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#### ALWD 7th ed.

Wasantha Seneviratne, Continued Relevance of International Humanitarian Law in Post-Armed Conflict Situations: A Critical Analysis with Special Reference to Sri Lanka, 24 Sri Lanka J. Int'l L. 33 (2012-2015).

#### APA 7th ed.

Seneviratne, Wasantha. (2012-2015). Continued Relevance of International Humanitarian Law in Post-Armed Conflict Situations: Critical Analysis with Special Reference to Sri Lanka. Sri Lanka Journal of International Law, 24, 33-52.

#### Chicago 17th ed.

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Seneviratne, Wasantha. "Continued Relevance of International Humanitarian Law in Post-Armed Conflict Situations: A Critical Analysis with Special Reference to Sri Lanka." Sri Lanka Journal of International Law, 24, 2012-2015, pp. 33-52. HeinOnline.

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**CONTINUED RELEVANCE OF INTERNATIONAL  
HUMANITARIAN LAW IN POST-ARMED CONFLICT  
SITUATIONS: A CRITICAL ANALYSIS WITH SPECIAL  
REFERENCE TO SRI LANKA**

*Wasantha Seneviratne* \*

**ABSTRACT**

Since it is generally believed that International Humanitarian Law (IHL) has no relevance in pre or post war situations, there prevails an impasse with regard to the continued relevance of IHL in post armed conflict situations. The central question attempted to answer in this article is that how the principles of IHL can be extended from their routine application to govern pertinent issues in post armed conflict situations. The main objective of the article is to examine the possibilities of out-spreading the application of relevant IHL principles to post armed conflict situations and to assess the sustainability of such a move with special reference to the post war Sri Lankan context. This article recognizes the continued relevance of IHL principles, in particular, in the areas of fostering reconciliation to war affected societies and communities; achieving transitional justice through retributive and restorative justice systems; extending the notion of humanity as the underpinning concept in all the decisions, actions and programmes initiated in helping the victims of war and affected communities and rebuilding the war ravaged society. Taking the necessary steps for better dissemination and implementation of IHL principles in post war context is also highlighted.

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## 1. INTRODUCTION

International Humanitarian Law (IHL), also known as the ‘law of armed conflict’ or ‘law of war’ is a set of rules intended to protect people who are not or are no longer taking part in the hostilities in times of armed conflict and to regulate the conduct of hostilities. Accordingly, IHL protects civilians and former combatants, who have laid down their arms due to several reasons and regulates the means and methods of warfare. IHL begins its application with the onset of an armed conflict and does not cover situations of riots, political upheavals and insurrectionist activities unless these conditions reach the thresholds of armed conflicts as defined by treaty law, case law jurisprudence and other legal instruments. This body of law does not deal with the legality of resorting to war<sup>1</sup> but attempts to humanize the inhumane character of the hostilities subject to its scope. The application of IHL principles in times of armed conflict is thus well documented. However, there remains a question in respect of the post war application of IHL because theoretically this legal regime is applied once an armed conflict is begun. Therefore, when the conflict comes to an end, in literal sense, IHL cannot be operated to address the post conflict consequences. Nevertheless, protection of victims, issues relating to their vulnerability, need for prosecution against the perpetrators of war crimes and other serious violations of laws and customs of war, reparation, accountability issues, repatriation of prisoners of war, family reunification, finding of dead and disappeared persons, resettlement of internally displaced persons and refugees forced to flee with the escalation of hostilities and rehabilitation and reintegration of former combatants to society may remain to be addressed from a legal perspective. Since it is generally believed that IHL has no relevance in pre or post war situations, there prevails an impasse with regard to the continued relevance of IHL in post war situations. As a matter of fact, domestic law of the country and human rights principles continue to be applied in times of peace or no-war situations. Thus, the continued relevance of IHL principles in post-armed conflict situations is subject to numerous queries and has led to a discourse worthy to examine from an academic viewpoint. The central question attempted to answer in this article is that how the principles of IHL can be extended to govern pertinent issues in post armed conflict situations despite the limited scope of this body of law. Thus the main objective of this article is to examine the possibilities of out-spreading the application of relevant IHL principles to post armed conflict situations and to assess the sustainability of such a move with special reference to Sri Lanka.

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<sup>1</sup> Legality of armed conflict is mainly regulated by the UN Charter. See Articles 1, 2, 51 and Chapter IV of the United Nations Charter.

## 2. OBJECTIVES OF INTERNATIONAL HUMANITARIAN LAW AND ITS APPLICATION IN TIMES OF ARMED CONFLICT

IHL attempts to strike a balance between two competing interests, namely military necessity and humanity. This compromise is maintained through the application of IHL principles, which have been developed to protect the individual who does not or no longer participate in the hostilities, but without discouraging the resort to war.

International humanitarian law necessarily evolves to reflect the nature of conflict and the values of its participants. In the first half of the twentieth century, it was known as the “law of war.” The 1949 Geneva Conventions prompted a change to the “law of armed conflict,” reflecting those instruments’ use of the term “armed conflict” to emphasize that application of their humanitarian prescriptions did not depend on either a declaration of war or recognition by the parties of a state of war. More recently, this body of law has become known as “international humanitarian law,” in great part through the efforts of the International Committee of the Red Cross (ICRC). Despite its recognition by the International Court of Justice (ICJ), the label has the marked disadvantage of masking the role military necessity plays in the law governing armed conflict. Nevertheless, it accurately reflects the trend toward according greater weight to the humanitarian features of the law.<sup>2</sup>

The purpose of this article is not to highlight the operational aspect of IHL in situations of armed conflict but to examine the means of extending the cardinal principles of this law to address relevant issues of post-armed conflict situations. It is therefore important to discuss the fundamental principles of IHL which has the potential to govern pertinent matters in the aftermath of war. The categorization of armed conflicts is also needed to be examined because the application of IHL treaty provisions basically depend on the nature of the armed conflict in question.<sup>3</sup> Armed conflicts are primarily classified as falling into two categories, as international and non-international armed conflicts.<sup>4</sup> Meron describes this categorization as;

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<sup>2</sup> Michael N. Schmitt, “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance” [2010] 50 (4) *Virginia Journal of International Law*, pp. 806-7.

<sup>3</sup> With respect to conventional law, the qualification of an international armed conflict involves the applicability of the Hague Convention of 1907, the Four Geneva Conventions of 1949 and of Additional Protocol I, total of more than 600 articles. On the other hand, the qualification of a non-international armed conflict leads to the application of common Article 3 to the Geneva Conventions, and to Additional Protocol II. See the forthcoming description on IHL treaty law for further details.

<sup>4</sup> Since International humanitarian law applies different rules depending on whether an armed conflict is international or non-international in nature. Commentators agree that the distinction is “arbitrary,” “undesirable,” “difficult to justify,” and that it “frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs”. See generally, towards a single definition of armed conflict in international humanitarian law, IRRC June 2003 Vol. 85 No 850, pp. 313-350. Armed Conflict and Its International Dimensions, 1946-2004 Author(s): Lotta Harbom and Peter Wallenstein, Source: *Journal of Peace Research*, Vol. 42, No. 5 (Sep., 2005), pp. 623-635.

...a crazy quilt of norms that would be applicable in the same conflict, depending on whether it is characterized as international or non-international....<sup>5</sup>

This classification demonstrates the intention of the drafters of the applicable treaty law over the application of IHL principles only to designated categories of armed conflict and not to govern situations before or in the aftermath of such conflict situations. Yet, before moving to discuss the post war application and the continued relevance of IHL principles, the nature and objectives of this legal regime and its application in times of armed conflict are discussed in the following section. As Rousseau delineated in his famous scholarly work titled “The Social Contract”:

...war was not a relationship of man with man but a relationship between states in which individuals are only enemies by accident, not as men but as soldiers, once they lay down their arms, they once again become mere men, and their lives must be spared.<sup>6</sup>

An important aim of IHL is to maintain a compromise between two conflicting interests; namely between military necessity and humanity. Accordingly, the law has to make allowance for the phenomenon of war and legitimate military goals and to make sure that the individual and his/her wellbeing shall be assured at the same time. This is achieved through the development of relevant principles of IHL to protect the individual who does not, or no longer participates in the hostilities, but allowing the maintenance of public order in times of war with military exigencies. Thus, IHL attempts to humanize war, but does little to discourage resort to war. Meron says,

As in a boxing match, pummelling the opponent's upper body is fine; hitting below the belt is proscribed. As long as the rules of the game are observed, it is permissible to cause suffering, deprivation of freedom, and death.<sup>7</sup>

IHL applied to regulate armed conflicts is known as *jus in bello*. It is not formulated to regulate the legality of armed conflict in question. The legal aspect is governed by international law (*jus ad bellum*) set out in the United Nations Charter.<sup>8</sup> A brief discussion of the diverse foundations of law that governs armed conflicts could be

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<sup>5</sup> Theodore Meron, “The Humanization of Humanitarian Law” [2000] 94(2) *American Journal of International Law*, p. 242.

<sup>6</sup> See Jean-Jacques Rousseau, *Ideal Empires and Republics. Rousseau’s Social Contract, More’s Utopia, Bacon’s New Atlantis, Campanella’s City of the Sun, with an Introduction by Charles M. Andrews* (Washington: M. Walter Dunne, 1901). 11/3/2016. <<http://oll.libertyfund.org/titles/2039>> accessed on 03.11.2016.

<sup>7</sup> Theodore Meron, see note 6.

<sup>8</sup> This article does not intend to discuss the provisions of the Charter of the United Nations on the matter of legality of resorting to warfare. See Articles 1, 2, 51 in particular regarding the use of force and in general Chapter VII.

useful. Similar to the sources of public international law,<sup>9</sup> the sources of IHL (this body of law being one of the oldest branches of international law) are very similar to those of international law. Article 38 (1) of the Statute of the International Court of Justice of 1945 stipulates the sources as follows:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a.) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b.) international custom, as evidence of a general practice accepted as law; c.) the general principles of law recognized by civilized nations; d.) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

IHL principles are mainly contained in international treaties<sup>10</sup> and legally binding customs.<sup>11</sup> IHL has two main branches: namely Geneva Law and Hague law.<sup>12</sup> The two branches of IHL draw their names from the cities where each was initially codified. However, the distinction between these two different origins is increasingly becoming blurred and these different branches have considerably amalgamated into each other.<sup>13</sup> The following treaties could be cited as some of the land mark international instruments, which embody the principles of IHL: Geneva Convention

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<sup>9</sup> See Article 38 (1) of the Statute of the International Court of Justice for primary sources and secondary sources of international law used by the International Court of Justice in deciding the cases before the Court. The 'sources' of international law constitute that reservoir of authoritative rules and principles to which the international lawyer must refer in order to ascertain the content of the law.

<sup>10</sup> The adoption of the first Geneva Convention in 1864, marked the starting point of IHL. This Convention codified and strengthened ancient, fragmentary and scattered laws and customs of war protecting the wounded and those caring for them. Henry Dunant, one of the pioneers of IHL proposed the creation of voluntary relief agencies, urged the adoption of an international agreement on the humane treatment of the sick and injured. This led to the 'Geneva Convention for the Amelioration of the wounded of the Armies in the field' of 1864, and the setting up of the International Red Cross Organization (ICRC). Francis Lieber a German immigrant to America was asked by President Abraham Lincoln to put together a few rules for the use of the troops during the American civil war. His manual 'Instructions for the Government of Armies of the United States in the field' was published in 1863, (The Lieber Code) and marked the first attempt to codify the existing laws and customs of war and helped the development of Hague Conventions on the Law of War.

<sup>11</sup> The ICRC Study on Customary IHL applicable in Armed Conflicts has codified widely dispersed legally binding customary rule which regulate international and on international armed conflict situations. The Study contains the customary rules of IHL with a short commentary, as well as indications of trends in practice where no clear rule of customary international law has yet emerged.

<sup>12</sup> The law of Geneva has been designed to safeguard military personnel who are no longer taking part in the fighting and the people who do not actively involved in hostilities, i.e. civilians; whereas the law of the Hague establishes the rights and obligations of belligerents in the conduct of military operations, and limits the means of harming the enemy.

<sup>13</sup> The two Additional Protocols of 1977 combine both branches of law to a great extent.

for the amelioration of the condition of the wounded in armies in the field of 1864, St. Petersburg Declaration prohibiting the use of certain projectiles in wartime of 1868, Hague Conventions of 1899,<sup>14</sup> Hague Conventions of 1907,<sup>15</sup> Geneva Protocol for the prohibition of the use in war of poisonous or other gases and of bacteriological methods of warfare of 1925, Two Geneva Conventions of 1929,<sup>16</sup> Four Geneva Conventions of 1949,<sup>17</sup> and the 1977 Two Protocols additional to the four Geneva Conventions of 1949. In times of armed conflict, treaty law covers many aspects of warfare by affording protection to a range of persons and limiting permissible methods and means of warfare.<sup>18</sup> Nevertheless, there are certain obstacles to the application of the treaties: One such impediment is that irrespective of the significance of the provisions embodied in treaties the provisions therein can be applied only to the States that have ratified them.<sup>19</sup> In contrast, rules contained in binding customary rules are applicable to States which are not parties (except the persistent objectors) to the relevant treaties but through the establishment of two main elements needed to be satisfied to create customary laws.<sup>20</sup> Therefore, it is important to understand IHL principles, which are part of customary international law and therefore applicable to all parties to a conflict, regardless of whether or not they have ratified the treaties containing the same or similar rules. Another problem of treaty law application is that humanitarian treaty law does not regulate in sufficient detail a large proportion of non-international armed conflicts. The one and only IHL treaty exclusively tailored to regulate such type of armed conflicts is the Additional Protocol II of 1977, which contains only 15 substantive Articles. In contrast, Additional

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<sup>14</sup> On Pacific Settlement of International Disputes, Laws and Customs of War on Land, Adaptation to Maritime Warfare of Principles of Geneva Convention of 1864, Prohibiting Launching of Projectiles and Explosives from Balloons, with 3 Declarations.

<sup>15</sup> It consisted of thirteen sections, of which twelve were ratified and entered into force

<sup>16</sup> *Review and development of the 1906 Geneva Convention, Geneva Convention relating to the treatment of prisoners of war* (new).

<sup>17</sup> *Conventions on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Treatment of Prisoners of War and Protection of Civilian Persons in Time of War.*

<sup>18</sup> Esp. the Geneva Conventions and their Additional Protocols provide an extensive regime for the protection of persons not or no longer participating directly in hostilities.

<sup>19</sup> Jean-Marie Henckaerts, "Study on customary international humanitarian Law: A contribution to the understanding and respect for the rule of law in armed conflict", *International Review of the Red Cross*, Volume 87 Number 857 March 2005. According to Henckaerts, this means that different IHL treaties apply in different armed conflicts depending on which treaties the States involved have ratified. For an example Additional Protocol I has been ratified by more than 160 States, but its efficacy is limited because several States that have been involved in international armed conflicts are not party to it. Similarly, about 160 States have ratified Additional Protocol II, several States in which non-international armed conflicts are taking place have not become parties to it and are not bound by the provisions of it.

<sup>20</sup> The Statute of the International Court of Justice describes customary international law as "a general practice accepted as law. The existence of a rule of customary international law requires the presence of two elements, State practice (*usus*) and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (*opinion juris sive necessitatis*).

Protocol I, which regulate international armed conflicts has more than 80 Articles in addition to the bulk coverage provided by Hague Conventions and other Geneva Conventions and exclusively regulate international armed conflict situations (except Common Article 3). This shows the significant disparity in regulation by treaty law between international and non-international armed conflicts. Therefore, Customary IHL Rules could be applied to situations not governed by treaty law provisions.<sup>21</sup>

### 3. POST WAR APPLICATION OF IHL

This section of the article examines the prospects of extending the application of IHL in post armed conflict situations. Although it is well accepted that the application of IHL begins when an armed conflict erupts, it is more difficult to identify the moment where its application ends, due to the diversity and different formulas used in conventional law.<sup>22</sup> For example, Article 6 (2) of Geneva Convention IV of 1949 states “*general close of military operations*” whereas the Article 2 (2) of Additional Protocol II of 1977 uses the expression of “*end of the armed conflict*”. The International Criminal Tribunal for former Yugoslavia (ICTY), in its decision of 2 October 1995 in the *Tadic* case, attempted to clarify this fact as follows:

International Humanitarian Law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.<sup>23</sup>

The ICTY has thus rejected the factual criteria which signify the cessation of hostilities. This implies that the arrival at a cease-fire, temporary or conclusive, or even the reaching of a ceasefire cannot be enough to suspend or to limit the application of IHL. However, Jinks says that the expression of “*a general conclusion of peace*” used by the ICTY to indicate the end of IHL’s application is unfortunately too general and vague.<sup>24</sup>

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<sup>21</sup> See below discussion on customary IHL rules.

<sup>22</sup> The laws of war were applicable in time of war--from the declaration of war until the formal reestablishment of peace (for example, by the signing of a peace treaty). See Derek Jinks, *The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts, Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, January 27-29, 2003*.

<sup>23</sup> International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Prosecutor v. Tadic*, Judgement, 15 July 1999, para. 70.

<sup>24</sup> *Derek Jinks, The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts*, Background Paper, Harvard Program on Humanitarian Policy and Conflict research, p.17, [www.hpcrresearch.org/sites/default/files/publications/Session3](http://www.hpcrresearch.org/sites/default/files/publications/Session3). Accessed on 03.11.2016



The author selects the Sri Lankan situation to determine whether IHL principles have any further applicability to our context. Sri Lanka is now transforming from war to peace after the cessation of hostilities. Our country was faced with a protracted armed conflict for about thirty years. Since the armed struggle was being fought between the State armed forces and the LTTE (a resistant movement named the Liberation Tigers for Tamil Ealam) it falls under the classification of a non-international armed conflict.<sup>25</sup> Article 1 of the Additional Protocol II of 1977 defines internal armed conflicts

as of having taken place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Considering the duration, intensity and the control maintained by the LTTE over certain areas of North and East Provinces it can be said that the war situation prevailed in Sri Lanka as an internal armed conflict. Therefore, it is pragmatic to examine the ways of extending the application of IHL principles to post war situations with special reference to Sri Lanka.

### *3.1 Achieving Transitional Justice and the Application of IHL Principles*

As aforesaid, though IHL is primarily designed to apply in times of armed conflicts its principles can be having a limited relevance in post war periods, if societies are willing to transform themselves through transitional justice. The term “transitional justice” (TJ) is generally used to refer to the various processes accompanying political transition by societies emerging from a period of violence.<sup>26</sup> The objective of TJ is to deal with the serious human rights violations committed during the conflict and to achieve national reconciliation. Although the United Nations has attempted to define some of the concepts related to the notion of TJ, there prevails a multiplicity of definitions on these concepts. According to the United Nations definition,

..notion of TJ comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at

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<sup>25</sup> According to Common Article 3 of four Geneva Conventions, an armed conflict of non-international character is a non international armed conflict. The ICTY affirmed that a non-international armed conflict exists when there is: “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” See, *Prosecutor v. Dusko Tadic* (ICTY), Judgement, 15 July 1999.

<sup>26</sup> See, <http://ictj.org/about/transitional-justice>, accessed on 06.05.2014.

all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.<sup>27</sup>

At present, TJ has become a popular theme in the common currency both at international and domestic levels. In Sri Lanka too, discussions are emerging in relation to TJ with the end of the long lasted internal armed conflict. Hazen explains the objectives of TJ rhetorically;

....In the view of the States that are threatened with fragmentation, where values and the social fabric are crumbling, transitional justice presents itself as an alternative means of escaping escalating violence and vengeance. Attuned to the request of victims and societies, transitional justice seeks to contribute to their reparation. But it proposes to be more than that. It aims to mobilize the dynamic forces in those societies in order to help them face a past mass violation of human rights so that they can then advance along the road towards a dawning democracy. In that sense, transitional justice appears as a New Jerusalem: it shows the way to institutional and political reforms which will gradually contribute to the establishment and consolidation of peace and the rule of law. There is an eschatological dimension to transitional justice here – the will of a society to extricate itself from the tragedy of history, to thwart the fatality of a world.<sup>28</sup>

Despite the numerous definitions of TJ, this article identifies the notion of TJ as a process that can be introduced as a response to systematic or widespread violations of human rights and humanitarian law principles occurred during situations of armed conflicts. As Hazen says it seeks recognition for victims and to promote possibilities for peace, reconciliation and democracy.<sup>29</sup> Achieving TJ to war torn societies is not a special form of justice, but to adapt justice to societies transforming themselves after a period of grave violations of human rights and humanitarian laws in order to foster reconciliation to war affected communities. During any armed conflict, international or non-international in nature, such violations are highly prevalent, and after the cessation of hostilities it is an obligation of the national authorities to bring justice to victims and to establish the rule of law in such societies.<sup>30</sup> TJ can be approached in diverse ways. For example, it can be accomplished through criminal prosecutions

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<sup>27</sup> See the Report of the UN Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, 23 August 2004, S/2004/616, para.8.

<sup>28</sup> Pierre Hazen, "Measuring the Impact of Punishment and Forgiveness: A framework for Evaluating Transitional Justice", (2006), Vol. 88(861), *International Review of Red Cross*, p.19.

<sup>29</sup> *ibid.*

<sup>30</sup> This approach emerged in the late 1980s and early 1990s, mainly in response to political changes in Latin America and Eastern Europe and to demands in these regions for justice. At the time, human rights activists and others wanted to address the systematic abuses by former regimes but without endangering the political transformations that were underway.

against the perpetrators of blatant violations of IHL, which is known as retributive justice.<sup>31</sup>

In addition to criminal prosecutions, truth commissions also serve achieving transitional justice to societies crippled by ravages of armed conflicts. These commissions of inquiry have the primary purposes of investigating and reporting on key periods of recent past abuse. They are often official state bodies that make recommendations to remedy such abuse and to prevent its recurrence. Besides, there can be reparation programs which are state-sponsored initiatives that help repairing the material and moral damages of past abuse. They typically distribute a mix of material and symbolic benefits to victims, benefits which may include financial compensation and official apologies.<sup>32</sup> This approach of justice is called as restorative justice. Another method of TJ will be the reforming of security systems of States. These efforts seek to transform the military, police, judiciary and related state institutions from instruments of repression and corruption into instruments of public service and integrity.<sup>33</sup>

Thus the paths of achieving transitional justice can be varied, depending on the nature of violations, actual damages occurred, cultures and practices of societies etc.<sup>34</sup> But the most significant factor is to bring justice to victims, with a view to rebuild war torn societies ending an era of distrust, despair and hatred due to huge violations of human rights and humanitarian law principles during the war. In Sri Lanka too, prosecuting the perpetrators who have committed serious violations of IHL during the conflict could be done in the light of relevant principles of IHL. Common Article

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<sup>31</sup> <http://ictj.orgeng/tj/781.html>, accessed on 06.05.2014. After the Second World War for the first time in the history, Nuremberg and Tokyo War Crimes Tribunals were set up to prosecute and punished the war criminals of the defeated countries. Though the best way of prosecuting the alleged offenders is through the domestic criminal justice system when the States are unwilling or not able to use their own laws and court system to prosecute the offenders, there should be an alternative system of prosecution beyond the domestic level. In 1990s the UN Security Council set up the *ad hoc* International Criminal Tribunal for the Former Yugoslavia and for Rwanda to prosecute the perpetrators of human rights and humanitarian violations occurred in the territories of the Former Yugoslavia, and in Rwanda. Considering the problems of having temporary tribunals, the *Rome Statute of the International Criminal Court* (ICC) was adopted in 1998.

<sup>32</sup> See <http://ictj.orgeng/tj/781.html>.

<sup>33</sup> As Hayner observes; First, a truth commission focuses on the past. Second, a truth commission is not focused on a specific event, but attempts to paint the overall picture of certain human rights abuses, or violations of international humanitarian law, over a period of time. Third, a truth commission usually exists temporarily and for a pre-defined period of time, ceasing to exist with the submission of a report of its findings. Finally, a truth commission is always vested with some sort of authority, by way of its sponsor, that allows it greater access to information, greater security or protection to dig into sensitive issues, and a greater impact with its report. Most truth commissions are created at a point of political transition within a country, used either to demonstrate or underscore a break with a past record of human rights abuses, to promote national reconciliation, and/or to obtain or sustain political legitimacy. Pierre Hayner, "Fifteen truth commissions – 1974 to 1994: A comparative study", (1994) Vol.16, *Human Rights Quarterly*, p.604.

<sup>34</sup> *ibid.*

3 (CA 3) of four Geneva Conventions (GCs) of 1949 would provide a good basis for this purpose. CA 3 is the one and only Article to be found in four GCs that regulate the circumstances of non-international armed conflict situations. It requires a humane treatment to be afforded to civilians and the *hors de combat* (former combatants who have laid down their arms due to various reasons).<sup>35</sup>

....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: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular, humiliating and degrading treatment; 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; the wounded, sick and shipwrecked shall be collected and cared for...”.<sup>36</sup>

In the case of Sri Lanka, being a country faced with a non-international armed conflict, CA 3 and relevant customary IHL rules govern the situation.<sup>37</sup> States which experienced international armed conflict situations should use the grave breaches provisions included in the four GCs and Additional Protocol I of 1977 to investigate and prosecute the crimes committed by the alleged offenders in the post war period. Grave breaches are included in the First Convention in Article 50, in the Second Convention in Article 51, in the Third Convention in Article 130 and in the Fourth Convention in Article 147.<sup>38</sup> A supplementary list of grave breaches is enumerated in

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<sup>35</sup> Common Article 3 states: In the case of an 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:“....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.

<sup>36</sup> See Common Article 3 of four Geneva Conventions of 1949.

<sup>37</sup> These rules will be discussed later.

<sup>38</sup> Although these breaches are included in different locations in four GC s wordings are the same. See Article 147 of the fourth GC:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Article 85 of the Protocol 1.<sup>39</sup> The Lessons Learnt and Reconciliation Commission (LLRC), the Sri Lankan initiative on finding the justice pathway to foster reconciliation to war affected communities in the country, was also partly influenced by the Truth and Reconciliation Commissions established in South Africa and few other jurisdictions. In implementing the recommendations of the LLRC, Sri Lanka can make use of relevant principles of IHL.<sup>40</sup> Thus, the application of IHL principles is important in post war situations in achieving TJ through retributive or restorative justice pathways.

### 3.2 Notion of Humanity

Humanity or humanitarian considerations are very catchy words in any context. In times of armed conflict, balancing military necessity with humanity is utmost significance.<sup>41</sup> Although many definitions can be found on the notion of humanity, in its simplest form humanity means the recognition of the due respect deserved by any human being due to his or her condition or quality of being a human and treat the person accordingly without adverse distinction. Whether it is war, pre-war or post-war, the value and the inherent dignity of human beings should not be undermined. This idea may be represented in times of peace through human rights discourse and in times of war in the discourse of humanitarian considerations or fundamental human guarantees or humane treatment.<sup>42</sup>

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<sup>39</sup> Article 85: The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol: when committed willfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

- (a) making the civilian population or individual civilians the object of attack;
- (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii);
- (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);
- (d) making non-defended localities and demilitarized zones the object of attack;
- (e) making a person the object of attack in the knowledge that he is *hors de combat*;
- (f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.

<sup>40</sup> The Report of the LLRC has devoted one full chapter on IHL principles applicable to Sri Lanka. See Chapter 9 of the Report. <http://www.llrcaction.gov.lk/en/llrc-report.html>, accessed on 05.05.2014.

<sup>41</sup> See the previous notes on this.

<sup>42</sup> Article 4 (1) – Fundamental Guarantees: All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all

The inextricable relationship between IHL and International Human Rights Law (IHRL) is now well documented and accepted,<sup>43</sup> in particular in international case law jurisprudence. ICJ has discussed the relationship between IHL and IHRL in number of cases. However, the ICJ contradicts itself over the issue on different occasions. For example, in the *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*,<sup>44</sup> the Court examined the applicability of HRL in times of armed conflict, and emphasized that “in such situations even though human rights law does not disappear, it nevertheless is in effect displaced by international humanitarian law”.<sup>45</sup> Nevertheless, after a few years, the same Court once again revisited its own judgment and approached the issue related to the applicability of IHRL in war situations quite differently. In the case named *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, (Advisory Opinion)*, the ICJ has thus decided that IHRL is not entirely displaced and can at times be directly applied in situations of armed conflict.<sup>46</sup> The continued applicability of IHRL in war situations was thus highlighted by the ICJ in 2004. The Court stated that there are three possible situations pertaining to the relationship between two bodies of law:

“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”.<sup>47</sup>

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circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

<sup>43</sup> International human rights law is a set of international rules, established by treaty or custom, on the basis of which individuals and groups can expect and/or claim certain behaviour or benefits from governments. Human rights are inherent entitlements which belong to every person as a consequence of being a human. Human rights law principles can be found in numerous treaties (hard law) and non-treaty based instruments such as declarations and guidelines (soft law). IHL and IHRL are both concerned with ensuring respect for individuals and their wellbeing. However, there are debates over the relationship between IHL and IHRL focusing on the question of whether IHRL continues to apply during armed conflict and if so, and how these two bodies of law can complement each other. See generally, Wasantha Seneviratne, “Challenges of Ensuring Accountability for International Humanitarian Law and Human Rights Law Violations Committed in Armed Conflict Situations: A Critical Appraisal with Reference to Sri Lanka”, (2010) Vol. 22(1) *Sri Lanka Journal of International Law*, p. 7.

<sup>44</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory opinion, 8 July 1996, ICJ Reports 1996. The General Assembly of the United Nations requested advisory opinion of the ICJ on the legality of the threat or use of nuclear weapons.

<sup>45</sup> *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion, ICJ Reports, 1995, para. 25.

<sup>46</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion, ICJ Reports 2004.

<sup>47</sup> ICJ, Advisory Opinion, para.106. It was decided by the ICJ in this Case that Israel's action in illegally constructing this wall has legal consequences not only for Israel itself, but also for other States and for the United Nations and determined that Israel has a legal obligation to bring the illegal situation to an end by ceasing forthwith the construction of the wall in the Occupied Palestinian Territory.

The Court clarified the relationship between IHL and HRL in war situations as follows:

"....a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' .... that they are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of International customary law."

Once again, in the case *Democratic Republic of the Congo v. Uganda* the ICJ re-emphasized the interrelationship between HRL and IHL.<sup>48</sup> In this case the ICJ affirmed the previous decision relating to the construction of a wall in the occupied Palestine Territory and accepted the significance of preserving and promoting the human rights and humanity of people in situations of armed conflict.

This argument by the ICJ can be used otherwise too. If IHRL rules continue in times of war, why cannot IHL be implemented where relevant in times of peace at least with limited relevance? The expansion of the notion of humanity found in IHL regime could be a prime example in this regard. The reference to '*elementary considerations of humanity*' in IHL as of having intransgressible character and being so fundamental to the respect of human person, it is wished to develop an argument to the effect that even in the aftermath of war this noble norm should be maintained irrespective of its roots or origin. Along with the above discussion, it is clear that the difference between the application of IHL and IHRL principles in war situations have become very much amalgamated now, and thus, some rights violations in armed conflict can be considered as matters under both legal regimes. Similarly, we can have a counter argument that with the end of hostilities the obligations of the responsible authorities to rebuild the societies should be coupled with an undeniable obligation on the preservation and upholding of humanity in war torn societies. Thus, Sri Lanka or any post war society when planning for fostering peace, reconciliation and achieving transitional justice, the notion of humanity should be the fundamental foundation. The relevant national authorities in Sri Lanka, in implementing the National Action Plan, which is the operational mechanism of the LLRC recommendations, should take humanity and humanitarian considerations to their perusal.

International law recognizes certain norms as inviolable under any circumstances. These norms are known as *jus cogens* (peremptory norms), which are undisputed and has long been accepted by the international community as a whole. It is widely

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<sup>48</sup> *Democratic Republic of the Congo v. Uganda*, Judgment of 19 December 2005, ICJ Reports, 2005, para.216-219. In this case, concerning armed activity on the territory of the Congo, the ICJ ruled that Uganda has violated the principles of non-intervention under Art 2(4) of the UN Charter and further violated IHL and HRL when it launched military operations in the DRC between 1998 and 2003.

accepted that the entire world has an obligation (*erga omnes*)<sup>49</sup> to protect and promote these norms.<sup>50</sup> These norms of inviolable character are binding on all States and cannot be modified by even an international treaty and are not subjected to any derogation.<sup>51</sup> The notion of humanity is arguably having the necessary requisites to be qualified as *jus cogens*. At least in the character of emerging *jus cogens* or un-established *jus cogens*. Therefore, based on this argument we can build another argument that it is the paying of due regard to humanity in post war programmes of any nature that is of utmost importance, since it the *erga omnes* of the States.

### *3.3 Setting Pre-requisites for Better Implementation of IHL*

Although it is argued that IHL begins to play its role once a conflict escalates, the necessary pre-conditions should be set prior to the commencement of such hostilities, for better application of IHL principles. The relevant pre-requisites should be created in advance in peacetime to ensure that the IHL obligations are respected with the onset of war. If this was not the case in any country at least they should take necessary actions to establish such conditions in the aftermath of the conflict. It is sad to say that the world would never be free from wars due to several reasons, i.e., power rivalries among nations, scarcity of resources and many other cravings of human beings atrocities. Thus hostilities are inevitable.<sup>52</sup> A war occurred in one territory does not mean that it could be the last war on that ground. Therefore, setting the pre-requisites before the escalating of armed struggles is very important, if not, at least at the end the conflict with the expectation to get the benefit of such endeavours in future war situations. Article 80(1) of Protocol I enumerates;

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

Common Article 2 of the 1949 Geneva Conventions refers to provisions which shall be implemented in peace-time,

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<sup>49</sup> In international law it is used as a legal term describing obligations owed by States towards the community of states as a whole.

<sup>50</sup> Examples of *jus cogens* norms coupled with *erga omnes* include piracy, genocide, slavery, and racial discrimination. The ICJ recognized the right to self determination as an inviolable norm in the *Case concerning East Timor*. The ICTY has also recognized the concept of *erga omnes*, noting that the prohibition on torture has that character, in *Prosecutor v. Anton Furundzija* Decision in 1998.

<sup>51</sup> However, there is no clear agreement regarding precisely which norms are *jus cogens* or how a norm reaches the status of *jus cogens*.

<sup>52</sup> As Thomas Hobbes puts in his book called *Leviathan*, by nature human beings are nasty, solitary and brutal. They are not familiar with the corporate living. Naturally, they tend to fight with each other.



...in addition to the provisions which shall be implemented in **peace-time**[emphasis added] ...the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties...

Accordingly, this provision requires States parties to take certain measures in times of peace in order to ensure better implementation of relevant IHL principles when an international armed conflict situation occurs. Such obligations can be explained as follows.

### 3.3.1 Incorporating IHL Principles to Domestic Law

Before or after an armed conflict, relevant IHL principles should be incorporated into domestic legal systems in order to punish the offenders of IHL violations, which are committed during the period of war. Once a war is started there will be practical difficulties to include international legal obligations into local laws. Responsible authorities may be unwilling to pass new laws during war situations due to numerous reasons. Therefore, pre or post war periods are ideal for adopting new laws to try and punish IHL violations. Disciplinary regulations applicable to the armed forces should be prepared and documented in such a period. Courts with relevant jurisdiction should be designated to prosecute the alleged offenders of IHL violations. However, there may be legal barriers for passing retrospective penal laws in the aftermath of war to cover things that happened in the past, unless the laws incorporate customary international law principles.<sup>53</sup> Incorporation of international legal principles into domestic legal systems is an issue about the extent to which municipal courts will give effect within the domestic system to rules of international law which are contrary or not contrary to domestic law. The extent of incorporation is dependent upon the legal systems and constitutional provisions of each individual country. The incorporation of IHL into domestic legal systems can be better done in times of peace.<sup>54</sup> Sri Lanka is generally believed to be a dualistic country and resultantly it is required to adopt an enabling legislation by the Sri Lankan Parliament in order to incorporate domestic law. Occasionally, the judiciary of the country has attempted to incorporate certain international law principles through judicial activism and broad interpretation.

In 2006 Sri Lankan Parliament adopted Geneva Conventions Act. The purpose of this Act was to incorporate IHL principles of the four GCs to Sri Lanka's domestic legal system. However, this Act includes very few articles and thus incorporates only grave

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<sup>53</sup> This argument was brought in Sri Lanka in the famous case *Sepala Ekanayake v. Attorney General* - SLR - 46, Vol 1 of 1988 [1988] LKSC 12; (1988) 1 Sri LR 46 (14 January 1988).

<sup>54</sup> The scope of this article does not allow for a detailed discussion on the different theories involved in the incorporation of international law principles into a domestic legal system.

breaches provisions of the four GCs.<sup>55</sup> Accordingly, it has made the violations of grave breaches provisions of four GCs as offences in our country. Nevertheless, the legislature has not taken steps to incorporate Common Article 3 of GCs into our legal system which is distressing. In many other countries, CA 3 has been incorporated to their similar domestic statutes in order to regulate non international armed conflict situations. But, many IHL treaty provisions only applicable to IAC snow have derived the form of customary law and thus can be applied to NIACs as well. This has been accepted in a number of landmark decisions at the international level.<sup>56</sup>

### *3.3.2 Dissemination of IHL*

Dissemination of IHL principles can be done successfully in a post war period. This could be achieved using the past experience encountered during war time. National authorities, judicial officers, members of armed forces and general public should be made aware of the principles of IHL and their application. In Sri Lanka, the LLRC has proposed this as a recommendation on fostering reconciliation to the war torn society. The National Action Plan also includes programmes in this regard. The National Human Rights Commission of the country and the Sri Lankan delegation of the International Committee of Red Cross have already taken steps to disseminate IHL principles among the stake holders.

### *3.4 Applicability of Customary IHL Rules in Post War Situations*

The Volume One of the ICRC Customary Law Study includes the customary rules of IHL applicable to international and non-international armed conflicts. Unlike the treaty law most of the customary rules cover both the categories of war situations. [International and non-international armed conflicts (IAC and NIAC)]. Importantly, some of these customary rules extend their application to post war scenarios. Rule 109 stipulates that;

whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction.<sup>57</sup>

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<sup>55</sup> See previous notes on the provisions of grave breaches of four GCs. Violations of grave breaches are considered to be serious offences in IHL. For example, Article 50 of the First Convention, Article 51 of the Second Convention, Article 130 of the Third Convention, Article 147 of the Fourth Convention; and Articles 11 and 85 of the AP 1 list out the grave breaches of IHL when committed in international armed conflict situations.

<sup>56</sup> See *Prosecutor v. Dusko Tadic*, op cit.

<sup>57</sup> See, the Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Volume One of the ICRC Customary Law Study: Rules*, (2005: Cambridge university press, New York).

Rule 112 emphasizes;

whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction.<sup>58</sup>

These obligations are equally applied to both IAC and NIAC situations. Rule 117 requires taking all feasible measures to account for persons reported missing as a result of armed conflict and to provide their family members with any information it has on their fate.

Rules pertaining to the implementation of IHL principles highlights the continuing responsibility of the parties to armed conflicts in both the war situations. Accordingly, each party to the conflict must respect and ensure respect for IHL by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control. Each State must make legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of IHL. States and parties to the conflict must provide instruction in IHL to their armed forces. States must encourage the teaching of IHL to the civilian population. Rule 149 relating to responsibility and reparation stresses the responsibility of State for violations of IHL attributable to it. An important characteristic corollary to responsibility is making of reparation to the damaged due to violations. Rule 150 provides that the State responsible for violations of IHL is required to make full reparation for the loss or injury caused.<sup>59</sup> In Sri Lanka too, the obligations arising from these rules should be put into practice. In order to heal the wounds created by the armed conflict in war affected areas it is utmost important to duly address the remaining issues with regard to reparation of the victims of war and rebuilding the war torn society. Noting with appreciation of the infrastructure developments happened in the North and East, socio, ethnic, economic and cultural issues and other civil society matters remain yet to be addressed from a humanitarian view point.

Customary IHL rules also cover the issue of war crimes. Rule 157 stipulates that the States have the right to vest universal jurisdiction in their national courts over war crimes. [IAC/NIAC]. According to Rule 158, States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects. [IAC/NIAC]. Rule 159 includes that at the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes [NIAC]. According to Rule 161, States must make every

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<sup>58</sup> *ibid.*

<sup>59</sup> See *ibid.*, pp.495-505 for rules on implementation of and compliance with IHL.

effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects [IAC/NIAC].

Thus, the aforesaid Customary IHL Rules require parties to any type of armed conflicts to apply them in post war situations reflecting the continuing relevancy and application of IHL principles in post-war situations.<sup>60</sup> International community increasingly intervenes to the humanitarian issues of the country. Recently, the United Nations Human Rights Council adopted a number of Resolutions on Sri Lanka requiring the investigations and prosecutions of alleged war crimes claimed as occurred during the armed conflict. Rather than allowing international actors to trample on domestic matters it is advisable to adopt our own programmes in good faith to help the victims of affected communities, while respecting constructive comments objectively. Well documented IHL treaty law and customary law principles can be used for this purpose.

#### 4. CONCLUSION

This article examined the prospects of extending the application of relevant IHL principles in post war situations. It discussed the scope of IHL, developments, challenges and the possible expansions. In particular the article recognized the continued relevance of IHL principles in the areas of fostering reconciliation to war affected societies and communities, achieving transitional justice through retributive and restorative justice systems, extending the notion of humanity as the underpinning concept in all the decisions, actions and programmes initiated in helping the victims of war and affected communities and rebuilding the war ravaged society. Taking the necessary steps for better dissemination and implementation of IHL principles in post war context was discussed. International law principles do not become automatically operative in a domestic system, unless the country in question is strictly monist in nature. Such flexible legal systems hardly prevail in the contemporary world. Most States prefer maintaining some autonomy in terms of international law incorporation. Therefore, States should adopt enabling statutes in order to include their international obligations to domestic law. The judiciary can have a wider perspective and allow the inclusion of important IHL principles through broad interpretations, referring to relevant international instruments and sources of IHL with an authority. Customary IHL rules can be used in post war situations better than IHL treaty law provisions. Unlike treaty law, customary laws extend obligations to non-State parties of IHL treaties. By this means non-State parties to fundamental treaties cannot hideaway from their obligations.

Sri Lanka is moving towards a brighter future in the aftermath of protracted internal armed conflict. Number of issues remain yet to be resolved objectively in order to achieve sustainable peace. Rehabilitation and reintegration of ex-combatants into the society, resettlement of displaced persons, reunification of families, matters

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<sup>60</sup> See *ibid*, Rules on war crimes, pp. 568-618.

pertaining to dead and disappeared persons, administration of restorative and retributive justice where applicable, granting possible amnesties, healing social wounds created by war, reinforcing trust among diverse communities and many similar issues remain as daunting challenges. We are a country that respect international law and maintain healthy international relations with the rest of the world. Therefore, the time has come for Sri Lanka to demonstrate its readiness to discharge her international obligations to win the good will of the international community. We need international solidarity in order to rebuild Sri Lanka. Committing to IHL obligations during and after armed conflicts would be a great leap forward in this regard.