Chapter- X

HUMAN RIGHTS

To best understand human rights law, it may be useful to think in terms of obligation versus aspiration. This results from the fact that human rights law exists in two forms: treaty law and customary international law.' Human rights law established by treaty generally only binds the state in relation to its own residents; human rights law based on customary international law binds all states, in all circumstances. For official U.S. personnel ("state actors" in the language of human rights law) dealing with civilians outside the territory of the United States, it is customary international law that establishes the human rights considered fundamental, and therefore obligatory. Analysis of the content of this customary international law is therefore the logical start point for this discussion.

CUSTOMARY INTERNATIONAL LAW HUMAN RIGHTS: THE OBLIGATION

A. If a specific human right falls within the category of customary international law, it should be considered a "fundamental" human right. As such, it is binding on U.S. forces during all overseas operations. This is because customary international law is considered part of U.S. law and human rights Law operates to regulate the way state actors (in this case the U.S. armed forces) treat all humans.' If a "human right" is considered to have risen to the status of customary international law, then it is considered binding on U.S. state actors wherever such actors deal with human beings. According to the Restatement (Third) of Foreign Relations Law of the

United States, [435] international law is violated by any state that "practices, encourages, or condones""a violation of human rights considered customary international law. The Restatement makes no qualification as to where the violation might occur, or against whom it may be directed. Therefore, it is the customary international law status of certain human rights that renders respect for such human rights a legal obligation on the part of U.S. forces conducting operations outside the United States, and not the fact that they may be reflected in treaties ratified by the United States. Of course, this is a general rule, and judge advocates must look to specific treaties, and any subsequent executing legislation, to determine if this general rule is inapplicable in a certain circumstances. This is the U.S. position regarding perhaps the three most pervasive human rights treaties: the Covenant on Civil

and Political Rights, the Covenant on Economic, .Social and Cultural Rights, and the Refugee Convention and Refugee Protocol.

B. Unfortunately, for the military practitioner there is no definitive "source list" of those human rights considered by the United States to fall within this category of fundamental human rights. As a result, the judge advocate must rely on a variety of sources to answer this question. Among these sources, the most informative is the Restatement (Third) of Foreign Relations Law of the United States. According to the Restatement, the United States accepts the position that certain fundamental human rights fall within the category of customary international law, and a state violates international law when, as a matter of policy, it practices, encourages, or condones any of the following:

1. Genocide,

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[435] See RESTATEMENT(THIRD) OF THE FOREIGN RELATIONSLAWOF THE UNITEDSTATES, at 3 701. See the Paquete Habana The Lola, 175 U.S. 677 (1900); see also supra note 1 at 5 11 1. Supra note 1 at 5701.

2. Slavery or slave trade,

3. Murder or causing the disappearance of individuals,

4. Torture or other cruel, inhumane, or degrading treatment or punishment,

5. Prolonged arbitrary detention,

6. Systematic racial discrimination[436], or According to the Restatement, as of 1987, there were 18 treaties falling under the category of "Protection of Persons," and therefore considered human rights treaties. This does include the Universal Declaration of Human Rights, or the United Nations Charter, which are considered expressions of principles, and not binding treaties.

7. A consistent pattern of gross violations of internationally recognized human right. Although international agreements, declarations, and scholarly works suggest that the list of human rights binding under international law is far more expansive than this list, the Restatement's persuasiveness is reflected by the authority relied upon by the drafters of the Restatement to support their list. Through the Reporters' Notes, the Restatement details these sources, focusing primarily on U.S. court decisions enunciating the binding nature of certain human rights, and federal statutes linking international aid to respect by recipient nations for these human rights.' These two sources are especially relevant for the military practitioner, who must be more concerned with the official position of the United States than with the suggested conclusions of legal scholars. This list is reinforced when it is combined with the core provisions of the Universal Declaration of Human Rightsqone of the most significant statements of human rights law, some portions of which are regarded as customary international law9), and article 3 common to the four Geneva Conventions of 1949 (which although a component of the law of war, is used as a matter of Department of

[436] Supra note 1, at $702.

Defense Policy as both a yardstick against which to assess human rights compliance by forces we support and as the guiding source of soldier conduct across the spectrum of conflict1'). By "cross-leveling" these sources, it is possible to construct an "amalgamated" list of those human rights judge advocates should consider customary international law. These include the prohibition against any state policy that results in the conclusion that the state practices, encourages, or condones-

1. Genocide.[437] Other commentators assert that only the primary protections announced within the Declaration represent customary law. These protections include the prohibition of torture, violence to life or limb, arbitrary arrest and detention, and the right to a fair and just trial (fair and public hearing by an impartial tribunal), and right to equal treatment before the law.[438]

2. Slavery or slave trade,
3. Murder of causing the disappearance of individuals,
4. Torture or other cruel, inhuman, or degrading treatment or punishment,
5. All violence to life or limb,
6. Taking of hostages,
7. Punishment without fair and regular trial,
8. Prolonged arbitrary detention,
9. Failure to care for and collect the wounded and sick,"

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[437] Supra note 1, at 5702. 'Supra note 1, at $702, Reporters' Notes.

G.A. Res. 217A (III), UN Doc. A/810, at 71 (1948). RICHARD B. LILLICH & FRANKNEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 65-67 (I 979); RICHARD B. LILLICH, INTERNATIONAL OF LAW,POLICY, \HUMAN RIGHTS:PROBLEMS AND PRACTICE,117-127 (2d. ed. 1991); Filartigav. Pena-Irala, 630 F.2d 876, 882-83 (2d Cir. 1980).

[438] GERHARD VON GLAHN, LAW AMONG NATIONS 238 (1992) [hereinafter VON GLAHN]. See DEP'T OF THE ARMY REG. 12- 15, JOINT SECURITY ASSISTANCE TRAINING, para 13-3. See DoD DIR. 5100.77; see also CJCS INSTR. 5810.01B.

10.Systematic racial discrimination, or

11 A consistent pattern of gross violations of internationally recognized human rights.

D. A judge advocate must also recognize that "state practice" is a key component to a human rights violation. What amounts to state practice is not clearly defined by the law. However, it is relatively clear that acts which directly harm individuals, when committed by state agents, fall within this definition." This results in what may best be understood as a "negative" human rights obligation-to take no action that directly harms individuals. The proposition that U.S. forces must comply with this "negative" obligation is not inconsistent with the training and practice of U.S. forces. For example, few would assert that U.S. forces should be able to implement plans and policies which result in cruel or inhumane treatment of civilians. However, the proposition that the concept of "practicing, encouraging, or condoning" human rights violations results in an affirmative obligation-to take affirmative measures to prevent such violations by host nation forces or allies-is more controversial. At this provision must be understood within the context from which it derives. This is not a component of the Restatement list, but instead comes from Article 3 of the Geneva Conventions. As such, it is a "right" intended to apply to a "conflict" scenario. As such, the JA should recognize that the "essence" of this right is not to care for every sick and wounded person encountered during every military operation, but relates to wounded and sick in the context of some type of conflict. As such, it is legitimate to consider this obligation limited to those individuals whose wound or sickness is directly attributable to U.S. operations. While extending this protection further may be a legitimate policy decision, it should not be regarded as obligatory.[439] All, must U.S. forces endeavor to prevent violations

[439] "See supra note 1, Reporters' Notes.

of human rights law by third parties in areas where such forces are operating?

E. This is perhaps the most challenging issue related to the intersection of military operations and fundamental human rights: what constitutes "encouraging or condoning" violations of human rights? Stated differently, does the obligation not to encourage or condone violations of fundamental human rights translate into an obligation on the part of U.S. forces to intervene to protect civilians from human rights violations inflicted by third parties when U.S. forces have the means to do so? The answer to this question is probably no, despite plausible arguments to the contrary. For the military practitioner, the undeniable reality is that resolution of the question of the scope of U.S. obligations to actively protect fundamental human rights rests with the National Command Authority, as reflected in the CJCS Standing Rules of Engagement. This resolution will likely depend on a variety of factors, to include the nature of the operation, the expected likelihood of serious violations, and perhaps most importantly, the existence of a viable host nation authority.

F. Potential responses to observed violations of fundamental human rights include reporting through command channels, informing Department of State personnel in the country, increasing training of host nation forces in what human rights are and how to respond to violations, documenting incidents and notifying host nation authorities, and finally, intervening to prevent the violation. The greater the viability of the host nation authorities, the less likelihood exists for this last option. However, judge advocates preparing to conduct an operation should recognize that the need to seek guidance, in the form of the mission statement or rules of engagement, on how U.S. forces should react to such situations, is absolutely imperative when intelligence indicates a high likelihood of

confronting human rights violations. This imperative increases in direct correlation to the decreasing effectiveness of host nation authority in the area of operations.

HUMAN RIGHTS TREATIES: THE ASPIRATION

A. The original focus of human rights law must be re-emphasized. Understanding this original focus is essential to understand why human rights treaties, even when signed and ratified by the United States, fall within the category of "aspiration" instead of "obligation." That focus was to protect individuals form the harmful acts of their own governments.[440] This was the "groundbreaking" aspect of human rights law: that international law could regulate the way a government treated the residents of its own state. Human rights law was not originally intended to protect individuals from the actions of any government agent they encountered. This is partly explained by the fact that historically, other international law concepts provided for the protection of individuals from the cruel treatment of foreign nations."

B. It is the original scope of human rights law that is applied as a matter of policy by the United States when analyzing the scope of human rights treaties. In short, the United States interprets human rights treaties to apply to persons living in the territory of the United States, and not to any person with whom agents of our government deal in the international community. This theory of treaty interpretation is referred to as "non-extraterritoriality."" The result of this theory is that these international agreements do not create treaty based obligations on U.S. forces when dealing with civilians in another country during the course of a contingency operation. This distinction between the scope of application of fundamental human rights, which have attained customary international law status,

[440] See supra note 1 and accompanying text.

versus the scope of application of non-core treaty based human rights, is a critical aspect of human rights law judge advocates must grasp.

C. While the non-extraterritorial interpretation of human rights treaties is the primary basis for the conclusion that these treaties do not bind U.S. forces outside the territory of the U.S., judge advocates must also be familiar with the concept of treaty execution. According to this treaty interpretation doctrine,[441] while the actual language used in the scope provisions of such treaties usually makes such treaties applicable to "all individuals subject to [a states]jurisdiction" the United States interprets such scope provisions as referring to the United States and its territories and possessions, and not any area under the functional control of United States armed forces. This is consistent with the general interpretation that such treaties do not apply outside the territory of the United States.[442] Citing the human rights groups that mounted a defense for an Amy captain that misinterpreted the Civil and Political Covenant to create an affirmative

obligation to correct human rights violations within a Haitian Prison.[443]

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[441] See supra note 1 at Part VII, Introductory Note.

[442] See supra note 1 at •˜322(2)and Reporters' Note 3; see also CLAIBORNE PELL REPORTON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. COC. NO. 102-23(Cost Estimate) (This Congressional Budget Office Report indicated that the Covenant was designed to guarantee rights and protections to people living within the territory of the nations that ratified it). "See Theodore Meron, Extraterritorialiv of Human Rights Treaties, 89 AM. J. INT'L L. 78-82 (1995). See also CENTER FOR LAW AND MILITARYOPERATIONS, THEJUDGEADVOCATE GENEML'SSCHOOL, UNITED STATES ARMY, LAW AND MILITARYOPERATIONS IN HAITI, 1994-1995--LESSONS LEARNEDFOR JUDGE ADVOCATES 49 (1995) [hereinafter CLAM0 HAITIREPORT],

[443] Lawyers' Committee for Human Rights, Protect or Obey: The United States Army versus CPT Lawrence Rockwood 5 (1995) (reprinting an amicus brief submitted in opposition to a prosecution pretrial motion).

Although treaties entered into by the U.S. become part of the "supreme law of the land," '"some are not enforceable in U.S. courts absent subsequent legislation or executive order to "execute" the obligations created by such treaties.

D. This "self-execution" doctrine relates primarily to the ability of a litigant to secure enforcement for a treaty provision in U.S. courts.'O However, the impact I8 US. CONST. art VI. According to the Restatement, "international agreements are law of the United States and supreme over the law of the several states."[444] The Restatement Commentary states the point even more emphatically: "Treaties made under the authority of the United States, like the Constitution itself and the laws of the United States, are expressly declared to be 'supreme Law of the Land' by Article VI of the Constitution."

The Restatement Commentary indicates:

In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await

implementation by legislation or appropriate executive or administrative action. If the international agreement is silent as to its self-executing character and the intention of the United States is unclear, account must be taken of any statement by the President in concluding the agreement or in submitting it to the Senate for consent or to the Congress as a whole for approval, and any expression by the Senate or the Congress in dealing with the agreement. After the agreement is concluded, often the President must decide in the first instance whether the agreement is self-executing, ie. whether existing law is adequate to enable the United States to carry out its obligations, or whether further legislation is required.. . Whether an agreement is to be given effect without

[444] Supra note 1, at $1 I 1.

further legislation is an issue that a court must decide when a party seeks to invoke the agreement as law . . .

Some provisions of an international agreement may be self-executing and others non-self- executing. If an international agreement or one of its provisions is non-self-executing, the United States is under an international obligation to adjust its laws and institutions as may be necessary to give effect to the agreement.[445] In Foster, the Court focused upon the Supremacy Clause of the United States Constitution and found that this clause reversed the British practice of not judicially enforcing treaties, until Parliament had enacted municipal laws to give effect to such treaties. The Court found that the Supremacy Clause declares treaties to be the supreme law of the land and directs courts to give them effect without waiting for accompanying legislative enactment. The Court, however, conditioned this rule by stating that only treaties that operate of themselves merit the right to immediate execution. This qualifying language is the source of today's great debate over whether or not treaties are self-executing;[446] which states: where a treaty is incomplete either because it expressly calls for implementing legislation or because it calls for the performance of a particular affirmative act by the contracting states, which act or acts can only be performed through a legislative act, such a treaty is for obvious reasons not self-executing, and subsequent legislation must be enacted before such a treaty is enforceable. . . On the other hand, where a treaty is full and complete, it is generally considered to be self-executing on whether a judge advocate should conclude that a treaty creates a binding obligation on U.S. forces is potentially profound. First, there is an argument that if a treaty is considered non-self-executing, it should not be regarded as creating such an

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[445] Supranote 1, at cmt h. See also Foster v. Neilson, 27 U.S. (2 Pet.) 253,254 (1 829).

[446] see also DEP'T OF ARMY, PAMPHLET 27-1 61-1, LAW OF PEACE,VOLUMEI para. 8

23 (1 September 1979) [hereinafter DA PAM 27-161-11,

obligation."[447] More significantly, once a treaty is executed, it is the subsequent executing legislation or executive order, and not the treaty

provisions, that is given effect by U.S. courts, and therefore defines the scope of U.S. obligations under our law."[448]

E. The U.S. position regarding the human rights treaties discussed above is that "the intention of the United States determines whether an agreement is to be self-executing or should await implementing legislation."[449] Thus, the United States position is that its unilateral statement of intent, made through the vehicle of a declaration during the ratification process, is determinative of the intent of the parties. Accordingly, if the United States adds such a declaration to a treaty,

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[447] There are several difficulties with this argument. First, it assumes that a U.S. court has declared the treaty non-self-executing, because absent such a ruling, the non-self-executing conclusion is questionable: "[Ilf the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts." Supra note 1, at $1 11, Reporters Note 5. Second, it translates a doctrine of judicial enforcement into a mechanism whereby U.S. state actors conclude that a valid treaty should not be considered to impose international obligations upon those state actors, a transformation that seems to contradict the general view that failure to enact executing legislation when such legislation is needed constitutes a breach of the relevant treaty obligation. "[A] finding that a treaty is not self-executing (when a court determines there is not executing legislation) is a finding that the United States has been and continues to be in default, and should be avoided." Id.

[448] "[It is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States." Id. Perhaps the best recent example of the primacy of implementing legislation over treaty text in terms of its impact on how U.S. state actors interpret our obligations under a treaty was the conclusion by the Supreme Court of the United States that the determination of refugee status for individuals fleeing Haiti was dictated not pursuant to the Refugee Protocol standing alone, but by the implementing legislation for that treaty -the Refugee Act. United States v. Haitian Centers Council, Inc. 113 S.Ct. 2549 (1993).

[449] See supra note 18131

the declaration determines the interpretation the United States will apply to determining the nature of the obligation.[450]

F. The bottom line is that compliance with international law is not a suicide pact nor even unreasonable. Its observance, for example, does not require a military force on a humanitarian mission within the territory of another nation to immediately take on all the burdens of the host nation government. A clear example of this rule is the conduct of U.S. forces Operation UPHOLD DEMOCRACY in Haiti regarding the arrest and detention of civilian persons. The failure of the Cedras regime to adhere to the minimum human rights associated with the arrest and imprisonment of its nationals served as part of the United Nation's justification for sanctioning the operation. Accordingly, the United States desired to do the best job it could in correcting this condition, starting by conducting its own detention operations in fill compliance with international law. The United States did not, however, step into the shoes of the Haitian government, and did not become a guarantor of all the rights that international law requires a government to provide its own nationals.

G. Along this line, the Joint Task Force (JTF) lawyers first noted that the Universal Declaration of Human Rights does not prohibit detention or arrest, but simply protects civilians from the arbitrary application of these forms of liberty denial."[451]

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[450] See Supra note 111 emt

[451] Common Article 3 does not contain a prohibition of arbitrary detention. Instead, its limitation regarding

liberty deprivation deals only with the prohibition of extrajudicial sentences. Accordingly, the judge advocates involved in Operation Uphold Democracy and other recent operations looked to the customary law and the Universal Declaration of Human Rights as authority in this area. It is contrary to these sources of law and United States policy to arbitrarily detain people. Judge advocates, sophisticated in this area of practice, explained to representatives from the International Committee of the Red Cross the distinction between the international law used as guidance, and the international law that actually bound the members of the Combined Joint Task Force (CJTF). More specifically, these judge advocates understood and frequently explained that the third and fourth Geneva Conventions served as procedural guidance, but the Universal Declaration (to the extent it represents customary law) served as binding law.

The JTF could detain civilians who posed a legitimate threat to the force, its mission, or other Haitian civilian.[452]

H. Once detained, these persons become entitled to a baseline of humanitarian and due process protections. These protections include the provision of a clean and safe holding area; rules and conduct that would prevent any form of physical maltreatment, degrading treatment, or intimidation; and rapid judicial review of their individual detention.[453] The burden associated with filly complying with the letter and spirit of the Universal Declaration of Human Rights[454] permitted the United States to safeguard its force, execute its mission, and reap the benefits of "good press."[455]

I. Accurate articulation of these doctrines of non-extraterritoriality and non-self- execution is important to ensure consistency between United States policy and practice. However, a judge advocate should bear in mind that this is background information, and that it is the list of human rights considered customary international law that is most significant in terms of policies and practices of U.S. forces. The judge advocate must be prepared to advise his or her commander

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[452] 'The newly arrived military forces (into Haiti) had ample international legal authority to detain such persons." Deployed judge advocates relied upon Security Council Resolution 940 and article 51 of the United Nations Charter. See CLAM0 HAITIREPORT, supra note 17, at 63.

[453] See supra note 17 at 64-65.

[454] Reprinted for reference purposes in the Appendix is the Universal Declaration of Human Rights. This is intended to serve as a resource for judge advocate to utilize as a source of law to "analogize" from when developing policies to implement the customary international law human rights obligations set out above.

[455] The judge advocates within the 10th Mountain Division found that the extension of these rights and protections served as concrete proof of the establishment of institutional enforcement of basic humanitarian

considerations. This garnered "good press" by demonstrating to the Haitian people, "the human rights groups, and the International Committee of the Red Cross (ICRC) that the US. led force" was adhering to the Universal Declaration principles. See OPERATION UPHOLD DEMOCRACY, DIVISION, 1OTH MOUNTAIN OFFICE OF THE STAFF JUDGE ADVOCATE MULTINATIONAL REPORT 7-9 (March 1995) FORCE HAITI AFTER-ACTION [I OTH MOUNTAIN AAR].

and staff that many of the "rights" reflected in human rights treaties and in the Universal Declaration, although not binding as a matter of treaty obligation, are nonetheless binding on U.S. forces as a matter of customary international law.

Sum Up: Resistance to the elimination of nuclear weapons is not only a matter of persisting political interests tied to nuclear weapons, but also of failure to move toward new policy visions that depart from deterrence doctrine and the pursuit of national security based on military might rather than collective well-being. Weapons of mass destruction represent the logical extension of traditional military thought, with its reliance on force and domination of armed conflict. An outgrowth of this security paradigm is the principle of deterrence, by which a military threatens overwhelming, even unthinkable, superior force on other states in order to protect its national interests. Proponents make two claims about deterrence: that the threat of nuclear weapons will prevent either a conventional or nuclear attack, and that the success of such deterrence will ensure that nuclear weapons will not be used (atleast by rational states). However, deterrence is inherently unstable and is bound to far at some point :

1. For deterrence to be effective it must be based on a willingness to use nuclear weapons, but that willingness itself a lead to its failure to prevent nuclear war, If in a conflict situation an enemy is not convened that nuclear weapons will be used against them, they may decide to use force against the nuclear state.

This situation has occurred already on a number of occasions since 1945 for example when Argentina invaded the Falkland Islands despite the British nuclear deterrent. Such failure of deterrence to prevent conventional attack could downgrade the deterrent value of nuclear weapons. Thus the desire to maintain

the credibility of the nuclear deterrent threat would provide an incentive for the use of nuclear weapon.

2. Nuclear war could also occur by accident or miscalculation number of accidents that could have resulted in an inadvertent nuclear exchange have already occurred. If nuclear weapons are kept on alert status, probable failures incorrect information transfers in military computers could have catastrophic result.
3. Nuclear deterrence stimulates other states to develop or acquire either nuclear weapons or other weapons of mass destruction in response.
4. When deterrence fails, there is no fall-back plan, and the consequences might include nuclear holocaust.

Nuclear weapons and deterrence logic do not fit into an emerging world where power structures are being transformed from state-based to more interlinked systems, including transnational and international corporations, a global market, international institutions, communications systems, environmental and social effects of policies and practices, civil society organizations and movements, and even a globalization of cultures and identities. A paradigm shift is afoot as the work moves away from self contained nation-state systems to interstate interdependence combined with globalization. In the field of security policy, a corresponding shift is from deterrence policy to increased reliance on collective security measures. Whether the emergent paradigm will be capital-driven or human rights-driven depends largely' on the concept of collective security that develops. A security model that takes into account global humanitarian needs, such as health, education, social and economic, justice, ecological balance and human rights is scarcely compatible with a model that relies on the capacity for mass destruction as the cornerstone of security, The global elimination of nuclear weapons will necessarily involve the different elements of global society in its implement anon and will generate new mechanisms for global co-operartion. The

blossoming support globally for a nuclear weapons convention is resulting partially from this paradigm shift in political social, and economic system and consciousness.

CHAPTER- XI

CONCLUSION AND SUGGESTIONS

The term "laws of war" refers to the rules governing the actual conduct of armed conflict. This idea that there actually exist rules that govern war is a difficult to understand. The act of war to be in violation of an universal law prohibiting one human being from killing another. But during times of war murder of the enemy is allowed, which leads one to the question, "if murder is permissible then what possible "laws of war" could there be?" The answer to this question can be found in the Charter established at the International Military Tribunals at Nuremberg and Tokyo:

Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan. The above excerpt comes form the Charter of the Tribunal Article 6 section C, which makes it quite clear that in general the "laws of war" are there to protect innocent civilians before and during war.

In this work the laws relating to war is studied in ten chapters to under stand the issue of killing the enemy on one hand and protecting the civilians on the other.

It has been demonstrated in **Chapter-I** that knowledge of historical evolution of the Rules of war in the context of armed conflict is an indispensable tool in studying the current international laws of war. Historical perspective and its evolution cause and effect related to conduct of war shown in this chapter.

Chapter–II is deals with the frame work of law of war and its sources. Numerous laws of war treaties and its categories described in this chapter. Certain measures provided for by the 1949 Genera Convention and protocol I to prevent violation of IHL- mainly through spreading knowledge of law. Meanwhile, the degree of effective ness of this measure, in the light of realities of war, is analyzed and concluded that if we codify laws of war it would be beneficial, but as the states are sovereign and law is void at the intersection of its boundary it will only be applicable after the requirement of piercing the shield of sovereignty have been satisfied. To this end it has been concluded in this chapter that laws of war is intended to mitigate the evils of war by Protecting both combatants and non combatants from unnecessary suffering ,Safeguarding certain fundamental rights of persons who falls into the hands of enemy particularly wounded sick and civilians, Facilitating the restoration of peace.

In chapter III over view of United Nations charter and its provision of use of force is discussed. In this it has been shown that International organisations work in maintaining peace, negotiating conflicts, responding to humanitarian crises (e.g. human rights violations, refugee crises health consequences of warfare) and rebuilding of societies. The United Nations (UN) is the main global intergovernmental organization with responsibilities in these areas.

In addition to the UN agencies some other organizations, especially humanitarian and relief organisation such as the Red Cross or Red Crescent, can be seen as traditional inter-national actors in war, health and peace issues.

It has been shown in this chapter that The number and role of humanitarian international organizations increased substantially during the last decades of the 20th century and other agencies also became involved in global activities an war and health. The scope and activities of non-governmental organizations (NGOs) are vastly different in terms of their number, resources and official legitimacy in the global politics of the early 21st century when compared to earlier periods.

In the aftermath of the Cold War the role of military and economic organizations such as the North Atlantic Treaty Organization (NATO) and the Organization of Economic Cooperation and Development (OECD) has been evolving towards a more global outlook in broader fields with significance for areas of health and development. The primary focus of Chapter III is on the role of UN bodies in war and health issues at global level and why these are important in spite of the UN current limited support and resources.

In chapter-IV Geneva Convention –I and the rules related to wounded and sick is discussed in brief and has been shown that War is a contest between armed forces of two or more States wherein force can be used within certain limits laid down by the laws and customs of war. International customs, treaties, etc., have prohibited certain means in land warfare. According to Hague Convention, 1907, the use of poisonous weapons, projectiles which cause unnecessary sufferings and pain, etc., have been prohibited. Similarly the use of poisonous gas has been prohibited in land warfare. It has also been laid down that to pollute or otherwise poison water and other food materials to be used by enemy is also the violation of the laws and customs of war. During land war undefended cities and villages

cannot be attacked or otherwise destroyed. Those cities and villages which are far away from military areas cannot be attacked. If on account of any special reasons it becomes necessary to attack such areas for the attainment of military objectives, then it is the duty of the military commanders to give prior warning to the inhabitants of such areas. Killing of wounded and sick persons of the armed forces during war has also been prohibited. International law has always maintained the distinction between combatants and non-combatants. Under international law certain facilities have been provided to non-combatants. They can be made prisoners of war under special circumstances and can be prosecuted but they cannot be killed or otherwise grievously hurt during war. Thus we see that the objective of the rules of war is to minimize the sufferings and pain of the persons involved in war and also to limit the area of war.

Reference may also be made in this chapter 'Convention on Prohibitions or Restrictions on the use of certain Conventional weapons which may be deemed to be Excessively Injurious or to have indiscriminate Effects" which was signed by the representatives of 34 States on 10th April 1981. Belgium became the thirty fifth signatory when it signed the convention later the same day. The convention is designed to prohibit or restrict the use of certain particularly inhumane conventional weapons, such as fragmentation, and incendiary weapons and mines and booby traps. Three Protocols are also annexed to the convention, which are not subject to signature. Protocol II deals with weapons designed to injure by fragments' that escape X-Ray detection in the human body Protocol II deals with mines, booby-traps and other devices. Protocol III deals with incendiary weapons. Expressions to be bound by the three Protocols is optional for each State provided that at the time they deposit their instruments of ratification, accession or approval, they consent to be bound by any two or more of the Protocols. The convention and the Protocols were concluded in 1981 in Geneva,

following work in 1979 and 1980 by a United Nations Conference and in 1978 and 1979 by a Preparatory Conference, as well as by efforts over the years by United Nations and other international bodies.

A brief reference may also be made in this chapter to Protocol I, i.e., Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed conflicts adopted on June 8, 1977, by the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed conflicts. It has been shown here that Article 35 of Protocol I which lays down basic rules relating to Methods and Means of Warfare provides that in any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited. Secondly it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. Thirdly, it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long term and severe damage to the natural environment.

Article 37, paragraph I of Protocol Additional to the Geneva Conventions of 12 August, 1946 and relating to the Protection of Victims of International Armed conflicts adopted on June 8, 1977 (hereinafter referred as Protocol I) provides that ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable to armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law, The following are the examples of such rusos the use of camouflage, decoys, mock operations and misinformation.

Article 46 of the Protocol I to the Geneva Conventions of 1949 and Relating to the Promotion of Victims of International Armed Conflicts provides that notwithstanding any other provision of the conventions

or this Protocol any member of the armed forces of a party to the conflict who falls into the power of an adverse party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy. A member of the armed forces of a party to the conflict who, on behalf of that party and in the territory controlled by an adverse party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces. However a member of the armed forces of a party to the conflict who is a resident of territory occupied by an adverse party and, who, on behalf of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. More over such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage. Further a member of the armed forces, of a party to the conflict who is not a resident of territory occupied by an adverse party and who has engaged in espionage in that territory shall not lose his sight to the status of prisoner of war and may not be treated as spy unless he is captured before he has rejoined the armed forces to which he belongs.

In chapter – V status and protection of prisoners of war is discussed and it has been concluded that The Geneva Convention on Prisoners of War, 1949, contains the following important provisions relating to the treatment of prisoners of war

(1) According to Article 13, prisoners of war must at all time be humanly treated.

(2) Any unlawful act or omission by the detaining power causing death or seriously endangering the health of the prisoners of war in its custody is prohibited and will be regarded as a serious breach of the present Convention.

(3) No prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical; dental or hospital treatment of the prisoner concerned and carried out in his interest.

(4) Prisoners of war must at all times be protected, particularly against act of violation or intimidation against insults and public curiosity.

(5) Measures of reprisal against prisoners of war are prohibited.

(6) Prisoners of war are entitled in all circumstances to respect of their persons and their honors.

(7) Prisoners of war shall retain the full civil capacity which they enjoy at the time of their capture. The detaining power may not restrict the exercise either within or without its territory of the rights which the convention confers except in so far as the captivity requires.

(8) The power, detaining prisoners of war, shall be bound to provide free of charge for the maintenance, for the medical attention required by their state of health.

(9) All prisoners of war shall be treated alike by the detaining power without any adverse distinction based on race, nationality, religious belief or political opinions or any other distinction founded on similar criteria subject, however, to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications.

(10) No physical or mental torture nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever, Prisoners of war who refuse to answer may not be threatened? Insulted or exposed to unpleasant or disadvantageous treatment of any kind.

(11) All effects and articles of personal use, except arms, horses, military equipment and military documents shall remain in their

possession, likewise their metal helmets and gas-masks, like articles issued for personal protection.

(12) Prisoners of war shall be evacuated as soon as possible after their capture to camps situated in an area far enough from connected zone for them to be out of danger.

(13) At no time should prisoners of war be without identity documents. The detaining power shall supply such documents to prisoners of war who possess none. Badges of rank and nationality decorations and articles having above all personal or sentimental value may not be taken from the prisoners of war.

(14) The detaining power may subject prisoners of war (POW) to internment. It may impose upon them the obligation of not leaving beyond certain limits of the camp where they are interned or if the said camp is fenced in, of not going outside its perimeter. Subject to the provisions of the present convention relating to penal and disciplinary sanctions. POW may not be held in close confinement except where necessary to safeguard their health, and then only during the continuation of the circumstances which make their confinement necessary (Article 21).

(15) Officers and prisoners of equivalent status shall be treated with due regard for their rank and age (Article 44). POW other than officers and prisoners of equivalent rank shall be treated with due regard due to their rank and age. (Article45).

(16) The detaining power shall grant all POW of a monthly allowance of pay, the amount of which shall be fixed by conversion, into the currency of the said power. (Article 60).

(17) POW's shall be allowed to send and receive letters and cards. (Article 71),

It is clear from the above provisions that these rules have been made for ensuring good treatment towards the prisoners of war. It has become a general principle of international law that the prisoners of war should always be humanly treated. It is the duty of the prisoners

of war that when they are asked questions relating to their name, date of birth and regiment etc., they should give reply properly. In case they do not give correct and appropriate replies in respect of the said questions they may not get the facilities which they might have been entitled to get.

It has been also shown in this chapter that Protocol I adopted on June 8, 1977 by the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts also contains some provisions relating to prisoners of war. Article 44 of Protocol I provides that any combatant, as defined in Article 43,17 who falls into the power of an adverse party shall be a prisoner of war. Article 45 provides that a person who takes part in hostilities and falls into the power of an adverse party shall be presumed a prisoner of war and therefore shall be protected by the Third Convention if he claims the status of prisoner of war, or if he appears to be entitled to such status or it the party on which he depends claims such status on his behalf by notification to the detaining power or to the protecting power. If a person who has fallen into the power of an adverse party is not held as a prisoner of war and is to be tried by that party for an offence arising out of hostilities, he will have to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and does not benefit from more favorable terms in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to the rights of communication under this convention.

Article 75 of the said Protocol I provides that in so far as they are affected by a situation referred to in Article I of the Protocol, persons who are in the power of a party to the conflict and who do not benefit

from more favorable treatment under the conventions or under this Protocol shall be treated humanly in all circumstances and shall enjoy, as a minimum the protection provided by this Article, without any adverse distinction based upon race, co lour , sex, language, religion or belief, political or other opinion of social origin, wealth, birth, or other status, or any other similar criteria. Each party shall respect the person, honour, conviction and religious practices of all such persons.

In chapter-VI Protection of civilian during armed conflict are discussed and it has been concluded that Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

In this chapter it has been concluded that there is so much limitation here and so much overlap with other crimes, that its practical usefulness is not very obvious. The same may be said of genocide, defined as an international crime in the UN Convention of December 1948. The Genocide Conventions capacity for usefulness is most of all limited by the fact that, failing the action of an international penal tribunal like the IMTs, the only courts able to enforce it are those of the State committing the genocide, which is no doubt partly why Georg Schwarzenberger was led to remark, 'The Genocide Convention is unnecessary when applicable and inapplicable when necessary.

Grave Breaches of the four Geneva Conventions, as defined in their respective Articles 50, 51, 130, and 147. The Articles lists differ from one another, because the acts they thus classify are to be read as such only (to cite a phrase which occurs in all of them) 'if committed against persons or property protected by the Convention'. The Civilians Convention's list is the longest and, since it incidentally

includes almost everything that is in the others, may serve to represent them all.

It has a fair idea to have such rules governing armed conflicting order to protect the Civilians in the general location of such a Conflict. But, when the conflict is over, and if war crimes have been Committed, how then are criminals of war brought to justice? The International Military Tribunals held after World War II in Nuremberg on 20 November 1945 and in Tokyo on 3 May 1946 are excellent examples of how such crimes of war are dealt with. (Roberts and Guelff 153-54) But, rather than elaborate on exact details of the Tribunals of Nuremberg and Tokyo a more important matter must be dealt with. What happens when alleged criminals of war are unable to be apprehended and justly tried? Are they forgotten about, or are they sought after such as other criminals in order to serve justice? What happens if these alleged violators are found residing somewhere other ban where their pursuers want to bring them to justice? How does one go about legally obtaining the custody of one such suspect? Some of the answers to these questions can be found in an analysis of how Israel went about obtaining the custody of individuals that it thought to be guilty of Nazi War Crimes. Not only will one find some of the answers to the previously stated questions, but also one will gain an understanding of one facet of international law and how it works.

The cases in specific will be dealt with here. First, the extradition of Adolf Eichmann from Argentina, and second, the extradition of John Demjanjuk from the United States of America. These cases demonstrate two very different ways that Israel went about obtaining the custody of these alleged criminals.

In chapter VII means and method of warfare is discussed and it has been shown in this chapter that In view of change in the methods of war of development .of devastating weapons, particularly nuclear weapons it has become necessary to bring about changes in

the laws of war' Besides this, following are the reasons which have necessitated changes in the laws of war; (1) Development of the concept or total war; (2) Expansion of the world' community as a result of the independence of new States; (3) Development of human rights; (4) Need for protecting the civilian population from the scourge of war; (5) Need for enforcement of human rights during war; and (6) The laws of war were codified long ago; since then revolutionary changes have taken place. They should, therefore, be revised and re Codified. The First and Second World Wars exhibited the inadequacy of the existing laws of war. JosefL. Kunz has, therefore, rightly remarked, "That the Laws of War are actually in a chaotic state and urgently need revision, is '-fact which cannot be challenged.

Despite the urgent need for the amendment in the laws of war, there is no likelihood of sincere efforts to amend them for the obvious reason that war, may even use of force has been prohibited under the charter for the settlement of international disputes. It is feared, and rightly too, that if laws of war are amended position of outlawry of war to the reverse gear.

In chapter – VIII War crimes and command responsibility is discussed and it has been shown in this chapter that Superior orders were among the simpler matters dealt with in the war- crimes trials; which is not to say that the question was then set forever to rest, By its very nature it can never be a restful one. Of all social organizations, armed forces are among the most given to demanding instant and unquestioning obedience to orders. As an Argenrinian delegate said the principle of due obedience is corner stone of the military system of many countries attending this conference. If responsibility for a legally or morally questionable order rests with anyone, it is with the person who gives the order, not the person who obeys. Kings and commanders have taken pride in assuming this responsibility, before God as well as before men: not least

because the men under their command might otherwise be less ready to do terrible -seeming things when ordered to do them. ' This absolutist military ethic has however never been unchallenged even among the military themselves. The soldier who disobeys his captain's order to shoot his colonel is more likely to receive the latter's commendation than reproof. Sensible soldiers may be able to distinguish between awful seeming orders that may have a legitimate Basis.

In chapter IX the law of war and other military operation is discussed and it has been concluded that history of the laws of war is very old but the development of the modern laws of war may be traced since the middle ages. The medieval concept of chivalry and Christianity greatly influenced the rules of war. In the modern times, in accordance with the rules of war, killing of civilians, bad treatment of prisoners of war, use of poisonous gases, sinking of ships without affording protection to the crew and its passengers have been prohibited. Before the nineteenth century, many multi-lateral treaties and conventions have been made which provide rules of war. More important of such treaties are : (1) Declaration of Paris, 1856; (2) Geneva Convention of 1864; (3) Declaration of Petersburg; (4) Hague Convention of 1899; (5) Hague Convention of 1907; (6) Geneva Gas and Bacteriological Warfare; Protocol, 1925; (7) The Submarine Rules Protocol, 1937; (8) the Four-Geneva Red cross Convention 1949; (9) Protocol I (i.e., Protocol Additional to the Geneva Conventions of 12 August, 1949, and relating to the protection of Victims of International Armed Conflicts and Protocol II (i.e., Protocol Additional to the Geneva Conventions of 12 August, 1949: and relating to the Protection of Victims of Non-International Armed Conflicts) adopted by Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law applicable in armed conflicts on June 8, 1977.

Finally in **chapter X human rights** is discussed here it has been concluded that Weapons and how they are used in armed conflict cannot properly be considered in isolation from the question, how far the choice and use of weapons in armed conflict is shaped and determined by things that have happened-decisions made, thoughts thought-before armed conflict begins. This seemingly logical procedure ought to surprise no one. But modern IHL. Writers have not usually followed it. The usual thing through the past two centuries has been to leave the part of the law which deals with the causes and pretexts of war, the *old jus ad bellum,* to defend for itself and to focus exclusively on the *jus in bello* .In the view of these conclusion it can be concluded that in international law, adjudication and post-adjudication are two distinct and separate phases in the process of settlement of disputes. The adjudication phase, mainly legal in character, relates to the settlement of disputes and its binding nature; whereas enforcement of decisions and judgments is the prime concern of the post-adjudication phase, which is more of political in character. This study is mainly focused on the post-adjudicative phase, i.e., enforcement of international decisions in inter-state disputes rendered by judicial organs and arbitral tribunals and methods of securing compliance with such decisions.

Settlement of inter-state disputes by peaceful means is a well-recognised principle of international law and has been enshrined in various bilateral and multilateral treaties. The Covenant of the League of Nations in Article 13, Para. 1, provided for submission of disputes to arbitration or judicial settlement. Article2, Para 3, of the United Nations Charter similarly enjoins the Members of the United Nations to settle their disputes by peaceful means. The peaceful means, in accordance with Article 33 of the Charter are negotiations, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agercor other arrangements. The modes such as negotiation, good offices and mediation, conciliation and Inquiry are

called as diplomatic means, which are more of political in nature. The diplomatic mode of settlement, no doubt, is a flexible method of compromise and usually do not suffer from any constitutional validity. These diplomatic means are out of the scope of this study.

Arbitration and judicial settlement are the adjudicative means, which generally follow a specified procedure. Arbitration has been defined by the International Law Commission, as a procedure for the settlement of disputes between States by a binding award on the basis of law and as a result of an undertaking voluntarily accepted. The arbitral tribunal is composed of judges who are chosen by the parties. This tribunal may be established adhoc by the parties or it may be a continuing body to handle certain categories of disputes. The modern trend has been towards the institutionalised arbitration where the rules in regard to the choice of arbitrators, the conduct of arbitration proceedings, and the rules regarding awards and their enforcement are well known to the parties in advance when reference to arbitration is made to such a body. Where the arbitration is undertaken by an arbitral institution, its rules of procedure will usually be explicitly or implicitly agreed by the parties. But its rules are likely to provide that the parties may agree on their own procedure. When parties to a dispute refer their dispute to an arbitrator or to an arbitral tribunal, in fact, they have accepted that the award of the tribunal shall be final and binding upon them unless stipulated otherwise. It is concluded from the finality character of the international arbitral awards that the awards are not appeal able. Even an arbitrator cannot interpret or modify his own award by revising it after the tribunal has completed its functions, unless through an agreement the parties expressly permit the tribunal to do so. There is a well-established rule under customary international law that award is binding on the parties and it shall be carried out immediately unless a time-limit has been fixed by the tribunal within which it must be carried out in its entirety or partly.

It is evident that arbitral awards are only binding when the arbitrator (s) or the arbitral tribunal has in every way executed its function and awards have been rendered in complete independence. If the award has been rendered under the influence of coercion of any kind, or if the award has been given beyond the jurisdiction of arbitrator (s) or arbitral tribunal, or if arbitrator (s) has been bribed by any of the parties to the disputes or if the arbitrator has been frauded by any of the disputing parties, the award would have no binding force and can be set aside.

In accordance with the vast record of arbitral procedure, it has been proved time and again that the awards are generally carried out and have practically met with acquiescence and fulfilment. Nevertheless, the problem of securing enforcement of awards has not been resolved completely as is evident in cases such as *Beagle Channel* (1977) between Argentina and Chile, in which the award was not accepted by Argentina; *Maritime Delimitation Arbitration* (1989) between Guinea-Bissau and Senegal, in which the award was rejected by Guinea-Bissau. In the past decades also, some of the awards have not been carried out. For instance, awards in the *Orinoco Steamship Company* case (1904), between United States and Venezuela; the King of Spain's Arbitration (1906), between Honduras and Nicaragua; the Charnizal Arbitration case (1911), between United States and Mexico; the *Society Commerdae de Beigique case* (1935 & 1936) between Belgium and Greece have not been complied with by losing parties. But, unfortunately, no mechanism existed under international law for the enforcement of arbitral awards in Inter-state disputes.

The rules relating to the securing compliance with international judicial decisions and arbitral awards were incorporated, for the first time, under the Covenant of the League of Nations. The Covenant of the League of Nations treated the execution of judgments as a

political problem and entrusted the task of enforcement to the Council of the League of Nations. The Covenant had empowered the Council to give effect to the judicial decisions and arbitral awards when faced with a failure by the losing party to comply with the terms of the judgment of the Court and also an arbitral award (Article 13, para. 4). It is also deduced from Article 13 (4), that the Covenant had placed upon the League Council a mandatory duty to propose measures to give effect to the decisions of the rourt, Under the terms of the provisions of that article failure to comply with the judgment was in violation of the Covenant of the League of Nations. Nevertheless, no machinery was provided for the enforcement of arbitral awards and judicial decisions except mechanism under Article 16 of the Covenant of the League of Nations. It is understood of this article that any Member of the League, which had violated the Covenant of the League, might be declared to be non-member of the League by a vote of the Council. Severance of all trade or financial relations, the prohibition of all intercourse with the nationals of the Covenant-breaking State were the probable measures that could be taken by the Council in the case of refusal of losing party to carry out the judicial decisions and arbitral awards.

The PCIJ, which was established in 1920, started functioning in the year 1922. Its first judicial pronouncement was made in the form of an advisory opinion in the *Designation the Workers delegate for the Netherlands at the Third Session of the International Labour Conference case.* The Court gave thirty-two judgments and twenty-seven advisory opinions during its existence. Many of these judgments and advisory opinions were of great importance, and international lawyer will admit that they have permanently enriched and enlarged the international law. A brief summary of the records of the Permanent Court of International Justice shows that in the entire history of judicial process of the Court, in no case did a State refuse to carry out a judgment rendered by the Court and, fortunately, no

case of non-compliance arose during the regime of the PCIJ. Thus, the enforcement machinery that was provided under Article 13 (4) of the Covenant had served the purpose of execution of judgments.

In fact, compliance with the decisions of international tribunals by the States concerned before the United Nations had been so much impressive that many authors thought that the execution of international judicial awards is a problem of minor importance. For example Jessup wrote in 1947 that, "although there has been no international marshal to enforce the decisions of international courts, but their decisions have been respected... enforcement of judgments of international courts has never been an international problem."

Nevertheless, certain attempts were underway to provide measures to secure enforcement of international judicial decisions. According to Article 10 of the Geneva Protocol for the Pacific Settlement of International Disputes of 2 October 1924, in the case of hostilities, a State which had refused to carry out the judgement of the Court would, under certain conditions, be considered as an aggressor. At the San Francisco Conference in 1945, it was again proposed that refusal to comply with a decision pronounced by a World Court should be considered as an act of aggression. The International Law Commission (ILC) constituted under the United Nations, took up similar proposal in 1970 during the course of its examination of the definition of aggression. However, such proposals have not hitherto commanded any general assent.

On the other hand, the Charter of the United Nations imposes the obligation of compliance with the decisions of the present World Court, ICJ, upon each Member State by stating in Article 94 (1) that, "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

But, in spite of this, the present Court is saddled with the problem of noncompliance, which has been further aggravated by non-appearance (which is a recent problem since 1970s) of the parties before the Court. In several cases in 1970s and 1980s, the Court experienced the phenomenon of the "non-appearance "of defendant, which is more a problem of jurisdiction. The defendant contests the jurisdiction of the Court on technical grounds. For example, Iceland boycotted the proceedings in the Fisheries Jurisdiction case, in the nuclear test cases, France, in the Aegean Sea Continental Shelf case, Turkey, in the United States Diplomatic and Consular Staff in Tehran case, Iran, n the Military and Paramilitary Activities in and against Nicaragua case the United States did not appear before the Court. Non-appearance has become a frequent occurrence on the proceedings of ICJ, and in fact poses a challenge to the jurisdiction of the Court, particularly when the jurisdiction of the Court had been invoked under Article 36 (2) of the Statute (optional clause). In order to safeguard the interests of the parties and to settle the disputes without any impediments such as non-appearance, it was provided under Article 53 of the Statute that the Court must satisfy itself that it has jurisdiction under either Article 36 or Article 37 of the Statute." In the Corfu Channel case, though Albania refused to appear before the Court, the Court had established its jurisdiction on the basis of forum prorogatun, to determine compensation n the proceedings on the merits. Similarly, in the Military and Paramilitary Activities in and against Nicaragua case, when the United States refused to appear before the Court, the Court decided to continue the proceedings on merits even the absence of the US on the basis of Article 36(2).

The problem of "non-compliance", though different from 'non-appearance', is inter-related. Whenever the States have contested the jurisdiction of the Court arid have not appeared, the chances of non-compliance with the judgments are high, In fact, all cases of

non-compliance with the judgments of the ICJ are also the cases of non-appearance. Even in such cases interim measures granted by the Court have not been complied with, For example, in the Corfu Channel case (1948), .the Fisheries Jurisdiction cases (1972), the United Nations Diplomatic and Consular Staff in Tehran case (1980), the Military and Paramilitary Activities in and against Nicaragua case (1984). In the case of non-compliance, States are reluctant to be bound by the decisions rendered by the Court, unlike challenging the authority of the Court to render the decision. Non-Compliance is usually accompanied by an aversion having some legal justification under international law.

The pertinent question is that whether States should comply with the decisions of the Court in which they have chosen not to appear before the Court? In other words, whether the parties should comply with such decisions, which are decided in their absence?

In Article 94(1) of the Charter, there exist a general principle of international law according to which, when States agree to submit their dispute to an international tribunal, they assume the obligation to comply with the decision of the tribunal. Non-compliance with the decision of the International Court or tribunal is an international wrong, a breach of various obligations arising out of a duty imposed by international law. This article does not speak about the decisions rendered in consequence of non- appearance. Thus, it could be a plausible explanation that States are under an obligation to comply with the decision only when they agree to it. If States, in general, have failed to appear before the Court or have decided not to appear before the Court are under no obligation to comply with the decions. This interpretation would seriously hamper the enforcement of judicial decisions. On the other hand, when the jurisdiction of the Court has been involved under Article 36 (2), their express agreement to the jurisdiction is there on the form of Declaration filed

with the Court. Failure to comply with the judgment and non-appearance is the breach of the international rule of pacta sunt servanda.

In order to induce the recalcitrant State to comply with the judicial decisions and the awards, the State whose interests are adversely affected has the right to take such measures, as it deems appropriate, not being incompatible with other international obligations of that State or with other general principles of law. Article 94 (2) of the Charter provides for enforcement of judgment by the UN Security Council. The ICJ is the principal judicial organ of the United Nations whose decisions should be enforced by the United Nations, in the case of non- appearance, hence, there is the role of the Security Council. The reason behind entrusting the task of enforcement of judgment to the Security Council is obvious. The Council is not only an executive organ of the United Nations but also has its own techniques of enforcement in circumstances where the dispute of situations degenerates into an actual "threat to the peace", "breach of the peace" or "an act of aggression" within the meaning of chapter VII of the Charter.

Certainly every act of non-compliance may not constitute an imminent threat to peace. Therefore, the acceptance of this view would mean that the Council is devoid of power to act in such cases where there is no threat to the peace. There is nothing as such in the wording of Article 94 (2) and there seems to be no reason to believe that there s a restriction on the authority of the Council under this provision. Furthermore, this article has made a considerable change in the functioning of the Security Council. Formally, the Security Council has jurisdiction only in matters concerning the maintenance of peace and security. This article would the Council authority to deal with matters, which might have nothing to do with security. In other words, the enforcement power given to the Security Council under

chapter VII is in addition to its powers to enforce compliance with judgment of the ICJ under Article 94 of the Charter.

Measures to be adopted under Article 94 are not necessarily limited to actions provided in Articles 41 and 42 of the Charter. The Council may also suggest other measures to secure compliance with a decision. For example, in order to give effect to the judgment, it may suggest that assets of the recalcitrant State in the territories of the Member States of the United Nations be attached. Moreover, according to Article 5 of the Charter. "a member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendations of the Security Council...'

One of the problems is that any one of the permanent members of the Security Council can prevent a decision from being taken on a non-procedural matter. Because, according to Article 27 (3) of the Charter, decisions of the Security Council on non-procedural matters shall be taken by an affirmative vote of nine members. Enforcement of a judgment of the Court is plainly non-procedural, and decisions subsequent to the Inscription of a question relating to enforcement of a judgment of the Court would require the affirmative votes of the permanent members of the Council. The following matters, however, are considered as procedural: inclusion of items In the agenda; the order of items in the agenda: deferments of consideration of items on the agenda; removal of items from list of matters of which the Security Council is seized; ruling of the President; suspension or adjournment of a meeting; invitation to participate in the proceedings under Article 31 and 32 and Rule 39; conduct of business; and convocation of an emergency special session under the Uniting for Peace Resolution of 3 November 1950. However, the distinction between "procedural and other matters has not always

been obvious and has occasionally been the subject of extended controversy.

The use of negative vote by a permanent member of the Security Council, under Article 27 (3) of the Charter, to prevent the adoption of a proposal described as the "veto". The power of veto has been the instrument whereby, much of the efficacy of the Council has been destroyed and the permanent members have not hesitated in the use of veto when they felt their interests were at stake. For instance, in the Military and Paramilitary Activities in and against Nicaragua case (1986), when the United States refused to comply with the decision of the ICJ, Nicaragua sought the intervention of the Security Council, under Article 94 (2) of the Charter, but the United States asserted its veto power in the Council when five non-permanent members in October 1986 introduced a draft resolution 'urgently' calling "for full and immediate compliance with" the judgment of the Court. However, as a general rule it is certainly true that the veto has invariably frustrated the Council's enforcement powers. Hence, the mechanism provided under the Charter for the enforcement of the decisions of the ICJ is devoid of any effect. This leaves the question of enforcement of the decisions to the parties under the customary international law.

The customary International law allows a successful party to take certain measures to carry out the judicial decisions and also arbitral awards. The successful party can resort to self-help. The term self-help is well-known in international law. The self-help can involve use of force or it can be without force. The self-help, involving use of force is in the nature of reprisals. Self-help may be done either through the use of force or it may be exercised as non- coercive (peaceful) measures 9enerafly designed to exert economic or diplomatic pressure on the recalcitrant State for complying with a request for satisfaction. In the case of enforcement of arbitral awards in 1898, in the Cerruti Arbitrations case, between Italy and Columbia,

Italy resorted to self-help when Columbia rejected part of the arbitral award, rendered by the arbitrator, President of the United States, in 1894. Italy, thereupon, sent its fleet to Colombian waters and the Commander of the fleet sent an ultimatum regarding enforcement of the award. This action by the Italian Government secured compliance with the award, by-Colombia. In the Corfu Channel case (1949), when Albania refused to pay compensation under the Judgment of the Court, the United Kingdom resorted to coercive measures as self-help against Albania.

No need to say that the use of force by one State against another State to obtain execution of International decisions is now generally regarded as illegal. Resorting to the use of non-forcible measures or threatens to use force short of war by successful party to compel the losing party for enforcement of decisions is one of the measures of self-help in the form of reprisals. However, the conditions for legitimate resort to reprisals are well supported by State practice when there is a previous violation of international law by the other party; second when they have been preceded by an unsuccessful demand for redress; and when taken, must be reasonably proportionate to the injury suffered. But most of the writers have deplored the use of forcible measures for enforcement of decisions. For example, Waldock states that the principle of resorting to forcible self-help was gravely weakened by the fact that conversion of forcible measures into war puts the case outside any legal principles. None of the recent authors deny this view. Rosenne says preventive or enforcement measures can only be taken in conformity with the decision of the competent organs. Verma supports this view and says that use of force as a part of retaliatory action is illegal under the modern international law.

Under the Charter of the United Nations, enforcement of judicial decisions or arbitral awards by successful party by use of armed force is not legal. The Charter obligates States to settle their disputes

by peaceful means so as to preserve international peace and security and justice - (Article 2, Para. 3). Similarly, the General Assembly Declaration on principles of International Law concerning Friendly Relations and Co-operation among States of 24 October 1970 declares that, "State has a duty to refrain from acts of reprisals involving the use of force. This view was expressed by the Court in its judgment in the United States Diplomatic and Consular Staff in Tehran case (1980). While the case was being deliberated before the Court, the United States conducted, on 24 April 1980, an armed incursion into Iranian territory as a form of self-help, in an attempt to secure the release of the hostages being held in Tehran.

A successful State has broad possibilities of diplomatic action distinct from available juridical steps, which may be effective in ensuring compliance. The other methods for enforcement of judicial decisions and arbitral awards by the successful party are diplomatic and economic measures that includes negotiations, diplomatic protests and finally severance of diplomatic relations and imposition of economic sanctions. These are known as acts of retorsion. The seizing of the international organisation at the instance of non-compliance may well be sufficient in itself to induce a change of heart on the part of the recalcitrant judgment debtor, For instance, in the Central Rhodopia Forests case, In 1933, between Greece arid Bulgaria, when Bulgaria refused to comply with the arbitral award, Greece resorted to the Council of League. During the discussion in the Council, the Bulgaria announced that its current financial situation prevented it from carrying out the award. After then, the parties concluded an agreement to continue negotiating an arrangement satisfactory to both. Resorting to the League of Nation Council and thereby its consequences were sufficient to lead the recalcitrant State to come to terms with the successful party.

In the Corfu Channel case, the judgment was carried out only after protracted discussions followed by diplomatic actions. On 8 May 1992, the British and Albania Governments finally reached an agreement on the settlement of outstanding claims.

The use of economic sanctions to compel the recalcitrant State is the proper means of self-help by successful State. Seizure of property belonging to the recalcitrant State in the form of expropriation or confiscation (freezing of assets), interference with the normal commercial intercourse of the recalcitrant State by the successful State, and restrictions Imposed by the successful State on the use of the recalcitrant State's property are the economic sanctions which the successful State may usually resort to in the form of self-help for compelling the recalcitrant State for comphance. For instance, in the Corfu Channel case, the final judgment of the Court awarded a sum of £843,947 as damages to the United Kingdom. British Authorities examined the possibility of seizing Albanian property situated in the United Kingdom in satisfaction of the British claim. This approach was of no avail, because at the time of the judgment there was no property of Albania situated in the United Kingdom.

In the Anglo-Iranian Oil Co. case, in order to compel the Iranian Government to comply with the interim measures, the United Kingdom Government withdrew certain facilities, which had granted to the Iranian Government before the dispute arose, However, the effectiveness of such measures depends on the availability of property belonging to the recalcitrant State in the territory of the successful party. The freezing of assets to compel compliance by a recalcitrant State seems to be a particularly suitable device since it does not involve appropriation of the property affected.

There are a great variety of regional organisations that are instrumental in the peaceful sett1ement of disputes and enforcement of decisions. This ranges from political bodies such as the Organisation of American States (OAS) and the Orgainsation of

African Unity (OAU), to more judicial bodies such as the European Court of justice, the European Court of Human Rights, the Central American Court of Justice and Inter-American Court of Human Rights. Obviously, these regional forums are eminently suitable for enforcement of decisions for various reasons. For example, a sense of regional responsibility and solidarity may prompt the parties to comply with the decisions and make it politically less difficult to secure the participation of other States in the measures to secure compliance at regional level.

International law lacks many of the formal institutions present in national legal system. There is no formal legislative body, no compulsory Court machinery with general jurisdiction and no police force. It does mean that international law does not operate in the systematic manner. While this may not be serious defect, because of the different purpose of international law, there will always be some difficulties inherent in international legal order due to much prevailed concept decisions.

It would be a mistake to conclude that international law is a perfect system. There is much required to reform international law to make it more effective. Strictly speaking, the development of international law can be achieved only by States and States themselves. The United Nations, other international organisations and the International Law Commission may propose substantive changes in the law or bring changes in existing procedures, but the development of the system ultimately depends on the political will of sovereign States.

Hence following **suggestion are made**

This study is mainly aimed to appreciate and highlight the problem more clearly rather than to suggest any immediate or comprehensive solution for it. The matters of compliance are wider, deeper and more problematic to accept as a rule of law. If the law commands the

loyalty of the community then the general respect for it could be secured. In an imperfect legal system it is difficult to suggest a perfect remedy to a problem of non-compliance with the judicial decisions and arbitral awards, particularly the judgments of the ICJ. At the present juncture of the international society, the States must respect their international commitments on the basis of the rule of pacta sunt servanda and abide by the decisions of the international courts and tribunals. To device any new mechanism or to improve the existing system for the enforcement of judicial decisions requires a strong political will of the States. At the same time, it requires the realisation of the importance of the rule of law; this can be reflected by having frequent recourse to the Court and implementing its judgments in letter and spirit. To repose the confidence of the States in the judicial settlement, it is necessary to devise a meaningful international machinery to enforce the judgments of the Court and create an objection for compulsory settlement of international disputes.

The possible suggestions proffered herein are to take precautions in advance to ensure compliance with financial decisions rendered by an international court or tribunal. To constitute a special fund by the disputed parties against which the decisions are to be made, or from which they are to be paid, and to vest the fund in trustees responsible for giving effect to any decisions which may be rendered by the court or tribunal. Such a fund may be so constituted that would help for payments made directly by the fund to the beneficiaries of the decisions made. This type of arrangement was illustrated by the Agreements of 28 April 1930, negotiated in Paris by the Committee on Eastern Reparations for the establishment of funds to meet liabilities towards Hungary under decisions of Mixed Arbitration Tribunals relating to agrarian reform claims against Czechoslovakia, Yugoslavia and Rumania and other obligations of the three Countries towards Hungary under the Treaty of Trianon. In

another case between United States and Iran, a fund was established that could be considered as appropriate for this suggestion. Following the claims of United States nationals against Iran and of Iranian nationals against the United States arising out of alleged violations of property rights as a result of the circumstances surrounding the hostage crisis, the Iran—United States Claims Tribunal, in order to ensure payment of award, established a special fund as Security Account" with one billion dollars capital from Iranian assets frozen in the United States.

The constitution of a special fund may be possible and appropriate to secure compliance in cases in which a substantial number of financial awards are likely to be made in virtue of a particular instrument, or by a particular court or tribunal. Such an arrangement may be essential and particularly desirable if the circumstances are such that the execution of awards rendered is likely to give rise to special financial difficulties. A device of this character is by its nature applicable only to limited range of cases involving financial liability in respect of which special arrangements can be made in advance.

In other cases, not having economic implications, through an increase in the scope of the ICJ compulsory jurisdiction, one could achieve a great progress in international law and the peaceful settlement of dispute only 59 Members of the total UN Members have availed themselves the opportunity to accept the compulsory jurisdiction of the Court under Article 36 (2) of the Statute. Only one permanent member of the Security Council, the Great Britain, now maintains it's Declaration under Article 36 (2) providing a compulsory jurisdiction for the ICJ. The fundamental problem is that States in the "New World Order" are reluctant to submit their disputes to a panel of Independent judges who would decide the matter on the basis of

justice and international law rather than yielding to the pressure tactics of the concerned States.

Enforcement through specialized agencies and similar bodies may prove more appropriate in certain types of cases by reason of the opportunities for effective forms of pressure which they may present in particular fields of action. As nations become increasingly dependent on certain world public services the withholding of such services becomes an increasingly effective sanction for any failure to respect the conditions on which they are made available, Enforcement through regional arrangements may also present both political and practical advantages. The procedures adopted in the European Communities, whose national judicial systems are enlisted in aid of the enforcement of Community decisions, are suggestive of a possible line of development for the future.

The hallmark of any system of law s that its rules are capable of being enforced against defaulters or violators. Consequently, one of the most fragile arguments used against international law in that it is not true law because it is not generally enforceable. As mentioned, the work of the ICJ is clouded by a phenomenon of non-compliance with several of its decisions, which is uncalled for. The absence of an international force having entrusted a general duty of maintaining international aw and order and particularly with executing the Courts decisions at the option of the judgment creditor is a factor, which encourage the States not to comply with the Courts decision.