatment of Prisoners of War, Signed at Geneva, 12 August 1949.
4. Convention (IV) Relative to the Protection of Civilian Persons in the War, Signed at Geneva, 12 August 1949.

The course of further development in the laws on war had been intensified by the armed conflicts Vietnam, Middle East and Nigeria. The atrocities and casualties witnessed in these armed conflicts had been unprecedented, and the sufferings faced by the civilian population were shocking. The human civilization had one more time been terrified by wars. These events, as a matter of fact, generated tremendous pressure for the application of the Geneva Conventions to the combatants. The United Nations thus took initiatives in collaboration with the International Committee of Red cross to improve the condition of applicability of the international laws on war. The International Conference on Human Rights in Teheran, in 1968, organized by UN General Assembly provided an incentive, which adopted a resolution on “Human Rights in Armed Conflict” (No. 30). It declared that:

“The Provisions of the Hague Conventions of 1899 and 1907 were intended to be only the first step in the provision of a code prohibiting or limiting the use of certain methods of warfare and that they were adopted at a time when the present means and methods of warfare did not exist”.

The Human Rights Conference realized that the proportionality of the human rights violation in the armed conflict was higher, and the consequences were far cruel and atrocious. It was therefore necessary to rethink on laws on war in the light of human rights jurisprudence. The outdated conventions had been seen ineffective and inadequate to respond to the existing degree of threat to human rights posed by modern weaponry and sophistication of war methods. This realization provided a strong ground to see ‘efficient and adequate application of Geneva Conventions’ to restrain the armed conflicts.

The UN General Assembly in the same year adopted Resolution (XXIII- No 13) in which it confirmed some of the basic principles of the law of armed conflict. The UN increasingly realized that there was a great need of devising other appropriate international legal instruments to ensure the better protection of civilians, prisoners, and combatants in all armed conflicts and the prohibition of and limitation of the use of certain methods and means of warfare. The most remarkable aspect of this development is that it linked the development of law of armed conflict with the international protection of human rights with which it had until then had not connection.¹⁰ Later the International Conference of Red Cross took initiative to complete the codification of international humanitarian law. In these two conferences held in 1971 and 1972, two draft protocols additional to the Geneva Conventions had been prepared. A Diplomatic Conference convened by the Swiss Federal Council in Geneva from 1974 to 1977 adopted these two Additional Protocols which mark the latest achievements in the development of the laws of the armed conflict (NOs. 53 and 54).

These two protocols made the following achievements:

¹⁰. Supranote 3, at p. IX

Protocol I, 1977

- a. Adopted adequate provisions for the protection of civilian population against effects of hostilities.
- b. The basic principles adopted by Hague Conventions of 1899 and 1907 on the conduct of hostilities are reaffirmed and progressively revised.
- c. The status of guerilla fighters is defined.

Protocol II, 1977

- a. Adopted elaborate rules on non-international conflicts. This improvement was made in the light of inadequacy of minimum rules embodied in Article 3 common to the Geneva Conventions of 1949, which proved inadequate in view of great number of internal conflicts and the magnitude of humanitarian problems.

In 1980, the UN supplemented to these two additional protocols by the Convention on Prohibitions or Restrictions on the use of certain conventional weapons (No. 20). The problem of execution however continued. The violation of principles adopted by protocols continued as the magnitude of internal conflicts continued. Many states failed to ratify the protocols and thus their scope of execution remained limited.¹¹ Impunity for violation of Protocols' provisions is phenomenal in many countries that are ridden by international conflicts. Nepal is an example, which is posited first at the list countries committing extrajudicial killings and disappearances of detainees.¹²

The most remarkable achievement to end the impunity and oblige the State parties to respect humanitarian laws is the 'adoption of Rome Statute of International Criminal Court', which provides jurisdiction against criminals who commit crime against humanity and peace. This legal instrument provides an international mechanism for trial of offenders. The scope of execution of protocols is this strengthened.

CAN WAR BE RESTRAINT?

One most serious historical study on issue of war laws "entitled *Disarmament Illusion*", while enunciating the truth of 1920s disarmament conferences, states: "all disarmament conferences are armament conferences".¹³ This statement remains largely valid. The armed conflict laws are largely illusory; at least they are either easily interpreted in favor of violators or disregarded with impunity. Human beings' faith or confidence on such laws is yet to be formed. Often the aggression is defined as 'defense', and weapons termed defensive if one possesses or is planning to possess, and offensive if other does. International law instruments on armed conflict thus pose a serious challenge of violation by those who have powers to do and avoid sanctions.¹⁴ It is hard to predict that 'the scourge of war can be restrained as long as there are powers with technological strength to develop weaponry of mass killings, and these powers have a dream of becoming the 'world police', if not empire.

¹¹ . Nepal has ratified four Geneva Conventions but not additional protocols. Right after the *Janadolan* (II), serious efforts had been made by Initiatives of NGOs, and the House of Representatives urged the Government to initiate process for ratification. However, the Government has not yet taken steps towards ratification.

¹² . For detail see, Sangroula, Yubaraj, 2005. *Concepts and Evolution of Human Rights: Nepalese Perspectives*, Kathmandu School of Law, pp. 153-207.

¹³ . See at Angell, N. 1910, *The Great Illusion*.

¹⁴ . Supranote 2 at p. 4

However, human civilization with its optimum intelligence potential can widen the scope of 'humanitarianizing the¹⁵ armed conflict laws'. It is why the armed conflict law is re-clothed as international humanitarian law. As the modern armed conflict law attempts to reconcile the principles of military necessity and humanitarian concerns, it in fact generates a series of ambiguities and confusions. While the notion is largely an outcome of Europe-based philosophy of war, the oriental notion of war philosophy is largely ignored. In the Sanskrit epic *Mahabharat* (the Great War), one can find a number of oriental war control norms. In one of its verse, it described that 'a King should never do such injury to his foes as would rankle in the latter's heart'. The following conduct of hostilities were widely established in the east many hundred years before, which show much the society was conscious to control or restrain the war:¹⁶

- A cart-warrior should fight a cart warrior,
- One on horse should fight one on horse,
- Elephant riders must fight with elephant riders,
- One on foot must fight with a foot soldiers,
- No war should be continued before sunrise and after sunset.
- No attack should be performed from back side, or without a clear warning given.
- After sunset, once the fights stops, fighters engaged in the conflict may visit each other.

The concept of war and control of it co-exist, and one is as older as other. The idea of controlling and retraining war has survived and is alive and well in the world today, although by no means as alive and well as it was one or two centuries ago.

Skepticism on plans of eliminating or limiting wars is generated by the changed contexts. Larger segments of philosophers and writers cast doubt on potential of international law to succeed in control or restrain wars based on the experience of the past. The cost of failure of attempts in the past is grave to human civilization. But the circumstances in which those attempts had been made were so different from those of 20th century that the war was virtually recognized as a right of the nation. One nation could easily imagine of a plan to cause extinction of other. The present world however understands the value of co-existence. The rapid breaking of racial boundaries is bringing human population of the world into ¹⁷ a 'global race'. Even the past believed that war could be restrained and rules of law could be respected. This provides an 'unbroken stream of relevance of faith on possibility of restraining war'. During the 19th and 20 century, the human civilization has seen more optimistic opportunities in this regard. Pro-peace activism in these centuries have developed a number of concepts such as disarmament, demilitarization, neutrality, zone of peace, non-violent resolution of disputes, international judicial machinery for resolution of disputes, and most importantly the illegality o war. These concepts are capable of restraining the conduct of hostilities, and limiting the scope of war.

¹⁵ . Ibid, at p. 5.

¹⁶ . Armour, W.S, 1922. *Custom of Warfare in Ancient India*, 8 Transactions of Grotius Society 81.

¹⁷ . War both in the east and west was emphasized as an instrument gaining superiority to others. In Hindu philosophy, was had been described as a means salvation. It was believed that War gave a heroic death, and anyone who died during the war would obtain 'immortality' and a place in the God's home. This pro-war philosophy inspired people engage in war and fight it with all possible extremities. For more information in this regard see at Epics of *Mahabharata and Bhagvat Geeta*.

DETAILS OF PROVISIONS OF GENEVA CONVENTIONS

- a. **Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field**¹⁸: This convention represents the latest version of the Geneva Convention on the wounded and sick after those adopted in 1864, 1906 and 1929. The improvement made in this latest version is found especially in relation to the rights and duties of medical personnel and chaplains falling into hands of enemy. This Convention provides that such persons should be repatriated immediately. The major provisions enshrined by the Convention are as follows:
- The Convention is mandatory to high contracting parties (States) as it provides that they are obliged to respect and ensure respect it in all circumstances (Article 1).
 - This Convention introduces minimum rules to be observed by warring parties in a conflict of non-international character. Interestingly, this convention makes the internal conflict as a subject matter of international law. The Convention in Article 3 embodies the following minimum rules for observance:
 - 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, should be treated humanly, without any adverse distinction on the ground of race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, acts like violence to life and person, taking hostages, outrages upon personal dignity and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court are prohibited.

The wounded and sick are to be provided care.

- The Convention recognizes privilege of International Committee of Red Cross or any other humanitarian organization undertake protection of wounded and sick, medical personnel and priests. It provides that the combating parties must not make any obstacles in such humanitarian works (Article 9).
- Wounded or sick members of the armed forces and other persons, such as medical doctors, priests should be treated humanly and cared for by the party to the conflict. While providing protection and humanly treatment and care, no discrimination based on religion, sex, etc. should be committed. The parties in the conflict must refrain from any attempts upon their lives, or violence to their persons. As it is stated, such acts are strictly prohibited. In particular, such wounded and sick should not be murdered or exterminated, subjected to torture or to biological experiments. They should be provided medical care, and should not left in a condition exposing them to infection (Article 12).

¹⁸. This Convention appeared as an improvement on the Geneva Conventions adopted in 1864, 1906 and 1929. The fundamental principles as well as the organization of issues in chapters remained unchanged, only with an exception of the new introductory chapter on general provisions. Changes were made especially in Chapter IV (personnel). As per it, the medical personnel and chaplains falling in the hands of enemy were to be immediately repatriated. Application of the protections and security provided by the Convention in the non-international conflict was the major achievement. In addition, its attempt to link up laws on armed conflict with human rights protection is equally significant achievement. These two improvements have brought the laws of armed conflicts with ambit of mainstream international law with human rights context. The Convention was adopted by Plenipotentiaries of the Government represented at the Diplomatic Conference held at Geneva from 21 April to 12 August 1949, for the purpose of revising the Geneva Convention for the relief of the Wounded and Sick in Armies in the field of 27 July 1929. However, there had been several objections made by the United States.

- The protection, medical assistance or care and security provided by this convention are available, *inter alia*, to the following categories of the wounded and sick members (Article 13):
 - Members of the armed forces or militias or volunteer corps of a party to the conflict, which collectively form such armed force,
 - Members of the militias or volunteer corps, including those of organized resistance movements, belonging to the party to conflict in and out of territory of occupation.
 - Member of the regular armed force who profess allegiance to a government or an authority not recognized by the detaining power,
 - Members who accompany the armed force without actually being members thereof, such civil members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for welfare of the armed force,
 - Inhabitants of non-occupied territory, who on the approach of the enemy, spontaneously take arms to resist the invading forces, without having had time to form themselves into a regular army units.
- Article 45 of the Convention requires the party to conflict, acting through commander in-Chief, must ensure the detailed execution of the articles of this Convention. Article 46 reinforces the obligation of conflicting party restraining from any act of reprisals against the wounded, sick, personnel, building or equipment protected by this convention.

This convention is basically concerned with protection and security of wounded, sick and non-combatant members of the armed forces engaged in conflict. A few provisions discussed above have made hard attempts to limit the scope of war in terms of its cruelties and harms to humanity. Several provisions of the Convention that provide a space for neutral organizations a privilege to engage in collection of, and provide medical treatment and care to wounded and sick provides a sound basis for development of the humanitarian laws. By prohibiting reprisals and inflictions, particularly the murder or extermination and torture of wounded and sick, this Convention has linked the laws on wars with human rights jurisprudence.

- b. **Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea:** This Convention replaced Hague (X) of 1907. This Convention too adopts principles similar to that of Convention (I). Similar to Article 3 of the Convention (I), the present Convention has adopted the principle of applicability in a conflict with non-international character, i.e. the conflict occurring in the territory of one of the High Contracting Parties. While USA had several reservations in this regard, Article 3 of the Convention provided a number of protections to members of armed force engaged in non-international conflict. These protections are similar to that provided by Article 3 of the Convention (I).

This Convention is targeted to wounded and sick and shipwrecked members. Article 4 provides:

“In case of hostilities between land and naval forces of Parties to the conflict, the provisions of the present Convention shall apply only forces on board ship”. Forces put ashore shall immediately become subject to the provisions of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949”.

Obviously, the present Convention is mainly concerned with the protection, security and medical treatment of the members of naval armed force, and is applicable only to those who still are on the abroad.¹⁹ Once they are rescued to the land, they are not governed by this Convention. According to Article 12, the members of wounded, sick or shipwreck should be treated humanly and cared for by the Parties to the conflict. On scope of application to members of armed force and other persons, this Convention has applied similar principles to that of Article 13 of Convention (I). This convention has made special provisions with regard to the protection of Hospital Ships. These provisions are as follows:

- Military hospital ships, that is to say, ships built or equipped by the Powers especially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them, may in no circumstances be attacked or captured; but shall at all times be respected and protected, on condition that their names and descriptions have been notified to the Parties to the conflict ten days before the ships are engaged (Article 22).
- Hospital ships utilized by National Red Cross Societies, by officially recognized relief societies or by private persons shall have the same protection as military hospital ships and shall be exempt from capture, on the condition that they have placed themselves under the control of one parties to the conflict, which previous consent of their own governments and with the authorization of the Party to the conflict concerned , so far as the provisions of Articles 22 concerning notification have been given complied with (Article 25).

Like Convention (I), this convention is framed in the line of humanitarian laws and as such maintains a close nexus with human rights jurisprudence.

- c. **Convention (III) Relative to the Treatment of Prisoners of War:** The present Convention replaced the Prisoners of War Convention of 1929. The adoption of this Convention was necessitated by urgency of giving certain regulations a more explicit form and thus to avoid misinterpretation. One of its spectacular features is that it broadened the categories of persons entitled to prisoner of war status in the line of provisions made by the Convention (I) and Convention (II). These two conventions have broadened the categories of persons obtaining the protection during the conflict.²⁰ One more fundamental achievement of this Convention is that it defined the conditions of captivity in more precise terms, especially with regard to the labor of prisoners of war, their financial resources, the relief they receive and the judicial proceedings instituted against them. The Convention establishes a basic principle that prisoners of war should be released and repatriated without delay after the cessation of active hostilities. The Convention (III) has more spectacularly linked the laws of armed conflict with human rights. The prisoners of war have been brought to the purview of human rights instruments in terms of treatment. This has been a major achievement in the development of laws of armed conflict. The most important provisions of the Convention are summarized as follows:

- Conflict of non-international conflict has been made a subject matter of international law, and as such 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,

¹⁹ . According to Article 12 of the Convention, members of the armed force who are at sea and are victims of injuries of the shipwreck are beneficiaries of this Convention. The term shipwreck is understood to mean 'shipwreck' from any cause and includes forced landing at sea by or from aircraft.

²⁰ . Article 3 of both the Convention (I) and Convention (II) provide protection to wounded, sick and other persons engaged in conflict of non-international character. Obviously, the status of prisoner of war is applicable both in the internal and international conflicts. The Convention (III) has taken care of this new development.

wounds, detention, or any other cause should be treated humanly without any adverse distinction (Article 3.1).

- Prisoners of war, in the sense of present Convention, are persons belonging to one of the following categories, who have fallen into the power of enemy. Such persons include members of armed force as well as militias or volunteer crops forming part of such armed force; members of other militias and members of other volunteer crops, including those of organized resistance movements who are being commanded by a person responsible for his subordinates, who are having a fixed distinctive sign recognizable at a distance and are carrying arms openly and conducting operation in accordance with laws and customs of war. Similarly, members of regular armed force who profess allegiance to a government or an authority not recognized by the detaining power, persons who accompany the armed force such as civilian members of armed force, crews, pilots and inhabitants of non-occupied territory are also within the scope of definition of prisoners of war (Article 4A).
- Prisoners of war may in no circumstance renounce in part or in entirety the rights secured to them by the present Convention, and by special agreements referred to in the Convention (Article 7).
- Prisoners of war are in the hands of the enemy Power, but not of the individual or military units who have captured them. Irrespective of the individual responsibilities that may exist, the detaining power is responsible for the treatment given to them (Article 12).²¹
- Prisoners of war must at all times be humanly treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited and will be regarded as serious breach of the present Convention. Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public custody (Article 13).
- Prisoners of war are entitled in all circumstance to respect for their persons and their honor. Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favorable at that granted to men. Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture (Article 14).
- Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, failing this, equivalent information. Neither physical or mental torture, nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment or any kind (Article 17).
- Upon outbreak of hostilities, the Parties to the conflict shall communicate to another the titles and ranks of all the persons mentioned in the Article 4 of the present Convention, in order to ensure equality of treatment between prisoners of equivalent ranks (Article 43).
- No prisoners of war may be tried or sentenced for an act which is not forbidden by law of the detaining power or by international law, in force at the time the said act was committed.

²¹ . With regard to this Article, Albania, Bulgaria, Byelorussian SSR, China, Czechoslovakia, Germany (Democratic Republic of), Hungary, Korea (Democratic People's Republic of) Poland, Portugal, Romania, Ukrainian SSR, USSR (Democratic Republic of) and Yugoslavia, Australia, New Zealand, United Kingdom and United States of America had reservations.

No moral or physical coercion may be exerted on a prisoner of war in order to induce him admit himself guilty of the act of which he is accused. No prisoner of war may be convicted without having had an opportunity to present his defense and assistance of qualified advocate or counsel (Article 99)

- Prisoners of war shall be released or repatriated without delay after the cessation of active hostilities (Article 118).

Protection against violence and integrity of person is a major achievement of the convention. This convention has brought the three major dimensions of human rights jurisprudence into the laws of armed conflict. Firstly, the Convention has specifically protected prisoners of war against physical and mental for the purpose of obtaining information. Secondly, prisoners of war are protected against punishment without trial.²² Thirdly, every prisoner of war is entitled to legal defense by a qualified advocate or counsel during the judicial proceeding. These three provisions together with protection against physical integrity of the prisoners of war have subjected the conduct of hostilities to ‘regime of human rights’.

Experiences in many parts of the world indicate that widespread abuse of judicial guarantees is common in situation of internal strife. The important guarantees of due process are mostly derogable in human rights instruments, e.g. Articles 9 and 14 of Civil and Political Covenant. These guarantees are also appeared in Geneva Conventions, specifically in the case of prisoners of war. However, like human rights instruments, these guarantees under humanitarian instruments are non-derogable.²³ In this sense, the Geneva Conventions can be taken as improved versions of the human rights regime.

It is a generally recognized principle of customary law that each State has to protect the essential human rights of all those who find themselves within its jurisdiction. This basic principle is implicit in the famous *obiter dictum* of the International Court of Justice in the Barcelona Traction Case in which it classifies under the obligation *erga omnes* the rules concerning the basic rights of the human person.²⁴ This principle affirms that each and every State is under obligation to guarantee to all those within its jurisdiction the enjoyment of certain rights, irrespective of whether that State has become a party to a human rights convention. Once the State ratifies the human rights conventions, the obligation to ensure enjoyment of human rights by all persons within its jurisdiction becomes absolute, irrespective of the condition of internal strife. Most importantly, this obligation is ‘unilateral one’; the State cannot violate the human rights or choose to ignore respect to human rights on the ground that ‘person involved in rebellion’ has committed similar violations of human rights of armed force under the command of government. It is a well established principle that if the individual does not comply with the norms established by the State for general well-being he/she may be punished, but even then his/her fundamental rights have to be respected.²⁵ The armed conflict law is saturated with this modern principle of

²² . The question of judicial guarantees is directly related to the protection of the right to life. Protecting the right to life from arbitrary deprivation is the first and most important of the non-derogable rights enumerated in Article 4(2) of the Civil and Political Covenant, 1966. However, because the critically important due process guarantees stated in Article 14 of the Covenant are derogable and the protection of right to life under Article 6 is not absolute, there is considerable danger that some States may argue that in times of emergency, death sentence may be imposed following summary procedures. Hence, there is urgent need to revisit these Articles.

²³ . Meron, Th “Internal Strife” in ” in Dellissen, Astrid J.M. and Tanja, Gerard J.1991 (eds) *Humanitarian Law of Armed Conflict Challenges Ahead*, Martinus Nijhoff Publishers, The Netherlands. P. 259

²⁴ . ICJ REP. 1970, #34 at 32

²⁵ . Koojimans, P.H. “In the Shadowland between Civil War and Civil Strife” in ” in Dellissen, Astrid J.M. and Tanja, Gerard J.1991 (eds) *Humanitarian Law of Armed Conflict Challenges Ahead*, Martinus Nijhoff Publishers, The Netherlands. P. 235

State's unilateral obligation to respect and protect human rights founded on customary and treaty human rights law.

- d. **Convention (IV) Relative to the Protection of Civilian Persons in the War:** If we consider international law of armed conflicts developed before 1949, it becomes obvious that it was only concerned with combatants, not with civilians. While the Hague Regulations 1899 and 1907 provided some provisions concerning the protection of populations against the consequences of war and their protection in occupied territories, these provisions were far short to meet the need, and were also insufficient in view of dangers originating from air warfare and of the problems relating to the treatment of civilians in enemy territory and occupied territories. The law of war, after 1945, has gone through a second phase of 'reaffirmation and development' as it since then is much more concerned with the protection of 'civilians'.²⁶ The following developments were important to arrive at this stage:
- a. International Red Cross Conferences of the 1920s took the first steps towards laying down supplementary rules for the protection of civilians in time of war.
 - b. Diplomatic Conference of 1929 revised the Convention on wounded and sick and also drew up Convention on prisoners of war. This Conference recommended that studies should be made with a view to concluding a convention on the protection of civilians in enemy territory and enemy occupied territory.
 - c. A draft convention prepared by the International Committee of the Red Cross was approved by the International Committee of Red Cross in Tokyo in 1934. This draft Convention was supposed to be submitted to a diplomatic conference planned for 1940, but this was postponed on account of war.

The atrocities and cruelties suffered by civilian population during the World War II also provided a background for adoption of this Convention. The events of World War II showed the disastrous consequences of the absence of a convention for the protection of civilian in wartime. The Convention adopted in 1949 takes account of the experiences of World War II.²⁷

The idea of protecting the civilian population from war was a major breakthrough in restraining the conduct of hostilities and importing the concepts of human rights in the regime of armed conflict laws. This brought a concept in lime light that the 'the civilian population could not be the target of the war'.

The following provisions, *inter alia*, made significant achievements in development of armed conflict laws:

- The minimum rules regulating the non-international character conflict laid down by other three Conventions have been enshrined into this Convention too.²⁸
- Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals (Article 4). However, nationals of a country not party to this Convention are deprived of this protection.

²⁶ . Reaffirmation and development were the key words adopted by the International Committee of Red Cross (ICRC) for the phase of updating of international humanitarian law which culminated in two Additional Protocols of 1977. See for further information on Supranote 2 at pp. 23-25

²⁷ . Supranote 2 at p. 495

²⁸ . This provision had been objected by USA.

- This right is irrevocable by protected persons (Article 8)
- The provisions of Part II of the Convention cover the entire population of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion, political opinion, and are intended to alleviate the sufferings caused by war (Article 13).
- Any party to the conflict may, either direct or through a neutral State or some humanitarian organization, propose to the adverse party to establish, in regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction:
 - wounded and sick combatants or non-combatants;
 - civilian persons, who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character (Article 15).
- Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack shall at all times be respected and protected by the parties to the conflict (Article 18).
- Persons regularly and solely engaged in the operation and administration of civilian hospitals shall be respected and protected (Article 2).
- Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanly treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity (Article 27).
- The presence of a protected person may not be used to render certain points or areas immune from military operations (Article 28).
- Taking of hostages is prohibited (Article 34).

How far the civilian population is benefited from this new development or is this offer of protection made by the Convention realistic? Answer is not 'sure'. The principle of 'military necessities' is what is thwarting the prospect of protection of civilian population. The doctrine of necessity permits action against 'guerillas', and obviously the civilian population can hardly benefit from it.²⁹ The 'permission to act against guerillas virtually takes the protection away from civilians. It was widely seen during the 'Alliance action against Taliban' in recent years. Carpet bombs had been widely used to weaken the Taliban, which caused a devastating suffering to civilian population.

While the issue of internal conflict is seriously addressed by the Geneva Conventions and subsequently by the Additional Protocol II, it does not mean that the classical international law was totally devoid of recognition of need to address problems of internal conflicts. Indeed, the laws of war applied to civil wars in case of recognition of belligerency; that is to say if a Government, facing rebellion on its territory, declared its willingness to apply the laws of war to the rebels. However, it was consensual, and thus the Government could not be compelled to

²⁹. Supranote 2 at p. 24

abide it. Some attempts had been made in theory to make recognition of belligerency compulsory for Government if certain conditions were fulfilled; but they did not much effect in practice. The theory of recognition of insurgency, which was developed later on, had the same purpose: imposing on governments the obligation to apply at least some of the principles of the laws of war in case internal conflicts.³⁰

The application of laws of war at internal conflict became formally established through Geneva Conventions of 1949. The issue of internal conflict had been commonly recognized by all four conventions in Article 3. Obviously, the from the perspective of internal conflict, the revision of the Geneva Convention in 1949 was a fundamental achievement as minimum legal regulations became formally applicable to the situation of internal conflicts. Nevertheless, international law jurists opine that the 1949 common Article 3 has served its purposes only in very limited sense. It looks possible only if the internal conflict is brought formally within the ambit of Geneva Convention and of humanitarian law in general.³¹ Experts and peace activist have pointed out that rising frequency of internal conflicts that occurred after 1960s has brought out more clearly the inadequacies of the content and scope of application of common Article 3. First, the frequency, intensity and duration, due mainly to the outside intervention which occurs in most cases of internal conflicts, make them increasingly similar to international wars. This situation thus clearly demands for extension of the content of the protection, particularly as concerns the status of combatants and its corollary, the status and treatment of prisoner, and as concerns the restraints on belligerents in their method of combat, in order to protect civilian population. Second, the very frequent occurrence of what is called in ICRC and humanitarian law terminology 'internal disturbances and tensions', made it necessary for those concerned with the protections of victims, to try to seek formal adoption of an extensive interpretation of the scope of application of the existing regulation, i.e. Article 3.³²

CONCLUSION:

The Geneva Conventions collectively represent an important treaty codifying and developing international humanitarian law applicable in armed conflicts. These instruments provide norms for control and restraints of war, and as such are considered helpful to protect and promote peace, and respect human rights of combatants and civilians. While enforcement of these instruments is not unproblematic and unchallengeable, these documents together provide a minimum rules to limit the scope of 'pains' of wars. Most importantly, these instruments link up human rights with armed conflicts and create absolute obligation on the part of state to 'respect and protect human rights'. This is one of the most important achievements made by the development of humanitarian law.

³⁰. Supranote 1 at p. 211

³¹. Ibid at p. 213

³². Common Article 3, according to the Geneva Conventions, is applicable 'in case for armed conflict *not of an international character* occurring *in the territory of one of High contracting Parties...*' This very vague formulation leaves ample room for interpretation, particularly of the terms 'armed' conflict and 'non-international' character: what should be nature of hostilities, should there be hostilities only between Government forces and rebel forces, and should these rebel forces exercise territorial control? What does non-international really mean in practice, what is the situation in case of foreign intervention? It is gathered from these terminologies that Article 3 has not been formulated the objective conditions of, nor the objective criteria for, its application.