

5. HUMAN RIGHTS AND HUMANITARIAN LAW: FROM A VICTIM'S PERSPECTIVE

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5.1 Introduction

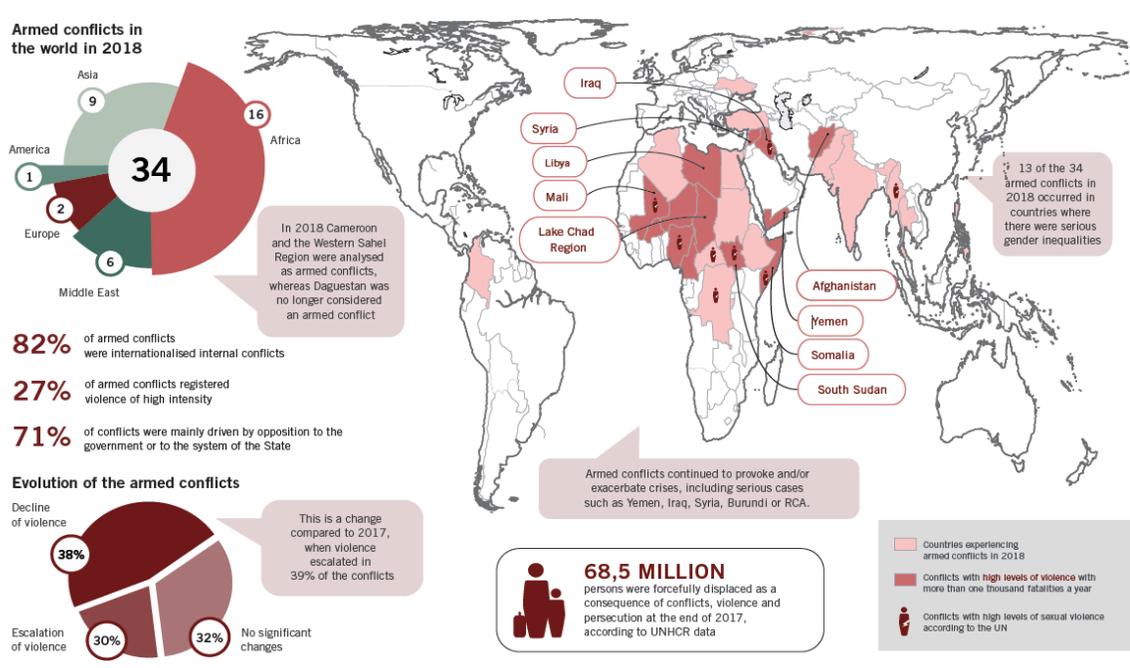


Image1 Source: Alert 2019! Report on conflicts, human rights, and peacebuilding

Available at: <https://reliefweb.int/report/world/alert-2019-report-conflicts-human-rights-and-peacebuilding>

Today's human rights violation are the causes of tomorrow's conflicts.

~*Mary Robinson*

In situations of military conflict, civil strife, lawlessness, bad governance and human rights violations, terrorists find it easier to hide, train and prepare their attacks.

~*Gijs de Vries*

The above two quotes simply explain the vicious cycle between the human rights violations and armed conflicts. Both these situations are inter-related in the matrix of cause and effect. Armed conflicts cause the breakdown of the rule of law and thus become the theatre for human rights violations like mass rapes and human trafficking, problems of child soldiers, genocides, loss of civilians' property, forced displacement of population, lack of education and employment, poor quality of life, etc. Unfortunately, the States who are protector of the human rights either facilitate or fail to protect the violations.

5.2 Victim of Armed Conflict: A Shift in the Concept

The original Geneva Convention of 1864 covered specifically those wounded in battle, excluding from the scope of protection anyone who was not a soldier, except for medical personnel tending to wounded or sick soldiers. The legal evolution of the protection of victims of armed conflict is therefore intricately linked to the changing definition of who is considered a victim of war.

The scope of this definition was expanded by the Geneva Conventions of 1906 and 1929 to include wounded, sick and shipwrecked members of the armed forces at sea, and prisoners of war, respectively. Essentially, new laws were created every time there was a realisation that the realities of war went beyond the current legal framework. For instance, it was the naval battle of Tsushima in 1905 which prompted the extension of legal protection to wounded, sick and shipwrecked members of the armed forces at sea; and the huge numbers of prisoners of war in the First World War led to improved protection for this category. It was not until 1949 and the Fourth Geneva Convention that civilians gained specific protection under international humanitarian law. With the inclusion of civilians, the overall scope of protection had effectively grown to include all people directly affected by armed conflict, regardless of whether they had at any time taken part in the fighting. For the past 65 years, all these groups have been considered

potential victims of armed conflict under international humanitarian law and hence enjoy specific rights and protection.

International humanitarian law protects those not or no longer taking part in hostilities. Defining which civilians are covered by international humanitarian law is a question of interpretation. In addition to injury or death, civilians may be directly affected by conflicts if they are displaced, their homes or livelihood destroyed, or if they suffer a significant shortage of goods and services available prior to the conflict. However, entire communities can also suffer from the demolition of infrastructure, the establishment of a war economy and the long-term effects of destroyed agricultural land and equipment and disrupted educational systems. Of course, these harmful repercussions do not disappear with a ceasefire or peace treaty. They continue to burden people and hinder societal development long after the fighting has ended.

5.3 Human Rights Violations in Contemporary Armed Conflicts

Since the World War II, non-international armed conflicts have become the norm, with emergence of non-State actors essentially involved in these conflicts. Due to the changing nature of war and evolving methods of warfare, these contemporary conflicts have caused immeasurable casualties. The asymmetry between the State and non-State groups further aggravates the repercussions. The major implication of the mushrooming non-State armed groups has caused double jeopardy to the victims of the conflict. The major problem is the issue of reciprocity and respect towards international humanitarian law by the non-State armed groups and secondly, expecting the non-State armed groups to comply to the norms of human rights law. Thus, the victims of the conflicts do not just bear the brunt of violations of international humanitarian law but also by grave breaches of human rights by the parties to conflicts and failure of States to protect them.

Armed conflict and wars have always resulted into loss of life and property. Human rights breaches have always taken place during a conflict. However, the contemporary conflicts have further aggravated the negative impact of wars on the people. Thus, it is of utmost importance to understand what kind of changes have aggravated the human rights violations.

5.3.1 Changing nature of Armed Conflict and Human Rights Violations: The fourth generation of warfare has undoubtedly made the applicability of humanitarian law difficult. However, the major impact of the changing nature of the conflict is its impact on civilians. The conflicts are less deadly compared to the conflicts of last century, with posing indirect impact on the civilians, however the conflicts today are waged among the non-State groups thereby directly impacting the civilians. Contemporary conflicts are ethnic-territorial based mobilising ethnic or religious identities, leading to homicides, genocides, massive displacement, fear, and insecurity. Also, with the ‘transnational warfare’ becoming a norm, multi-faceted human rights violations have occurred. The other main issue concerning the landscape of human rights is terrorism and violent extremism that leads to maximum fatality of civilians. With mushrooming of non-State armed groups and militia States structures have become more fragile leading to severe human rights violations. Technological advances have further raised concerns about the protection of civilians from being victimized by new wars. Thus, varied risks have increased which have aggravated the human rights violations in times of conflicts and have been discussed below.

5.3.2 Urban Warfare-high population density and vulnerability: Contemporary conflicts have a defining feature that they are fought on urban fronts in populated areas. Use of explosive weapons in open battlefields has placed civilians at high risk of indiscriminate harm. Further, high population density in cities means more civilians at harm. Moreover, narrow street that are overcrowded with high occupancy and blind corners makes it difficult for the parties to assess and anticipate harm to civilians and civilian objects thus making them more prone to be caught in crossfire or mistaken as

combatants. Further, the intermingling of civilian with combatants and proximity of civilian objects with military objects has increased the risk to civilians. Also, the interconnectedness of essential service infrastructures, such as water and power grid, makes the survival of an already suffering population difficult. These aggravated human rights violations have occurred deliberately as a result of the asymmetric nature of modern contemporary conflicts.

5.3.3 Development and Proliferation of Weapons Technology- increased risk for civilians: The increasing use of drones and unmanned aircraft by States and non-State armed groups in Libya, Syria, Yemen reinforces long-standing concerns over compliance with international humanitarian and international human rights law, accountability and transparency. As drone technology proliferates, the need to address those concerns becomes increasingly acute. The current absence of debate around the proliferating acquisition and use of armed drones leaves a policy vacuum that must be addressed immediately. It is also important to move expeditiously to address concerns over the implications of developments in lethal autonomous weapon systems. Autonomous weapons are generally considered to be systems that are enabled to select and attack a target, whether a person or an object, without human intervention, thus leading to grave human rights violations.

5.3.4 Malicious use of digital technologies- additional risk to civilians: Although, digital technologies have used for peaceful purposes that helps to connect people, share news and information, learn and take decisions, it has been used during conflicts to promote hatred and violence. In many conflict situations, social media has been used to spread disinformation, sow's divisiveness, and exacerbate violence. In fragile contexts, hate speech is amplified by digital technologies, creating opportunities for individuals, including political actors, and organized groups to prey on existing fears and grievances and spark violence. For some non-State armed groups, such as ISIL, social media has been an important means of recruitment, manipulation, and coordination. The potential

for the malicious use of digital technology also extends to cyberattacks on critical infrastructure. For example, the increased digitization and interconnectivity of the healthcare and energy sectors makes them particularly vulnerable to direct cyberattacks and to incidental harm from attacks directed elsewhere. That vulnerability is often exploited in times of crises, including the COVID-19 pandemic, during which health-care facilities in several countries have been targets of serious cyberattacks and the International Criminal Police Organization (INTERPOL) has reported a rise in ransomware attacks. WHO has faced an onslaught of cyberattacks and impersonation attempts. Similarly, cyberattacks affecting the operation of electrical and water infrastructure in situations of armed conflict could cause significant harm to civilians. Growth in global interconnectivity means that the frequency and impact of such attacks could become increasingly widespread, affecting many systems or networks at the same time. Responses to those attacks can increase the threat to civilians. The challenges of identifying the attribution and intent of cyberattacks are amplified by the challenges of clearly defining State and non-State actors in cyberspace.

5.3.5 Environmental impact of conflict and climate change- compounding civilian sufferings: Armed conflict negatively impacts environment thus leading to adverse consequences for human health. Armed conflict has a direct and significant impact on the natural environment, leading to long-term habitat destruction, direct loss of wildlife from poaching or because it becomes a food source for conflict-affected populations, over exploitation and degradation of natural resources, and increases in soil, air and water pollution. This can have detrimental effects on local populations and the environment on which they depend. For example, damage to infrastructure, such as oil installations and chemical facilities, as well as the deliberate burning of oil wells, as occurred in Iraq in 2016, can force large volumes of greenhouse gases and other airborne pollution into the atmosphere. At the same time, conflict-affected populations are especially vulnerable to the consequences of climate change. Armed conflict damages or destroys infrastructure, decreases financial stability, and has a negative impact on foreign investment or

interventions which could otherwise support adaptation.³⁸⁵ Globally, many conflicts occur in warm climate zones, where farming is a common and dominant livelihood, and which are particularly sensitive to climate shocks. According to the Office for the Coordination of Humanitarian Affairs, the world's eight worst food crises are all linked both to conflict and climate shocks. In sub-Saharan Africa, combinations of conflict, floods, droughts and other natural hazards led to a doubling of new internal displacements in just three years between 2015 and 2018.³⁸⁶ Conflicts erode institution-building and the ability of States and their populations to adapt to and plan for climate change. A better understanding of the relationship between conflict and climate change is crucial.

5.3.6 Overall degradation of standard of life: Undoubtedly war takes away the population of the conflict decades behind. People who lose their property live in sheds, children become homeless and orphans thus living a life without care and protection. People who are displaced are uprooted from their civilisation with no signs of rehabilitation in their own environment but live a life of alienation in foreign lands. This, ultimately affects the basic tenets of life, lowering the standards of living and depreciating the dignity of individuals. This ultimately make the victims less empowered and impoverished.

5.4 Conflicts and its consequence on Human Rights

The UN Secretary General's Report on Protection of Civilians in Armed Conflict that released in 2020 described 2019 as a year of suffering for the civilians. "Tens of thousands of civilians were killed, physically injured or traumatized in 2019. Millions of

³⁸⁵ Norwegian Red Cross, Report on Overlapping Vulnerabilities: The Impacts of Climate Change on Humanitarian Needs (May,2019).

³⁸⁶ Office for the Coordination of Humanitarian Affairs, Report on Global Humanitarian Overview 2020 (December 2019).

people were forced from their homes or displaced for a second, third or fourth time, their vulnerability increasing in the process. Consistent with the findings in previous years, women, and girls, in particular, were subject to appalling sexual and gender-based violence. In addition, direct or indiscriminate attacks by parties to conflict damaged and destroyed homes, schools, hospitals, markets, places of worship and essential civilian infrastructure, such as electrical and water systems.”³⁸⁷ The following consequences of human rights violations have been identified by the researcher.

5.4.1 Death/Fatality: With the latest data available, 2018 saw *seven* international armed conflicts and *fifty one* non-international armed conflicts.³⁸⁸ The data becomes more interesting when one zooms in to find out that the *fifty one* non-international armed conflicts occurred in just 23 States. However, more than 20,000 civilians were killed in 2019 as a result of attacks of conflicts in just ten countries- Afghanistan, Central African Republic, Iraq, Libya, Nigeria, Somalia, South Sudan, Syrian Arab Republic, Ukraine and Yemen. Afghanistan accounted for the largest number of recorded civilian casualties, with 10,392 civilians killed or injured by improvised explosive devices, ground engagements, air strikes or other tactics. Women and children represented 42 per cent of the civilians who were killed or injured. In the Syrian Arab Republic, hostilities resulted in the deaths of at least 2,404 civilians, including 466 women and 688 children. In Yemen, 3,217 civilians were reported to have been killed or injured, with children accounting for 25 per cent. In South Sudan, fighting between March and December 2019 led to the killing or injury of 1,405 civilians. In Somalia, 1,459 civilian casualties were recorded in 2019. The use of explosive weapons in populated areas accounted for at least 17,904 civilian casualties in 2019.³⁸⁹ For the ninth consecutive year, over 90 per cent of those killed and injured by the use of dangerous munitions in populous areas were

³⁸⁷ UN Security Council, Report of The Secretary-General on The Protection Of Civilians In Armed Conflict, S/2005/740 (28 November 2005).

³⁸⁸ Geneva Academy/ Annyssa Bella, “The War Report” 2 (2018).

³⁸⁹ Action on Armed Violence, Report on Explosive Violence in 2019 (January 2020). <https://aoav.org.uk/>

civilians.³⁹⁰ This statistic again underlines the need for parties to conflict to avoid the use of explosive weapons with wide-area effects in populated areas. Libya, for example, saw a significant increase in civilian casualties resulting from air strikes, with 409 civilians killed and injured in 2019, compared with 17 civilians the previous year. In Afghanistan, improvised explosive devices remained the leading cause of death and injury, accounting for 42 per cent of civilian casualties. The Independent International Commission of Inquiry on the Syrian Arab Republic reports that countless children have been killed by cluster munitions, thermobaric bombs, barrel bombs, improvised rocket-assisted munitions, and chemical weapons, often used against civilians and civilian objects. In those and other contexts, explosive remnants of war remain a lethal threat. In Nigeria, contamination from explosive remnants of war posed a threat to an estimated 1.5 million people in the north-east of the country.

5.4.2 Attack on Civilian Objects: However, these numbers seem to be an underestimation keeping in mind the number of conflicts and attacks that took place targeting various civilian objects. In Myanmar, for example, monasteries, schools, and camps for internally displaced persons, as well as agricultural areas, were reportedly subjected to attacks. In Libya, an air strike on an immigration detention facility in July 2019 killed at least 53 migrants and refugees and injured 87 others. Attacks by armed groups on markets, towns and commercial trucks in Nigeria also killed more than 100 civilians. In the far north of Cameroon, attacks by armed groups resulted in the destruction of 700 houses and 7 churches and the killing of more than 200 civilians. In the Syrian Arab Republic, 29 pumping stations were attacked, which affected water availability for tens of thousands of civilians across the country.

5.4.3 Sexual violence: Sexual violence is one of the major forms of human rights violations that has become common in conflict and crisis situations. Some examples of the tactics used include rape, physical attack, abduction, killing and the targeting of

³⁹⁰ Ibid.

female political leaders, whose bodies are used as weapons of humiliation. It is extremely easy for the parties in a conflict with a gun in their hand, to commit rape during wartime. Amnesty International Report³⁹¹, has stated that “rape during times of war has often been used a pre-planned and deliberate military strategy, especially in intrastate civil wars because rape can be used as a “cheap” weapon against the civilians. Rape has been used as weapon in various conflicts, notably those involving genocide or attempt of genocide, such as the conflicts in former Yugoslavia and Rwanda. First, these rapes are used to instil terror among the civilian population, with the intent to dislocate them from their property. Second, this rape strategy aims to degrade the chance of possible return by having inflicted humiliation and shame on the targeted population. These effects are strategically important for non-state actors since it is sometimes necessary for them to remove the targeted population from the land they want to control.”³⁹²

The perpetration of conflict-related sexual violence persists in many armed conflicts. In 2019, although men and boys were also victims of conflict-related sexual violence, women and girls continued to account for the vast majority of recorded victims. Patterns of conflict-related sexual violence were identified in the context of detention, displacement, and migration, during military operations, as retaliation by armed groups for perceived support for adversaries, or in order to control land, mineral resources or illicit industries. Harmful coping mechanisms, such as early and forced marriage, were reportedly used by households, primarily in refugee and displacement settings.

5.4.4 Child Soldiers: The Paris Principles issued by UNICEF defines a child associated with an armed group as: “any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but

³⁹¹ Amnesty International, *Lives blown apart: Crimes against Women in times of Conflict: Stop Violence against women* (Amnesty, London, 2002).

³⁹² Pegah Malek-Ahmadi, *Human Rights in Non-International Armed Conflicts* (2018) (Unpublished Ph.D. thesis, Columbia University).

not limited to children, boys, and girls, used as fighters, cook, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities".³⁹³

There are several reasons cited by armed groups that make recruitment of child soldiers favourable. *Firstly*, as they are economically viable and easy to maintain, child soldiers are the most suitable combatants that do not become financial burden. *Secondly*, as children are more sentimental and passionate, they can easily be manipulated to fight for emotions rather than for money or material gain. Being novice and incapable to take reasonable decision, they can be easily convinced to fight which seems to be exciting for innocent minds. *Thirdly*, as per the rules of war, States and not the non-State armed groups are held answerable for any such instance of hiring of child soldiers. Thus, as armed groups are not accountable whereas State are, States usually tend to hide the existence of child soldiers to save themselves from international scrutiny thereby promoting the practice of child soldiers.

Conflicts continued to have a devastating impact on children throughout 2019. Afghanistan, the Democratic Republic of the Congo, Mali, Somalia, the Syrian Arab Republic, Yemen, and the occupied Palestinian territory saw significant levels of grave violations against children. Tens of thousands of boys and girls were forced to take part in hostilities, including on the front lines, and were exposed to a multitude of other violations, including killing, maiming and sexual violence. A disproportionate number of children were displaced, with many becoming separated from their families and lacking access to shelter, food, and health care. Throughout the year, schools continued to be used for military purposes, exposing teachers and students to attacks. In many situations of conflict, attacks on schools included the burning of facilities, the destruction of school equipment and threats against education personnel. Such incidents underline the need for

³⁹³ UN Children's Fund (UNICEF), The Paris Principles. Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007 (February 2017).

parties to conflict to strictly comply with international humanitarian law and for States to endorse and implement the Safe Schools Declaration.

Thousands of children actually or allegedly associated with Islamic State in Iraq and the Levant (ISIL) and affiliated groups live in precarious conditions. Those children are highly vulnerable and need to be treated first and foremost as victims, with primary consideration given to the best interests of the child in determining their treatment. Under international human rights law, every child who has allegedly infringed the penal law, or who has been accused of or recognized as having done so, is to be treated in a manner keeping in mind the best interest of the child, his sense of dignity and self-worth should not be diminished. This would in turn promote respect for human rights amongst the troubled children and thus would ease the process of his reintegration into the society.

5.4.5 Displacement: Conflict forced millions of civilians from their homes in 2019, adding to the 70.8 million people who had already been displaced as a result of conflict and violence by the beginning of 2019. The majority of those people – over 41 million – were displaced in their own country. For example, almost 1 million people were newly displaced in the Democratic Republic of the Congo, 455,553 in Afghanistan and 200,000 in Nigeria. In Libya, the number of internally displaced persons almost doubled in 2019 to 343,000 because of fighting in Tripoli. In the Syrian Arab Republic, 1.8 million people were displaced in 2019. Many Syrian families have suffered multiple displacements. In Myanmar, fighting displaced 48,000 people in Rakhine State and 26,000 in Shan State. Displaced people faced acute challenges in 2019, including the threat of further violence, inadequate access to humanitarian assistance and limited prospects for durable solutions. At the same time, families and communities hosting displaced people, both in urban and in other areas, were under increasing stress.

5.4.6 Human Trafficking: Human Trafficking Search (HTS) has stated that armed conflicts and human trafficking are so much interrelated that in any region around the

world, armed conflicts are followed by human trafficking. It exists in several form, from slavery to forced or bonded labour to most common sexual exploitation and flesh trade³⁹⁴.

If one zooms into the regions that are engulfed in conflict, one would find that armed conflict makes an environment that is suitable for large scale human trafficking and human trafficking thus becomes a financial source that helps the conflict thrive for a long period time. It leads to a symbiotic relationship, a vicious circle that various armed groups like Islamic State or Boko Haram and who have no fixed source of revenue encourage and promote trafficking of women and children, the most vulnerable in a conflict setting. Apart from being used a source of money, it is also used a weapon to target the already affected civilian population.

Flesh trade has multiple uses apart from selling women and children as sex slaves. People who have lost their homes and have been displaced during conflict are also exploited through forced labour or even through forcible organ transplantation. Thus, in this way, the conflicts have been supported by the finances generated out of human trafficking.

5.4.7 Human shields: More human rights violation have come to light due to the asymmetrical nature of armed conflicts. One of such is the use of human shield, which is one of the harshest human rights violations that occur during any conflict. As often occurring in asymmetrical conflicts, human shields are usually the most feasible tool for non-State armed groups. It has often realized that, incidents of human shields are not given due highlight by the international regime despite being of common occurrence and frequently used by non-State actors. However, if that would have been done by a State, international community would respond immediately to criticize on the event. This had led to a paradoxical situation, which latently gives confidence to non-State actors whose

³⁹⁴ Human Trafficking Search, *available at:* <http://humantraffickingsearch.org/> (last visited on January 12, 2020).

actions often go unnoticed.³⁹⁵ This inconsistent response by the international regime has given a pseudo legitimacy to the practice of human shield by the non-State armed groups just on the pretext that are the weaker party in comparison to the State armed forces. This approach has led to the continuance of the practice of human shield even today³⁹⁶.

Thus, as the burden to abide by the rules of humanitarian law and abstaining from human rights violations is very low as compared to what is expected out of States, human rights violations by non-State actors have soared high, making it imperative to hold non-State actors responsible under international law.

5.5 The inter-dependence of armed conflicts and human rights violations

The relationship between human rights and armed conflicts is very complex, dynamic and multi-dimensional.³⁹⁷ It's because, human rights violations can act as causes, consequences or transformers of any conflict. They act as catalyst in the dynamics of any conflict. Thus, the patterns of human rights violations affect the conflict in several ways. This section provides an overview of the intersectionality and cross-cutting nature of human rights issues in conflict contexts.

5.5.1 Human Rights violations as causes and symptoms of violent conflict:

Although there can be no single cause leading to violence, but diversity of contexts and multiple causes, a crucial dimension of factors leading to violence is the lack of

³⁹⁵ Amnon Rubinstein, Yaniv Roznai, *'Human shields in modern armed conflicts: the need for a proportionate proportionality'*, 22 *Sandford Law and Policy Review* (1993).

³⁹⁶ Margaret T. Artz, 'A chink in the armor: how a uniform approach to proportionality analysis can end the use of human shield?' (Hein Online, 2014), p. 1448-1449, 1480

³⁹⁷ Georg E. Frerks, 'Human Rights Violations and Contemporary Violent Conflict: an Inquiry into Causes and Remedies' in Ineke Boerefijn (ed) *Human Rights and Conflict: Essays in Honour of Bas de Gaay Fortman* (Intersentia 2012) 67, 68.

satisfaction of human needs, and of protection and fulfilment of human rights.³⁹⁸ Human rights violation may not be the direct cause of propelling any conflict, but the violations can definitely affect any undercurrents of the conflict. Sometimes, failure to meet basic needs and similar human rights violation lead to violence and conflict and in other times, horizontal political and socio-economic inequalities coinciding with ethno-cultural divisions accompanied by grievances lead to conflicts.³⁹⁹ In the current scenario of conflicts, inequality, discrimination, marginalization are some important causes that fuel violence between communities. “Violations of civil and political rights are more obviously linked to conflict [...]. When populations are unsettled by long-standing inequalities in access to basic needs and political participation, government repression may trigger violent conflict.”⁴⁰⁰

Further, human rights violations can be considered as a symptom of armed conflict. In such a scenario, human rights violations may not be the direct cause of conflict but may have some resonance to the exiting undercurrents of inequality and marginalization, corruption and misgovernance, unreasonable restriction and violence by State which can be a warning to an emerging conflict. For example, as the north African uprisings attested, such violations as torture, inhumane treatment, arbitrary detention as well as violations of freedom of thought and other political freedoms, create the conditions for or accentuate systematic marginalisation and structural violence against sections of society (such as the youth in the countries where uprisings took place in 2011) that would, in turn, create grievance, dissatisfaction and frustration, resulting in the conditions that incentivise actors to resort to violence and armed conflict.⁴⁰¹

³⁹⁸ Ibid at 68.

³⁹⁹ African Commission on Human and Peoples' Rights, Addressing Human Rights Issues In Conflict Situations, 10 (2019)

⁴⁰⁰ Thoms, Oskar NT, and James Ron. “Do human rights violations cause internal conflict?” 7 *Human Rights Quarterly* 674 (2007).

⁴⁰¹ African Commission on Human and Peoples' Rights, Addressing Human Rights Issues in Conflict Situations, 10 (2019).

5.5.2 Human Rights violations as consequences of armed conflict: The primary result of any conflict is human rights violation, by not just loss of life in battlefield but also loss of family, property, lack of safety, and deprivation of basic necessities which forms the essence of human dignity. Contemporary conflicts are regarded as the major cause of civilian death and suffering, as they employ deliberate targeting of civilians as a mode of warfare. Some common human rights violations include torture and disappearances, destruction of infrastructure for socio-economic activities and social services as well as sources of livelihoods of affected populations in general, but there may also be war crimes, crimes against humanity, and even genocide.⁴⁰²

5.5.3 Human Rights violations as transformers of conflict dynamics: Human rights violations are not only causes and consequences of violent conflict, they are also “potentially transformers of conflicts and may make their already difficult resolution an even greater challenge”.⁴⁰³ Thus, it might happen that causation of a conflict would be sharing of natural resource, or territorial claims, or even ethnic and religious issues, but gradually the conflict fuses new grievances that arise due to human rights violations of one party by the other party. These kinds of violence are usually used by political leaders to polarize the citizenry and thus instigating them for inflicting violence on the other side. This us vs them divide was seen in Sudan that resulted in the deaths of over two million people and the internal displacement of four million persons out of a total national population of 38 million, fuelled resentment and protracted the conflict which only ended with the secession of South Sudan in 2011⁴⁰⁴. In addition, the abuse of natural resources by one or all sides to the conflict is also both a human rights violation and a factor which

⁴⁰² Chandra Lekha Sriram, Olga Martin-Ortega and Johanna Herman. *War, Conflict, and Human Rights: Theory and Practice 5* (Routledge, 3rd ed., 2017).

⁴⁰³ Ibid.

⁴⁰⁴ Carmen Márquez Carrasco Laura Iñigo Alvarez, “Human Rights violations in Conflict Settings”, *FRAME*, 28 (2014).

leads to the protraction of conflict, as natural resources are often used to fund and sustain conflict.

Thus, human rights violations can usually be both cause and effect of conflict. An analogy of an iceberg has been used to demonstrate human rights violations as both cause and effect of armed conflicts. The visible part or the top of the iceberg symbolizes human rights violations as symptoms, like most common violation of the basic civil and political rights that is meted by States on citizens by either using police force, enforced disappearances, intimidation or censorship. Then comes the middle of the iceberg, which is partly hidden and partly visible representing those violations that are indirect due to armed conflicts, like destruction of civilian infrastructure, schools, hospitals and houses cause displacement and affect right to life, health and education. Finally, comes the bottom of iceberg that reflects the human rights violations that are causes of a conflict, like discrimination, exclusion, etc.⁴⁰⁵

5.6 Protection of Human Rights during conflicts: Place of Human Rights in times of Non-International Armed Conflict

At first glance the law of armed conflict and human rights seems to be at poles to each other, where one promotes the protection of right to life and the other permits killing in certain circumstances. Although the high level of protection accorded to human rights in times of peace, it diminishes during the armed conflict. Further, international humanitarian law is a *lex specialis* applicable only during armed conflicts with the purpose of regulating the conduct of hostilities.

Thus, it is obvious to believe that the aims of both these regimes are distinct, however a remarkably close relationship exists between human rights and humanitarian law. It's true

⁴⁰⁵ Michelle Parlevliet, 'Rethinking Conflict Transformation from a Human Rights Perspective' 6 (Berghof research Centre, 2009).

that despite different historical origins, and different applicability, both international humanitarian law and international human rights law have a common feature, that is a shared philosophical underpinning.⁴⁰⁶ The international humanitarian law guided by principles of humanity, military necessity and proportionality provides significant number of rights and protections for persons deprived of their liberty during an armed conflict. “The laws of war are based on certain of the fundamental rights proclaimed in the Universal Declaration of Human Rights- respect for the human person, protection against torture and against cruel, inhuman or degrading punishments or treatment. Those rights derive their legal expression in the contractual agreements which Governments undertake... the Universal Declaration of Human Rights and the Geneva Conventions are both derived from one and the same ideal, which humanity pursues increasingly in spite of passions and political strife and which it must not despair of attaining- namely, that of freeing human beings and nations from the suffering of which they are often at once the authors and the victims.”⁴⁰⁷

The laws of war have an older history than the human rights laws. Humanitarian law not just provides for the protection of liberties like life and dignity, access to justice, freedom from exploitation and discrimination but also regulates the means and methods of war and due protection to combatant as well as non-combatants. Formalised in 1949 in the form of the four Geneva Conventions and supplemented in 1979 by adoption of two Additional Protocols, in light of the statistics of casualties of wars and the changing nature of conflicts, these provisions have found to be inadequate. Thus, it becomes imperative to analyse how humanitarian law protects human rights during non-international armed conflicts.

⁴⁰⁶ Pictet, J. “The principles of international humanitarian law”, 66 *International Review of the Red Cross*, 25 (1966).

⁴⁰⁷ Robert Kolb, “The Relationship Between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions”, 324 *International Review of the Red Cross* 2(1998).

5.6.1 Protection of human rights during Non-International Armed Conflict: International Humanitarian Law and human rights: Norms that apply in all circumstances are spelled out in the common Article 3 of all the Geneva Conventions:

“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, color, 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. [...] While human rights law provides for derogation of some rights in times of emergency, it is important to note that several human rights may not be derogated from under any circumstance”.

Thus, Common Article 3 provides same level of protection to fighters who have renounced fighting and the civilians, putting both under the same bracket of non-combatants. Apart from protecting several human rights like right to humane treatment without distinction which includes protection against violence, taking of hostages, outrage upon personal dignity, fair trial, it provides for non-derogation of several human rights under any circumstances.

Thus, the operation of international humanitarian law does not negate the applicability of international human rights law. This has been acknowledged by the ICJ in the *Nuclear Weapons Advisory Opinion*⁴⁰⁸ when it noted that “the protection of the International Covenant on Civil and political Rights does not cease in times of war, except by operation of Article 4 of the Covenant”⁴⁰⁹. Article 4 provides for derogation only in the times of public emergency threatening the life of the nation, such as an armed conflict. However, these derogations must be permissible and consistent to obligations of State under International law, specifically international human rights law. Nonetheless, the non-derogatory human rights iterated under Common Article 3 remain intact as they are considered a part of Customary International Law.

Further, the Additional Protocols contained specific rules dedicated to an effective protection of the civilians, notably:

- The duty to protect the civilian population against dangers from military operations (article 51 and 57 of the Protocol I),
- The duty to remove civilians from and not locate military objectives in the vicinity of military objectives (article 58 of the Protocol I),
- The duty to avoid methods or means of warfare that cause unnecessary injury
- or suffering (article 35 of the Protocol I),

⁴⁰⁸ International Court of Justice, “Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion”, *ICJ Reports* 1996 (July 1996).

⁴⁰⁹ *Ibid*, para 25.

- The Prohibition of forced movement and displacement of civilian population (article 17 of the Protocol II),
- The protection of objects indispensable to the survival of the civilian population (article 14 of the Protocol II),
- The protection of medical units and transports (article 11 of the Protocol II),
- The protection and care of wounded, sick and shipwrecked persons (article 7 of the Protocol II).

However, States being the implementing bodies, often ignore their obligations if they are inconvenient or against their interests. The most often cited illustration is the US treatment of detainees of at Guantanamo bay. The protections are more often neglected during non-international armed conflicts as States can easily circumvent the operation of Common Article 3. Nevertheless, *Martens Clause* comes to rescue in such a scenario as it provides that in situations not sufficiently addressed in treaty law, “civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience”. Thus, the clause fills the vacuum and supplements the international obligations. As highlighted by the ICTY in *Kupreskic*, “this clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances, the scope and purport of the rule must be defined with reference to those principles and dictates the principles of humanity and the dictates of public conscience.”⁴¹⁰

5.6.2 Institutional Protection to Human Rights: ICC and *ad hoc* tribunals

To widen the protection during hostilities, the Rome Statute responds to the crimes committed during the conflicts by prosecuting the criminals of war in the International Criminal Court established under the said convention. The four core international crimes

⁴¹⁰ *Prosecutor v Zoran Kupreskic*, IT-95-16, para. 525.

recognised under the Rome Statute are genocide, crime against humanity, war crimes and the crime of aggression. However, the jurisdiction of ICC is complementary to domestic courts as it investigates and prosecutes any of the crimes only when the States are “unable” or “unwilling” to do so by themselves. However, a point of distinction between a domestic court and ICC is that domestic courts are bound by the limitations of territorial jurisdictions, whereas ICC can preside over crimes if authorised by the UNSC. With 123 parties currently to ICC, the framework can be considered to be considerable strong to adjudicate war crimes, if used effectively.

In order to punish for the war crimes committed during the wars in former Yugoslavia and Rwanda in 1990s, UN Security Council created several International Criminal Tribunals were established. Moreover, Special courts were also set up to prosecute domestic and international crimes in Kosovo, Lebanon, Sierra Leone, Cambodia and Bosnia.⁴¹¹

Thus, Common Article 3 and Additional Protocol II enumerate several obligations and rights, and with institutional mechanisms the breach of these rights can be vindicated. However, these provisions during implementation turn to be vague thus leaving gaps. To fill in the void, other alternate and appropriate international legal principles need to be consulted, one such being the international human rights law.

5.7 International Human Rights Law Protections During Armed Conflict

There are several human rights principles that supplement and augment international humanitarian law, thus affording protection to the non-combatants and civilians.

⁴¹¹ Pegah Malek-Ahmadi, Human Rights in Non-International Armed Conflicts (2018) (Unpublished Ph.D. thesis, Columbia University),g 29.

5.7.1 Non-Discrimination: Being the fundamental principle of human right law, and enshrined under Article 2 of Universal Declaration of Human Rights, it enshrines that all people are entitled to the rights and freedoms outlined in the Declaration “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Under the ICCPR, the principle of non-discrimination is non-derogable. With respect to the right of non-discrimination, the Additional Protocol II and the various human rights instruments are broader than Common Article 3 as they prohibit discrimination on the grounds of language, political or other opinion, national and social origin. This has a special reference in context to non-international armed conflicts as during the times of civil unrest and internal strife, discrimination on grounds of political, religious, or cultural reasons may be the very reason for the conflict. This is testified in light of the numerous conflicts fought today have ideological, ethnic and religious underpinnings.

5.7.2 Humane Treatment: The international human rights regime lays down that all persons deprived of liberty must be treated humanely. The ICCPR in Article 10 determines that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”. However, under international humanitarian law humane treatment is not a positive right but has been designated as a prohibited act, such as medical or scientific mutilation or experimentation, murder, acts of violence and intimidation. During conflict, the provision is a necessity to ensure humane treatment of detainees. It is integral to the Prisoner of War and thus, the right under human rights law and law of armed conflict can be equated.

5.7.3 Prohibition on Murder: Recognised as right to life and the most important of all human rights, it says that ‘every human being has the inherent right to life that shall be protected by law. No one shall be arbitrarily deprived of his life.’ A right that can never be taken away, has a wider scope than just mere prohibition on violence to life or acts of murder. It even includes a positive obligation on the State to ensure the existence of an

environment conducive to respecting the right to life. Thus, the scope of the right to life encompasses both the prohibition on acts of violence and murder, and the positive obligation to prevent violence to life, either through an act or omission. As such, the international human rights law principle of right to life would seem to be equal to the prohibition on violence to life in both Additional Protocol II and Geneva Convention III.

5.7.4 Prohibition on cruel, inhuman, and degrading treatment or punishment: This right has been well recognised under Article 7 of ICCPR and all the major human rights instruments and has a non-derogable status even in times of emergency or in times of war. The aim of this right to protect both the dignity and the physical and mental integrity of the individual and thus the prohibition stipulated related not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. However, Common Article 3 and Additional Protocol II have discussed this right in detail by including all that is suggestive of cruel, inhuman, and degrading treatment or punishment. Further, Article 89 of Geneva Convention III provides that “in no case shall disciplinary punishments be inhuman, brutal or dangerous to the health of the prisoners of war”. In addition, Article 13 of the same convention prohibits corporal punishment. Moreover, the Convention also contains detailed provisions regarding permissible labour for detainees. The closest human right to this aspect is the prohibition on slavery and servitude under Article 4 of UDHR.

Associated to these major rights, there are other human rights that need to be respected during armed conflicts. Some of them are, prohibition on medical or scientific experimentation, special regard for women, children and indigenous people, recording identification details of persons deprived of their liberty like the detainees or prisoners of wars, detention in healthy and sanitary facilities, including access to medical facilities. Thus, the international human rights law provides for several rights that are available during the conflict and can be applied in convergence to the law of armed conflict during a non-international armed conflict.

5.8 Application of International Human Rights Law during Contemporary Conflicts: Issues

Although, the legal regime of international humanitarian law and international human rights law purport to protect the human rights of victims of armed conflict, the rising number of violations open the doors to further analyse to the issues and challenges that act as a roadblock in curtailing the human rights violations. Further, an important aspect that needs to be investigated is to understand the extent of application of international human rights law in times of contemporary conflicts which more or less are non-international armed conflicts. For the said purpose, three approaches have been used post which the issues and challenges have been highlighted.

5.8.1 International Humanitarian Law as the only applicable law: In the tug of war between international humanitarian law and international human rights law, the principle of *lex specialis* is applied so as to mean that in situations of armed conflict, international humanitarian law is applied in exclusion of human rights law in entirety. However, this view has not been accepted unanimously by States and other institutions like ICJ and United Nations. While the US and Israel the major proponents of this idea, apply the *lex specialis* approach to the entire regime substituting the application of human rights regime, ICJ interpreted *lex specialis* in relation to international humanitarian law and international human rights law between legal concepts and provisions of both the regimes.⁴¹² Second, the above interpretation of ICJ was followed by UN Special Rapporteur and other UN charter human rights bodies who have extended their power to

⁴¹² Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ GL No 131, [2004] ICJ Rep 136. Also see, P. Alston, J. Morgan-Foster, and W. Abresch, 'The Competence of the un Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extrajudicial Execution in the "War on Terror"', 19 *European Journal of International Law* 186 (2008).

monitor human rights violations in period of armed conflicts, but has not been accepted by States who have refused to be held accountable for any human rights violations during an armed conflict when inquired or investigated by these bodies.

5.8.2 International Human Rights Law as the only applicable law: This approach of applying human rights law in complete isolation of international humanitarian law has been practised a lot by regional human rights courts. The European Court of Human Rights “applies only [the European Convention on Human Rights (ECHR)] and never refers to international humanitarian law, even when it is adjudicating the application of human rights during an armed conflict, and even when the issue it is deciding is also governed by international humanitarian law.”⁴¹³ This European Court of Human Rights interpretation is better illustrated in the *Isayeva, Yusupova and Bazayeva v. Russia* case. In this case, the court accepted that

“the situation that existed in Chechnya at the relevant time called for exceptional measures on behalf of the State in order to regain control over the Republic and to suppress the illegal armed insurgency [...] measures [that] could presumably include employment of military aviation equipped with heavy combat weapons.”⁴¹⁴

With this statement, the Court clearly acknowledged that there was in Chechnya a “protracted armed violence between governmental authorities and organized armed groups.”⁴¹⁵ After this recognition, the Court directly applied the ECHR in assessing whether there has been a violation of the right to life. In conducting its assessment, the

⁴¹³ M. Sassoli, “The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts”, in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law, Pas de Deux* 70 (OUP, 2011).

⁴¹⁴ Judgment, *Isayeva, Yusupova and Bazayeva v. Russia*, Application Nos. 57947/00, 57948/00, and 57949/00, ECTHR, 19 December 2002, para. 178.

⁴¹⁵ Definition of “armed conflict” by the ICTY. See Judgement, *Prosecutor v. Kunarac, Kovac and Vokovic*, icty, Appeals Chamber, 12 June 2002, para. 56, citing Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic*, Appeals Chamber, 2 October 1995, para.70.

Court did not bother asking whether the violations in question fell, “*ratione materiae* within the scope of the ECHR or whether, according to the principle of subsidiarity, the law of peace had to yield to the law of armed conflict.”⁴¹⁶ The same approach was applied by The African Court on Human and Peoples’ Rights in the *African Commission on Human and Peoples’ Rights v. Great Socialist Peoples’ Libyan Arab Jamahiriya* case.⁴¹⁷

Thus, it becomes clear that ECHR and African regional human rights systems treat international human rights law a *lex specialis* in at least non-international armed conflicts.

5.8.3 The Three-Pronged Approach: This third approach was developed by the ICJ in its *Palestinian Wall Opinion*. In fact, it looks like a revised and reformulated interpretation of its *lex specialis* theory as developed in the 8 July 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.⁴¹⁸ Under the new reformulation, the ICJ stated:

“More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question, put to it, the Court will

⁴¹⁶ C. Tomuschat, ‘Human Rights and International Humanitarian Law’, 21 *E.J.I.L.* 15 (2010), at 20.

⁴¹⁷ Order for Provisional Measures, *African Commission on Human and Peoples’ Rights v. Great Socialist Peoples’ Libyan Arab Jamahiriya*, Application No. 004/2011, Afr.Ct.hr, 25 March 2011.

⁴¹⁸ Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, icj, para. 25

have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis* inter-national humanitarian law.”⁴¹⁹

Although the Court reiterated these three possible situations in its ruling in the *Democratic Republic of the Congo v. Uganda* case,⁴²⁰ neither here nor in the *Palestinian Wall* Opinion did the Court specify which human rights and/or international humanitarian law violations fall into each of the above mentioned three categories.

Irrespective of the fact that this approach is the most suitable one, there is still no clarity as to how to apply it in practice. This was felt in the case of *DRC v Uganda* case, where the court just listed the acts committed by Uganda in DRC as violation of international humanitarian law / international human rights law rather than specifying which ones are exclusively a matter of human rights, which ones are exclusively matters of international humanitarian law, and which ones are matters of both branches of law.⁴²¹

5.9 Trends in application of International Human Rights Law during armed conflict

Thus, during an armed conflict, all forms of human rights are violated usually by all parties affecting the whole set of rights. Legally speaking, most atrocious violations of human rights in a conflict are identified as international war crimes.

To simplify the concurrent application of international humanitarian law and international human rights law six variations have been identified.

⁴¹⁹ *Supra* note 412, para. 106.

⁴²⁰ Judgment, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005, icj, para. 216.

⁴²¹ Judgment, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005, icj, para. 216.

- The first variation consists of rights that exist in peacetime but may disappear completely in wartime. This category includes, for example, freedom from arbitrary detention.
- The second variation concerns some rights which, even though an armed conflict is being waged, are left intact. Freedom from torture is included in this list.
- The third variation concerns a number of rights that are engendered by the existence of the special circumstances of an armed conflict; for example, freedom from military service under belligerent occupation in wartime.
- The fourth variation concerns the list of rights that exist neither in peacetime nor in wartime. An example of one such right in this category is the right to enter a foreign country with a view of settling there.
- The fifth variation concerns rights which continue to exist in wartime, but due to the exigencies of the armed conflict their scope of application is severely limited. This includes the freedom of assembly.
- The last variation concerns rights that continue to exist in wartime but get boosted or broadened by the exigencies of the armed conflict. This last category includes freedom from medical or scientific experimentation. While in peaceful time such experiments can be conducted with the consent of the concerned person, in times of war there are general injunctions against such experiments.

5.10 Application of International Human Rights Law during Contemporary Conflicts: Challenges

5.10.1 Applicability of International Human Rights law to non-State groups: The rising number of new wars with multiple non-State actors participating in armed conflicts, and important question that needs to be answered is the applicability of international human rights law to these non-State actors. There is no doubt whatsoever on the duty of non-State actors to be bound by international humanitarian law, although practical difficulties with respect to the same has been discussed. But, the binding

character of international human rights law is controversial, not just in wartime but also during peace, as their inability accede to international treaties.⁴²² There have been several arguments made so as to exonerate the non-State armed groups from applying human rights law in the course of their hostilities, based on the nature of the law and the conduct of the State parties. *Firstly*, the traditional doctrine of human rights jurisprudence lays responsibility on the States to protect the human rights of its citizens, thus being the sole subject of human rights obligations. This idea emanates from the orthodox understanding of the International Law which is primarily considered to be the law regulating the nation-States. Thus, private individuals and for that matter non-State actors and armed groups cannot be regulated by International Human Rights Law which is a sub-set of International Law. *Secondly*, the human rights treaties have not accorded any place for the non-State armed groups. Thus, the scarcity of references to armed groups in human rights treaties and documents further prove the state of keeping armed groups at abeyance from responsibility. *Lastly*, the States fear that expecting and asking the non-State actors to apply human rights law and respect would lead to their recognition and legitimise their existence. Thus, the States are reluctant to give any recognition or legitimacy to armed groups by imposing human rights law obligation on them.⁴²³

However, there a band of opposite views that favour the applicability of international human rights law to non-State actors. There are several arguments advocated to bring the non-State actors under the fold of international human rights law specially during the armed conflict. *Firstly*, it is imperative to treat the parties of conflict equally. This will result in imposition of equal obligations on both the sides by virtue of the obligation

⁴²² Sandesh Sivakumaran, 'Re-envisaging the international law of internal armed conflict, (2011) vol. 22 (1) *European Journal of International Law* 22(1), 251.

⁴²³ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 46-53.

theory.⁴²⁴ *Secondly*, there is no doubt that States have obligations under human rights law even towards the members of non-State armed groups. So, if the non-State actors enjoy human rights implies that they must fulfil the correlative human rights obligations.⁴²⁵ *Thirdly*, one of the major triggering points of an existence of a non-international armed conflict is the territorial control by the non-State armed group. Thus, as far as an armed group controls a territory and bears State like features, they constitute the authority responsible for protecting the human rights of those subject to their jurisdiction.⁴²⁶ *Lastly*, as the customary principles of international human rights law have attained the status of *jus cogens*, they are now deemed to be binding to any entity which is capable enough comply with them, even non-State actors. This was applied by UNHR bodies in Afghanistan, Libya and Syria.⁴²⁷ Even the UN Security Council implicitly recognised the applicability of international human rights law to non-state groups by stating that it “condemns the human rights violations and acts of violence committed in northern Mali, in particular by rebels, terrorist groups and other organized transnational crime network, including the violence perpetrated against women and children, the killings, the hostage-taking, pillaging, theft and destruction of religious and cultural sites, as well as the recruitment of child soldiers, and calls for the perpetrators of these acts to be brought to justice.”⁴²⁸

⁴²⁴ Christian Tomuschat, ‘The applicability of human rights law to insurgent movements’, in Horst Fischer, Dieter Fleck et al. (ed), *Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, (Berliner Wissenschafts-Verlag 2004) 573-576.

⁴²⁵ Dieter Fleck, ‘Humanitarian protection against non-state actors’ in Johan Frowein et al. (eds), *Negotiating for Peace: Liber Amicorum Tono Eitel*, (Springer 2003) 69 and 79.

⁴²⁶ Geneva Academy of International Humanitarian Law and Human Rights, *Rules of engagement: protecting civilians through dialogue with non-state actors* (Geneva 2011)

⁴²⁷ Carmen Márquez Carrasco Laura Iñigo Alvarez, “Human Rights violations in Conflict Settings”, *FRAME*, 108 (2014).

⁴²⁸ Security Council, Resolution 2056, UN Doc. S/Res/2056 (2012), para. 13; Security Council, Resolution 2071, UN Doc. S/ Res/2071 (2012).

To overcome the issue of non-signing of international human rights law instruments by non-State actors, they can be agreed to sign non-binding political documents, such as special agreements, memoranda of understanding, and action plans, as well as adopting unilateral acts, namely declarations, codes of conduct, standing orders, or commitments.⁴²⁹ Nevertheless, in some cases, such as that of the Free Syrian Army (FSA), the willingness of the leadership is not enough to secure the engagement of the often heterogeneous factions that make up an armed group, with increasingly common incidents of ‘fighters shifting from one group to another based on the availability of funds and weapons’.⁴³⁰

5.10.2 Asymmetry between parties in conflicts: As already identified in previous chapters, contemporary conflicts have increasingly become asymmetric due to vast difference between the military capability of the States and non-States actors. The most significant impact of this asymmetry has been reflected in the increasing number of intentional attacks on civilians and targets on civilian objects. This was also identified by UN Secretary General in 2013 with respect to ongoing conflicts in Afghanistan, Iraq, and Somalia.⁴³¹

The major casualty of asymmetry between States and Non-State actors is the violation of norms of international humanitarian law by the party that is militarily inferior and thus ends up making the civilians ‘soft-targets’. Although, in such indirect engagement, military casualty is less, but the political and psychological risks are greater. Some of these tactics, namely wearing civilian clothes, using civilian objects for military purposes

⁴²⁹ Stuart Casey Masley (ed), *The War Report 2012* (Oxford 2013) 411.

⁴³⁰ UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic A/HRC/31/685 (February 11 2013)..

⁴³¹ UN Security Council, Report of the Secretary-General on the protection of civilians in armed conflict, S/2013/689 (November 22, 2013).

or employing civilians as human shields, may run counter the prohibition of perfidy⁴³² contained in article 37 of 1977 Additional Protocol I to Geneva Conventions, if attempting to kill, injuring or capturing enemies. In any event, the increasing asymmetric nature of conflicts poses and exacerbates risk for civilians especially in populated areas.⁴³³

This pushes to form a vicious cycle when the militarily superior party, in order to minimise the risk to civilians engaged in unlawful tactics to crush the opponents who in turn resort to hurt the civilian thus aggravating the harm. This was evidenced in the development of the remarkable counter-insurgency doctrine published in the US Army/Marine Corps Counterinsurgency Field Manual published in 2007. The doctrine was based on “lessons learned from Iraq and Afghanistan, in which the minimisation of civilian casualties has come to the forefront. This shift in tactical directives stems from the realisation that loss of civilian lives hindered the achievement of military and political goals in Iraq and Afghanistan, and therefore a balance between force protection and civilian protection must be sought by implementing more detailed guidelines, inter alia, for aerial bombardments or artillery strikes.”⁴³⁴

Thus, when non-State actors attack civilians and violate principles of international humanitarian law to bring themselves at par with State by inflicting deep injury to State, the States also get demotivated to respect the provisions of international humanitarian law the civilians are the most affected. It’s important to note, that although non-State actors may indulge in actions that are violative of international humanitarian law, the States in no case are exonerated of their liability under the principles of international humanitarian

⁴³² It is a form of deception where a party promises with an intention to break it later when the other party exposes itself.

⁴³³ Carmen Márquez Carrasco Laura Iñigo Alvarez, “Human Rights violations in Conflict Settings”, *FRAME*, 108 (2014).

⁴³⁴ *Ibid*, page 109.

law. Thus, reciprocity by both the parties is an important way to safeguard the safety of the civilians during an armed conflict.

5.11 Conclusion

The questions of it, how, and which international human rights apply in non-international armed conflict have recently been subject of discussion in inter-national law, but solutions have remained scattered and ineffective, leaving victims of such violations uncertain on where international law really stands on these issues. This has been the same with the question on whether international human rights are really binding on rebel groups. However, several factors show that today, more than ever before, the international community is ready to seal the deal on these questions. Firstly, the scenario today is characterized by numerous wars forming several sub-sets of conflicts without any front or borders. These conflicts have removed the distinction between battle zones and safety zones and combatants and civilians. This depicts the rise in non-international armed conflicts. Second, while non-international armed conflict involving armed non-State actors were fought by States with little or no influence on the development of international law, the fight against terrorism has brought about the involvement of the United States and other NATO countries in the fight against armed non-State actors, making the issue of non-international armed conflict and non-State armed actors a global issue affecting both the influential and non-influential members of the international community. The moment is therefore ripe now to reintroduce radical approaches that were either not introduced in the past or were introduced but failed to create enthusiasm among States in the past for the reasons mentioned above. Despite the rhetoric that international human rights law applies in non-international conflict and to both States and armed rebel groups, more work is still needed in order to move this rhetoric into action.