

Enforcement of Humanitarian Laws and Transformation of Conflict

Associate Prof. Geeta Pathak, KSL

Introduction

It is said that human beings are the 'best creation of nature'. I feel, however, sorry to say that, we the human beings are behaving in a way the most horrible beast does. Today, the world is horrified because of severe forms of inhuman practices. No country is freed from the violence and social inequalities. Either in the time of war or in peace, a large number of people of this world are at risk. People, having no access, power and control over resources, are seen often being used and abused by the dominant groups. The dominant groups always hold the power and control over resources while people having no accessibility over resources are controlled and dominated by the dominants. In the case of women, children, physically or mentally and socio-economically handicapped people, the right to dignified life for them is hardly more than a 'myth'.

Peace is the core value of Human Rights and Humanitarian Standards that justifies Justice as ends. No war justifies human rights. Peace and justice are indivisible in this regard. Right to survival, which is associated with peace and justice, justifies the inherent quality of human rights. The question of survival, within a broad framework of human rights, does not mean only not to be killed but consists of many other underlying issues relevant to humanity, dignity and livelihood. This holistic approach of human rights, however, is seen far from being achieved. As a result, the ratio of vulnerability is seen increasing day by day especially at the time of conflict, war and other emergency situations. The history is self evident of thousands of pathetic examples of human sufferings.

Time and again, we the human beings are busy in finding the instruments and mechanisms to regulate human behavior. State is created by human being for their welfare and betterment. State in this sense, is an institution of people that has a vital role to respect, protect and fulfill the legitimate (reasonable) expectations or interests and basic rights of people. The rulers in this sense do not have alternative choice or excuse. State neither has defense for its failure to discharge the said responsibility. For violation of the rights of people, even the rulers, including the head of the state are neither excused nor immuned. The abuses of rights or atrocities committed by them are criminally dealt with. This is why the international community has adopted a numbers of standards on human rights and humanitarian laws.

Considering the individual/s as subject matter, these international tools protect right to life, dignity and worth of human values. Unlike human rights law, the humanitarian law, however, justifies the context and extents. The humanitarian laws are enforced at the time war and conflict with the framework of protection of victims, while human rights laws do exist both at the time of conflict and peace with the framework of protection and promotion of individual, including advancement and empowerment model. However, there are still some limitations in enjoyment of human rights. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) is an obvious example where there is provision for derogating some human rights at the time of state in emergency especially the one instigated by the state of armed conflict, natural calamities and any other reasons mentioned therein.

The major objective of this paper is to explore the situation of development of humanitarian standards with a human face, their basic features, implementation mechanisms and internalization process. This paper mainly concentrates on the humanization of humanitarian law, a process driven to a large extent by human rights and the principles of humanity. It has tried to show how the law of war has been changing and acquiring a more humane face in terms of fostering of accountability; and innovations in the formation, formulation, and interpretation of rules. These trends are manifested in both the substance and the language of the law. Indeed,

the increasing substitution of "international humanitarian law" for terms such as "law of war" and "law of armed conflict" reflects the influence of the human rights movement. The term "international humanitarian law" initially referred to the 1949 Geneva Conventions and their two additional Protocols, it is now increasingly used to comprise and signify the entire law relating to, and applicable in, the armed conflict situation. This development is an evidence of the growing concept that the humanitarian and human rights laws are interrelated and complementary to each other in the context and situation of armed conflict, and thus they should not be considered as overlapping to each other or creating a regime of parallel standards.

In this regard, the first part of this paper highlights on the background, including some historical cases that contributed to the development of humanitarian law. I have also examined the evolution of thresholds of applicability of humanitarian law and the influence of human rights on crimes against humanity. With respect to the enforcement of humanitarian laws, the paper follows a legalistic approach in dealing with internalization process and practices of International Humanitarian laws and jurisprudence at domestic spheres. The internalization process includes the assessment of constitutional and legal framework. In so far, I have discussed the instrumental commitment of some countries towards humanitarian laws, including principles and jurisprudence.

The second part of the paper discusses the scope, ways and approaches of international humanitarian laws in transformation of conflict. Focusing the given situation of human insecurity in the region, this part focuses how the academic institutions, can contribute in enforcement of Humanitarian laws and find best approaches in the context of conflict transformation.

Part 1

1. Development of Humanitarian Laws:

In 1474, *Peter von Hagenbach*, governor of the Austrian town, was put on trial for committing war crimes for what today would be described as crimes against humanity. This is the first war crimes trial recorded in Western history. Von Hagenbach, who acted under the instructions of his master, Charles of Burgandy, in seeking to subjugate Breisach, was accused of engaging in acts of extreme brutality: murder, rape, and other atrocities. The accused's defense of superior orders did not avail him, and a court of twenty-eight judges convicted with sentenced to death.¹ This case contributed in the development of principles that no one is immuned from "superior's order". This jurisprudence, however, was not followed by many countries. We can see the historical fact where in many instances the superior's order being justified with the traditional concept of hierarchical administration in state affaires as a normal course.

1.1. Contribution of Nuremberg and Tokyo Tribunals

The international humanitarian law is, in fact, seen existed in modern structure only after World War II, when the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East² (here in after referred as Nuremberg and Tokyo Tribunals) were established by the Allied Powers to prosecute German and Japanese war criminals. The Nuremberg and Tokyo trials were the first modern application of international humanitarian law as there had been multiple trials brought against individuals charged for war crimes. The case of General Yamashita, who was in fact not involved directly, however, punished under the

¹. George Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 465 no.10 (1968) (quoting John Knebel Capellani, *Basil Diary 1473-1476*).

². See London Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945. The London Charter was signed by France, United Kingdom of Great Britain, and the Union of Socialist Soviet Republics. It subsequently won the support of 19 other governments. The charter for the International Military Tribunal for the Far East was subsequently issued by United States General Douglas McArthur.

command responsibility for killing, rape and other forms of crimes under the international criminal law mentioned in the charter of the Tokyo Tribunal.³

The original charges against the Nazis fell on three categories of crimes for which the defeated Germans would be called to account. The first category was the crime of aggressive war. The Second category was war crimes--crimes against the laws or customs of war. This was more traditional, as international law had already recognized limits on the ability of nations to conduct war.⁴ These crimes have since been codified in the Hague and Geneva Conventions governing the treatment of civilians and prisoners during the course of international conflict. In fact, the idea of war crimes has an ancient lineage. This is why, the international humanitarian law, traditionally, is known as the laws of war. The third category of crimes were crimes against humanity. The crimes that are against individuals for racial, religious, or political reasons where Nazis were charged for killing millions of Jews and other ethnic groups.

The Nuremberg trial also convicted for the conspiracy on any of the three substantive charges mentioned above. These three counts were incorporated into the London Charter. Furthermore, the Nuremberg Tribunal developed the following principles that are the fundamental guiding norms for international criminal.⁵

Principle I:

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II

The fact that international law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI

The crimes hereinafter set out are punishable as crimes under international law:

³ Kelly dawn Askin, 'war Crimes Against Women', (Kluwar Law International; 1997) p, 261.

See MICHAEL WALZER, JUST AND UNJUST WARS 44-48 (2d ed. 1992) (Cited at Lanham, Maryland: University Press of America, 1999. Pp. v, 1580 (vol. 2) Reviewed by Henry T. King, Jr., (Georgetown Law Journal, August, 2000, (88 Geo. L.J. 2421)

⁵ See, Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950 at www.icrc.org

(a) *Crimes against peace:*

(i) *Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;*

(ii) *Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).*

(b) *War crimes:*

Violations of the laws or customs of war include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) *Crimes against humanity:*

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

Since the Nuremberg and Tokyo Tribunals were established by the victorious powers of World War II, the precedents laid down by these tribunals are not seen followed by many countries. The trials are criticized by many authors of humanitarian laws that they were not set up by the global consensus and thus lacked to prosecute independently. The Nuremberg judgment drew political fire from Senator Robert A. Taft, a powerful politician and presidential candidate. Taft condemned the Nuremberg judgment as *ex post facto* law that is inconsistent with the notion of criminal justice system. Moreover, Nuremberg was borne of the "spirit of vengeance" and that "the hanging of the eleven men convicted will be a blot on the American record, which we shall long regret." Taft stated that "by clothing policy in the forms of legal procedures we may discredit the whole idea of justice in Europe for years to come."⁶

Nevertheless, the trial at Nuremberg has become more than a mere historical event. The trial ignited a revolution in modern international humanitarian law, and it dramatically changed the relationship between individuals and national governments. At least the principles recognized and reaffirmed by the tribunal need to be viewed contributory in the development of the ICC in many extents.

1.2. Contribution of International Criminal Tribunals for Rwanda and Former Yugoslavia

The Rwanda and Yugoslavia Tribunals, by contrast, are the first international criminal tribunals established by the UN Security Council. The International Criminal Tribunal for the Former Yugoslavia (ICTY)⁷ at Hague, Netherlands. The Security Council subsequently established the International Criminal Tribunal for Rwanda (ICTR) at Arusha, Tanzania⁸. As the UN ad hoc

⁶ . See Henry T. King, **Nuremberg** to Rome: A Critical Review of the Recent U.N. Treaty Negotiations at Rome in Light of the Vision of Justice Robert H. Jackson, Address at Case Western Reserve University School of Law (Nov. 11, 1998).

⁷ . See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute].

⁸ . See S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

international criminal tribunals were formed by international community, unlike the Nuremberg and Tokyo tribunals, these two tribunals got international political recognition. The jurisprudence of the Hague Tribunal for the former Yugoslavia (ICTY) and the Tribunal for Rwanda affords a wealth of material showing how criminal tribunals applying humanitarian law in conjunction with human rights law and recognized principles of justice. In considering questions such as the definition of torture under human rights instruments and customary law, the ad hoc criminal tribunals have adopted human rights methodologies. For example, in the case of Akayesu,⁹ the ICTR observed "Rape as torture" finding a close nexus with the elements of Torture under Article 1 of the UN Convention on Torture.¹⁰

The case of Drazen Erdemovic¹¹, is the first case of the ICTY, who had confessed to killing somewhere between seventy and one hundred unarmed Muslims in a mass execution as a member of the Bosnian Serb army in July 1995. He was the first defendant convicted by the said Tribunal. On March 5, 1998 the ICTY sentenced Drazen Erdemovic to five years imprisonment.¹² As this is the first individual to be condemned by a modern war crimes tribunal. The time for determining detention issues is now. The legacy of international criminal law may well depend upon it. The authority of the ICC requires such cases to be considered in the days to come.

Despite the international recognition and the precedent setting verdicts, these tribunals are also not freed from the criticism. There had been lots of debate on the issue of state sovereignty raised by Rwanda in the context of jurisdictional and functional mandate of ICTR.¹³ The human rights institutions, organizations and activists also identify a major weakness of the UN mandate limiting the jurisdiction of tribunals within the framework of crime control model and lacking adequate remedy to victims. Nevertheless, these tribunals continued to exert broad influence on both the development of international humanitarian law and its humanization. As a result, the international community finally realized the importance of full and complete justice to victims and thus recognized some substantive provisions in the Rome Statute for International Criminal Court. The Rome Statute has also made an attempt to patch up the past precedents that accounted the ex post facto laws inconsistent with the criminal justice system.

1.3. International Criminal Court: A Complementary International Mechanism

⁹. See Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment by Trial Chamber I, para. 634 (Sept. 2, 1998). The Chamber recalled, inter alia, that Hirota, the former Foreign Minister of Japan, was convicted at Tokyo for crimes committed during the rape of Nanking.

¹⁰ See generally, Pathak Sangroula Geeta, *Defining rape as Torture: Contribution of the International Criminal Tribunals*, KSL Journal, Vol.2. (Kathmandu School of Law, (2004)

10. See U.N. War Crimes Court Hands Down First Sentence, Agence France Press, Nov. 29, 1996; see also War Criminal Jailed Over Massacre, London Evening Standard, Nov. 29, 1996, at 17 (reporting that Erdemovic is the first individual to be sentenced by an international war crimes tribunal since the Nuremberg and Tokyo trials).

¹² Unlike the World War II Tribunals at Nuremberg and Tokyo, each of which were conducted following the War in the occupied territories of the victorious Allies, the seat of the ICTY is The Hague, Netherlands - far outside the continuing Yugoslavian conflict. Further, the ICTY is not permitted to place convicted defendants in prisons located in the territory of the former Yugoslavia. The language of Article 27 of the ICTY Statute implicitly precludes imprisonment in any former Yugoslavian territory. To the extent that any ambiguity exists, however, the Secretary-General of the United Nations confirmed that Yugoslavian prisons were unacceptable given the nature of the crimes in question and the international character of the Tribunal. See John R.W.D. Jones, *The Practice Of The International Criminal Tribunals For The Former Yugoslavia And Rwanda* 116 (1997). The Tribunal has also expressed reservations about sentencing any ICTY defendant to a Yugoslavian facility. See First Judgment, *ibid* note 6, at paragraph 70 (unequivocally indicating that "the Trial Chamber shares the view of the Secretary-General that [ICTY] sentences should be served outside the territory of the former Yugoslavia ... because of the situation prevailing in that region, it would not be possible to ensure the security of the convicted person or the full respect of a decision of the International Tribunal in that regard.").

¹³. See generally Paul J. Magnarella, *Justice in Africa: Rwanda's Genocide, its Courts, and the UN Criminal Tribunal* 111-13 (2000).

The establishment of International Criminal Court is the victory of international humanitarian laws. The Rome Statute for the international criminal court adopted in 1998 came into legal force since July 1, 2002, following a tidal wave of ratifications by more than the required sixty States by 2004 -- much earlier than had been anticipated by even the most enthusiastic supporters and proponents of the Court.¹⁴

The Rome Statute 1998 enumerates war crimes, crime of aggression and the crime against humanity. There is a scope of humanitarian laws to be implemented with the principles of complementarity, including the mechanisms for universal criminal jurisdiction and the repression of grave breaches falling under the notions of customary international law. The Rome Statute also reveals the intent "to go beyond the interstate level and to reach for the level of the real beneficiaries of humanitarian protection, *i.e.* individuals and groups of individuals."¹⁵

The Tribunals- ICTR and ICTY made important contributions to the Statute of the ICC. Chief among these was its successful advocacy, taken up by several non-governmental organizations and States, for the establishment of a comprehensive system of restitutive justice in the ICC that would cater to victims of crimes under the jurisdiction of the Court, including the establishment of a trust fund for victims.¹⁶

With respect to practical operations in areas both legal, and not strictly legal, which serve as essential support functions for the legal work of an international criminal court, the ICTR is making its experience available as the process of formulating the practical operating framework of the ICC unfolds. These areas include witness support and protection, defense counsel issues, and administration and financing of the Court. The contributions of the ICTR to the establishment of a permanent framework of international criminal justice are particularly unique because the Tribunal operated in a difficult environment without adequate external support infrastructure, overcoming several obstacles in the process. A practical example is the Tribunal's witness support and protection operations, which are undertaken in a region of the world with no prior history of witness protection, and yet has been largely successful. The ICC, although located in The Hague - an advanced country with adequate infrastructure - will undertake operations on a global scale, and many of these operations, be they arrests or movements of witnesses, will take place in countries with an operating environment similar to what the ICTR and ICTY have experienced.¹⁷

2. Principal Humanitarian Instruments Protecting Victims of Armed Conflict

Protection of victims of armed conflict is the primary objective of humanitarian law. Law of humanity explains its resonance in the formation and interpretation of international humanitarian law. The four Geneva Conventions 1949¹⁸ and the Additional Protocols, 1977¹⁹ are landmark in this regard. All four Geneva Conventions are categorized as follows:

- 1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

¹⁴. As of 25th May 2004, 94 countries have ratified the Rome Statute.

¹⁵. Theodor Meron, *The Humanization of Humanitarian Law*, *The American Society of International Law*, *The American Journal International Law*, April, 2000, 94 A.J.I.L. 239

¹⁶. Article 75 of the Rome Statute provides for reparations for victims through restitution, compensation and rehabilitation, while Article 79 provides for the establishment of a Trust Fund for victims for these purposes.

¹⁷. See the Statement of the ICTR Registrar to the Preparatory Committee on the Establishment of an International Criminal Court, which met in New York from March 16 - April 3, 1998 at www.ictr.org

8. Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949 *entry into force* 21 October 1950.

¹⁹. Adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts *entry into force* 7 December 1979, in accordance with Article 95

- 2) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
- 3) Geneva Convention relative to the Treatment of Prisoners of War
- 4) Geneva Convention relative to the Protection of Civilian Persons in Time of War

The following Additional protocols further specified the nature of Armed Conflict:

- Protocol Additional to the Geneva Conventions of and relating to the Protection of Victims of International Armed Conflicts (Protocol I)
- Protocol Additional to the Geneva Conventions of and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

Apart from the Conventions, The Diplomatic Conference held in Geneva, 12 August 1949 also issued some very important resolutions for the interpretation and application of the Geneva Conventions. The diplomatic conference issued eleven resolutions focusing the dispute resolutions mechanism, settlement of procedures and the relief actions. The resolution also expanded the role of ICRC to prepare a model agreement and take all necessary steps in time of peace to have medical personnel duly provided with the badges and identity cards prescribed in Article 40 of the Convention.

The Conference also wished to affirm before all nations:

*"that, its work having been inspired solely by humanitarian aims, its earnest hope is that, in the future, Governments may never have to apply the Geneva Conventions for the Protection of War Victims; that its strongest desire is that the Powers, great and small, may always reach a friendly settlement of their differences through cooperation and understanding between nations, so that peace shall reign on earth for ever".*²⁰

3. Contribution of Human Rights Laws in Instrumental Development and Enforcement of Humanitarian laws

There is a great contribution of the Universal Declaration of Human Rights and human rights treaties in subsequent development of the humanitarian laws. The 1907 Hague Convention No. IV set forth a few rules on the protection of civilians in occupied territory, but of the fifteen articles in the attached Regulations under the rubric "Military Authority over the Territory of the Hostile State," only three relate to the physical integrity of civilian persons. The other provisions deal essentially with the protection of property. The Fourth Geneva Convention establishes a new balance between the rights of the occupant and the rights of the population of the occupied country. The Fourth Geneva Convention spells out in detail the protection to be afforded to civilians--aliens, the general population, vulnerable groups such as children and women, and internees--in occupied territories and so on. Article 76, 77 of the Additional Protocol I of the Geneva Convention that enumerate further protection to women and children, are worth to mention. The international community under human rights framework has further declared a Declaration on the Protection of Women and Children in Emergency and Armed Conflict. In this way, the human rights laws are seen as complementary reference or guidelines in enforcement of humanitarian laws.

The common Article 3 of all four Geneva Conventions is a landmark provision of humanitarian law which reads as follows:

²⁰ See Resolution NO. 8, **The Resolutions of the Diplomatic Conference held in Geneva, 12 August 1949**

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions":

1. *Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.*

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

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

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Article 3, common to all four Geneva Conventions, is a landmark provision that enumerates the principles of right to life, humanity, dignity, equal treatment, and fair criminal trial. Furthermore, the ICRC as an impartial body has been explicitly recognized by the Convention. Despite these guarantees, article 3 has been criticized that it lacked covering the whole range of armed conflict and the nature of atrocities. However, the international criminal tribunals and the domestic courts have observed this with constructive interpretation and protected the victims of armed conflict in many instances. This provision further enhanced the notion of human rights. In matters such as the prohibition of torture and cruel, inhuman, or degrading treatment and punishment, arbitrary arrest and detention, and discrimination, as well as the guarantees of due process of law, human rights have exercised vast influence on instruments of international humanitarian law, producing a large measure of parallelism between norms, and a growing measure of convergence in their personal and territorial applicability.

Both Human rights and humanitarian laws justify the principles of humanity, dignity and equality as customary international law. In addition to Article 3, the inclusion in the United Nations Charter of the promotion of human rights as a basic purpose of the Organization, the recognition of crimes against humanity as an international crime, the conclusion of the 1948 Genocide Convention, and the regulation by a multilateral treaty of non-international armed conflicts for the first time in 1949--all stemmed from the influence of human rights law on humanitarian law.

The issues enumerated in Article 3 uphold the principle of jus cogens- a peremptory norm, having quality of customary international law that justifies the doctrine of universal jurisdiction. However, the language used in this Article is too complex and vague. Article 3 refers only to cases of conflict

not of an international character. But, if these provisions represent (as they do) the minimum applicable in a non-international conflict, that minimum must a fortiori be applicable in an international conflict. That is the guiding principle common to all the Geneva Conventions.

Article 3 should be applied as widely as possible. This also demands respect for certain rules, which were already recognized as essential in all civilized countries, and enacted in the municipal law of the States in question, long before the Convention was signed. What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to inflict torture and mutilations and to take hostages? However useful, therefore, the various conditions stated above may be, they are not indispensable, since no Government can object to respecting, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact respects daily, under its own laws, even when dealing with common criminals.

Out of all four Geneva Conventions, the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War is landmark achievement in international humanitarian regime.

The main object of the Convention is to protect a strictly defined category of civilians from arbitrary action on the part of the enemy, and not from the dangers due to the military operations themselves. In the same way, the Diplomatic Conference declared that a draft Resolution forbidding the use of weapons of mass destruction was not receivable.

Article 2 of the convention enumerates the provision for the application of the convention. paragraph 1 of the Convention deals about Armed Conflict involving the application of the convention. By its general character, this paragraph deprives belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations. There is no need for a formal declaration of war, or for recognition of the existence of a state of war, as preliminaries to the application of the Convention. The occurrence of de facto hostilities is sufficient. However, it remains to ascertain what is meant by "armed conflict". The substitution of this much more general expression for the word "war" was deliberate. It is possible to argue almost endlessly about the legal definition of "war". A State which uses arms to commit a hostile act against another State can always maintain that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression "armed conflict" makes such arguments less easy. Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims. The Convention only provides for the case of one of the Parties denying the existence of a state of war. What would the position be, it may be wondered, if both the Parties to an armed conflict were to deny the existence of a state of war. Even in that event it would not appear that they could, by tacit agreement, prevent the Conventions from applying. It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.²¹

4. Role of ICRC for the Effective Enforcement of Humanitarian Laws²²

Apart from providing humanitarian assistance, ICRC has contributed in the development of Humanitarian laws and the principle guidelines for the effective enforcement of IHL both at international and national level. ICRC is seriously concerned to protect civilians and the people at risk during armed conflict. For example, in 1993 the Final Declaration of the International Conference for the Protection of War Victims declared alarm at "the marked increase in acts of sexual violence directed notably against women and children" and reiterated "that such acts constitute grave breaches of international humanitarian law."

²¹ Commentaries on Geneva Conventions, See for more details at www.icrc.org

²² Ibid

Moreover, the Twenty-sixth International Conference of the Red Cross and Red Crescent adopted by consensus a resolution dealing separately with sexual violence against women. The resolution condemned sexual violence, reaffirmed that rape in armed conflict is a war crime, and highlighted the importance of enforcement of the relevant provisions as well as the need to train those involved in enforcement processes.

The ICRC has consistently taken the view that the "tragic plight of women affected by armed conflict does not primarily result from a lack of humanitarian rules to protect them, but rather from a failure to coherently interpret and implement existing rules." Its principal response to the Beijing Platform for Action has been to reiterate the need for respect and implementation of the existing rules. However, there is also a growing awareness by the organization that women experience armed conflict in distinctive ways and, moreover, some indication of a preparedness to investigate whether IHL is indeed adequate to address the problems of women in armed conflict. In 1998 the ICRC commenced an in-house study of the situation of women in armed conflict to assess the adequacy of IHL and its own humanitarian response to their needs. Although a welcome initiative, the level of resources devoted to this project is minimal compared to other ICRC studies such as the examination commenced in 1998 of the customary international law status of conventional provisions of IHL. The role of ICRC can also be viewed in expanding the scope of humanitarian laws and "legislative" efforts regarding internal strife.

5. Internalization of Humanitarian laws:

The internalization of humanitarian laws begins with the instrumental commitment followed by the ratification status. The recent status of ratification of major international humanitarian laws and armed conflict recorded by ICRC provides the following information:

Instruments	Number of state parties
1. Geneva Convention I-IV, 1949	191
2. Additional protocol I for Geneva Convention, 1977	161
3. Additional protocol II for Geneva Convention, 1977	156
4. Opt. CRC on armed conflict, 2000	72
5. ICC Statute, 1998	94
6. Hague Convention on protection of Cultural property, 1954	109
7. „, Protocol, 1954	88
8. „, „, 1999	21
9. Convention on Environmental Modification (ENMOD), 1976	69

Among the SAARC countries, all seven countries are the parties to the Four Geneva Conventions 1949.²³

5.1. Enforcement of humanitarian laws: National Case Law

• The issue of Retrospective Act

Polyukhovich v. Commonwealth, the High Court of Australia, 14 August 1991²⁴
 Ivan Polyukovich was charged with war crimes in respect of acts allegedly committed by him during World War II. He initiated a challenge to the constitutional validity of the *War Crimes Act*, on the basis that the Act is retrospective. The court held that the

²³ ibid

²⁴ *Polyukhovich v. The Commonwealth of Australia and Another* (1991), 172 Commonwealth Law Reports 501 F.C. 91/026

Commonwealth Constitution gives the Commonwealth the power to enact laws to implement obligations under treaties to which Australia is a party regardless of the content of the treaty. The Commonwealth Parliament also has the power (under the external affairs power) to legislate to implement customary international law. The Act is not retrospective in operation because it only criminalizes acts which were war crimes under international law as well as “ordinary” crimes under Australian law at the time they were committed; While there is no obligation at customary international law to prosecute war criminals, there is a right to exercise universal jurisdiction. The *War Crimes Act* further facilitates the exercise of this right.

The court also observing the material drawn from international agreements and UNGA resolutions held that *"international law recognises a State to have universal jurisdiction to try suspected war criminals whether or not there is any international concern that the State should do so"*: Justice Brennan, pp. 562-3.

- **Limitations of the Humanitarian laws**

In 13th July 1994, the Supreme Court of Austria observed the case of Oberster Gerichtsh, a Bosnian Serb who had been arrested in Austria for having allegedly committed genocide and other crimes (murder and arson) in the former Yugoslavia challenged the legality of his detention before the Regional Supreme Court (Linz). On 1 June 1994, this court ruled that he was lawfully detained and asserted the competence of Austrian jurisdictions in connection with the acts he had allegedly committed. The suspect subsequently lodged an appeal before the Supreme Court, arguing mainly, at this stage, that Austria was not competent to try him for the acts concerned and that such acts were in any case not punishable under the law applicable to him at the time, including the law of war. The Supreme Court rejected these arguments and confirmed the decision of the lower jurisdiction.

The Supreme Court then indicated that the acts allegedly committed were indeed punishable under the criminal law in force in the place where they had been committed (Bosnia-Herzegovina) and that they could not be justified under the law of war (the Geneva Conventions and their Protocols and the Hague Conventions).

The court further added that extradition was impossible – not because of the nature of the alleged crimes, but for practical reasons alone. On this last point, the Supreme Court referred to *Art. 7 of the UN Convention on Genocide, which states that "[g]enocide and the other acts enumerated in article III [conspiracy, incitement and attempt to commit genocide, and complicity in genocide] shall not be considered as political crimes for the purpose of extradition"*.

As for the appellant's concern that he might be tried three times for the same alleged acts (in Austria, in Bosnia-Herzegovina and by the International Criminal Tribunal for the former Yugoslavia), the Supreme Court replied by referring to Art. 10 of the Statute of the International Criminal Tribunal for the former Yugoslavia (*Non-bis-in-idem*) and to Art. 96 of the Yugoslav criminal code, which states that sentences served in a foreign country for the same acts should be taken into account by the national judge.

For all these reasons, the Supreme Court dismissed this appeal based on the claim that a fundamental right (personal liberty) had been violated.

- **Recognition of laws of humanity**

The War Council sentenced Sergeant W. to 5 years of imprisonment for having wilfully murdered a civilian woman while in service in Stanleyville (now Kisangani) in the

Democratic Republic of Congo).²⁵ The War Council found him guilty of violating not only the Belgian and Congolese penal codes but also the laws and customs of war and the laws of humanity. The War Council dismissed the defence of orders from superiors.

- **Granting extradition**²⁶

A request was presented by the Belgian government to Rwandan authorities to extradite a Rwandan national residing in Cameroon for his participation in the killing of 10 Belgian blue-helmet paratroopers and in the Rwanda genocide of 1994. A Belgian investigating magistrate had issued an international warrant for the arrest of the suspect.

The extradition request was challenged on the ground that the acts had not been perpetrated on Belgian territory and that an international tribunal had been especially established for the trial of persons involved in the Rwandan genocide. The Court granted the extradition request under Extradition Act 1964.

Part 2

1. Transformation of Conflict:

In the case of international wars, the conventional aim is seen as fostering the political interests of a state while in the case of civil wars, the aim is seen as changing the policies and the nature of the state. In this context, David Keen, a very renowned author, rightly observes that "in order to think sensibly about peace, we need to think clearly about what war actually is. rather than simply being concerned with 'winning', many of those helping to shape violence during a conflict have other aim, aims which often foster a limited but very enduring violence."²⁷ The question of peace requires considering a number of questions regarding its term, targeted people or group and their interest on the issues.

The jurisprudence of application of the humanitarian laws in the context of internal conflicts has now steadily developed. The countries in our region, Sri-Lanka and Nepal which are seriously affected by the internal conflicts, have shown interests to implement humanitarian laws, though commitments and honesty of the conflicting parties can be seriously questioned. In these both countries, the conflicting parties have agreed to follow the norms of Geneva Conventions during ceasefire of the conflicts. It is believed that the honest and committed implementation of the humanitarian laws is taken as an important 'instrument of the transformation of the conflict'. This statement is justified by the following arguments:

1. The resolution of internal conflict by 'guns' is impossible. The history shows that none of the states have been able to resolve the internal conflicts by use of violence. The political solution is only means for the resolution of the internal conflict, in which the dialogue is used to transform the crisis.
2. The dialogue between the conflicting parties is dependent on 'trust' and 'observance of rules' governing the relations of conflicting parties. The Geneva Conventions are the only tools to provide this instrument. Hence, humanitarian laws are tool for transformation of the conflict.
3. The transformation of the conflict is dependent on building of trust between the conflicting parties. The trust is built by such parties being committed to the rules of humanitarian laws as described above.

²⁵ Brussels War Council, 18 May 1966, partially reported in the *Revue Juridique du Congo*, 1970, p. 236, see at www.icrc.org

²⁶ Case No. 433/COR, Court of Appeal, 15 March 1996, see at www.icrc.org

²⁷ David Keen " War and Peace: What's the Difference? at managing Armed Conflicts in the 21st Century, editors, Adekeye Adebajo and Chandralekha Sriram (International Peace Academy, Newyork, 2001) p, 1-22

1.1. Dynamics of Conflict and Transformation: Nepal's Case Study.²⁸

Nepal Communist Party (Maoist) officially declared its so-called "People's War" on 12 February 1996. The main reason cited for need of such war was the "dissatisfaction with corruption and lack of development under parliamentary democracy". The ultimate goal declared by it is to overthrow the current political system and the existing structure of the government, and then to establish a "people's democratic republic" with Marxist economic structure. The Maoist Party had been one of the constituent groups of the Left Front during 1990's people movement, which collaborated with Nepal Congress Party to restore democracy; multi-party system along with constitutional monarchy. It participated in the first general elections under the banner of "People's United Front" (Samyukta Janamorcha), ideologically headed by Mr. Baburam Bhattarai, a publicly known left intellectual in Nepal. The front had been successful to secure 9 members in the House of Representatives in the first general elections in 1992.

There have been number of immediate and mediate dynamics that have played roles of causative factors for the rise of the Maoist Insurgency. Some left intellectuals and ideologues believe that the CPN Maoist's manifesto to resort to war adopted by its conference was the main cause for the rise of the insurgency. This statement is however not true. The ideology itself cannot be taken as a cause. The ideology is an orientation for desired "end result". The implementation of the ideology in action needs development of the vision and strategies, which, in turn, require positive atmosphere. The causes and factors therefore indicate to those dynamics, which help to create a positive atmosphere for the implementation of the ideology through vision and strategies. In this backdrop, the following dynamics can be identified as the causative factors for the rapid rise of the insurgency:

These dynamics may be classified as Immediate and mediate dynamics.

Immediate Dynamics:

Split of "United Front": As an incept ional prelude to the current insurgency, the "Front" got splitted into two factions, one of them being led by Mr. Bhattarai and his colleagues and the other by Mr. Niranjana Baidhya, an old communist veteran and the founder member of the Nepalese Communist Movement. In the split of the front, the majority of workers and members remained with Mr. Bhattarai's group. However, the Election Commission denied recognizing their "legal status" as a mainstream part. The faction led by Baidhya was officially recognized as the mainstream faction. The faction which failed to obtain legal status of mainstream party maintained its stronghold in the mid western hilly districts, which gave majority of members for the "Front" it in the past. The failure of the State's institution to recognize the political strength and viability of the then "*Samyukta Janamorcha*" led by Bhattarai was the most immediate cause for pushing it to the jungle.

Failure to Recognize the *Samyukta Janamorcha* as a Political Force by the Government:

CPN Maoist, before it officially launched the war against the establishment on January 1, 1995, submitted a roster of 38 demands to the government then headed by Mr. Man Mohan Adhikari, the first communist government in Nepal. However, Mr. Adhikari's government collapsed following the judgment of the Supreme Court, which unlike in the past, declared unconstitutionality of Mr. Adhikari's recommendation to the monarch for dissolution of the House of Representatives. A coalition Government of Nepali Congress, Rastriya Prajatantra Party

²⁸ I would like to acknowledge Mr. Yubaraj Sangroula, Director of KSL, for the cooperation in the development of Dynamics for the conflict transformation.

and Nepal Sadvawana Party, under the leadership of Sher Bahadur Deuba, was formed immediately to succeed Mr. Adhikari. The Maoist Party, then adding two additional demands, submitted a roster of 40 demands to the coalition government.

In the memorandum submitted to the government as well as the statements made to the public, the Maoist Party warned that it would undertake an armed struggle against the State if its demands were not met by February 17, 1996. The government failed to pay attention to these demands, and never took the challenge seriously. Deuba, very possibly, took the threat of struggle as everyday political propaganda, and a few days after receiving demands went on previously scheduled visit to India. The Front went underground and engaged in insurgent activities. The Front was dissolved in February/March 2000.²⁹ The dissolution of the Front was the complete end of their open political activities. During the reign of Deuba, Nepal saw a beginning of an unprecedented degeneration of the parliamentary ethical values. The frequency of horse trading for making and making and unmaking of the government accompanied by unprecedented episodes of corruption terribly shocked the people. The consequent mounting dissatisfaction of the people to the political corruption and inefficiency of the political parties constituted an immediate factor for the formation of the atmosphere for the insurgency.

Failure to Develop an Integrative Political Civil Participation in Governance: Nepal, despite being a home for peoples speaking dozens of languages, having various ethnic connections, casts, professions, cultures, religions and topographical settings, is ruled by a family and caste aristocratic group for all parts of its history. The representation of the vast majority of the population in political and civil affairs is ignored for centuries. The share of linguistic groups and nationalities in the government and civil affairs is still in a bleak condition. The orthodox Hinduism has been consistently reinforced as a basis of the societal structure in Nepal, so as to create a monolithic and systematically structured societal hierarchy of a certain class or caste of the population, the Brahmin and Chettris in particular. The economic, social and cultural, linguistic domination by this class or caste and social isolation of a majority population is the rich foundation for acceleration of the Maoist insurgency in Nepal. This is a very important mediate dynamics of the current insurgency.

Foreign Influence: India dominates the politics and economy of Nepal in many ways. A number of politicians, including Maoist leaders, received their education in India. In general, Nepalese people are deeply influenced by Indian politics and culture. Anti-Indian sentiment frequently forms part of the nationalist political platform and has occasionally erupted into violent protests on streets of Nepal.³⁰ The following issues of Indo-Nepal relations and realities often create source of problems in Nepal:

- The crisis between India and Pakistan is often spilled over in Nepal, in the shape of their proxy war. India often alleges that Nepal has been a “hatching place” for Pakistani terrorist activities against India. The closing of borders is a long demand of Nepalese nationalists, and Maoists have reiterated the demand.
- Chinese diplomacy in Nepal is mainly related with Tibetan issue. The security of frontiers along the Nepal border is a main concern of the Chinese Government. For Chinese the major political parties of Nepal, including UML, are friendlier to India, and as such it cannot rely on them. The stability of Nepal is necessary for China for stability in Tibet. The King-led Panchayat system was much more comfortable for Chinese in matters of Tibet. With advent of democracy in Nepal, Tibetan refugees in Nepal had been able to show up their heads, and their communication with Dharmasala in India is quite frequent and easier. The multi-party democracy in Nepal is therefore not a desired choice for Chinese.

²⁹ . New Era, ‘An Overview of Recent Armed Conflict in Nepal’, Kathmandu, Nepal, at 1, (2001).

³⁰ . *Id.*, at 36.

- Negative or positive situations in these two countries largely influence the politics and diplomatic affairs of Nepal. Over the last six years, there has been a deep competition between major political parties to win the support of the Indian government.

This competition has brought even the communists in close relation with Indian government. Even the Maoists have avowed for a SAARC federation, the objective and scope being dubious.

American interest in Nepal is mainly related with China and India. It has very little to do with Nepal's politics itself. Thus the American interest to Nepal is largely dependent on its policy to China and India.³¹ The memorandum signed between the Government of Nepal and the United States to cooperate in matters of suppressing the terrorism is a reflective of the American policy, which emphasizes the 'coercive means of resolution'.

Japan and Scandinavia are major donors for the development efforts of Nepal. Nepalese people view these countries more comfortable in both the finance and political diplomacy compared to others in matters for their having no particular vested interests to Nepal. Particularly, Scandinavia is taken positively from the following points of view:

- Scandinavia has a tradition of democracy with constitutional monarchy, and has no trouble between the people and the monarchy.
- Scandinavia had never been a colonial power in the past, and therefore their cultural set up is not founded on colonial superiority or domination.
- Scandinavia has been consistently and constantly involved in economic development of Nepal, the infrastructure investment in particular being the area of focus.
- Scandinavia is a rich market for tourism of Nepal, without risk of politico-cultural invasion.

The transformation of conflict calls for the recognition of the socio-economic dynamism of the problem. It is therefore suggested that the transformation process must consider following dynamics of the problem:

- a socio-political problem is an outcome of long standing conflict of interests between constituent members or groups in the society; and as such the solution lies on agreement of the both parties
- no party in the socio-political crisis or problem is fully wrong, the issue of injustice and wrong is relative
- no socio-political problem is satisfied in root ignoring the valid interest of each of the party; attempt to resolve problem by means of coercion is called suppression of the problem in its currently apparent form but to let it emerge in other form subsequently
- A harmonious resolution of the problem is sustainable because it also develops confidence of disputing parties to each other.

These dynamics in the dialogue between the government and Maoist had been fully ignored in both occasions of dialogue.

The following dynamics of the problem should therefore be minutely examined and precisely apprehended before preparing groundwork for the dialogue in order to address the problem meaningfully:

³¹ . *Ibid.*

Mediate Dynamics:

Mediate dynamics are those causative factors which provide a source of injustice or grounds for suppression of valid interests of certain group or section of population. Some reflections are made in this regard already. Mediate dynamics are those factors that provide a rich background for the emergence and growth of the problem. They are not concrete and specific in nature. Their existence is independent of the problem. So it is not necessary that the resolution of the problem somehow will address these problems too. Mediate dynamics are product of a longer period of timeframe, and as such require closer look and systematic and well thought plan to address effectively. The achievement made thus will gradually sooth the intensity of the problem. A few important mediate dynamics have been mentioned as follows:

- ***Imbalance of Power sharing between feudal dominant class and marginalized and economically, socially and culturally subordinated groups:*** The state machinery has been predominantly controlled by a group of elites within dominant groups, e.g. Brahmin, Chettri and Newar. Although, there has been imbalance of power sharing within these groups also, collectively they constitute the ruling elites of Nepal. The imbalance in power sharing is therefore a root cause of the widespread poverty, marginalization in participation in political and public affairs and vulnerability of extinction of indigenous culture, language and traditions.
- ***Disguised protection of feudal societal structure:*** Traditionally, the Nepalese societal structure has been founded on concept 'caste hierarchy'. The caste hierarchy is pervasive in political, social, economical and cultural set up of Nepalese life, which is the most pernicious obstacle of developing a 'mainstream of national life'. The concept of hierarchy is a feudal value system. This feudal value system is reflected in many walks of life:
 - women's identity is defined in terms of sex and marital status
 - dalits' identity is defined in terms of their profession, and integrity of profession is first degraded in order to obtain systemic degradation of people carrying out the profession
 - cultural values of indigenous people who do not profess Hinduism are recognized not as equally important and civilized like values practiced by so-called higher caste groups
 - the person's identity in ordinary situation is dependent on his/her official position, e.g. a police constable is supposedly in higher position to an independent professional as the former has "*sindhur*" of *raja* or government obtained; this is why a government officer has different passport than the ordinary citizen, one has to obtain a government official signed the documents for passport- all these kind of practices show that a government official is ruler and thus has higher status, eventually meaning that government is not instrument of service delivery but a rule.

These practices have been preserved disguisedly in laws, structure of bureaucracy, awards and honors given away and so on.

- ***Imbalance in distribution of national resources:*** A major complaint in connection with development and distribution of resources is that development activities and allocation funds are concentrated in the capital city and few other major towns either by design, or by default. It is widely perceived that even the resources meant for rural development tend to revert back to officials, merchants or contractors in the cities or district headquarters'

through kickbacks, leakage and patronage.³² The concern of rulers for the development of remote and rural parts of the country is lacking manifestly. This trend is obvious in the following pattern of the development of the country:

- The school system is privatized without vision and plan, and the private schools are poorly managed. State funded schools are subjected to competition with private schools where no children of ordinary people can afford obtaining education. Surprisingly, students from both types of schools have been put in similar type of examination. A large mass of students from public schools is therefore unable to cross the barriers, and become fortunate for further education and development. The education and development has therefore been a monopoly of the elites and neo-elites in cities. The education system is thus an important instrument of sustaining the so-called hierarchical structure of the Nepalese society. Poor, indigenous, tribal and women population is manifestly affected by this discriminatory policy of the government.
 - The tax system is not proportional on earning. A poor farmer is subjected to pay land tax, house tax, and many other forms of payments. So that a farmer who cultivates for the sake subsistence is taxed for his/her living. Governments officials however obtain receive exemption on tax on slab. The tax imposed on comfort and pleasure and tax imposed on basic need are not proportional.
 - The justice system is founded on “concept of revenue earning” source. A person having his/her right violated has to pay “court fee” for his/her concern entertained by the court. Even the access to Supreme Court for restitution of fundamental rights is taxed.
 - The privileges granted by the government are constructed based on the status. Hence, a medical allowance, insurance and provident fund of employees are determined not by the need of persons but his/her status. A medical allowance to be granted to the secretary and minister is many times larger than that of lower staff.
 - The state is not interested in peaceful resolution of disputes at personal level, which collectively emerge as a collective interest of people. State’s funding for institution of peaceful resolution of problems (judicial system) is ridiculous. The State is fully apathetic towards investment on justice system.
- ***Lack of preparedness and motivation towards devolution of power at local level:*** Decentralization as a rhetoric has been matter of talk for over five decades in Nepal. The latest move in this regard is the promulgation of the Local Autonomous Governance Act. Although, the Act, in its preamble, stipulates to devolve governance power at the grassroots level it is not true in reality. Article 3 of the Constitution of the Kingdom of Nepal, 1990, has vested the sovereign power of the nation on people; however, the reality is opposite.

The Act definitely has made attempt to decentralize some power of governance at local level. The concept of decentralization, however, does not meet the requirements of autonomy of governance. The concept of decentralization vest ownership of the power on central government, and as such the local governance institutions have to function as local functionaries of the central government. Whereas the concept of autonomy vest ownership of governance power at local institutions, and as such they truly represent the people at their respective levels.

Ruling echelon of Nepal has consistently but disguisedly resisted the autonomy of local institutions. The present Act is no exception. The following provisions of the Act not only

³² New ERA, A draft proposal for discussion, 26th October, (2002).

discard the values of autonomy of local institutions but also degrade the sovereign rights of people:

- The power of local institutions concerning tax, employment, local development and welfare of people is subjected to direct control of the central government through Regulations. No local institution can introduce a tax system to generate revenues for the development and welfare of the people.
- Central government recruits the employees the principal and required number of staff at the local institutions, who effectively controls the purse and decision making process.
- Central government directly controls the election system and electoral process of the local governments
- Central government maintains direct control over many affairs and as such there has been a dual system being implemented
- The authority of the local governance institutions is subjected to direct control of district administration, the local unit of the central authority. The central authority's local unit treat local governance units as opposition institutions or unnecessary troubles.

These characteristics prevent effective participation of people at the governance system. Local governance system is the instrument of securing participation of indigenous people in the governance system, but in a condition that the local governance is fully controlled by the central governance system, the participation of indigenous and marginalized people at governance is nothing but a myth. This system has blocked the process of emergence of the leadership of the indigenous and marginalized people, eventually helping to maintain the consistent monopoly of elites in the politics of Nepal. Moreover, the lack of devolution of the power at the local level has virtually mystified the sovereignty of the people.

These dynamics, along with others, are directly responsible for

- failure of the government to alleviate the condition of poverty
- consistent backwardness of many nationalities, dalits and women in political participation and decision making process
- increased level of corruption in all aspects of governance with impunity
- increased dominance of elites and neo-elites in governance system through criminalization of politics
- Discrimination in distribution of opportunity and resources; for instance deplorable situation of public school
- politicization of bureaucracy and its deplorable inefficiency
- failure in investment of justice system, which is a mechanism for peaceful resolution of conflicts in lack of proper functioning of which is necessarily resulted in violence
- failure to secure the nation's future; e.g. rampant unemployment created by lack of development vision of rulers, nepotism and abuse of power in matters of recruitment and resultant brain-drain , lack of fairness in decision making process, insensibleness in matters of diplomacy and security of the nation.

These factors are collectively responsible for emergence of insurgency. The insurgency is therefore not created by the “guns at hands of rebels”, but by “characteristics of governance for last 50 years and consequences resulted therefrom”. These consequences which constitute factors for insurgency are manifestly associated with systemic discrimination the State is practicing for century.

Required Interventions:

The solution lies in “reforms of politics” through accommodation of diversified ideological interests and justifiable adjustment of ethnic, linguistic and local interests in the political mainstream of the country. How these concerns can be addressed is still a question. The nation has discussed the problem in plenty, but neither the government nor the civil society has made attempt to discuss on “possible, appropriate and accommodative” model of the political reform that is a ‘prelude of actions” to solution of the present crisis. A few postulates, however, are present on which the ‘prospective model has to rest on’.

Sustainable and meaningful consolidation of democracy: The democracy, meaning safeguards of each person’s liberty and dignity as prescribed by international conventions, is fundamental issue of concern. No solution is feasible for sustainable solution of the problem undermining the democratic system along with institutions for democratic governance. This safeguard calls for the consolidation of the following:

- transparency and accountability of governance institutions
- supremacy of law
- multi-party system
- constitutional monarchy
- wider representation oriented electoral process
- devolution of power to grassroots
- Independence of judiciary and anti-corruption mechanisms.

These are fundamental elements of democratic governance, and thus they need to be promoted, strengthened and strictly protected. No compromise should be allowed to prevail against these elements.

Change in the Constitution: The popular movement of 1990 was largely unorganized in terms of achievements to attain. The movement was an outcome of failure of the *panchayat* system due to absolutism in power exercise and corruption. People wanted change, and thus had been supportive of the opposition forces (called *panchayat itar shakti*). The movement was largely spontaneous on the part of the people. The demonstrations on the streets were largely voluntary. The gradual upsurge of the people forced the Nepali Congress and left front to unite. The objective of the movement in the inception was simply to achieve radical changes in the *panchayat* system so as to allow existence of the political forces accommodated within it. However, the people’s great participation in the movement forced the political parties to think of elimination of the *panchayat* system and the restoration of the multi-party system. Subsequently, the political parties raised the issue of constitutional monarchy. The movement thus was continuously built on following the successive participation of the people and their interest to restore the democracy.

The movement ended with a tripartite consent between the Royalty, Nepali Congress and the Left Front. To address the interests of all parties in the consent, a Constitution Drafting Commission comprising representatives of all had been constituted. It made hard efforts to draft the constitution and create a balance of powers between the royalty and the people. However, the commission failed in many aspects, which has been, as discussed herein before, a major causative factor of the present crisis. Thus, the change in the constitution is indispensable. The following agenda need to be addressed by the change:

Fairness, open and true representation of people at governance: The bureaucracy in Nepal is motivated to the delivery of service to the citizens. The post and power attached thereto are "symbolic" hierarchy. Government personnel in rank and files feel no accountability towards people. The government service has been apprehended as a "status", so as to mean that the personnel are higher to people. This culture has been defined as "Thalupan" (so-called higher status). This characteristic is "symbolic of feudal" structure of the society. Few instances can be cited which have been maintained to protect "psyche" of *thalupan*:

- In the government offices, including courts, ordinary people, and villagers in particular, are treated not with respect. They are addressed, for instance, "*timi*", and a word that is used to subordinate the one.
- In government offices, in military and police in particular, junior officers and so-called lower level personnel are verbally abused while addressed by senior officers.
- In many institutions, so-called lower level personnel are not allowed to enter the cafeteria where officers and seniors are supposed to dine.
- Government officers have been exempted of income tax to a certain amount; however common farmers taxed in basic Government officers have been awarded distinct passport for special privileges in travel and custom. No person, who may have far greater contribution in the society, is allowed to such privilege, who is not a government officer.
- The higher the post, the higher the benefits in social welfare or security. Even the medical support given to the personnel is different according to the post.
- Military guards for ministers and other officials, including chief justice.
- Lower level staffs have to work as servants at houses or quarters of officers, most prevalent in police and military.
- State's vehicles are privately used by officers.
- The position of the leaders of the institution has been taken as "owner" of the institution rather than the chief accountable person.
- State's properties have been unhesitatingly used by the family members of the officers.
- Personal interference of senior officers is unhesitatingly acceptable to junior officers and personnel.
- Ordinary people obtain citizenship cards and passport not as the right of their own, but due to favor of government officers.
- Being government officer is recognized as a special class of citizens.
- Government personnel are exempted from paying income tax to a certain amount of earning but farmers are taxed on basic resource, like land.

These are very minor but very important conditions determining the class structured relations in the Nepalese society. These elements require progressive restructuring of the governance system in Nepal.

Making of Propositions and Lobbying for Dialogue: The government has to make logical framework of agenda to be agreed upon with rebels, and only then it is possible to design strategies for negotiation. Governments can have no dialogue in vacuum of issues. So far it has been the position of the government. The lobbying for the dialogue must give attention to the following concerns:

- **Formulation of Strategies:** The dialogue requires extensive works to be carried out, and such works require high level of substantive and technical expertise, which government lacks badly at current position. Designing, executing and achieving negotiation are professional works. Government can work out a framework for negotiation, but the execution of the negotiation is a work to be carried out by a group of experts under agreed framework. The government's role would be important in decision making process, but not

significant in handling of the dialogue. One of the serious failures of the past government in dialogue is directed related with this issue.

- **Involvement of the Third Party in the Dialogue** : Involvement of the third in the dialogue is important for the fairness of the process and enforcement of the accountability for the best observance of the agreement. Considering the typical situation of Nepal, the involvement of the third party must consider the following perspectives:

UN as a Third Party: The best possible option lies on UN system for facilitation of dialogue, as it does not bring any particular country's interest in. It also avoids inter-country rivalry and suspicion.

Scandinavia may be another 'best option': Scandinavia in view of the following grounds may be a choice:

- It does not have colonial background,
- Its welfare economy is appreciated even by rebels
- Countries from Scandinavia have helped Nepal from long time in infrastructure development
- Countries in Scandinavia may not have detrimental political interest in Nepal.
- Devolution of power at grassroots, State's preparedness in protection of human rights, neutrality in international politics is positive aspects.
- Scandinavia possesses a potentiality of support for post conflict rehabilitation.

Conclusion:

Institutional contribution in adoption and enforcement of IHL

For the enforcement of humanitarian norms and standards, there is a need of institutionalized moral support from the institutions working in the areas with the advanced normative and holistic approach. The academic institutions can also play a vital role in this regard. For this, first of all, a conceptual basis of humanitarian laws needs to be developed. The conceptual basis is that the humanitarian laws can not be implemented in isolation with the principles of human rights laws.

- The academic institutions with theoretical and research-oriented approach can help concerned enforcement authorities in understanding and applying the core concept and value of humanitarian norms.
- The principles of humanitarian laws need to be reviewed in the context of prevention and protection of civilians. As there is no preventive approach in the laws of war. A principle of complementarity requires states to follow all the principles in this regard.

In the context of Nepal, the peaceful resolution of the humanitarian crisis is dependent on:

- Recognition of the political character of the problem,
- Recognition of the co-existence of the diverse political ideologies in politics
- Compromise among political forces to recognize each other's existence without prejudice

These achievements are possible to attain only by building a commitment to abide by the international human rights and humanitarian norms and standards in a holistic manner.