

## International Humanitarian Law in India: A Critical Case Study

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### Abstract

Present Article attempts to sketch the application of International Humanitarian Law in the context of internal armed conflict in India, as well as various approaches at national and international level to solve this problem. Since Human Rights violation is no longer contained within the state-private relation spectrum and has spilled outside it. Therefore, right now there is need for effective implementation machinery to check such spillage and meet new challenges posed by private actors for the enjoyment of Human Rights.

**KEYWORDS:** Human Rights, International Humanitarian Law, Geneva Conventions, Non-International Armed Conflict etc.

### INTRODUCTION

The term International Humanitarian Law (IHL) also known as ‘The law of armed conflict’ or ‘the law of war<sup>1</sup>’. It is a branch of International Human Rights Law. Generally International Humanitarian Law deals with situation of the armed conflict which is either at international or non-international level. The object of the IHL (International Humanitarian Law) is to provide protection to all non-combatant and combatant who have been disabled (accident, retire etc.) during the period of the armed conflict. Right now International Humanitarian Law comprises following parts:

1. Geneva Convention
2. Hague Convention
3. Customary international law

### WHAT IS THE NEED OF INTERNATIONAL HUMANITARIAN LAW (IHL)?

Before 1949, neither the Charter of United Nations, nor any other rule of International Law, prohibited the use of force by armed group within the state. Even though there is International Human Rights Law which deals with war as well as peaceful situation. But there is not as such special provision which regulate the conduct of the state during the war. After World War II, it is realised that more conflicts is purely internal character have occurred, which led to violation of human rights and create the necessity to regulate the conduct of war. Moreover, today we are living in nuclear arena. Nobody can forget the damage caused by the atomic bombs, in Japanese cities of Hiroshima and Nagasaki. Day to day advancement of technology increases the threat to human life. In 21<sup>st</sup> century various kinds of advance weapons have been developed this includes Cluster ammunitions, Chemical and Biological Weapons. All

<sup>1</sup>International Humanitarian law Research

Initiative<ihl.ihlresearch.org/index.cfm?fuseaction=page.viewpage&pageid>accessed 29 November 2011.

these technological development extend our abilities to change the world. Hence, these things compel us to reconsider the role to be played by international law in accordance with the fast changing world. Therefore, there is an urgent need to modify the law, so that it keeps pace with the need of the society and gives respect for human beings.

## IHL IN INTERNAL ARMED CONFLICT

Law regulating armed conflict has existed for centuries, but prior to 1949 there was no exclusive law which dealt with internal armed conflict. Generally, violence within states remained outside the scope of International Law and thus it could not prohibit the use of force. This deficiency and lacunae were finally resolved in 1949 with the adoption of Geneva Conventions 1949. The Common Article 3 of Geneva Conventions of all the four conventions provides for the respect of basic standards of human rights in non-international armed conflicts. After some time, it gained momentum in the 1960's and led to the adoption of two Protocols in 1977, in which Protocol II relates to non-international armed conflict.<sup>2</sup> Now it is very essential to analyse the legal provision relating to international armed conflict to access the real magnitude of the problem, which, we will deal in further part of the article.

## INTERNAL ARMED CONFLICT: ANALYSIS OF LEGAL PROVISION

Scope of Common Article 3: Additional Protocol II, 1977 of the Geneva Convention  
The concept of non-international armed conflict in humanitarian law can be analyzed on the basis of two main treaty texts: namely, Article 3 common to all the four Geneva Conventions 1949 and Article 1 of Additional Protocol II of 1977. After analyzing the provision of Common Article 3 and Article 1 of Protocol II, it can be clearly documented that, definition given in Article 1 of Protocol II is very restrictive in comparison to Common Article 3, in following aspects:

- a) It introduces the requirement of territorial control.
- b) It will be applicable only to the armed conflicts between State armed forces and dissident armed Forces or other organized armed groups.
- c) It will not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflict<sup>3</sup>.

Now the main and consistent argument develop here is that, what will be the scope of the Article 3 in reference of Article 1 of Protocol II? The answer to this question is enshrined in Article 1 of Protocol II itself, which states that, "this Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application..." The close analysis of the content of text connotes that, Protocol II develops in supplements of Common Article 3. "Without modifying its existing conditions of application." So it can be conclude, that both Protocol II and common article 3 apply simultaneously, and in

<sup>2</sup> David M. Miller, Non International armed conflicts, <www.wcl.american.edu/journal/lawrev/31/miller.pdf> accesses on 30 October 2011.

<sup>3</sup> <www.icrc.org > icrc.org > Treaties Home > Introduction > accessed on 22 November, 2011

case of low-intensity conflict, which does not fulfill the conditions for the application of Protocol II, would be covered under common Article 3. In fact, Article 3 retains an autonomous existence; its applicability is neither restricted nor subject to the scope of the Protocol II<sup>4</sup>.

### **WHY HAS INDIA NOT RECOGNIZED PROTOCOL II OF GENEVA CONVENTION, 1949?**

The rules of IHL have been evolved for the purpose of balancing military necessity and concern for humanity. These rules seek to protect person who are not or no longer, taking direct part in the hostilities such as civilian, prisoners of war and other detainees, and the injured and sick<sup>5</sup>. But ambiguity and non clarity in the provisions creates initial hurdles in the application of International Humanitarian Law. Apart from that, the Additional Protocol II of Geneva Convention, 1949 has not been universally accepted and ratified by the following countries like USA, India, Iran, Myanmar, Pakistan, Afghanistan, Israel, and Srilanka. Now striking question is that, why India has not recognized Protocol II? We could be found the answer in some of the following arguments, which have been taken by India during the discussion for not recognizing the Protocol II of the Geneva Convention. These are as follow:

a) It argued that in the face of equal suffering, victims have the right to the same protection in all armed conflicts, whether internal or international. Therefore, there is no need of protocol II.

b) Favoring the **high threshold** of application<sup>6</sup>.

The analysis of the above given arguments itself shows the unwillingness of India to escape from responsibility of domestic matter.

### **EFFECT OF NON- RECOGNITION OF THE PROTOCOL II**

The above arguments justifying non-recognition of protocol II, it connotes how India tried to drag its feet from its liability to protect the human rights of the people. Now, the next looming question is that, what would be the legal effect of non-recognition of the protocol II?

So after analysis of legal provision of Common Article 3 and Protocol II of Geneva Convention (already mentioned in the Article), it can be clearly documented that, the scope of Common Article 3 is wider than Protocol II. Even though India has not recognized protocol II, it cannot avoid application of legal provision on internal armed conflict, within the ambit of Common Article 3 of Geneva Convention.

### **THE THRESHOLD OF NON-INTERNATIONAL ARMED CONFLICT:**

Right now, the major problem is to examine the threshold between International and Non- International armed conflict, which is very much essential for proper application of the International Humanitarian Law. It is thus it is crucial to be clear about the

<sup>4</sup> Sylvie Junod , Additional Protocol: It History and Scope, <[www.wcl.american.edu/journal/lawrev/33/junod.pdf](http://www.wcl.american.edu/journal/lawrev/33/junod.pdf)> ( accessed on 22 November 2011.

<sup>5</sup> U C Jha, *International Humanitarian law: The laws of War*, (Vij Books India Pvt. Ltd: New Delhi 2011).

<sup>6</sup> *Supra* note 4, p.33

internal armed conflict, for proper application of the law. This is the crux of whole Article.

No universal definition - only a whiff of vague understanding:

There are many definitions for internal armed conflict and civil war but none of them is universally acceptable. A widely accepted definition comes from the Peace Research Institute, Oslo (Prio). The Institute defined the term internal conflict as, “a ‘contested incompatibility’ between a state and internal opposition, regarding the government of the territory, where the use of the armed force between the parties result in at least 25 battle related deaths per year civilian military”.<sup>7</sup> This definition shows the quantitative approach of internal armed conflict which fixed 25 battle deaths of human beings as the threshold.

According to ICRC (International Committee of the Red Cross), commission of experts for the study of the question of aid to the victims of internal conflicts– the existence of an armed conflict cannot be denied if the hostile action, directed against the legal government is of a collective character and consists of minimum amount of organization.

In the year 1997, in *Prosecutor v. Dusko Tadic*, the International Criminal Tribunal for the Former Yugoslavia **ICTY** (International Criminal Tribunal for Yugoslavia) defined the concept of armed conflict. According to the tribunal, “an armed conflict exists whenever there is a resort to armed forces between states or protracted **armed violence between governmental authorities and organized armed groups within a state**. In given case, it was stipulated that International humanitarian law applies from the initiation of such conflict 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>8</sup>

The two aspects of non-international armed conflict stated in Tadic case are:

- (1) Armed violence and
- (2) Organization of parties to the conflict.

Similarly, the commentary, Elements of War Crimes under the Rome Statute of the International Criminal Court, indicates that the parties should be ‘organized to a greater or lesser extent’ in order to qualify as an armed conflict<sup>9</sup>.

Hence, this Article attempts to define the term international armed conflict. Therefore, international armed conflict can be defined as, “the use of armed force within the boundary of one state between one or more armed groups and the acting government, or between such groups”<sup>10</sup>.

## CASES ON INTERNAL ARMED CONFLICT:

### Lebanon

Since 1975, Lebanon has been battered by armed clashes between the government forces and armed groups and also between rival opposition groups. This conflict has all the features of a non-international armed conflict; and Article 3 of the Convention

<sup>7</sup>Oskar N.T. Thomas & James Ron, Do Human Rights Violation cause internal conflict? The John Hopkins University Press (2007) Vol. 29, No.3 Human Right Quarterly.

<sup>8</sup>Tadic (jurisdiction) at para 70

<sup>9</sup>Dörmann et al., Elements of War, p. 442.

<sup>10</sup>Eve La Haye, *War Crimes in Internal armed Conflicts* in Cambridge University press (2008).

is applicable here. The relation between the various groups fighting against each other is also covered by the common article 3<sup>11</sup>.

### **Tablada Case**

In recent Tablada case before the Inter- American Commission on Human Rights, the question before the commission was to determine, whether the **30 hour long armed confrontation** between attackers and Argentine armed forces was ‘merely an example of internal disturbances or tensions or whether it constituted a non- international armed conflict within the meaning of the common Article 3? Commission held that, common Article 3 stipulate that, armed conflicts do not ‘require the existence of large scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory’. It held that direct involvement of governmental armed forces and the nature and level of the violation attending the events amounted to the armed conflict<sup>12</sup>.

### **PROTECTION UNDER INTERNATIONAL HUMANITARIAN LAW: OBLIGATION ON INDIA**

At the international level, India has certain obligation under some International Convention and Treaty i.e. The Universal Declaration of the Human Rights (UDHR) which, opens with the emphatic declaration ‘*All human being are born free and equal in dignity and rights. They are endowed with the reason and conscience and should act towards one another in a spirit of the brotherhood.*’<sup>13</sup> Closely on the heels of UDHR followed the two important human right documents, with a new concept of the binding obligation. The first one is **International Covenant on Civil and Political Rights 1966 (ICCPR)** and **International Convention on the Economics, Social and Cultural Rights 1966 (ICESCR)**. Apart from this India is a signatory of Geneva Convention, 1949.

### **CERTAIN ABSOLUTE AND NON- DEROGABLE RIGHTS:**

The term ‘absolute and non-derogable rights’ connotes those rights which cannot be suspended at any time, not even during emergency. Under international law, some rights are absolute and non-derogable. These rights are given in **International Covenant on Civil and Political Rights 1966 (ICCPR)** which is ratified by India.

Article 4(2) of the ICCPR provides that no derogation is permitted for<sup>14</sup>:

- freedom from torture or cruel, inhuman and degrading treatment or punishment; and freedom from medical or scientific experimentation without consent (art 7);
- freedom from slavery and servitude (arts 8(1) and (2));

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<sup>11</sup> Hans Peter Gasser, Internationalized Non International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon, Vol. 33, American University Law Review, <[www.wcl.american.edu/journal/lawrev/33/gasser.pdf](http://www.wcl.american.edu/journal/lawrev/33/gasser.pdf)> accessed on 30 October, 2011.

<sup>12</sup> *Supra* note 10, pp. 12, 13.

<sup>13</sup> Article 1 UDHR, 1948, available at <[www.un.org/en/documents/udhr/](http://www.un.org/en/documents/udhr/)> accessed on 12 November 2011.

<sup>14</sup> International Covenant on Civil and political Rights, <[www.ohchr.org/english/law/ccpr.htm](http://www.ohchr.org/english/law/ccpr.htm)> accessed on 12 November, 2011.

- freedom from imprisonment for inability to fulfill a contractual obligation (art 11);
- prohibition against the retrospective operation of criminal laws (art 15);
- right to recognition before the law (art 16); and
- Freedom of thought, conscience and religion (art 18).

## **INDIA'S INTERNATIONAL HUMANITARIAN LAW OBLIGATIONS IN DOMESTIC LAW**

The Indian Government passed THE GENEVA CONVENTIONS ACT, 1960 under Article 253 of the Indian Constitution, read with entries 13 and 14 of the Union List in the Seventh Schedule based on Geneva Convention. This Act provides the punishment for grave breaches of the Geneva Conventions 1949. It regulates legal proceedings with respect to protected persons (prisoners of war and internees). Apart from that, the Act also prohibits misuse of the Red Cross and other protected emblems under the Geneva Conventions. In spite of domestic law India has failed to punish the violator of the human rights in J&K.

## **NON- DEROGABLE RIGHTS UNDER THE INDIAN CONSTITUTION**

Under the Indian Constitution, 1950 Fundamental Rights are incorporated under part III of the Constitution from Article 12 to 35. Among them, some rights are absolute and non-derogable (i.e., Art 20 and 21) which cannot be suspended even during emergency<sup>15</sup>.

## **HUMANITARIAN LAW IN INDIA: NEED FOR INTERVENTION**

*“Perpetual peace is no empty idea, but a practical thing which, through its gradual solution, is coming always nearer its final realization” – Immanuel Kant*

At present India is combating two major problem i.e ‘**militants**’ refers to groups operating in Jammu and Kashmir to a large extent, in the Northeast while the other is ‘**extremists**’ which refers to groups in the Naxal-affected areas. According to the estimate of the Asian Centre for Human Rights (ACHR)<sup>16</sup> the highest number of killings has been reported from Chhattisgarh (208) which constitutes 54% of the total killings, followed by Andhra Pradesh (59), Jharkhand (44) and Bihar(28). There have been credible reports of serious human rights violations by the security forces while combating the Naxalites. Though security forces identify all those killed by them as “Naxalites”, there have been allegations of fake encounter killings<sup>17</sup>. Therefore, it is really matter of the serious concern that, in spite of signatory of various human rights treaties (mentioned in earlier part of the article) India has failed to protect the human rights of J& K people.

<sup>15</sup> Art.359 of The Indian Constitution 1950<indiacode.nic.in/coiweb/welcome.htm>accessed on6November 2011.

<sup>16</sup> Naxal Conflict Monitor, A Quarterly New Shelter of ACHR Vol. II, (April-June 2006) <www.achrweb.org/reports/india/AR08/chhattisgarh.html>accessed on6 November, 2011.

<sup>17</sup> The Naxals get lethal Chhattisgarh continues to be the epicenter of the conflict, Naxal Conflict Monitor, p. 2,A Quarterly Briefing Article of the Asian Centre for Human Rights.<www.achrweb.org/nmc/NCM-VOL-02-03.pdf>accessed on3 October, 2011

The decision of the **International Court of justice** in the case concerning Military and Paramilitary activities in (**Nicaragua v. United States**), observed that common Article 3 of the Geneva Convention, 1949 reflected the elementary consideration of the humanity<sup>18</sup>. Therefore, in case of J& K matter there is clear violation of the Common Art. 3 of the Geneva Convention under which India is obliged to follow it.

## **WAR BETWEEN PAKISTAN AND INDIA: VIOLATION OF HUMANITARIAN LAW**

The long-standing border and Kashmir dispute resulted in full-scale wars between India and Pakistan in September 1965, December 1971 and 1999. Many prisoners of war were captured by both the countries i.e., India and Pakistan. Recently according to The Daily Mail, 18 Pakistan Army personnel, who were made Prisoners of War in 1965 and 1971 Indo-Pak Wars, are still being held in Indian custody, contrary to all norms of humanity as well in direct contravention of the Geneva Convention and, the Indian government has failed to respond to repeated requests about the status of the POWs (Prisoners of War)<sup>19</sup>. This incident clearly, demonstrated the great violation of the human rights, because both India and Pakistan as signatories to the four Geneva Conventions III relating to the treatment of the prisoners of war of August 12, 1949 were bound by the rules of POW. The proper treatment of prisoners is the responsibility of the detaining power, derogation from it may incur liability at both levels international and domestic, under Geneva Convention III relating to treatment of the prisoners of war and under THE GENEVA CONVENTIONS ACT, 1960 which is passed by Indian parliament.

### **THE WAR OF KASHMIR: HUMANITARIAN LAW**

*The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.*<sup>20</sup>

Whenever the question of Human Rights and Humanitarian Law arises in context of India the first thing that strikes us is Kashmir. Now the question before us is whether the situation in Kashmir invokes the concept of internal armed conflict or not? After considering the above-mentioned threshold of internal armed conflict, the conclusion that can be possibly arrived at is that, the war in Kashmir between the Indian armed forces and Kashmiri resistance fighters automatically invokes Humanitarian Law. A long lasting demand of revocation of Armed Forces (Special Powers) Act of 1958 (AFSPA) is still not fulfilled. For the above cause, Iron lady **Irom Sharmila** has been on a hunger strike since November 2000 which has been the longest hunger strike ever. The present Chief Minister Mr. Omar Abdullah has also raised his voice for withdrawal of the Armed Forces (Special Powers) Act, 1958.<sup>21</sup> The reason for the strong voice for withdrawal of this act is, because of the violation of Humanitarian

<sup>18</sup>[www.icj-cij.org/docket/index.php?sum=367](http://www.icj-cij.org/docket/index.php?sum=367) accessed on 3 October, 2011

<sup>19</sup> Available at [www.humanrights.asia/news/...news/.../AHRC-FAT-062-20...](http://www.humanrights.asia/news/...news/.../AHRC-FAT-062-20...) - Indonesia accessed on 12 Nov. 2011.

<sup>20</sup> John Stuart Mill, *Human Rights and Humanitarian Law Development in Indian and international Law*, p. 17, New Delhi: Oxford University Press, (2008).

<sup>21</sup> Figures Back Case for army rollback in Kashmir, *The Hindu*, (Bangalore 28 October, 2011) 14.

law in the guise of the instant Act; there are various provisions of the act which are in clear violation of human rights.

Under this Act, all security forces are given unrestricted and unaccounted power to carry out their operations, once an area is declared disturbed. Even a non-commissioned officer is granted the right to shoot, to kill on mere suspicion. The AFSPA gives wide powers to armed forces to shoot, arrest and search, all in the name of "aiding civil power." It was first applied to the North Eastern states of Assam and Manipur and was amended in 1972 to extend it to all the seven states in the north-eastern region of India. The enforcement of the AFSPA has resulted in innumerable incidents of **arbitrary detention, torture, rape, and looting** by security personnel. This legislation is sought to be justified by the Government of India. There is a strong movement for self-determination which precedes the formation of the Indian Union.<sup>22</sup>

*Apparel Export Promotion Council v. A K Chopra*<sup>23</sup> Delivering judgment on behalf of justice V N Khare, the chief justice of India, Justice Dr A S Anand said:

In instant case Court held in all the cases of human rights violation, Courts are under an obligation to see that the message of the international instruments is not drowned. Court and counsel must never forget the core principles embodied in the International Conventions and Instruments and as far as possible give effect to the principles contained in those international instruments. Further, the Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws. It is disheartening to note that, Indian government failed to observe the guidelines of apex court.

International judicial bodies such as European court of Human Rights in *Plattfrom Arzte fur das Leben case*<sup>24</sup> and the Inter- American court of Human Rights in *Velasquez Rodriguez case*<sup>25</sup> have observed that the state is duty bound to safeguard human rights from the infringement not only by the government, but also by the private individuals. States thus have a positive obligation to protect individuals from other individuals including collective individuals, such as armed group.

*Prosecutor v. Anto Furundzija*<sup>26</sup>

In this case it was stipulated that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated, not even at the time of emergency (on this ground the prohibition also applies to situations of armed conflict). Therefore, the prohibition on torture is a peremptory norm or *jus cogens*, which is irrevocable. The same has been also upheld in the case of Delalic Trial case.

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<sup>22</sup> Armed forces Special powers Act available at <[www.hrdc.net/sahrdc/resources/armed\\_forces.htm](http://www.hrdc.net/sahrdc/resources/armed_forces.htm)> accessed on 6 November 2011.

<sup>23</sup> [1999] Supreme Court Cases 759 at 776).

<sup>24</sup> Available at <[www.iidh.ed.cr/.../platform%20arzte%20fur%20das%20leben%20](http://www.iidh.ed.cr/.../platform%20arzte%20fur%20das%20leben%20)> accessed on 6 November, 2011.

<sup>25</sup> Chris Jochnick, *Confronting the Immunity of Non-State actors: New fields for the Promotion of the Human Rights*, (Feb 1999), Vol.21, Human Rights Quarterly p.66.

<sup>26</sup> Available at <[www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid.](http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid.)> accessed on 7 November, 2011.



Therefore rape of Kashmiri women, constant and continuing armed attacks against the civilian population. These all are the elements of internal armed conflict, as well as it amount to the grave breach of the Geneva Convention, 1949.

Hence, the people of Kashmir are in dire need of help. The country is in ruins, there is need to take action by the United Nations for the protection of innocent people. Besides that, India signed the ICCPR in 1978; taking on the responsibility of securing the rights guaranteed by the Covenant to all its citizens, but the greatest outrage of the provisions of AFSPA under both Indian and International law is the violation of the right to life. This comes under Article 6 of the ICCPR, and it is a non-derogable right. Indian Government is liable for putting the life of Kashmiris in peril moreover, liable for large scale deaths and torture. Although India has not signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention") which was adopted by the General Assembly of the United Nations on 10 December 1984 (resolution 39/46), India still is liable for torture because now it is customary law as a *Jus Cogens*, which is also upheld in *Sierra Leone* case that even though the country did not ratify the Torture Convention until 2001, prohibition against torture is enshrined in international customary law as a *Jus Cogens* norm.<sup>27</sup> Therefore, it is obligatory even on Indian government also.

*US v. Matta- Ballesteros case* it was noted in that case, *jus cogens* norms which are non derogable and peremptory, enjoy the highest status within customary international law, are binding on all nations and cannot be pre-empted by the treaty<sup>28</sup>

### **HOW DOES THE SITUATION IN KASHMIR ATTRACT THE PROVISION RELATING TO INTERNAL ARMED CONFLICT?**

As it has already been mentioned that, India is signatory of Geneva Convention, 1949. Therefore, it is bound by the provision of the Common Article 3 of the Geneva Convention.

There are some of the following current situations in Kashmir, which are sufficient to meet the threshold of the internal armed conflict. These are as follows:

- Existence of internal armed conflict  
After considering various definition and cases on internal armed conflict, It can be clearly documented that, direct involvement of governmental armed forces and level of the violation in Kashmir i.e. killing, rape, torture etc. itself invokes the situation of internal armed conflict.
- Effective control  
No doubt India has effective control over Kashmir. Which is one of the essential elements to constitute the internal armed conflict.
- High contracting party  
The provision of Common Article 3 applies to armed conflicts 'occurring in the territory of one of the High Contracting Parties'. The meaning of this element is very controversial. It can be argued that, this specific point was

<sup>27</sup> Chandra LekhaSriram, Olga Martin-Ortega and Johanna Herman, *War, conflict and Human Rights*, Routledge Taylor & Francis Group: London and New York, p. 95.

<sup>28</sup> Cited in Shaw N. Malcolm, *International Law*, (2005) 5<sup>th</sup> ed., (UK: Cambridge University Press) p.117.

included in order to make it clear that the Common Article 3 may be applied only in relation to the territory of states that have ratified the Geneva Conventions, 1949.<sup>29</sup>

➤ **Protracted violence**

The problem of Kashmir is not a current problem. However, Since December 1989, the strength of the insurgency in Jammu and Kashmir has fluctuated. The more prominent of the insurgent groups include the nominally secular, pro-independence Jammu and Kashmir Liberation Front (JKLF) and the radical Islamic and pro-Pakistani groups Hizb-ul-Mujahideen (HUM), Hizbollah, Harkat-ul- Hizb-ul-Ansar, and IkhwanulMuslimeen.<sup>30</sup>

After analyzing all the above factors, it can be clearly documented, that conflict of J& K is internal armed conflict.

### CONCLUDING THOUGHTS/ SUGGESTION

Now the time has come to break the endless cycle of violence and counter violence. We should not trade our humanity and friendship for now is time of healing. There is need to underscore the complexity of the human situation and our limitation in understanding, which unite us. Such shocking and repeated instances of violation of Human Rights by the security forces are blot on the country democratic credentials, its need to be perished. Right now violation of the human rights is a matter of global concern. Therefore, concept of sovereignty and jurisdiction is immaterial in these cases. In this regard following are some suggestions:

1. There is a need of implementation machinery at international level.
2. There is a need to demand from the Government of India to take immediate step to put a stop to the violations of the human rights and humanitarian law in Kashmir.
3. Need for mandatory periodical inspection in disturbed area by independent authority like International Committee on Red Cross.
4. Inclusion of non- derogable provision in Geneva Convention, 1949.
5. Amend the draconian provision of the Armed Forces special power Act.
6. India should accept and ratify The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
7. Need to establish **World Human Rights Court**.
8. As examined earlier, **The Indian Penal code, 1860** not contain any specific provision on war crimes. Further, it does not provide for universal jurisdiction over certain crimes, like The German Penal Code which provide universal jurisdiction, over genocide or other offences which are if they made punishable by the terms of international treaty binding on Germany (Article 6, Penal Code of Germany)<sup>31</sup>.

Therefore, Geneva Convention Act, 1960 does not seem to have an adequate piece of legislation for incorporating India's obligation under the International Humanitarian Law. Therefore, there is needed to take the further step in this regard.

<sup>29</sup> Sylvain Vite, *Typology of Armed conflicts in International Humanitarian Law: Legal concepts and situations*, (2009) Vol. 91, International Review of the Red Cross.

<sup>30</sup> Available at <[www.mtholyoke.edu/acad/intrel/sumit.htm](http://www.mtholyoke.edu/acad/intrel/sumit.htm)> accessed on 1 December 2011.

<sup>31</sup> Available at <[wings.buffalo.edu/law/bclc/germind.htm](http://wings.buffalo.edu/law/bclc/germind.htm)> accessed on November 24, 2011.

***Rev. Mons Sebastiao Fransisco Xavier Dos Remedios Monterio v. The State of Goa***<sup>32</sup>

In instant case Indian court analyse the Geneva Convention Act, 1960 by saying, this Act itself does not give any special remedy. It does give only indirect protection by providing for the breaches of the convention and convention are not made enforceable by the government against itself, nor does the act give a cause of action to any party of the conventions. Thus there is only obligation taken by the India to respect the convention regarding the treatment of the civilian population, but there is no right created in respect of the protected person which the court has been asked to enforce. Therefore, there is need for a thorough revision of the Geneva Convention Act, 1960.

So last but not least in the light of human Rights jurisprudence some innovative revision and amendment is needed.

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