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ISIL YEARBOOK OF INTERNATIONAL HUMANITARIAN AND REFUGEE LAW



VOL. XXV 2025

**THE INDIAN SOCIETY OF INTERNATIONAL LAW
NEW DELHI**

Indian Society of International Law

Mode of Citation: Vol. XXV ISIL YBIHRL (2025)

India : Rs. 400

Developing Countries : US \$ 50

US and Other Countries : US \$ 80

The ISIL Yearbook of International Humanitarian & Refugee Law (ISSN 0974-9500) is published annually by the Indian Society of International Law.

All the materials of ISIL Yearbook, (in duplicate), and all correspondence regarding the ISIL Yearbook should be addressed to the Chief Editor, ISIL Yearbook, V. K. Krishna Menon Bhawan, 9, Bhagwan Dass Road, New Delhi-110001. Manuscripts will not be returned under any circumstances.

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Edited, printed and published by U. C. Jha for the Indian Society of International Law, 9, Bhagwan Dass Road, New Delhi and printed at Shivam Offset Press, New Delhi.

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FACILITATING RESTORATION OF PEACE IN CONFLICT AREAS AND THE ROLE OF IHL: EXPERIENCES FROM NEPAL AND SRI LANKA

BENARJI CHAKKA*

RUPAL MALIK**

UMAMAHESH SATHYNARAYAN***

ABSTRACT

The Global South has, over the years, been plagued by constant and chronic non-international armed conflicts (NIACs), which have defined the region's history for centuries. Regions within this geography, from Nepal to Sudan, have endured long periods of violence. Structural inequalities, colonial heritage, competition for resources, and governance issues have always fuelled instability, ensuring NIACs are an ever-present feature. These have facilitated the emergence and growth of Armed Non-State Actors (ANSAs), who engage in combat against traditional armed forces, motivated by factors such as systemic discrimination, demands for equal rights, and desires for political hegemony. In their pursuit of goals, such ANSAs have employed armed rebellion as a tactic, often pursuing the situation to levels that qualify as a NIAC, thereby requiring the application of the normative principles of International Humanitarian Law (IHL). Despite the persistence of such conflicts, some conflicting States demonstrate the role of acknowledging the significance of applying IHL principles in framing avenues to regain enduring peace. Prominent among them are the civil conflicts of Nepal and Sri Lanka, these two countries with unique geographical and political landscapes, one located at the foot of the Himalayas and the other an island country in the Indian Ocean. One struggled against the domination of the kingdom, and the other struggled for the recognition of their ethnicity to be provided with equal opportunities. In both scenarios, long-standing grievances of marginalized communities against the government propelled the emergence of ANSAs involved in armed battles against regular armed forces. These conflicts, having reached the brink of NIACs, highlighted the need for the application and enforcement of IHL mechanisms in framing lasting peace and to reduce violations by the conflicting parties.

* Professor of International Law and Dean VIT-AP School of Law, VIT-AP University, Vijayawada Andhra Pradesh, India.

** Assistant Professor, Ramaiah College of Law, Bengaluru, Karnataka, India.

*** Principal, Ramaiah College of Law, Bengaluru, India

A turning point for both Sri Lanka and Nepal was the official recognition of their conflicts as NIACs, which offered the prospect of the systematic use of the IHL framework and the intervention of humanitarian agencies, particularly by the International Committee of the Red Cross (ICRC). The presence of the humanitarian agencies was instrumental in guaranteeing compliance with the rules of IHL, promoting dialogue among State and non-State actors, and ensuring the dissemination of humanitarian principles. Sri Lanka and Nepal's cases demonstrate the practical application of IHL principles, coupled with humanitarian interventions, to curb the violations, improve accountability, and eventually achieve peace, which had long remained elusive for more than three decades. The mutual appreciation of the obligations of IHL by State and non-State actors further increased the role of international legal norms in conflict resolution and post-conflict reconstruction.

Yet, despite these obvious achievements, most States are still reluctant to embrace the reality of NIACs within their borders. Instead, governments would rather label such conflict as internal disturbance, insurgency, or national security concerns, thus avoiding the international proscriptions of IHL. For this reason, there is a need, particularly for developing countries in the Global South, to submit to the provisions of IHL. This is not merely a required but also a desirable action for States, even when internal disturbance does not reach the threshold of NIAC. The strict application of IHL provisions ensures the protection of rights as well as the maintenance of peace and stability. Even outside the sphere of IHL, the International Criminal Court (ICC), under the Rome Statute, has increasingly been dealing with human rights violations, extending its jurisdiction beyond traditional armed conflicts to more recent so-called non-traditional conflict scenarios. This trend shows the increasing suitability of IHL in situations technically not NIAC, but necessitating legal intervention to protect human dignity and prevent impunity.

Against this backdrop, the present study endeavours to examine and research the strategies that have assisted in restoring peace through the implementation of IHL in NIACs, with due reference to the lessons of Nepal and Sri Lanka, which are robust case studies, offering lessons for other States confronted by similar circumstances. Adopting such an approach would enhance compliance with the IHL, strengthening the legal and institutional frameworks necessary for peace maintenance. Conversely, the deliberate neglect or selective application of IHL weakens its implementation, allowing cycles of violence and impunity to perpetuate and hence exacerbating humanitarian disasters in the concerned regions.

This research emphasizes the importance of re-examining the categorization of internal conflicts under international law and promoting more uniform and impartial application of IHL, drawing lessons from experiences in Nepal and Sri Lanka. This would make it possible for all warring factions, be they geopolitically strong or weak, to be held to the same legal standards, thus making it easier to have greater accountability, improve civilian protection, and bring doors of sustainable peace to conflict zones of the Global South.

Keywords: *International Humanitarian Law (IHL), Peace, Non-International Armed Conflict (NIAC), State, Humanitarian*

I. INTRODUCTION

NIACs are the most prevalent form of war in modern society, surpassing inter-State conflict and producing a disproportionate amount of humanitarian harm. The ICRC recorded that there are more than one hundred twenty ongoing armed conflicts, which involve more than sixty States and approximately one hundred twenty ANSAs, with around one hundred more ANSAs in other situations of violence across the globe.¹ In most cases, one or more ANSAs are contained within the boundaries of the territory of one State, manifesting most frequently as protracted and fragmented violence. The prevalence of such conflicts within the Global South is most acute. A combination of intersecting historical grievances, weak governance institutions, and the persistent legacy of colonial occupation is combined with transnational motivators such as resource extraction, illicit trade, and geopolitical competition to create armed mobilization conditions.² While these conflicts are contained within the boundaries of a single State, they frequently involve a large number of participants, including national armed forces, organized armed groups, regional militias, and, in some instances, foreign-backed proxies, each of which has different aims, resources, and comprehension of the laws of warfare.

IHL, as codified under Common Article 3 of the 1949 Geneva Conventions (GC) and Additional Protocol II (AP-II) of 1977, binds all parties to conflicts without discrimination between NIACs and

1 ICRC, ICRC Annual Report 2023, 22 July 2024.

2 Abhay Goyal, “The Role of International Human Law in Armed Conflicts Involving Non-State Actors: An Analytical Study”, *Psychology and Education*, Vol. 55, No. 1, 2018, p. 303, 305–06.

international armed conflicts. The legal frameworks require adherence to rudimentary humanitarian principles, that is, distinction between civilian and combatant persons, proportionality of the use of force, and military necessity. Common Article 3, which has been referred to as a mini-convention, sets out minimum requirements concerning NIACs of treatment in a humane manner, that is, excluding violence to life, cruel treatment, taking of hostages, and denial of fair judicial trial.³ AP-II broadens these principles to NIACs against organized armed groups and government forces. The source of these provisions lies in the principle that government and non-State actors are equally bound by the same humanitarian norms.⁴

The ICRC approach to customary IHL affirms that numerous rules that bind international conflicts are, in modern times, applicable to the NIACs as well.⁵ The obligations are not dependent on the consent of States but are established by the general principle of equality of belligerents and by the need to safeguard all those who are not parties to the hostilities. In light of this, it is hard to affect the rules in play. The majority of ANSAs do not have respect for established chains of command, refuse formal acceptance of legal obligations, and challenge the legitimacy of the legal order of the State.

The prompt and effective resolution of conflicts in the Global South, both of extreme importance and urgency, can be seen as vital. Humanitarian protection must be independent of political support in terms of the typology of a conflict. If not settled, these conflicts are likely to transgress State borders, become part of transnational networks of armed groups, and be integrated into a challenge to international peace and security. Against this backdrop, the present research is highly pertinent for three reasons. First, the humanitarian consequences of NIACs are very high. It results in large-scale displacement, high civilian fatalities, and destruction of critical infrastructure that poses a threat to human security and development. Second, the legal and operational dilemmas that arise when attempting to apply humanitarian law to these conflicts weaken the capacity of governments, humanitarian

3 Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1, ICRC, Geneva, 1952, p. 49–51.

4 Annyssa Bellal and Ezequiel Heffes, “Yes, I Do: Binding Armed Non-State Actors to IHL and Human Rights Norms Through Their Consent”, *Human Rights and International Legal Discourse*, Vol. 12, No.1, 2018, p. 123-24.

agencies, and international organizations to ensure adherence, accountability, and protection of civilians. Third, such conflicts in the Global South are often in areas where humanitarian access is severely constrained, rendering constructive engagement with non-State actors a necessity.

In this context, the present study examines the NIACs in Nepal and Sri Lanka to explore the contribution of humanitarian law to the establishment of lasting peace. Through critical examination of both the scale and root causes of NIACs, the research seeks to bridge the gap between rules and realities. Based on the ICRC's insight into the matter, combined with in-depth case studies and inter-disciplinary analysis, the research develops strategies for the use of legal obligations attuned to local contexts and for spurring real engagement with ANSAs. The research methodology enriches academic understanding of such conflicts and provides guidance to policymakers, humanitarian actors, and lawyers that aims to improve civilian protection, provide humanitarian access, and reduce the human cost of war in the Global South. Based on the Nepalese and Sri Lankan experiences, the study concludes that better application and adherence to the normative framework of humanitarian law, combined with deliberate and reflective cooperation with ANSAs, can end cycles of violence, maintain humanitarian corridors, and help in securing lasting peace.

II. STRUCTURAL CAUSES THAT LEAD TO NIACS

Even though there exists a codified normative framework of IHL to regulate armed conflicts, States prefer to treat NIACs as situations of internal disturbances or counter-terrorism. The reclassification is typically applied to avoid the responsibilities of IHL and limit the presence of humanitarian actors.⁶ These actions undermine the protection of civilians, lower accountability, and promote a culture of impunity. States rationalize such actions by referencing the doctrine of sovereignty, which limits the regulation of internal conflict. The International Criminal Tribunal for the former Yugoslavia's ruling in

5 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol. I: Rules*, Cambridge University Press, 2005, Rules 1, 14, 15.

6 WASS Wijesinghe and Ruwanthika Ariyaratna, "Applicability of International Humanitarian Law in a Context of Non-International Armed Conflicts: An Overview", *OUSL Annual Academic Session Proceedings*, November 2016, p. 3-4.

the Tadic case went one step further in the process of harmonization of the rules of NIACs with international conflicts.⁷

The structural drivers of such conflicts in the Global South are multifaceted, interlocking, and complex. Politically, poor governance of the State, institutionalized corruption, minority repression, and lack of inclusive political settlements create easy grievances to be exploited by armed groups.⁸ Economically, competition over valuable natural resources, institutionalized poverty, marginalization of rural or minority communities, and mass unemployment widen social and economic cleavages. These drivers make it a fertile terrain for the mobilization of arms. Socially, ethnic, tribal, or religious issues, founded on historical grievances, feed tensions and provide space for the cultivation of prolonged violence. Unless controlled, these drivers generate cycles of violence and widen the terrain of mistrust between communities and governing authorities.⁹ The scenario is compounded by weak judicial systems, porous borders, and the easy availability of small arms. External interests, under the cover of arms supply, political patronage, or covert operations, can drive localized conflicts into large-scale confrontations over large territorial areas.

Operational imperatives further compound the difficulty of making peace in such conflicts. ANSAs are extremely diverse in organizational structure and their adherence to humanitarian norms. Some exert jurisdiction similar to governmental actors over specified territories, and others are loose networks with no apparent chains of command. The result is an enormous humanitarian footprint. Civilians are subjected to targeted killings, indiscriminate violence, rape and other forms of sexual violence, enforced displacement, and the use of starvation as a conscious strategy of warfare, all of which breach treaty-based and

7 The International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v Duško Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), Case No. ICTY-94-1-AR72, Judgment (Appeals Chamber), 2 October 1995, paras 96–97. See also: Claus Kreß and Frédéric Me’gret, “The regulation of non-international armed conflicts: Can a privilege of belligerency be envisioned in the law of non-international armed conflicts?”, *International Review of the Red Cross*, Vol. 96, No. 893, 2014, p. 29–66.

8 A. Goyal, “The Role of International Human Law in Armed Conflicts”, above note 2, p. 306–307.

9 Terry and McQuinn, *The Roots of Restraint in War*, ICRC, 2018.

customary IHL.¹⁰ In the Global South, such conflicts are most often fought amid chains of functional vulnerability, which is to say humanitarian emergencies persist long after the end of main hostilities. The effective deployment and adherence of IHL in such environments not only saves lives during the conflict but also enables the pursuit of justice, redresses the grievances fuelling the violence, and enables the provision of a functional framework for sustainable peace by establishing norms constraining harm to civilians.

III. Theoretical Framework concerning the Application of IHL in NIACs

NIACs involving State armed forces and organized ANSAs are largely regulated by Common Article 3 of the GC. It sets minimum humanitarian requirements for all parties, prohibiting violence, torture, cruel or inhuman treatment, and requiring humane treatment of the sick and wounded.¹¹ Where applicable, AP-II provides further protection to civilians and regulates hostilities, though its ratification and scope are restricted.¹² Customary IHL also filled the gap between international and NIACs. State practice, judicial precedent, and doctrinal texts, most importantly the ICRC study on customary law, demonstrate that distinction rules, proportionality rules, prohibited weapons, and responsibility rules apply reciprocally in NIACs.¹³ In *Prosecutor v Tadić*, the ICTY held that the majority of the IHL principles apply in NIACs as customary rules.¹⁴

Application of IHL to ANSAs is justified by the equality of belligerents' principle, treaty obligations executed domestically, and actors' obligations exercising de facto territorial control akin to the power of

10 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions*, ICRC, 2019.

11 Geneva Convention (III) relative to the Treatment of Prisoners of War, 75 UNTS 135, 12 August 1949, (entered into force 21 October 1950), Art 3.

12 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977, (entered into force 7 December 1978).

13 Jean-Marie and Louise (eds), "Customary International Humanitarian Law", above note 5.

14 ICTY, *Tadić*, above note 7, paras 98–127.

States.¹⁵ Ongoing interaction, training, and engagement with ANSAs are compliance keys, especially in the absence of formal sanctions. Political, historical, and socio-economic factors in the Global South prevent IHL compliance. Colonialism has led to contested borders and fragile State institutions. Inequality, competition for resources, and political exclusion drive mobilization for armed conflict, whereas poor governance and corruption, and external interference undermine State commitment to meet humanitarian obligations or allow independent humanitarian access. These drivers not only drive conflict but also restrict compliance with humanitarian norms.

3.1 Case Studies

The Maoist insurgency in Nepal, 1996–2006, was originally an internal strife that evolved into an NIAC on the cusp of Common Article 3 and AP-II, with grave abuses committed on both sides, including killings, torture, and enforced disappearances.¹⁶ Political reluctance to recognize the conflict as an NIAC extended legal protection and humanitarian intervention.¹⁷ However, the ICRC persisted in approaching both sides,¹⁸ visiting detainees and encouraging humanitarian norms, and the 2006 Comprehensive Peace Agreement contained IHL guarantees,¹⁹ although enforcement was intermittent.

In Sri Lanka (1983–2009), the LTTE's territorial presence and military organization were NIAC-compliant.²⁰ Treatment of civilians, detainees, and humanitarian access were continually challenged. The LTTE used suicide attacks, child recruitment, and human shields, and government forces indiscriminately shelled civilians and severed supply lines.²¹

15 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, 2012, p. 254–261.

16 International Crisis Group, *Nepal's Maoists: Their Aims, Structure and Strategy: Asia Report N°104*, 27 October 2005, p. 2–3.

17 Human Rights Watch, *Human Rights Watch World Report 2005 - Nepal*, 1 January 2005.

18 ICRC, *Overview of Operations: 2005*, Geneva, 7 December 2004.

19 Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal (Maoist), 21 November 2006, Art 7.

20 *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, p.188–201.

21 Human Rights Watch, *War on the Displaced: Sri Lankan Army and LTTE Abuses against Civilians in the Vanni*, 19 February 2009.

During the final phase from 2008 to 2009, humanitarian organizations encountered severe access restrictions,²² which prevented evacuations and illustrated the vulnerability of operations in high-intensity NIACs.

These cases together demonstrate that the political will, correct classification of conflict, ANSA organization, and humanitarian access contribute to the effective application and implementation of IHL. Nepal shows that the sustained humanitarian presence helps to preserve operational space despite disagreement over the classification of the conflict. Sri Lanka shows that the ratified obligations can still fail without considering humanitarian concerns in prolonged conflict.

In similar patterns, the foreign fighters, large-scale territorial control, systematic IHL violations, and numerous ANSAs in Syria meet NIAC criteria.²³ ICRC and UN accounts, where egregious abuses exist, affirm that customary norms continue to apply. State failure, sectarian fragmentation, and foreign intervention, though, have de facto incapacitated enforcement. In Somalia, Mali, and Sub-Saharan Africa, ANSAs generally control civilian populations, and field-level engagement by humanitarian organizations has sometimes gained access in the absence of formal accountability. Political or ethnic grievance-based insurgencies and State resistance to NIAC status in South and Southeast Asia undermine IHL implementation and limit international oversight.

Since NIACs are the most prevalent form of armed violence and account for the majority of civilian deaths and displacement, effective application of IHL depends upon the translation of legal obligations into enforceable compliance. This is a combination of confidential negotiation, diffusion of norms, negotiated humanitarian access, and mechanisms of accountability. In the absence of investigation or prosecution by States of serious breaches, ad hoc international tribunals or the International Criminal Court (ICC) shall intervene.²⁴ Continuing legal development, in the form of the duty to investigate grave breaches, has underpinned these obligations. Judicial pronouncements and crystallization of

22 Report of the Secretary-General's Panel, above note 20, p. 45-52.

23 *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/19/69, 22 February 2012.

24 Rome Statute of the International Criminal Court, 2187 UNTS 3, 17 July 1998 (entered into force 1 July 2002), Arts 12-15.

customary law have clarified legal obligations, facilitated their incorporation into local systems, and reaffirmed restraint on the conduct of hostilities.

IV. NEPAL CIVIL WAR (1996–2006) & THE APPLICATION OF IHL

The Nepal Civil War, or Maoist Insurgency, began on 13 February 1996 when the Communist Party of Nepal (Maoist) simultaneously attacked the police stations in the Rolpa and Rukum districts.²⁵ The insurgents sought to abolish the monarchy and establish a people's republic. The insurgents justified their campaign as an uprising against long-standing land-allocation injustices, rooted in caste-based bias, and ongoing marginalization of rural communities. In the early years of the war, Maoist troops shunned direct confrontation, and the security challenge rested with the police. This was turned on its head in November 2001, however, when Maoist troops attacked an army outpost in Dang, prompting the government to mobilize the army and issue a national State of emergency.²⁶ What began as a local insurgency soon became a general armed conflict involving much of the nation.

At first, the Maoist rebellion had a level of organization that differentiated it from most of the rebellions in the nation. Its armed wing, or People's Liberation Army, had a centralized chain of command and was backed by a political organization that could exercise judicial and administrative power within its domains. The rebellion was capable of orchestrating operations between various districts, upholding discipline among its militants, and instituting governance processes within its domain. This hybrid of organized structure, territorial hold, and large-scale combat later became decisive in determining the conflict in IHL terms.

Since Common Article 3 to the GC and Article 1 of AP-II establish what constitutes a NIAC, it is one in which there is more than isolated violence, and the ANSA must have an effective command structure with the ability to carry out military operations and enforce humanitarian law. By late 2001, such requirements were clearly met in Nepal. The conflict

25 Michael Hutt, *Himalayan People's War: Nepal's Maoist Rebellion*, Indiana University Press, 2004, p. 58.

26 Mahendra Lawoti and Anup K. Pahari (Eds), *The Maoist Insurgency in Nepal: Revolution in the Twenty-First Century*, Routledge, New York, 2010.

had been protracted and widespread, the Maoists were controlling vast amounts of the mid-western hills,²⁷ and their organized administration exhibited the administrative capacity necessary for the legal requirement.

The designation was recognized by the United Nations OHCHR and the ICRC, both of which described the conflict as an NIAC. That determination had serious legal implications.²⁸ It meant that both the government of Nepal and the Maoists were bound by the provisions of Common Article 3 and AP-II, including humane treatment of detainees and civilians, ban on torture and cruel treatment, protection of civilians against attacks, and relief provided by humanitarian assistance.

The Nepalese government countered this description, framing the conflict as a counter-terrorism operation and a matter of internal security. From this perspective, the government was technically able to avoid some of the responsibilities that accompany the recognition of an NIAC, including the granting of wider access for humanitarian agencies and the acceptance of international monitoring. But according to international law, the operation of humanitarian norms is a matter of the factual context of the conflict and not of the political stance of the State.²⁹ Therefore, both sides were still bound by these norms, regardless of official acknowledgement.

Lacking formal acknowledgment, elements of IHL started to come into actual practice as humanitarian organizations engaged in negotiations for access to conflict-affected zones. In the course of time, these interactions played a significant role in formulating the conditions of the 2006 Comprehensive Peace Agreement, where both parties pledged to uphold principles commensurate with legal standards that had been contentious in the past.

27 Thomas A. Marks, "Terrorism as method in Nepali Maoist insurgency, 1996–2016", *Small Wars & Insurgencies*, Vol. 28, No. 1, 2017, p. 81-118.

28 Mahendra Lawoti, "Evolution and growth of the Maoist insurgency in Nepal" in Mahendra Lawoti and Anup K. Pahari (Eds), *The Maoist Insurgency in Nepal*, 1st Edn, Routledge, New York, 2009, p. 23-50.

29 DB Subedi, "From Civilian to Combatant: Armed Recruitment and Participation in the Maoist Conflict in Nepal", *Contemporary South Asia*, Vol. 21 No. 4, 2013, p. 429-443.

4.1 Nepal (1996–2006): IHL as a Foundation for Negotiation and Transitional Governance

The Maoist insurgency in Nepal is a perfect case study of IHL's engagement and influence on directions towards sustainable peace. Gradually, the war matured into an NIAC satisfying the standards in Common Article 3 and finally ended in the Comprehensive Peace Agreement of 2006. The agreement included provisions related to humanitarian protection, arms control, and reintegration, which met the standards of IHL on disarmament, prisoner treatment, and civilian protection.³⁰ During the conflict period, the ICRC worked quietly but persistently with both sides, monitoring conditions of detention, facilitating the release of detainees, and raising awareness of humanitarian law. These efforts played an important role in reducing human suffering and maintaining channels of communication open, which were later useful in the peace talks process. After the war, IHL provided a legal and moral framework to processes of transition such as demobilization, monitoring for treatment of detainees, and the need to investigate serious abuses.³¹ The uneven application of measures of accountability, however, proved that legal frameworks are not enough without lasting political will and proper institutional capacity.³²

Concurrently, the Nepal example points to the limitations of legislative design when political will and administrative capacity are low.³³ While the Comprehensive Peace Agreement and attendant commitments formally invoked humanitarian and IHL concerns, translation of transitional justice measures, such as investigation into enforced disappearances and other serious abuses, was consistently in abeyance or challenged.³⁴ Victims' organizations and international witnesses documented failure to respond expeditiously and inadequate mechanisms to provide effective accountability. This outcome

30 Amalendu Misra, "Subaltern and the Civil War: An Assessment of Leftwing Insurgency in South Asia", *Civil Wars*, Vol. 5, No. 4, 2002, p. 56-76.

31 Thomas "Terrorism as method in Nepali Maoist insurgency", above note 27.

32 Thomas A. Marks, *Insurgency in Nepal*, Army War College, Strategic Studies Institute, 2003.

33 DB Subedi, "From Civilian to Combatant", above note 29.

34 Narendra Bam, Raju Shrestha, and Ram Krishna Maharjan. "Importance of International Humanitarian Law (IHL) Training in Armed Police Force, Nepal", *Journal of APF Command and Staff College*, Vol. 3, No. 1, 2020, p. 106–119.

underscores that the long-term effect of IHL on peace depends on strong domestic institutions and ongoing political will to convert legal commitments into effective and credible redress.

V. SRI LANKAN CIVIL WAR (1983–2009): APPLICATION OF IHL

The Sri Lankan Civil War began in July 1983, after the anti-Tamil riots of Black July, when mass communal unrest in Colombo and other cities left hundreds dead and tens of thousands forcibly displaced. The violence was the culmination of years of systematic repression of the Tamil minority, articulated in restrictive controls on the exercise of linguistic rights, diminished access to educational opportunities, and diminished political representation.³⁵ In response to these chronic grievances, the LTTE arose as a highly organized and disciplined ANSA with the goal of establishing an independent Tamil State, Tamil Eelam, in the island's northeast. Over the next twenty-six years, the war developed in stages, characterized by alternating periods of intense military campaigns, fragile ceasefires, and several breakdowns of peace negotiations. Civilians were drawn into a combination of traditional warfare, guerrilla warfare, and terrorism characterized by egregious violations of human rights by both parties. These articulations of violence placed the application of IHL in sharp relief.

From the humanitarian point of view, the combat soon was at the level of NIAC. Such designation is applied under Common Article 3 and Article 1 of AP-II when hostilities are of long duration and the non-State actor possesses an effective command system capable of enabling continued military activities and conformity with humanitarian law. In the mid-1980s, all these were firmly in place in Sri Lanka. The LTTE had a centralized command system with territory under its control that was administered by itself system, and waged long and massed battles against the Sri Lankan security establishment.³⁶ The war encompassed conventional combat, protracted sieges, and battles for control of strategically important places such as Jaffna, Kilinochchi, and the Vanni district. Despite these clear indicators, the political position of the government rendered the legal recognition of the war problematic.

35 Bruce Matthews, "The Limits of International Engagement in Human Rights Situations: The Case of Sri Lanka," *Pacific Affairs*, Vol. 82, No. 4, 2009, p. 577-596.

36 Damien Kingsbury, *Sri Lanka and the Responsibility to Protect: Politics, Ethnicity and Genocide*, Routledge, New York, 2012.

The Sri Lankan government repeatedly dismissed the idea that the conflict could be legally categorized as an NIAC, instead defining it as a counter-terrorism campaign against a separatist insurgency. This particular characterization was significant in its implications. The refusal to grant a legal categorization short-circuited the formal application of humanitarian law, tied the operational ability of humanitarian organizations, and resisted external scrutiny of the government's behaviour.³⁷ Yet, under international law, the application of humanitarian regulation is determined by the factual situation of the conflict, rather than the permission of the State. Thus, both the Sri Lankan military forces and the LTTE were obligated to respect the terms of Common Article 3 and AP-II. These obligations include three basic requirements, humane treatment of those not actively participating in hostilities, prohibition against torture and cruel treatment, protection of civilians against direct and indiscriminate attacks, and the granting of humanitarian assistance. Yet, in reality, these obligations were often disrespected by both sides.

The compliance record was extremely disturbing, and the LTTE became internationally notorious for conducting suicide bombings, political leader targeted assassinations, systematic recruitment of children, sometimes at age twelve.³⁸ In the conflict's final phases, there were credible reports that the LTTE had forced civilians out of combat areas, and they were effectively used as human shields to deter military action. The security forces of the government were also accused of serious abuses, including indiscriminate shelling of civilian settlements, extrajudicial killings, and obstruction of humanitarian access, particularly during the 2008-2009 Vanni conflict.³⁹ Enforced disappearances and mass civilian slaughter in the conflict's final months were documented by the United Nations Panel of Experts, which documented credible evidence of serious breaches of humanitarian law

37 Deirdre McConnell, "The Tamil People's Right to Self-Determination", *Cambridge Review of International Affairs*, Vol. 21, No. 1, 2008, p. 59-76.

38 Francis A. Boyle, *The Tamil Genocide by Sri Lanka: The Global Failure to Protect Tamil Rights Under International Law*, 2nd ed. Clarity Press, 2016.

39 Gerrit Kurtz and Madan Mohan Jaganathan, "Protection in Peril: Counterterrorism Discourse and International Engagement in Sri Lanka in 2009," *Global Society*, Vol. 30, No. 1, 2015, p. 1-19.

and human rights law. They were inextricably connected with the humanitarian access problems.

Humanitarian access management in Sri Lanka reacted to the restrictive State attitude. Throughout the Norwegian-brokered ceasefire period from 2002 to 2006, humanitarian agencies like the ICRC operated with relatively limited restrictions, including prisoner exchanges, observation of detention conditions, and evacuations of wounded civilians from combat areas. This situation deteriorated drastically after 2007 when the government intensified its military campaigns. All foreign humanitarian agencies were driven out of LTTE-held areas by late 2008, leaving large civilian populations without independent humanitarian control. The ICRC's sea evacuations and delivery of relief items were completely stopped in the last months of the war. Finally, the war's end depended on a clear military victory and not on compliance with humanitarian principles.

The war ended in May 2009 with the total triumph of the LTTE, which was won by sheer military strength and not by a negotiated resolution. This had deep-seated consequences for the post-war environment. Unlike Nepal, where progressive recognition of the obligations of humanitarian law was a part of the peacebuilding paradigm, Sri Lanka's steadfast refusal to recognize the war as an NIAC meant that humanitarian norms had no material influence on the conduct of the war or the nature of government at the time. Transitional justice powers remained limited and were still in the control of the State, and calls for independent investigations into allegations of war crimes were politically resisted with fervent zeal. Without a shared recognition of humanitarian obligations in the course of conflict, post-war reconciliation was fought over, with competing accounts of the conflict dominating public narrative.

In Sri Lanka, humanitarian law norms applied in theory, while their practical application remained rare. The legal framework was still clearly relevant to international norms, but its application remained marred by political resistance, severe constraints on humanitarian intervention, and the absence of a negotiated peace that could incorporate humanitarian norms into the post-conflict regime. Therefore, the protection expected under IHL has remained in decline, and the resulting peace has remained fragile, based more on humanitarian intervention than humanitarian rule of law norms.

5.1 Sri Lanka (1983–2009): The Humanitarian Value of IHL and the Impact of its Weak Enforcement

The Sri Lankan civil war is a great example of the humanitarian importance of IHL and the negative consequences that may arise when mechanisms of enforcement, access, and accountability are undermined. Early in 2009, the ICRC organized mass maritime evacuations of the wounded and sick. These operations were based on IHL provisions for medical care and humane treatment, directly reducing suffering among civilians in the midst of intense fighting.⁴⁰ Such interventions demonstrate humanitarian law's ability to save lives and provide vital humanitarian space, even in the midst of intense hostilities.

Despite these measures, subsequent United Nations and Office of the High Commissioner for Human Rights (OHCHR) follow-up investigations, including the Report of the OHCHR Investigation on Sri Lanka (OISL), recorded systematic claims of serious abuses by both LTTE and government forces in the final stages of the conflict. The reports cited a failure of full compliance with IHL, highly restricted humanitarian access, and reluctance to conduct impartial investigations or initiate accountability.⁴¹ The Sri Lankan experience thus demonstrates that blanket acknowledgment of humanitarian responsibilities, short of independent investigation, actual accountability, and political will to address abuses, cannot in itself ensure reconciliation or grant permanent legitimacy. Security and political considerations driving decisions in the conflict's final months eroded norms of protection and left grievance and contested narrative issues unresolved,⁴² which remain a barrier to reconciliation.

Collectively, these findings underscore that IHL is a pragmatic and facilitative peacebuilding force only if its protections are actually practiced through persistent humanitarian action. It functions optimally when protecting norms are practiced in conflict in neutral action, monitored compliance, and integration into ceasefire arrangements and

40 Simon Harris, "Humanitarianism in Sri Lanka: Lessons Learned?", *Feinstein International Center*, Tufts University, 2010.

41 Megan Price, "The end days of the fourth Eelam War: Sri Lanka's denialist challenge to the laws of war", *Ethics & International Affairs*, Vol. 36, No. 1, 2022, p. 65-89.

42 Neil Devotta, *From Civil War to Soft Authoritarianism: Ethnonationalism and Democratic Regression in Sri Lanka (Routledge Contemporary South Asia Series)*, 1st ed., Routledge, 2017.

post-conflict settlements, such as disarmament, demobilisation, and reintegration programs, protection of detainees, and humanitarian corridors.⁴³ Effective mechanisms of accountability and investigatory capacity are required in order to ensure that IHL can bring transitional justice and reconciliation. Without mechanisms of investigation and remedy that can be counted upon, legal provisions can be symbolic, but not character-altering. Political will and robust institutional capability also matter. Humanitarian law can grease, but not replace, politics of compromise, domestic transformation, and establishment of legitimate governance. Humanitarian actors have a bridging function between legal obligations and political possibilities, depending on private conversation, technical support, and principled negotiation in order to construct the incremental trust needed for more inclusive peace arrangements.

VI. HUMANITARIAN ENGAGEMENT AND THE DISSEMINATION OF IHL IN NEPAL AND SRI LANKA

The effective implementation of IHL in Nepal and Sri Lanka was to a significant extent due to the activities and scope of humanitarian agencies. These agencies served as facilitators between abstract law and the existing needs of affected civilians. In Nepal and Sri Lanka, the ICRC, a range of United Nations agencies, and several local and foreign non-governmental organizations functioned to alleviate suffering, promote respect for humanitarian norms, and ensure communication with the parties to the conflict.⁴⁴ But the environment in which they were operating, and the degree to which their activities could influence political and military decision-making, differed considerably between the two conflicts.

The ICRC had a formal presence in Nepal at the start of the conflict, with it opening its main delegation in Kathmandu and regional delegations that enabled its teams to access areas severely affected by conflict, such as Rolpa and Rukum districts.⁴⁵ Before the conflict was formally declared an NIAC, the organization was able to gain access to

43 Rajan Hoole, “Sri Lanka: Ethnic Strife, Fratricide, and the Peace Vs. Human Rights Dilemma”, *Journal of Human Rights Practice*, Vol. 1, No. 1, 2009, p. 120–139.

44 Damien, “Sri Lanka and the Responsibility to Protect”, above note 36.

45 DB Subedi, “From Civilian to Combatant”, above note 29.

both the Royal Nepalese Army and the Maoist leadership.⁴⁶ That access enabled the ICRC to engage in a range of humanitarian activities, from visiting detainees to tracing missing persons in action, through to family contact and the provision of assistance to isolated communities severed by conflict. One of the principal breakthroughs was in 2003, during the ceasefire, when the ICRC held direct sessions of humanitarian law with government combatants and Maoist combatants.⁴⁷ Such simultaneous contact with both sides of a conflict is unusual and suggests some degree of mutual confidence in the impartiality of the organization and in the importance of humanitarian norms. Such activity did more to address immediate needs, it began to write humanitarian principles into the political language that continued to shape the Comprehensive Peace Agreement.

The United Nations intervention in Nepal gained special importance towards the close of the conflict and after the declaration of a ceasefire. In 2005, the OHCHR launched a monitoring mission through a formal agreement with the government of Nepal. The mission reported human rights abuses by both parties, including extrajudicial killings and forced disappearances by security personnel, and abductions and forced recruitment by the Maoists. Upon the Comprehensive Peace Agreement of 2006, the United Nations Mission in Nepal conducted a range of activities, including monitoring military and armament control, election assistance, and reintegration of ex-combatants into civilian society.⁴⁸ Throughout these activities, the norms of humanitarian law, those of humane treatment and protection of civilians, provided the legal basis of the institutions in the post-conflict context.

In Sri Lanka, the presence of the ICRC was long but politically charged. Under the Norwegian-brokered ceasefire of 2002-2006, the organization could conduct prisoner exchanges, visit detention facilities, and evacuate wounded civilians off the battlefields, sometimes by the roundabout path of heavily fortified checkpoints. It held secret negotiations with the LTTE and the government, calling on them to respect humanitarian law. This relatively accommodating atmosphere did not endure. With

46 Ramya Chamalie Jirasinghe, “The International Community’s Intervention During the Conclusion of the War in Sri Lanka”, *Strategic Analysis*, Vol. 40, No. 4, 2016, p. 1-16.

47 Amalendu, “Subaltern and the Civil War”, above note 30.

48 Mahendra and Anup “The Maoist Insurgency in Nepal” above note 26.

the government's escalation of its military campaign after 2007, humanitarian access narrowed.⁴⁹ By late 2008, all but a few international agencies had been expelled from LTTE-held areas, and for the last months of war, the ICRC's sea evacuations from the Vanni were suspended entirely.⁵⁰ This humanitarian evacuation came at the very time when civilian populations were most exposed to harm, demonstrating the way in which State control of access can effectively negate the protective impact of humanitarian law.

The United Nations activities in Sri Lanka were further restricted and subsequently subjected to intense scrutiny. Bodies like the UNHCR, UNICEF, and the World Food Programme stopped aiding internally displaced individuals and endeavoured to establish limited humanitarian corridors into areas of ongoing hostilities. Their ability to monitor abuse or respond to violations was significantly curtailed, especially towards the later periods of the conflict. The 2011 United Nations Panel of Experts report concluded that both the government and the LTTE were equally guilty of serious breaches of humanitarian and human rights law.⁵¹ It also criticized the United Nations for its inability to protect civilians and for its unreasoned silence on the many atrocities taking place at the time.

Non-government organizations played a major role in both conflicts, though their operational dynamics were the same as intergovernmental organizations. In Nepal, international non-governmental organizations such as the Nepal Red Cross Society, Amnesty International, and Human Rights Watch, and national non-governmental organizations were able to operate in most parts of the country with autonomous freedom, carrying out activities such as documentation of human rights abuses, delivery of humanitarian aid, and legal campaigning. In Sri Lanka, non-governmental organizations such as Médecins Sans Frontières and Oxfam operated during periods when access was allowed, but under strict government control, mobility constraints, and eventually exclusion from zones of heavy military activity.

The two scenarios differ in the extent to which they reflect that the statutory applicability of humanitarian law was secondary to the

49 Neil, "From Civil War to Soft Authoritarianism" above note 42.

50 Damien, "Sri Lanka and the Responsibility to Protect", above note 36.

51 *Ibid*

political and military leadership's willingness to allow humanitarian action.⁵² In Nepal, even reluctant acknowledgment of humanitarian responsibilities provided space for agencies to intervene, disseminate humanitarian principles, and influence the terms of the final peace accord. In Sri Lanka, the government's refusal, on multiple occasions, to characterize the war as an NIAC, and its intentional restriction of humanitarian access, severely reduced the capacity of these actors to intervene.⁵³ In both settings, the mandates of ICRC, United Nations agencies, and non-governmental organizations rested on the universal humanitarian law principles, but the reality was contingent on the political climate and the operational environment of the conflict. Drawing on this account of humanitarian intervention in the two wars, the following comparative analysis considers the way political will, the scope of humanitarian access, and the on-the-ground practicalities influenced both the course of the hostilities and the post-conflict environment in both settings.

VII. COMPARATIVE ANALYSIS: POLITICAL WILL, HUMANITARIAN ACCESS, AND THE OPERATIONALIZATION OF IHL

The conflicts witnessed in Nepal and Sri Lanka demonstrate that autonomous application of IHL, as defined by the factual criteria employed in Common Article 3 and AP-II, does not necessarily guarantee its effective application in practice. In both cases, the conditions of an NIAC were met at an early point. Organized ANSAs, namely the Maoist combatants in Nepal and the LTTE in Sri Lanka, waged prolonged hostilities against government forces. Both movements had centralized command, controlled territorial areas, and demonstrated the ability to wage large-scale military operations.⁵⁴ Despite these similarities, the degree to which humanitarian law shaped the conduct of hostilities and determined post-war settlements varied considerably. The main reasons for this variance were differences in political will and the degree of humanitarian access during the conflicts.

In Nepal, the State was reluctant at first to officially acknowledge the conflict as an NIAC. It permitted, however, the existence of a limited

⁵² Neil, "From Civil War to Soft Authoritarianism" above note 42.

⁵³ Yugichha Sangroula, "Investigating the Jana Adalat of the 1996-2006 armed conflict in Nepal", *International Review of the Red Cross*, Vol. 102, No. 914, 2020, p. 789-806.

⁵⁴ Simon, "Humanitarianism in Sri Lanka", above note 40.

level of humanitarian involvement that progressively made the language of humanitarian law commonplace for both State and insurgent forces. The ICRC was allowed to access detention sites, offered direct training for combatants on both sides, and worked in concert with non-governmental organizations with few restrictions.⁵⁵ This created a context in which the norms of humane treatment, protection of civilians, and impartial relief provision could be effectively advanced. Over time, these activities enabled the embedding of humanitarian norms in the peace process. This was made real in the 2006 Comprehensive Peace Agreement, which included explicit humanitarian commitments.⁵⁶ In the aftermath of the conflict, these common references provided a basis for the reintegration of former combatants, human rights monitoring, and security institution reform. While the violations of humanitarian norms did not disappear, the partial embrace of these norms enabled a common framework that made the transition from armed conflict to political participation feasible.

Sri Lanka followed a very different course. The government repeatedly avoided characterizing the conflict as an NIAC, instead referring to it as an anti-terrorism operation. This policy, the government claimed, justified the imposition of broad limitations on humanitarian access, especially at the height of the military combat from 2007 to 2009. While the ICRC and United Nations players enjoyed greater liberty of action during the 2002-2006 ceasefire, this liberty of action seriously diminished in the following years.⁵⁷ In the final months of the conflict, independent humanitarian actors were effectively barred from LTTE-controlled territory. The absence of humanitarian intervention fell when civilian harm was at its peak, accompanied by the worst documented infringements on human rights and humanitarian law, including indiscriminate shelling, denial of relief, and use of civilians as human shields by the LTTE.⁵⁸ In spite of the absence of a humanitarian presence

55 Nataliia Martsenko and Malvina Hrushko, “Humanitarian Access during Armed Conflicts”, *University Scientific Notes*, Vol. 6, No. 84, 2021, p. 72-83.

56 Simon, “Humanitarianism in Sri Lanka”, above note 40.

57 Usman Asghar, Muhammad Hassan Javed, and Arslan Haider, “The Application of International Humanitarian Law in Non-International Armed Conflicts: Examining the Challenges and Complexities of Applying IHL in Non-International Armed Conflicts”, *Social Science Review Archives*, Vol. 3, No. 2, 2025, p. 667–680.

58 Gerrit and Madan, “Protection in Peril”, above note 39, p. 94-112.

in this period of conflict, humanitarian law was a corpus of law lacking the means of operation to avoid harm or deliver accountability.

The differences between the two wars shed light on the significance of political will in the application of humanitarian law. In Nepal, selective receptivity to humanitarian discourse allowed space for norm diffusion and led to a negotiated peace accord. In Sri Lanka, the aim of pure military victory undervalued any incentive to maintain humanitarian restraints, and decisions were controlled by coercion instead of reconciliation.⁵⁹ These differing strategies not only influenced wartime behaviour but also produced a lasting impact on post-conflict governance. Whereas Nepal's post-conflict environment was marked by political insecurity, it had institutional frameworks for rights monitoring and negotiation of humanitarian obligations. Sri Lanka's post-conflict governance, by contrast, had centralized control, limited civil society participation, and continued controversy over wartime accountability.

Humanitarian access was both a technical and political issue in these findings. Humanitarian actors were third parties to the conflict,⁶⁰ mediating assistance while respecting humanitarian principles in their activities in Nepal. Access was tightly managed and sometimes deliberately refused in Sri Lanka to avoid offering a channel for external observation of military actions.⁶¹ Access control became a war strategy, one with wide-ranging humanitarian implications. The Sri Lankan example demonstrates that the implications of refusal of operational space to humanitarian actors can significantly weaken humanitarian law's ability to protect, although legally mandated.

As a whole, the above examples demonstrate that the practical effectiveness of humanitarian law in NIAC is more a matter of the political will of the parties involved to use it than of its legal applicability, determined by objective factors.⁶² Where political will is combined with humanitarian values, even in a constrained sense, the possibility exists for negotiating access to impartial bodies, alleviation of civilian misery, and the establishment of a more beneficial agenda for peace. Where

59 Megan, "The end days of the fourth Eelam War", above note 41.

60 Yu Usmanov and A. Martynevich. "Humanitarian Access in Armed Conflicts: Current Challenges", *Problems of Legality*, No. 156, 2022, p.143-158.

61 Jayadeva Uyangoda, *Ethnic Conflict in Sri Lanka: Changing Dynamics*, East-West Center, Washington, 2007.

political will is absent and access is limited, humanitarian law can be an intellectual exercise with minimal influence on the facts of conflict or post-conflict settlement. The methods of war used in Nepal and Sri Lanka have had enduring effects on peacebuilding and accountability, and have been learning experiences for monitoring future NIACs.

VIII. ROLE OF IHL IN MAINTAINING LASTING PEACE

IHL achieves enduring peace through mechanisms that are interconnected, primarily by limiting means and methods of warfare and protecting lives no longer engaged in hostilities.⁶³ It reduces the direct human cost of war and preserves useful social capital, lives, infrastructure, and institutions available for reconstruction and reconciliation after war. Empirical observation confirms that adherence to humanitarian limits on the law, organisational culture, or ethics halts revenge cycles and creates opportunities for negotiated reconciliations.⁶⁴

IHL also creates confidence among warring factions. Rules for treatment of prisoners of war, civilian protection, and conduct of hostilities can be applied in ceasefires, safe passages, and localized arrangements, creating confidence and a humanitarian safe space, the prerequisites for political negotiation and peace agreements.⁶⁵ Humanitarian actors, and especially the ICRC, do this via back-channel diplomacy, monitoring, and access negotiations, which bring both short-term relief and long-term channels of communication that can be used for political leverage.⁶⁶

Another manner in which IHL supports peace is by providing the normative framework for transitional justice and post-conflict justice and mechanisms. The characterization of certain acts as war crimes or

62 Remi Russbach and Daniel Fink, “Humanitarian Action in Current Armed Conflicts: Opportunities and Obstacles”, *Medicine & Global Survival*, Vol. 1, No. 4, 1994, p. 188-199.

63 Cordula Droege, “International humanitarian law and peace: A brief overview”, *International Review of the Red Cross*, Vol. 106, No. 927, 2024, p. 989-1001.

64 Geoffrey S Corn, et al, *Law of Armed Conflict: An Operational Approach*, 2nd ed, Aspen, 2018, p. 441-444.

65 Ce’sar Rojas-Orozco, “The role of international humanitarian law in the search for peace: Lessons from Colombia”, *International Review of the Red Cross*, Vol. 102, No. 914, 2020, p. 705-720.

66 ICRC, *Enhancing Protection for Civilians in Armed Conflict and Other Situations of Violence*, November 2012, p. 33-39.

grave breaches enables national and international courts to prosecute the perpetrators. Permanent peace is supported by equitable and credible judicial proceedings, accompanied by transitional justice, reparations, and institutional reform, as well as the obligation to investigate and prosecute grave breaches, including in NIACs.⁶⁷

IHL also safeguards key services and continuity of humanitarian relief in war. Prohibitions against attacking medical units, relief channels, and civilian infrastructure stop deprivation from being a chronic complaint, reduce mortality, restrict displacement, and allow for smoother relief-to-recovery transitions.⁶⁸ Together, these roles show that IHL is not pacific in the narrow political connotation but mitigates the humanitarian cost of war, prepares for negotiation and reconstruction, and offers legally-normative frameworks which, along with accountability and political will, facilitate a transition from violence to secure governance. It is facilitative rather than determinative, but it is crucial to peace processes.

IX. LESSONS LEARNED AND WAY FORWARD

Experience with the Nepal and Sri Lanka wars indicates that IHL's success in affording protection in NIACs depends not just on its implementation in law, but also on its deep political, operational, and institutional effects embedded in the conflict situation. Whether a situation constitutes an NIAC under Common Article 3 and AP-II depends on objective factual factors.⁶⁹ However, the translation of these legal tools into actual humanitarian achievements depends on the political willingness of parties to cooperate with impartial humanitarian agencies, the level of operational independence afforded such agencies, and the extent to which humanitarian principles are internalized into political negotiations.

⁶⁷ Cristina Pellandini, "Ensuring national compliance with IHL: The role and impact of national IHL committees", *International Review of the Red Cross*, Vol. 96, No. 895-896, 2014, p. 1043-1048.

⁶⁸ Aldo Zammit Borda, "Introduction to international humanitarian law", *Commonwealth Law Bulletin*, Vol. 34, No. 4, 2008, p. 739-748.

⁶⁹ Haitham M Altaany, "Enhancing the Implementation of International Humanitarian Law in Conflict Zones: A Comprehensive Review", 2025, available at SSRN: <https://ssrn.com/abstract=5147510> or <http://dx.doi.org/10.2139/ssrn.5147510>.

Nepal's post-conflict transition was characterised by a sequence of tangible actions testifying to the operationalisation of IHL in a post-NIAC environment, translating legal norms into tangible measures of reconciliation and protection of civilians. Foremost among these was demobilisation and reintegration of child soldiers, undertaken by the United Nations Mission in Nepal and in line with IHL's clear prohibition against conscription of children into armed forces or groups. In addition to protection of vulnerable persons against further exploitation, the process facilitated the healing of the social fabric of affected communities.⁷⁰ Equally, the simultaneous release of political detainees by the government and Maoists attests to compliance with IHL norms on humane treatment and the duty to restore liberty once detention is no longer warranted by the needs of security. In the post-conflict years, legislation of the Truth and Reconciliation Commission Act in 2014 attempted to institutionalise processes of investigation of wartime abuses, reparations, and promotion of acknowledgment of victims' suffering, though its legitimacy has been undermined by delay and charges of bias. At the judicial level, landmark Supreme Court judgments on enforced disappearances reaffirmed judicial acknowledgment of victims' rights and reemphasised Nepal's duty, pursuant to domestic law as well as IHL, to investigate and remedy such abuses. Collectively, these steps demonstrate that systematic post-conflict initiatives based on IHL can bury the legacies of armed violence, restore public confidence in institutions, and create space for building sustainable peace.

The Nepalese experience demonstrates that even limited support for humanitarian involvement can yield long-term dividends to peacebuilding. By permitting the ICRC and other humanitarian agencies to work in the country, the government and the Maoist forces created avenues for the provision and application of humanitarian law.⁷¹ Although this involvement did not completely eliminate abuses, it created a shared basis of humane treatment, protection of civilians, and impartial care. These concepts were ultimately incorporated into the

70 Daniel Palmieri, “‘Si vis pacem, impera bellum’: The ICRC, international humanitarian law and peace”, *International Review of the Red Cross*, Vol. 106, No. 927, 2024, p. 1023-1043.

71 Adnan Mahmutovic, “How Humanitarian and Human Rights Law Shape Conflicts Within States”, *Bratislava Law Review*, Vol. 9, No. 1, 2025, p. 27-50.

Comprehensive Peace Agreement.⁷² The Nepalese experience demonstrates that sustained humanitarian involvement, particularly when perceived as impartial and non-provocative to the strategic interests of the parties, can serve as a bridge between the phase of active conflict and the post-war reconciliation process.

Following the Sri Lankan civil war, a combination of domestic and international responses was a result of the State's partial adherence to IHL principles, even where there was no complete legal recognition of the war as an NIAC. The National IHL Committee provided a permanent platform to advise the government on bringing national law and military practice into conformity with humanitarian obligations under the GC and customary law. Its role included reviewing legislation, suggesting ratification of other treaties, and calling for IHL training among the military and other interested groups. In addition to this institutional endeavour, the creation of the Office of Missing Persons in 2016 ended one of the war's most painful humanitarian legacies, the thousands of enforced disappearances, and missing persons from all communities. The Office of Missing Persons' investigative mandate, and its responsibility to facilitate truth-finding and reparations, was a recognition of the continuing relevance of IHL provisions on accounting for the missing. In addition to these domestic initiatives, the ICRC maintained a sustained operational presence in promoting IHL, confidential communication with the government and the LTTE during and after the conflict, training in the conduct of hostilities and humane treatment of detainees, and communication with communities designed to promote awareness of humanitarian norms. Though these initiatives varied in their impact and were at times vitiated by political opposition, they nonetheless proved to be a better contribution of institutional mechanisms, truth-finding initiatives, and impartial humanitarian presence to the building blocks of reconciliation and civilian protection in post-war environments.

Sri Lanka is an apt cautionary tale. The government's rejection of the term NIAC, coupled with its intentional restriction of humanitarian access at the war's conclusion, demonstrates the effects of political control on operational spaces that sharply undermine the potency of

72 Colm Campbell, "Peace and the laws of war: the role of international humanitarian law in the post-conflict environment", *International Review of the Red Cross*, Vol. 82, No. 839, 2000, p. 627-652.

humanitarian law. Although numerous abuses were thoroughly documented following the war, the lack of an early humanitarian presence constrains the avenues of protection of civilians, minimizes potential damage, and enervates the preservation of evidence that can assist in accountability.⁷³ The Sri Lankan case demonstrates that IHL cannot fulfil its protective function when humanitarian personnel are excluded from access during periods of heightened risk, no matter the extent of post-conflict investigative activity.

The existence of these opposing experiences has a number of consequences for States, ANSAs, and the international community. First, cooperation with humanitarian organizations must be perceived as a contribution to peace in a conflict and not as a liability. Allowing the activities of neutral organizations, like the ICRC or United Nations agencies in conflict areas, to move unimpeded diminishes pain among civilians at the same time offering channels of communication that can later be utilized to negotiate a settlement.

Second, regional and international organisations must build up early warning systems to detect trends in withholding humanitarian access. Tracking these restrictions, particularly at crossroads in a conflict, can allow diplomatic and political responses to be initiated before humanitarian interventions are completely denied.

Third, humanitarian law should be enforced on both combatants and political figures. The Nepalese experience shows that the concurrent involvement of State military personnel and insurgent combatants can lead to the infusion of humanitarian principles down the chain of command. This approach maximizes the chances of compliance even in a conflict of uncertain nature.

Finally, post-conflict accountability mechanisms should have a methodical examination of the extent to which humanitarian access was provided throughout the conflict period.⁷⁴ These examinations are used not just to record violations of the humanitarian law but also to analyse the extent to which each of the warring parties facilitated or

73 Adnan, “How Humanitarian and Human Rights”, above note 71.

74 Christopher Gane and Mark Mackarel, “Geneva Convention Relative to the Protection of Civilian Persons in Time of War”, in Christopher Gane and Mark Mackarel (eds.) *Human Rights and the Administration of Justice*, Brill Nijhoff, 1997, p. 579-581.

hindered humanitarian work.⁷⁵ This would consolidate the idea that operational impediments are a serious legal issue and would raise compliance incentives for future conflicts.

The Nepalese-Sri Lankan contrast implies that humanitarian law's effectiveness hinges not only on its formal implementation but also on the political will in its favour that it always commands. Where political and humanitarian interests are in partial alignment, the law can shape both the methods of conducting hostilities and the terms on which peace is concluded. With negligible political will and humanitarian access, the law threatens to become an intellectual exercise remote from the reality of human tragedy. Through these lessons and their application with strategic wisdom, the strategies can be conceptualized for containing future NIACs.

X. CONCLUSION

The Nepalese and Sri Lankan cases show that the application of IHL in NIACs is not only a question of legal acknowledgment but of political will, operational transparency, and consistent humanitarian engagement. In both nations, the level of intensity for the application of IHL was met, but the different means of its application led to very different post-conflict and humanitarian results. Nepal's, if modest, willingness to allow humanitarian access pushed the incremental institutionalization of IHL norms in war and in the peace process, and allowed for a negotiated settlement that created some room for rights monitoring and reconciliation. Sri Lanka's strategic withholding of humanitarian access, added to its NIAC denial, categorization, brought the impartial actor mandate to an end to alleviate suffering or affect responsibility in this period of greatest need, and allowed for a settlement based on military dominance over inclusive negotiation.

These occurrences are of more importance in the Global South, where NIACs are a commonplace feature of political life. The lesson is unequivocal that the systematic application of IHL, accompanied by unrestricted humanitarian access, is neither a concession to the adversary nor an indulgence but an investment in the pillars and foundations of peace. Those governments that avoid such engagement on sovereignty or security grounds risk triggering cycles of violence, sustaining humanitarian emergencies, and undermining post-conflict

⁷⁵ Adnan, "How Humanitarian and Human Rights", above note 71.

legitimacy. Those who seize IHL as a tool of waging hostilities and building just settlements, on the other hand, can build bridges to sustainable peace, even under the most polarized societies.

Nepalese and Sri Lankan experiences thus validate the imperative of a more balanced and fairer application of IHL norms free of politics, and attuned to the local environment. Harmonizing humanitarian interests with conflict policy and peace negotiation to align theory and practice, so that civilian protection, atrocity prevention, and accountability remain at the core of conflict resolution. For States on the hard road of internal armed conflict, this is not just a legal but a strategic imperative for lasting peace.

The experiences of Nepal and Sri Lanka confirm that the normative framework of IHL has significant protective and peacebuilding potential beyond cases technically qualified as international armed conflict or NIACs. Even in cases of internal disturbances, sporadic violence, or armed occurrences short of the threshold of treaty mechanisms, application of the foundational principles of IHL, human treatment, distinction, proportionality, and facilitation of humanitarian access can effectively end humanitarian harm and uphold civilian dignity significantly. Policies like truth-seeking mechanisms, judicial rulings on disappearances, humane release of detainees, demobilisation of children from militias, and widespread dissemination of humanitarian norms serve to break cycles of reprisal and provide the legal basis for reconciliation. Furthermore, the preventive effect of internalising IHL principles in State institutions, security sector processes, and grassroots awareness programmes can stabilise volatile post-crisis conditions and prevent resurgent violence. By embracing humanitarian protections as not wartime temporary niceties but as permanent governance norms, States are better placed to resolve future crises by restraint, transparency, and legitimacy. The scope of IHL is thus not confined to its technical legal applicability, but a strategic tool of civilian protection, enabling accountability, and enabling conflict transformation in all modes of organised violence, whether or not they constitute the technical definition of armed conflict.

MAPPING THE DEVELOPMENTS AND DEBATES OF INTERNATIONAL HUMANITARIAN LAW: WITH SPECIAL REFERENCE TO THE WRITINGS OF PROF. B. C. NIRMAL

SANTOSH UPADHYAY*

ABSTRACT

Juristic writings play important role in making as well as determining the rules of Public International Law. Jurists inject elements of coherence and order in the international legal system that is extensively affected by divergent sovereign interests and fragmented adjudicatory bodies. The role of jurists in making and unmaking of international law is far more nuanced and delicate than a plain dictum of Article 38(1)(d) of Statute of the International Court of Justice. The developments and debates of International Humanitarian Law that is a branch of Public International Law are also similarly affected by the writings of jurists. A recent study by the International Law Commission on role of subsidiary means of international law has highlighted the issue of abject representation of academic writings of the scholars of Global South in the judgements rendered by the international tribunals including the International Court of Justice. Thus, there is a need to extensively engage with the writings of the scholars of Global South and to highlight their contribution to the existing debates of Public International Law. Prof. B. C. Nirmal is one such scholar of the Global South who has immensely contributed to many streams of Public International Law. This paper discusses the developments and debates of International Humanitarian Law with special reference to the writings of Prof. B. C. Nirmal. International Humanitarian Law has been witnessing many challenges to its core principles for last few decades. The new and innovative war realities have strained the dogmatic understanding of its provisions. The paper highlights the relevant developments and debates of International Humanitarian Law so that suffering humanity could have a dignified solace even during the grim realities of armed conflicts. The paper also indicates towards a need to encourage serious and extensive research in International

* Dr. Santosh Upadhyay is an Assistant Professor (Senior Scale) at Law Centre II, Faculty of Law, University of Delhi. He can be contacted at skupadhyay@lc2.du.ac.in (official) and santoshupadhyay.jnu@gmail.com (personal). Author expresses his heartfelt thanks to the anonymous peer reviewers for their useful suggestions. However, any mistakes in the article are the sole responsibility of the author.

Humanitarian Law to adequately cope with the fast moving developments in war technologies and new conflict realities.

Key Words: *International Humanitarian Law, Prof. B. C. Nirmal, Principle of Distinction, Proportionality, Weapons of Mass Destruction, International Criminal Law*

I. PROLOGUE: THE ROLE OF JURISTS IN INTERNATIONAL LAW MAKING

International Humanitarian Law (IHL) determines the ambit of permissible means and methods of conducting hostilities during armed conflicts. It protects the specific categories of individuals and objects from the dangers arising out of armed conflicts. Armed conflicts are mere reflections of differing political ambitions of conflicting parties wherein each seeks to militarily overpower the other. The legitimate aim of using force during armed conflicts is to win it and not to cause unnecessary brutalities and savageries. IHL ensures that conflicting parties must not inflict unnecessary harm and sufferings to another. It keeps the basic considerations of humanity afloat even during the grim and muddled realities of armed conflicts.

IHL is a specialized branch of Public International Law and its sources are same as mentioned in article 38 (1) of the Statute of the International Court of Justice (ICJ Statute). Article 38(1)(d) of the ICJ Statute recognizes 'the teachings of the most highly qualified publicists of various nations' as a subsidiary means for the determination of the rules of international law.¹ Publicists means the 'learned writers' of international law or international legal jurists.² Though ICJ Statute classifies jurists' teachings only as subsidiary means for determination of international law rules but in practice such strict 'subsidiary' characterization does not always hold good.³

The impacts of jurists in making and unmaking of international law is far more overarching, nuanced and delicate than the mere *verbatim* dictum of article 38(1)(d) of the ICJ Statute. The US Supreme Court in the famous *Paquete Habana* case underlined the role of international jurists by observing that, "[jurist's] work are resorted to by judicial

1 The Statute of the International Court of Justice, Article 38 (1) (d).

2 Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law*, 9th edition (Routledge, New York, 2022) p. 51.

3 Malcolm N Shaw, *International Law*, 7th edition (Cambridge University Press, Cambridge, 2014) p. 50.

tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is".⁴

International jurists play proactive role in determining the relevant state practice and *opinio juris* and thus contribute efficiently in finding the contents of customs between states. Juristic writings and teachings positively affect the treaty interpretation and its construction. Even the determination of the contours of general principles of law is not completely immune from jurists' critical gaze. Juristic writings play crucial role in analyzing and synthesizing the legal principles discussed in judicial opinions of international tribunals.

Jurists inject the elements of coherence and order into the international legal system that is marred by divergent sovereign interests and absence of supreme authorities and institutions.⁵ They question the direction and purpose of international law rules.⁶ Juristic writings provide wider conceptual framework essential for international legal discussions.⁷ Jurists perform cumulative, evaluative and aspirational roles within the ongoing international legal mechanisms.⁸ However, it is needless to say that while considering juristic writings, one must remember the cautious words of Max Huber that jurists' opinions many a times are "politically inspired and represent a natural reaction against unjustified interventions in the affairs of certain states".⁹

The place of jurists in international law debates is also slightly different from that of judges. A judge engages in international law debates through judgments in which participation is secured by virtue of state

4 *The Paquete Habana*, 175 US 677 (1900) at p. 700 (1900), available at <https://tile.loc.gov/storage-services/service/ll/usrep/usrep175/usrep175677/usrep175677.pdf> (last visited on 01 March 2026).

5 M N Shaw, note 3, p. 80.

6 *Ibid.*

7 Alexander Orakhelashvili, note 2, p. 51.

8 Mark W. Janis, *An Introduction to International Law*, 2nd edition, (Aspen Law and Business) pp. 80-81.

9 *Spanish Zones of Morocco Claims, Great Britain v Spain*, 2 RIAA 615 (1925) at p. 640. Quoted in Gillian Triggs, "The Public International Lawyer and the Practice of International Law", *Australian Yearbook of International Law*, vol. 24 (2005) pp. 201-218 at p. 203.

specific representation in the composition of that tribunal.¹⁰ In contrast to this, the role of scholars in international law “emerge[s] from individual scholarship and private expert bodies whose authority derive not from representative mandates but from analytical rigor and intellectual imagination”.¹¹ Scholar’s success in determining and formulating the rules of international law depends much upon her/his capacity of argumentative persuasion rather than any formal representation.¹²

Professor Charles Chernor Jalloh, the special rapporteur of the International Law Commission (ILC) on topic ‘subsidiary means for the determination of rules of international law’ has recently highlighted the issue of lack of representation of scholars of Global South in the works cited by international tribunals. In his very first report of 2023, Prof. Jalloh underscores a point that ten most cited scholars by the International Court of Justice (ICJ) “are all from Western States and all of them are men”.¹³ These scholars are Shabtai Rosenne, Hersch Lauterpacht, Gerald Fitzmaurice, Manley O. Hudson, Lassa Oppenheim, Robert Jennings, Charles de Visscher, Ian Brownlie, Arthur Watts and Julius Stone.¹⁴ Most of them belong to the USA or UK nationalities. The first person from Global South, Eduardo Jimenez de Arechaga from Uruguay, comes in relevant picture only if one expands the data to find top forty most quoted persons by ICJ.¹⁵

Given this grim representative landscape for the scholars of Global South at international tribunals and being cognizant of the immense international law literature produced by them, it is pertinent to extensively engage with the teachings of the scholars of Global South and to highlight their contributions to the debates and developments

10 Aldo Zammit Borda, Stefan Mandelbaum, and Andrea Maria Pelliconi, “The ILC Study on Teachings as Subsidiary Means: Arguments for a Pluralist Reading”, *The American Journal of International Law*, vol. 120(2) (2026) pp. 322-342 at p. 323.

11 *Ibid.*

12 *Ibid.*

13 International Law Commission, “First Report on Subsidiary Means for the Determination of Rules of International Law”, A/CN.4/760, 13 February 2023, para 332, <https://digitallibrary.un.org/record/4010690?ln=en&v=pdf#files> (last visited on 01 March 2026).

14 *Ibid.*, para 332, see the foot note 613 in the paragraph 332.

15 *Ibid.*

of international law. Prof. B. C. Nirmal¹⁶ is one such scholar of Global South who has been extensively contributing to the debates and development of Public International Law, International Human Rights Law, International Refugee Law and International Humanitarian Law. During his four decades long academic career at Law School, Banaras Hindu University, Varanasi, India, and even after his superannuation, Prof. Nirmal selflessly dedicates his time and energy to spread knowledge of international law through his teachings and academic writings. A fearless voice who tells truth to the power and a dedicated personality eager to establish international rule of law without any concessions, Prof. Nirmal has been the inspiring force for the students of international law. Objective in his methodology and critical in his approach, Prof. Nirmal's writings are a treasure trove for the seekers of international law.

This article is a modest attempt to honor Prof. Nirmal's contributions to IHL.¹⁷ This article maps the developments and debates of IHL with special reference to the writings of Prof. B. C. Nirmal. In addition to Prof. B. C. Nirmal, India has also produced many other well renowned IHL scholars and practitioners.¹⁸ Since academic writings are the exercise of mutual learning, the article also relies upon the contributions from other scholars and develops its theme accordingly.

The last few decades have been quite engaging for IHL scholars and practitioners. The new and innovative opportunities to augment IHL came to the fore with the establishment of two *ad hoc* criminal tribunals by the Security Council to prosecute *inter alia* serious violations of IHL committed by individuals during Yugoslav and Rwandan conflicts.

16 To know more about Prof. B. C. Nirmal, please see, https://en.wikipedia.org/wiki/B.C._Nirmal Prof B C Nirmal is also one among 98 most notable alumni of Banaras Hindu University. Please see, <https://edurank.org/uni/banaras-hindu-university/alumni/> (last visited on 01 March 2026).

17 To know about Prof. B. C. Nirmal contribution towards International Refugee Law, please see, Anupam Jha & Shabnam Khan, "International Refugee Law and India's Practice: Contextualizing Prof. B C Nirmal's Writings", *Indian Journal of International Law*, volume 64 (3&4), 2024, pp. 317-344.

18 Without being exhaustive, the names of some IHL scholars and practitioners from India include Prof. V S Mani, Prof. Manoj Kumar Sinha, Major General Nilendra Kumar, Prof. Rose Verghese, Prof. Anupam Jha, Prof. Burra Srinivas, Prof. Sanoj Rajan, Prof. Aftab Alam, Dr. Umesh Kadam, Prof. Vinai Kumar and Prof. Anuradha Saibaba.

Juristic writings have infused jurisprudential cogency in the findings of these tribunals. The establishment and functioning of International Criminal Court (ICC) has also engaged jurists' attention in streamlining and synthesizing the developments therein.

IHL scholars have also critically reflected upon the surmountable challenges posed to the stream due to the onset of advanced technological warfare and innovative war realities. The increased participation of civilians in armed conflict and the phenomena of private military companies and foreign terrorist fighters have strained the traditional understandings of combatants and non-combatants. Violence against women and children is also on rise. The concept of military objective is also under strain because of intense urban warfare and emerging environmental concerns. The issues of elimination and safe handling of Weapons of Mass Destruction (WMDs) and other lethal weapons are still depicting a gloomy picture, if not taken seriously. The realities of cyber warfare and the use of Artificial Intelligence technologies in armed conflicts challenge the traditional categories of IHL. The article reflects upon these challenges and maps the existing IHL debates with special reference to the writings of Prof. B. C. Nirmal.

To develop its central theme, the article primarily but not solely relies on the works published in the ISIL Yearbook of International Humanitarian and Refugee Law (ISIL Yearbook). The ISIL Yearbook that started its journey in 2001, has been actively contributing to the discussions and debates of IHL throughout these twenty-five years. Slowly but steadily, the ISIL Yearbook has carved out a space of its own eminence. These twenty-five years of the ISIL yearbook have been the story of academic excellence, perseverance and zeal to reflect upon existing and contemporary challenges to IHL. This is also a time to celebrate the twenty-five years of successful journey of ISIL Yearbook and to honor all who have contributed directly or indirectly to its development. Academic writings are also a helpful tool in disseminating IHL debates and awareness to the masses, and to create a group of informed individuals cognizant for the compliance of IHL. The discussions in this article about the contributions of Prof. B. C. Nirmal and other scholars are also aimed to meaningfully disseminate IHL: its core principles and its contemporary debates.

II. INTERNATIONAL HUMANITARIAN LAW: SOME BASICS

Most of the civilizations and religions have well developed rules and principles of conducting warfare and treating individuals in just and

fair manner.¹⁹ In ancient India, it was prohibited to attack unarmed soldiers, civilians and sacred spaces; and the use of disproportionate weapons were discouraged.²⁰ Unlike many European countries ancient India never witnessed a war based exclusively on religious differences²¹ and thus, there were no exclusion from the protections available during war to any civilian merely on religious grounds. Ancient India has well-developed traditions of International Humanitarian Law and International Human Rights Law empowering the individuals with rights and adequate protections against unwarranted excesses. Many of the contemporary principles of IHL including the principle of distinction, principle of proportionality and the law on occupation were already discussed and debated threadbare in the ancient Indian texts and were accordingly practiced.²²

In modern context, IHL consciousness started to take shape in Europe after a book 'A Memory of Solferino' published in 1862 by Henry Dunant, a businessman from Geneva.²³ This book was a catalyst for constitution of Geneva Committee: a committee of five persons, including Gustave Moynier a driving force of this committee, to adopt the proposals of Henry Dunant into practice.²⁴ The Geneva Committee

19 B. C. Nirmal and Nimmi Shukla, "Deciphering Codes of Warfare: Ancient Indian Humanitarian Law as a Precursor of Modern Humanitarian Law" *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 24 (2024) pp. 1-39. Also see, B. C. Nirmal, "International Humanitarian Law in Ancient India" in V.S. Mani (ed.) *Oxford Handbook of International Humanitarian Law in South Asia*, (Oxford University Press, 2007), pp. 3-37. Also see, B. C. Nirmal, "An Ancient Indian Perspectives on Human Rights and its Relevance", *Indian Journal of International Law*, vol.43 (3) (2003), pp. 445-480, Also see, Manoj Kumar Sinha, "Hinduism and International Humanitarian Law" *International Review of the Red Cross*, vol. 87 (858), pp. 285-294. Also see, Sangeeta Tak, Sugandha Sawhney & Madeeha Majid, "Sikhism and International Humanitarian Law" *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 18, pp.1-21. Also see, James Cockayne, "Islam and International Humanitarian Law: From a Clash to a Conversation between Civilisations" *International Review of the Red Cross*, vol. 84(847), pp. 597-626. Also see, Sanoj Rajan, *International Humanitarian Law in India: A Handbook*, (Thomson Reuters, 2021).

20 B. C. Nirmal and Nimmi Shukla (2024), note 19, p. 4.

21 B. C. Nirmal (2007), note 19, p. 29.

22 B. C. Nirmal and Nimmi Shukla (2024), note 19, pp. 1-39.

23 Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, (Hart Publishing, Oxford, 2008), p. 38.

successfully persuaded the Swiss Government to convene a conference and this led to the adoption of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field in 1864.²⁵ This conference was attended by sixteen states and the convention merely had ten articles but it was a significant step for the development of the laws and customs of war.²⁶ This Geneva Convention of 1864 was subsequently replaced by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 1906.²⁷

The St. Petersburg Declaration of 1868 was the next step and it was the first formal treaty to prohibit the use of certain weapons in war.²⁸ This declaration resolved that the progress of civilization must alleviate calamities of war and the only legitimate aim during the war was to weaken the military force of enemy and not to cause unnecessary sufferings.²⁹ The declaration, in words of Prof. R. A. Malviya, “furnishes the basis for the entire body of IHL” and balances the necessities of war with the considerations of humanity.³⁰ This declaration was the foundation for modern laws of warfare and it also shaped the concept of military necessity.³¹ It prohibited the use of projectiles of less than

24 *Ibid.*

25 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 1864, available at <https://ihl-databases.icrc.org/en/ihl-treaties/gc-1864> (last visited on 01 March 2026).

26 Cordula Droege & Eirine Giorgou, “How International Humanitarian Law Develops”, *International Review of the Red Cross*, vol. 104 (920-921), pp. 1798-1839, at 1801-1802.

27 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 6 July 1906, available at <https://ihl-databases.icrc.org/en/ihl-treaties/gc-1906> (last visited on 01 March 2026).

28 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868, available at <https://ihl-databases.icrc.org/en/ihl-treaties/st-petersburg-decl-1868?activeTab=default> (last visited on 01 March 2026).

29 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868, available at <https://ihl-databases.icrc.org/en/ihl-treaties/st-petersburg-decl-1868?activeTab=default> (last visited on 01 March 2026).

30 R. A. Malviya, “International Humanitarian Law Concerning Employment of Means and Methods of Combat: Problems and Prospects”, *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 5 (2005) pp. 1-27, p. 2.

400 grams that were either explosive or charged with fulminating substances.³² Apart from the St. Petersburg Declaration of 1868, there were also some non-conventional but significant developments (Lieber Code of 1863,³³ Brussels Declarations of 1874³⁴ and Oxford Manual of 1880³⁵) in IHL that were indicative of emerging humanitarian thought processes during those days.

The Hague Conferences of 1899 and 1907 were the next significant steps in the development of IHL through treaty mechanisms. These conferences declare that right of the belligerents to adopt the means and methods of warfare is not unlimited.³⁶ The Hague conferences replicate the principle of St. Petersburg Declaration of 1868 and prohibit causing of unnecessary suffering during warfare.³⁷ The addition of the so called 'Martens clause' in IHL debates is an important contribution of these conferences.³⁸ Named after the Russian diplomat Fyodor Fyodorovich Martens, this clause that is part of the preamble of the Fourth Hague Convention of 1907 declares that any gap in treaty and customary law would not turn belligerents and civilians bereft of any protection under the law and such persons would remain protected under the laws of humanity and the dictates of the public conscience.³⁹

The Martens Clause provides a legal safety net that ensures protection to individuals on the basis of humanitarian principles even in case of a

31 Cordula Droege & Eirine Giorgou, note 26, p. 1802.

32 R. A. Malviya, note 30, p. 2.

33 Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, available at, <https://ihl-databases.icrc.org/en/ihl-treaties/liebercode-1863> (last visited on 01 March 2026).

34 Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874, available at <https://ihl-databases.icrc.org/en/ihl-treaties/brussels-decl-1874> (last visited on 01 March 2026).

35 The Laws of War on Land. Oxford, 9 September 1880, available at <https://ihl-databases.icrc.org/en/ihl-treaties/oxford-manual-1880> (last visited on 01 March 2026).

36 R. A. Malviya, note 30, p. 3.

37 *Ibid.*

38 V. S. Mani, "International Humanitarian Law: Challenges in the Twenty-First Century", *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 4 (2004) pp. 1-10, at pp. 2-3.

39 Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18

gap in positive law.⁴⁰ The basic principle contained in the Martens Clause also finds its place in API⁴¹ and AP II⁴² of 1977 and the Convention on Certain Conventional Weapons, 1980.⁴³ The Martens clause is the statement loud and clear that everything that is not regulated by IHL cannot understood to be permitted.⁴⁴ The Martens Clause and other principles of Hague Conventions have also become the customary principles of International law.⁴⁵

The Geneva Gas Protocol of 1925 and the Geneva Convention related to the Prisoners of War of 1929 were also the important stages in the development of IHL. However, the plight of civilians was still at large from IHL horizon and the same was addressed with the adoption of the Four Geneva Conventions of 1949.⁴⁶ The common article 3 of the four Geneva Conventions 1949 was the first treaty provision specifically addressed to the situations of NIAC.⁴⁷ For its uniqueness, the common article 3 of the four Geneva Conventions 1949 is called as a ‘mini-convention within the conventions’.⁴⁸ Geneva Conventions gave a loud and clear message that, in the words of Prof. Nirmal, “the civilian population should be protected as far as possible even in the midst of armed conflicts and suffering caused by the war should be minimized to the greatest possible extent”.⁴⁹

October 1907. Preambular Paragraph, <https://ihl-databases.icrc.org/assets/treaties/195-IHL-19-EN.pdf> (last visited on 01 March 2026).

40 R. A. Malviya, note 30, p. 4.

41 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 1(2), available at <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977> (last visited on 01 March 2026).

42 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Preambular paragraph, available at <https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977?activeTab=> ((last visited on 01 March 2026).

43 Vitaliy Ivanenko, “The Origins, Causes and Enduring Significance of the Martens Clause: A View from Russia”, *International Review of the Red Cross*, vol. 104(920-921), pp. 1708-1724 at p. 1721.

44 R. A. Malviya, note 30, p. 4.

45 *Ibid.*

46 V. S. Mani, note 38, p. 2.

47 B. C. Nirmal, “Sixtieth Anniversary of the Geneva Conventions: Lessons from the Past”, *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 9 (2009), pp. 1-46 at p. 11.

It is fashionable in IHL discourse to discuss the development of IHL along two different trends: Hague Law and Geneva Law. The Hague Law that is identified with the regulations of means and methods of warfare like prohibition of unnecessary suffering, treacherous warfare and others mostly revolves around the Hague Conferences of 1899 and 1907. As per Prof. Nirmal, Hague Law “sought to fix the rights and duties of the belligerents in their conduct of [armed] operations and limited their choice of methods and means of injuring the enemy in an international armed conflict”.⁵⁰ In contrast to this, Geneva Law that has rules for the protection of such individuals who either do not take part in the hostilities or who no-longer in a position to take part in the hostilities is mostly centered on the Geneva Conventions of 1864/1906/1929/1949.⁵¹

Though it is right to say that Hague Law regulates the relations between opposing armies during hostilities and Geneva Law protects the designated individuals from the effects of hostilities, yet the difference between these two streams is mostly descriptive and pedagogic.⁵² It does not yield to any substantial divergence because the permissible means and methods of warfare is essentially conditioned by the protection granted to the individuals and objects.⁵³ As it is rightly observed by Robert Kolb, “‘What the military may do’ is conditioned by ‘what the protected persons should not suffer’”.⁵⁴ However with the adoption of the API of 1977, the analytical differences, if any, between ‘Hague Law’ and ‘Geneva Law’ got merged and both these streams united into a one whole.⁵⁵ API, as observed by Prof. Nirmal, did “not only improved and complemented or elaborated upon the Geneva Conventions but also sought to establish new rules governing means and methods of warfare and also revised and updated the Hague Law”.⁵⁶

48 *Ibid.*

49 *Ibid.* p. 2.

50 *Ibid.* p.5.

51 Robert Kolb & Richard Hyde, note 23, pp. 40-41.

52 *Ibid.* p. 41.

53 *Ibid.*

54 *Ibid.*

The API applies to the international armed conflicts (in classical sense of war between two or more states) as well as to such other conflicts that people fight, in exercise of their right to self-determination as recognised under international law, against colonial domination, racist regime and alien occupation.⁵⁷ The AP II of 1977 laid down some general principles for the NIAC and thus it substantiates common article 3 of the 1949 Geneva Conventions. There is also an Additional Protocol III of 2005 to the four Geneva Conventions of 1949 that adds new emblem of 'Red Crystal' in addition to the 'Red Cross' and 'Red Crescent'. All these emblems have same legal force and meaning.

In addition to this, there are also many weapons specific conventions that are part of IHL treaty laws. These weapons' conventions either prohibit or regulate the manufacturing, transfer or use of the specific weapons because they are fundamentally in violation with the IHL rules and other principles of public international law. IHL is also known as *jus in bello* and it applies equally to all the conflicting parties irrespective of any question of legality or illegality of the use of force. It is different from *jus ad bellum* that determines the question of legality of the use of force. In more simple terms, "*jus ad bellum* governs the decision to go to war, *jus in bello* regulates the conduct of war".⁵⁸

III. APPLICABILITY OF IHL: INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS

IHL regulates the conduct of adversaries during international and non-international armed conflicts. Its application depends upon the factual situations on ground and remains unaffected by any official declaration or non-declaration of the existing facts. In normal parlance, International Armed Conflicts (IACs) represent the phenomenon of armed hostilities between two or more states. Hostilities do not always mean active armed hostilities and IHL would be applicable even if the advancing troops of the adversary is not resisted by the territorial state. Common article 2 of the Four Geneva Conventions of 1949 unequivocally guarantees the application of IHL to "all cases of partial or total occupation of the

55 B. C. Nirmal, note 47, p. 7.

56 *Ibid.*

57 AP I, note 41, Article 1. To know more, please see, B C Nirmal "Wars of National Liberation and International Humanitarian Law" *Indian Journal of International Law*, vol. 28(2), (1988) pp. 201-215,

58 B C Nirmal and Nimmi Shukla, note 19, p. 5.

territory of a High Contracting Party, even if the said occupation meets with no armed resistance”.⁵⁹

In contrast to IAC, the Non International Armed Conflicts (NIAC) are the protracted armed violence between government armed forces and organized armed groups or between two such armed groups.⁶⁰ Each and every internal disturbances, law and order problems, banditry, riots or terrorist activities are not the situations of NIAC. For constituting NIAC, the armed violence must be carried with a particular scale of intensity and also the warring armed groups must exhibit a specific threshold of organization.⁶¹ Some of the indicative factors of particular levels of organization are appointment of zonal commanders, supply of weapons, ability to recruit, train and equip new members, issuance of political statements, involvement of general Staff in the negotiation with the representatives of neutral and adversary parties etc.⁶² The effective control over land by the non-state armed group is also one of the important criteria for constituting NIAC but it is not an essential condition.⁶³

The intensity of such protracted armed violence must be above the levels of internal disturbances and tensions but “there is no need to reach it to the extent of sustained and continuous military operations”.⁶⁴ The intensity is determined by the cumulative impacts of all the armed clashes that linked to the conflict throughout the protracted period. The indicative factors are “seriousness of the armed clashes, troops mobilization, types of weaponry used, scale of destruction of property

59 The Four Geneva Conventions of 12 August 1949, Common Article 2, available at <https://www.icrc.org/sites/default/files/external/doc/en/assets/files/publications/icrc-002-0173.pdf> (last visited on 01 March 2026).

60 *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for the Interlocutory Appeal on Jurisdiction on October 02, 1995. Para 70, available at <https://www.icty.org/x/cases/tadic/acdec/en/51002.htm> (last visited on 01 March 2026).

61 Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, (Cambridge University Press, Cambridge, 2010), pp. 132-136.

62 Santosh K Upadhyay, “The ICTY’s Contribution to the Development of the Public International Law”, *National Capital Law Journal*, vol. XVII (2018-2019) p. 101.

63 Kailash Jeenger, “How “Ability” Requirement in Additional Protocol II May “Disable” its Applicability to NIACs”, *ISIL Yearbook of International Humanitarian and Refugee Law*, vol.16, (2016-17), pp. 43-56 at pp.45-46.

64 Santosh K Upadhyay, note 62, p. 101.

and displacement of population and existence of causalities etc.”⁶⁵ Small interruptions in violence do not break the existence of conflicts and the obligations of the parties remain intact. The protracted character of conflicts should be measured from the start of hostilities to its end and intermittent pauses would not disturb the existence of NIAC.

The geographical scope of both IACs and NIACs are not limited to the places of actual hostilities but they are extended to the whole area of warring parties provided the act or omission in question are linked to the ongoing hostilities.⁶⁶ The ICTY in its Tadic Appeal judgment states that “international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there”.⁶⁷ IHL admits the possibility of a single situation breaking into both IAC and NIAC depending upon the different factual situations on the ground.⁶⁸ Thus in any given situation there may be the existence of different kinds of armed conflicts affecting the rights and obligations of parties differently.

This theoretical understanding of IAC and NIAC has been seriously compromised by the emerging trends among few states to target specific terrorist destinations beyond their borders. States while doing so issue statements that their strikes are only against terrorist organisations and not against any military establishments. This is probably done to avoid any aspersions of being an aggressor state under international law. Any such declaration must not compromise the applicability of IHL and whenever there is a resort to armed forces against terrorist destinations beyond the borders, IHL rules must apply. However, the question whether such conflict would be IAC or NIAC is quite intriguing and have posed significant challenges to the academics, particularly after the so called ‘war on terror’ by the United States.⁶⁹

65 *Ibid.*

66 *Ibid*

67 *Prosecutor v. Dusko Tadic*, note 60, para. 70.

68 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua 1986*, International Court of Justice, 1986, para. 219 available at <https://www.icj-cij.org/sites/default/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>, Also see, *Prosecutor v. Dusko Tadic*, note 60, para 72.

69 See, Hisakazu Fujita, “International Humanitarian Law: “War on Terror” in Afghanistan”, *ISIL Yearbook of International Humanitarian and Refugee Law*, vol.3 (2003), pp. 59-82.

3.1 IHL and International Human Rights Law

Both IHL and International Human Rights Law (IHRL) are meant to protect human beings. The most basic and elementary considerations of humanity are the driving force for both of these streams of public international law.⁷⁰ IHL is *lex specialis* and applies only to the situations of armed conflicts and occupation whereas IHRL would be applicable both during the times of peace as well as war. Applicability of IHL does not automatically exclude the protections available under IHRL to individuals. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) clearly states that some fundamental human rights including right to life, right against torture, right against slavery, right of legal personality, right against *ex post facto laws* can never be derogated.⁷¹ However, the *lex specialis* character of IHL would affect the application of IHRL during armed conflicts. It means that the IHRL rules would be interpreted according to the realities of armed conflicts on the ground. ICJ in the famous Nuclear Weapons advisory opinion observes:

“[P]rotection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference

⁷⁰ B C Nirmal, note 47, p. 17.

⁷¹ International Covenant on Civil and Political Rights, article 4, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (last visited on 01 March 2026).

to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.”⁷²

The application of IHRL during the situation of occupation is well accepted in the jurisprudence of ICJ.⁷³ The application of IHRL depends upon the territorial jurisdiction of state or its effective control over territory whereas the application of IHL depends upon existence of armed conflicts. IHRL primarily protects individuals only against states however IHL protects them also against non-state actors.⁷⁴ The protections under IHL are non – malleable and do not accept exceptions but protection under IHRL are malleable to the existing emergencies and admit exceptions for the larger collective good. These are probably the reasons that Prof. Nirmal is of the view that protections offered by IHRL during armed conflicts are inferior to that afforded by IHL.⁷⁵

IV. PRINCIPLE OF DISTINCTION: CARDINAL PRINCIPLE OF IHL

The principle of distinction is the cardinal principle of IHL.⁷⁶ Adversaries can attack only combatants and military objectives. Civilians and civilian objects are protected against the dangers arising out of the armed conflicts. IHL only permits a single status to a person or an object at a time. A person at a given time can either be civilian or combatant and in same vein an object at any given time can either be civilian object or military objectives. There is no third status or anything in-between these two respective extremes. The precise questions as ‘who are the civilians?’ and ‘what are the military objectives?’ have never been a simple task to answer and new conflict realities significantly challenge any ‘either-or’ binary.

72 *Legality of the Threat or Use of Nuclear Weapons*, (Advisory Opinion), International Court of Justice 1996, para 25, available at <https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf> (last visited on 01 March 2026).

73 See, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, ICJ Reports 2004. Also see, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, ICJ Advisory Opinion of 2024. Both these advisory opinions are available at <https://www.icj-cij.org/advisory-proceedings> (last visited on 01 March 2026).

74 B C Nirmal, note 47, p. 19.

75 *Ibid*, pp. 18-19.

76 *Legality of the Threat or Use of Nuclear Weapons* Nuclear, note 72, para 78.

4.1 Combatants and Civilians: An Intricate Balance

Combatants are those persons who are legally entitled to fight during armed conflicts. They can lawfully engage in attacks against the hostile forces and they can also be attacked. Article 43(2) of AP I states that the members of the armed forces of conflicting parties (except medical personnel and chaplains) are combatants.⁷⁷ The armed forces of a party consists of all organized armed forces, groups or units which are under a responsible command and subject to internal disciplinary system that, with other things, also enforces the compliance with IHL.⁷⁸ A party to a conflict, while informing to the other party, can also incorporate its paramilitary or law enforcement agents into its armed forces and thus grant them a combatant status.⁷⁹

Combatants are eligible for Prisoners of War Status (PoWs) after their capture by adversary. Combatants are not answerable for their lawful conducts during hostilities even after their arrest. This situation may change if such combatant owe any duty towards the capturing adversary state on the basis of nationality or citizenship. Combatants have obligations to distinguish themselves from the civilian population during the time of attack or during the military operation preparatory to the attack in which they are to participate.⁸⁰ AP I also regulates the guerrilla techniques of warfare among combatants. During guerrilla warfare, combatants must carry arms openly during their military engagement and the time preceding and preparatory to launch of the attack when he is visible to adversary.⁸¹ In guerrilla warfare, a combatant would lose the PoW status after arrest if s/he fails to comply with the abovementioned condition of distinguishing oneself.⁸²

Combatants must comply with the rules of armed conflict but any such non-compliance except the abovementioned rules of distinguishing oneself, would not compromise their combatant status. Non-compliance

77 AP I, note 41, Article 43 (2).

78 *Ibid*, Article 43(1). Also see, U. C. Jha, "International Humanitarian Law and the Doctrine of Command Responsibility", *ISIL Yearbook of International Humanitarian and Refugee Law*, vol.7 (2007), pp.75-87.

79 AP I, note 41, Article 43 (3).

80 *Ibid*, Article 44(3).

81 *Ibid*.

82 *Ibid*, Article 44(4)

with the rules of armed conflicts would expose combatant to a judicial proceedings. The members of the armed forces of the conflicting parties if captured while engaging in espionage are not entitled to PoW status.⁸³ Mere gathering of information in uniform is not considered as espionage.⁸⁴ Mercenaries do not have right to be considered as combatants.⁸⁵

On the other hand, civilians are such persons who are not combatant.⁸⁶ The purpose of negatively defining civilians is to avoid any gap in IHL.⁸⁷ The civilian character of the population as a whole is not altered by scattered presence of combatants amidst a majority of civilian population.⁸⁸ In contrast to combatants, IHL does not either legally entitle or prohibit the civilians to fight the war.⁸⁹ IHL protects the civilians against the dangers arising out of war. Spreading terror through acts or threats of violence among the civilian population is specifically prohibited.⁹⁰ Civilian population or civilians are also protected against any violent acts of reprisals.⁹¹ But if civilians directly participate in armed hostilities, s/he incurs the dangers of warfare during the time of their direct participation.⁹²

Civilians are not entitled to PoW status unless they are captured during *Levee en Masse*.⁹³ *Levee en Masse* is that factual situation wherein the inhabitants of a non-occupied territory spontaneously take up arms to oppose the approaching invading army and they carry arms openly

83 *Ibid*, Article 46(1).

84 *Ibid*, Article 46 (2).

85 *Ibid*, Article 47.

86 *Ibid*, Article 50.

87 Robert Kolb & Richard Hyde, note 23, p. 127.

88 API, note 41, Article 50(3).

89 Santosh Upadhyay, "Making Sense of Foreign Fighters Phenomenon under International Law" in V K Ahuja, Pinki Sharma & Ashutosh Acharya (eds.) *International Law: Contemporary Developments (Essays in Honour of Prof. A K Kaul)*, Satyam Law International, 2021, p. 302-303.

90 API, note 41, Article 51(2).

91 *Ibid*, Article 51 (6).

92 *Ibid*, Article 51 (3).

93 Geneva Conventions of 1949, note 59, GC III, Article 4(A) (6).

and respect the laws and customs of war.⁹⁴ Participation of individuals in *Levee en Masse* also expose them to the dangers of war. In situations other than *Levee en Masse*, participation of civilians in armed conflicts can be a ground for their prosecution by adversary even if such civilians had complied with the rules of IHL.

The issue of direct participation in hostilities by civilians has been widely debated topic during the last few decades.⁹⁵ ICRC's 2009 interpretative guidelines on the notion of direct participation in hostilities discuss three constitutive elements of such phenomenon.⁹⁶ First, such civilian must cause a particular threshold of harm to the adversary or to the objects protected against direct attack. Second, there must be direct causal link between the particular act by the civilian and the meeting of the particular threshold of harm. Third, there must be a belligerent nexus i.e. the particular harmful act of civilian must be caused to help one belligerent party and to the detriment of another.

The temporal and geographical scope of direct participation extends to the phases of deployment and withdrawal in connection to the actual hostilities and its preparedness.⁹⁷ The civilian who directly participate in hostilities including the phases of deployment and withdrawal in connection to actual hostilities is subject to attack by adversary during such participation. However, the members of the non-state armed groups that are engaged in continuous combat functions are subject to attack at any time during the ongoing conflicts.⁹⁸ Thus, there is a difference between the status of civilians who directly participate in hostilities and the members of the non-state armed groups engaged in continuous combat function: the former can be lawfully attacked only

94 *Ibid.*

95 Aftab Alam, "The Rights and Status of Fighting Civilians in International Armed Conflicts", *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 5 (2005), pp.76-81.

96 International Review of the Red Cross, "Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law", 2009, pp. 46-64. Available at <https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/icrc-002-0990.pdf> (last visited on 01 March 2026).

97 *Ibid.*, pp. 65-68.

98 *Ibid.*, pp. 72-73.

during the time of such participation while the latter can be lawfully targeted at any time during the conflict.⁹⁹

4.2 Private Military Companies and Foreign Fighters

The phenomenon of engagement of the Private Military Companies (PMC) for war related purposes has also been on rise now a days. The status of the members of PMCs are dependent upon the particular functions and association of such members during armed conflicts. Normally such members are termed as civilians unless they directly participate in hostilities. This direct participation may include activities of guarding or protecting any military objective that can legally be attacked during armed conflicts.

The members of PMCs can also be compared with mercenaries. Mercenaries are such persons who fight war for private material gains and have no association based on nationality or residence with the conflicting parties.¹⁰⁰ Recruitment, use, financing and training of mercenaries are prohibited under international law by virtue of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989.¹⁰¹ IHL does not prohibit mercenaries to take part in hostilities, it only states that a mercenary does not have right to be combatant or PoW.¹⁰²

99 Aftab Alam, “ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: An Overview”, *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 9, (2009) pp. 47-77, at p. 56. Also see, Aswathy Madhukumar, “Re-Defining Civilian Security within the Concept and Acts of Direct Participation in Hostilities”, *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 20, (2020-21), pp.111-151. To know more about the critique of combatant’s privilege during NIAC, please see, Gunjan Chawla, “Exploring International Legal Norms in Global and Domestic Counterinsurgency Operations: A TWAIL Critique of Combatant’s Privilege”, *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 18, (2018-19) pp. 22-62. Also see, Sanoj Rajan, “The New Frontier of War: International Counterterrorism Regime and Criminalising Humanitarian Action in India”, *ISIL Yearbook of International Humanitarian and Refugee Law*, vol.23, (2023) pp. 59-90.

100 Santosh Upadhyay, note 89, p. 305.

101 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989, Art. 2, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-against-recruitment-use-financing-and> (last visited on 01 March 2026).

102 API, note 41, Article 47.

Foreign Fighters phenomenon have also posed a serious challenge to the application of IHL's personal scope of protection. The issue came into much discussion after the UNSC resolution 2178 of 2014 wherein the UNSC prohibited the recruitment and movement of foreign terrorist fighters. The UNSC defines foreign terrorist fighters as those individuals who "travel to a State other than their states of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict".¹⁰³ It is difficult to pre-determine the purpose for which an individual is undertaking a journey and this definition has led to a complete travelling ban to some destinations. It means any movement of an individual or terrorist to participate in an ongoing armed conflicts is restricted. It is very difficult to pre-determine by states the exact purpose behind individuals' journey. The phrase 'including in connection with armed conflict' conveys that states must use the resolution to prohibit any terrorist to participate in any conflict.

This is a strange situation for IHL because IHL though prohibits the acts of terrorism but it does not prohibit even a hardened terrorist of competent age to participate in conflicts.¹⁰⁴ This might be the reason that IHL discourse uses a more neutral term Foreign Fighters without any qualification of 'terrorist'.

The 2015 ICRC's Challenges Report defines foreign fighter phenomenon as "national of one country who travel abroad to fight alongside a non-state armed groups in the territory of another state".¹⁰⁵ Though this definition only associates the phenomenon of foreign fighters with respect to their deployment by non-state armed groups but the chances of their incorporation in regular armed forces are not completely bleak. However, if any party to the conflict would grant them combatant position by incorporating them in their usual armed forces, then the recognition of such status on international plane would be dubious

103 UNSC Resolution 2178 of 2014, preambular paragraph, available at [https://docs.un.org/en/S/RES/2178%20\(2014\)](https://docs.un.org/en/S/RES/2178%20(2014)) (last visited on 01 March 2026).

104 Santosh Upadhyay, note 89, p. 308.

105 ICRC Report, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts" (2015), p. 19, available at https://www.icrc.org/sites/default/files/document/file_list/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf (last visited on 01 March 2026).

because of the Security Council resolution prohibiting their use or deployment in armed conflicts. These fighters participate in conflicts due to their radicalized ideology and not for any personal gains, thus they do not come under the categories of mercenaries. It is urged that the position of these fighters under IHL should be analyzed using the framework of civilians directly participating in hostilities.

4.3 Protection to Children and Women

Armed conflicts disproportionately affect women and children. Recognizing this, IHL prescribes special protection to women and children in addition to the general protection available to them as civilians.¹⁰⁶ Children has protection against indecent assault during armed conflicts. Both AP I and AP II desist the conflicting parties to recruit children below the age of 15 years in the regular armed forces or armed units.¹⁰⁷ This is also a war crime to appoint a child below the age of 15 years for the participation in armed conflicts.¹⁰⁸ The normal age of maturity i.e. 18 years has been lowered down to 15 in case of child soldiers. This is a problematic scenario for the welfare and protection of child.¹⁰⁹ If the appointment is to be made between the age group of 15 to 18 years then older must be preferred.¹¹⁰ Even if the child below 15 years directly participates in the hostilities and captured by adversary, such child must be benefitted from the special protection accorded by IHL.¹¹¹ The menace of child soldiers still continues to compromise the interests of children and their welfare. It is also required that the minimum age for being considered as child should be same both for IHL and other welfare schemes.

106 AP I, note 41, Articles 76 & 77.

107 *Ibid*, Article 77 (2). Also see, AP II, note 42, Article 4(3)(c).

108 Rome Statute of the International Criminal Court, Article 8(2)(b)(xxvi) & Article 8(2)(e)(vii), available at <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf> (last visited on 01 March 2026).

109 To know more about protection to children and the intricate problems of the phenomenon of child soldiers, please see, Usha Ramanathan, "Child Soldiers: Finding Recognition in International Humanitarian Law", *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 2 (2002), pp. 228-240. Also see, Ranjana Ferraro, "Prohibition on the Use of Child Soldiers: How Real", *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 9 (2009), pp. 279-299.

110 AP I, note 41, Article 77 (2).

111 *Ibid*, Article 77(3). Also see, AP II, note 42, Article 4(3)(d).

Sexual and gender based violence are still the realities of the conflict situations. IHL grants special respect to women and protects them against rape, forced prostitution and any other form of indecent assault.¹¹² The conflict related judicial cases of pregnant women and mothers having dependent infants are to be prioritized and death penalty should be avoided.¹¹³ In any case, death penalty against pregnant women and mothers having dependent infants must not be executed.¹¹⁴ Sexual and gender based violence against women may also be considered as genocide, crimes against humanity and war crimes, depending upon the factual situation on the ground and the intent of the perpetrators. Despite these safeguards, the gender and sexual based violence are still hovering upon the conscience of humanity.¹¹⁵

4.5 Military Objectives and Civilian Objects: The Puzzle of Nature, Location, Purpose or Use

The difference between military objectives and civilian objects is the important facet of application of principle of distinction during armed conflict. During armed conflict, parties can direct their hostile actions only against combatants and military objectives. As per article 52 (2) of API, any objects to be considered as military objective must satisfy the two cumulative conditions. First, such objects by virtue of its nature, location, purpose or use must make an effective contribution to the ongoing military actions; and second, that total or partial destruction or capture or neutralization of that object during the existing conflicts situations or realities offer a definite military advantage.¹¹⁶ The customary international law also have the same requirements for being

112 API, note 41, Article 76(1).

113 *Ibid*, Article 76 (2) & (3).

114 *Ibid*.

115 To know more about the patterns of violence against women during armed conflict and intricate legal issues surrounding therein, please see, Bharat H Desai & Moumita Mandal, *Sexual and Gender Based Violence in International Law: Making International Institutions Work*, (Springer, 2022). Also See, T.V.G.N. S. Sudhakar, "Protection of Women during Armed Conflicts: A Survey of Existing Networks of Treaty-Customary Law and Practice", *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 6 (2006), pp.251-264. Also See, R. K. Dixit, "Special Protections of Women during Armed Conflicts under the Geneva Conventions Regime", *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 2 (2002), pp. 147-174.

116 API, note 41, Article 52 (1).

considered as military objective and so these criteria are equally applicable to NIAC.¹¹⁷

The term 'nature' refers to the intrinsic value of the object.¹¹⁸ Location simply indicates its geographical location or its geographical or topographical direct linkages with other military objectives in vicinity. The determination of military objective in respect of location should be done on case to case basis and one must avoid considering a big land parcel or zone as military objective and thus targeting everything within it indiscriminately.¹¹⁹ The term 'purpose' refers to the intended future use under reasonable consideration and 'use' means its current function in the scheme of ongoing armed conflicts.¹²⁰ Only tangible objects can be military objectives. Military objectives are strictly restricted only to objects and do not extend to persons. A combatant can target another combatant during armed conflict irrespective of any dilemma of nature, location purpose or use.¹²¹ Presence of civilians in the vicinity of military objectives does not immune it from attack but legality of such attack would be determined by applying the principle of proportionality.

4.6 Principle of Proportionality

The principle of proportionality is a test to measure the legality of any collateral or incidental damage to civilians or civilian objects. This doctrine prohibits such attacks that expected to cause any incidental or collateral damage to civilians or civilian object that 'would be excessive in relation to the concrete and direct military advantage anticipated'.¹²²

117 ICRC, IHL Database, Customary International Humanitarian Law, Rule 8, Definition of Military Objective, available at <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule8> (last visited on 01 March 2026).

118 Marco Sassoli, "Military Objectives", Max Planck Encyclopedia of Public International Law, available at <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e334> (last visited on 01 March 2026).

119 *Ibid.*

120 *Ibid.*

121 *Ibid.*

122 AP I, note 41, Article, 51 (5)(b) & Article 57 (2)(a) (iii). To know more about the application of principle of proportionality and the use of explosive weapons, please see, Juliee Sharma, "Use of Explosive Weapons in Populated Area and International Humanitarian Law", *ISIL Yearbook of International Humanitarian and Refugee Law*, vol.16, (2016-17), pp. 166-184. Also see, Juliee Sharma, "Improvised Explosive Devices and International Humanitarian Law: An Analysis", *ISIL Yearbook of International Humanitarian and Refugee Law*, vol.14, (2014-15), pp. 137-157.

Attack means acts of violence directed against adversary and this doctrine does not apply to any propaganda or any such intangible things. Similarly, the military advantage that should accrue from the attack must be 'direct and concrete'. It means the military advantage must be relatively close to the attack and any conjectures, speculations and long-term gains must be shunned from any weightage.

Military advantages should be calculated in reference to the particular singular attack in question. Any attempt to locate military advantage with reference to the overall armed conflicts and its purposes would definitely compromise the protection to civilians and civilian objects. However, article 8(2)(b)(iv) of the ICC Statute while making violation of principle of proportionality a war crime uses the phrase "*clearly excessive in relation to the concrete and direct overall military advantage anticipated*" (italics supplied). Both these terms 'clearly' and 'overall' are not found in the corresponding provisions of API. By putting high bar on criminal liability, ICC statute definitely widens the scope for collateral damages.

4.7 Dual Use Objects and Other Special Protections

There are also some 'dual use' objects that simultaneously used by both the civilian populations and military infrastructure. The examples of such objects may be the electricity generating power stations or internet infrastructures that are used both by the civilians and military personnel. IHL does not have any specific regulation for 'dual use' objects and the legality of attack against such objects would be determined by the principle of proportionality. In addition, IHL also carves out special protection to many objects useful for civilian purposes. Any hostility against the cultural objects or places of worship are prohibited.¹²³ These objects also must not be used in support of the military efforts of the warring parties and they are also protected against any acts of reprisals.¹²⁴

123 API, note 41, Article 53 (a). Also see, Burra Srinivas, "Special and Enhanced Protection of Cultural Property during Armed Conflicts", *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 5, (2005), pp. 249-261. Also see, International Criminal Court, Office of Prosecutor, "Policy on Cultural Heritage", 2021, available at <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20210614-otp-policy-cultural-heritage-eng.pdf> (last visited on 01 March 2026).

124 API, note 41, Article 53 (b) & (c).

It is prohibited to cause starvation to civilians during armed conflicts.¹²⁵ Any attack or destruction to those objects that are essential for the survival of the civilian population are prohibited subject to condition that if such objects are used solely for the sustenance of the members of the armed forces or directly supporting the military action, they can be targeted only to the extent that it does not result into the starvation of civilians.¹²⁶ The natural environment are protected against any attack that intended or may be expected to cause widespread, long-term and severe damage to it.¹²⁷ The precise meanings of the terms ‘widespread’, ‘long-term’ and ‘severe’ still remain undetermined and the world community is still facing a serious challenge to protect the natural environment during armed conflicts.¹²⁸ Works and installations containing dangerous forces like dams, dykes, nuclear or electrical generating stations are protected against the attack even if they are the military objectives.¹²⁹ However, if these installations are used for the direct support to the military operations and there is no other way to stop their use by the adversary army, then in such circumstances, these works and installations become open to attack.¹³⁰

125 *Ibid*, Article 54 (1).

126 *Ibid*, Article 54 (2) & (3).

127 *Ibid*, Article 55

128 To know more about the protection to the environment during armed conflicts and other related concerns, please see, R. A. Malviya, “Laws of Armed Conflict and Environmental Protection: An Analysis of their Inter-relationship”, *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 1 (2001), pp. 72-93. Also see, Manoj Kumar Sinha, “Protection of the Environment during Armed Conflicts: A Case Study of Kosovo”, *ISIL Yearbook of International Humanitarian and Refugee Law*, vol.1 (2001), pp.230-250. Also see, Santosh K Upadhyay, “Natural Environment during Armed Conflicts and International Humanitarian Law: A Legal Analysis of Protective Ambits”, *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 23 (2023), pp. 104-126. Also see, Santosh K Upadhyay, “Environment at International Criminal Court: Problems and Perspectives”, *Environmental Law and Practice Review*, vol. 9 (2024), pp.107-138. Also see, Guidelines on the Protection of the Natural Environment in Armed Conflicts, International Committee of the Red Cross, Geneva, 2020, available at https://www.icrc.org/sites/default/files/document_new/file_list/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf. Also See, Draft Principles on Protection of the Environment in relation to Armed Conflicts, 2022, International Law Commission, available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/8_7_2022.pdf

129 API, note 41, Article 56 (1).

130 *Ibid*, Article 56(2).

V. IHL AND WEAPONS OF MASS DESTRUCTION & OTHERS

The Weapons of Mass Destruction (WMDs) are such “atomic explosive weapons, radioactive material weapons, lethal chemical and biological weapons and any weapons developed in the future which might have characteristics comparable in destructive effects to those of the atomic bomb or other weapons mentioned above”.¹³¹ WMDs constitute a class of weaponry in itself that have potential to produce enormous destructive effects at a single moment that may kill millions of people, jeopardize natural processes and severely affects the life of the future generations.¹³²

WMDs are inherently in violation of the principles of distinction and proportionality. They are capable of high order of destruction and they fail to distinguish between civilians and combatants as well as between civilian objects and military objectives.¹³³ WMDs are incapable of being directed precisely at specific military targets and their after-use effects cannot be limited.¹³⁴ Such weapons also challenge the fundamental IHL principle that unnecessary and superfluous injuries must not be caused during armed conflicts.¹³⁵ All such injuries that are disproportionately excessive to the military advantage are termed as unnecessary or superfluous injuries.¹³⁶ Biological weapons, chemical weapons and nuclear weapons are the prominent examples of WMDs. The significant international efforts to prohibit the developments, stockpiling and transfer of these weapons are being taken under the aegis of the United Nations Office for Disarmament Affairs (UNODA).¹³⁷

131 UNGA Resolution 32/84 B of 1977, para 3, available at <https://digitallibrary.un.org/record/623117?ln=en&v=pdf> (last visited on 01 March 2026).

132 United Nations Office for Disarmament Affairs, Weapons of Mass Destruction available at <https://www.unrcpd.org/wmd/> (last visited on 01 March 2026).

133 B. C. Nirmal, “Implementation of the Biological Weapons Convention and the Indian State Practice”, *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 11 (2011), pp. 107-138, at p. 108.

134 *Ibid.*

135 *Ibid.*

136 *Ibid.*, pp. 108-109.

137 United Nations Office for Disarmament Affairs, available at <https://disarmament.unoda.org/en> (last visited on 01 March 2026).

5.1 Biological Weapons

The attempts to prohibit biological weapons started with the adoption of the Geneva Gas Protocol of 1925. This protocol was adopted in the backdrop of the largescale use of chemical and biological weapons during the First World War.¹³⁸ Before adoption of this Protocol, these weapons were governed under the category of poisonous weapons.¹³⁹ This Protocol, in the words of Prof. Nirmal was “the first international convention which not only separated biological and chemical weapons from the poison or poisoned weapons but also forbade their use independently of the prohibition of poisonous weapons”.¹⁴⁰

But this Protocol failed to protect the humanity from the use of biological weapons and these weapons came on the disarmament agenda of the United Nations. After many turns and twists, The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC) was opened for signature in 1972. This is the first multilateral disarmament treaty that ban the production and use of the entire category of weapons.¹⁴¹ According to the recent data, the BWC has one hundred eighty nine state parties.¹⁴² Rule 73 of the ICRC customary IHL also prohibits the use of the biological weapons.¹⁴³

Despite its importance, the BWC does not have any designated international body to oversee its implementation.¹⁴⁴ The sixth review conference tried to overcome this problem by establishing an Implementation Support Unit (ISU) at the Geneva branch of the United Nations Office for Disarmament Affairs in 2006.¹⁴⁵ ISU provides

138 B. C. Nirmal, note 133, p. 110.

139 *Ibid.*

140 *Ibid.*

141 *Ibid.*

142 United Nations Office for Disarmament Affairs, Treaties Database, available at <https://treaties.unoda.org/t/bwc> (last visited on 01 March 2026)

143 IHL Customary Rules, Rule 73. Biological Weapons, available at <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule73> (last visited on 01 March 2026).

144 B. C. Nirmal, note 133, p. 110.

145 Implementation Support Unit, available at <https://disarmament.unoda.org/en/our-work/weapons-mass-destruction/biological-weapons/implementation-support-unit> (last visited on 01 March 2026).

administrative support to the meetings of the review conferences and also helps in ensuring the universal implementation of the convention and exchange of confidence building measures.¹⁴⁶ Since the task of ISU is only to assist the states rather than carrying the tasks of implementation by itself, there is a need to have an enforcement protocol to the convention.¹⁴⁷ The implementation of BWC still depends mostly on the national implementation measures, mutual confidence-building mechanisms and the periodic review conferences. Prof. B. C. Nirmal opines that BWC needs an enforcement protocol but this could not be done and the implementation of BWC is quite diffused and mostly depends upon the national implementation mechanisms.¹⁴⁸

5.2 Chemical Weapons

Chemical weapons are the other category of WMDs. They are inherently indiscriminate and defies the core IHL principles of distinction and proportionality. They are prohibited because their use is against the humanity.¹⁴⁹ The use of chemical weapons both during IAC or NIAC have been declared as war crimes by the ICC Statute.¹⁵⁰ Their use, if satisfies the other essential conditions, can also result into the commission of crimes against humanity and genocide.¹⁵¹ Rule 74 of the ICRC's customary IHL prohibits the use of chemical weapons both in IAC and NIAC.¹⁵²

The international efforts to ameliorate the menace of chemical weapons share close connection with such efforts as discussed above in respect of biological weapons. Attempts were directed to regulate the chemical weapons under the category of poisonous weapons almost from the seventeenth century.¹⁵³ The Hague Declaration concerning Asphyxiating

146 *Ibid.*

147 B. C. Nirmal, note 133, p. 111.

148 *Ibid.*

149 B. C. Nirmal, "Challenges on the Implementation of Chemical Weapons Convention with Special Reference to the Syrian Crisis", *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 12, (2012-13), pp. 44-85, at p.47.

150 Rome Statute of International Criminal Court, note 108, Article 8(2)(b)(xviii) & Article 8(2)(e)(xiv).

151 B. C. Nirmal, note 149, pp. 48-49.

152 ICRC Customary Rules, 74, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule74> (last visited on 01 March 2026).

153 B. C. Nirmal, note 149, p. 49.

Gases of 1999 was probably the first international convention to prohibit the use of projectiles “the sole object of which is the diffusion of asphyxiating or deleterious gases” during war among contracting parties.¹⁵⁴ The brutalities caused by the use of chemical weapons during the First World War further prompted the adoption of the Geneva Gas Protocol of 1925. The Geneva Gas Protocol of 1925 did not prohibit the development, stockpiling and possession of chemical weapons and its application was also restricted to the affairs only between the parties and its efficacy was also compromised by extensive reservations filed by the contracting parties.¹⁵⁵

Overshadowed by the fear of looming destruction and large stockpiling by many states, the agenda to prohibit chemical and biological weapons became part of the UN disarmament conference in Geneva in year 1968.¹⁵⁶ Though Biological Weapons Convention was adopted in 1972 but it took too long for chemical weapons. The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC) was adopted in 1993 and came into force in 1997.¹⁵⁷ This was the world’s first multilateral disarmament agreement that proposes to eliminate an entire category of weapon within a fixed time frame.

The important features of the CWC is its comprehensive verification system that includes compulsory declaration by states of its military and industrial activities in prohibited chemical substance, complete destruction of chemical weapons within an adequate time framework and a system of periodical inspection of the declared facilities.¹⁵⁸ The

154 Declaration (IV, 2) Concerning Asphyxiating Gases. The Hague, 29 July 1899, available at <https://ihl-databases.icrc.org/assets/treaties/165-IHL-13-EN.pdf> (last visited on 01 March 2026).

155 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925, available at <https://ihl-databases.icrc.org/assets/treaties/280-IHL-36-EN.pdf> (last visited on 01 March 2026).

156 OPCW, “History Looking Back Helps Us Look Forward”, available at <https://www.opcw.org/about-us/history> (last visited on 01 March 2026).

157 Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction, Paris, 13 January 1993, available at <https://ihl-databases.icrc.org/en/ihl-treaties/cwc-> (last visited on 01 March 2026).

158 B. C. Nirmal, note 149, p. 51.

CWC also provides for on-site inspection of chemical facilities declared by states. As per the recent data, the Chemical Weapons Convention has one hundred ninety three state parties and almost ninety eight percentage of the world population live under its protection.¹⁵⁹ All the stockpiles of the chemical weapons declared by the state parties have already been verified and destroyed.¹⁶⁰

Unlike the BWC, the CWC has designated body to oversee its implementation: The Organization for the Prohibition of Chemical Weapons (OPCW). The OPCW, seated in the Hague, oversees and coordinates stakeholders' efforts to permanently and verifiably eliminate chemical weapons from the world. It also conducts onsite inspection to the facilities for destruction of chemical weapons stockpiles and to ensure the non-diversion of the legitimate chemical production.¹⁶¹ Despite the prohibition on use of chemical weapons, there are multiple instances of such use in recent past. There use in Syria during 2013-14 has put serious questions on the prohibition regime.¹⁶² Some reports also indicate towards the use of chemical weapons during Russia-Ukraine war as well as during recent Israeli onslaught on Gaza. Reemergence of the chemical weapons is also a looming threat and the OPCW and world community need to remain vigilant against this menace.¹⁶³ Non-state actors are also posing a great threat to the prohibition regime. Thus though there is almost universal coverage of the CWC but one must not become complacent and continuous vigil and safeguards are still needed on much higher scales.

5.3 Nuclear Weapons

Though the use of nuclear weapons violate many rules and principles of IHL yet there is no comprehensive and universal prohibition on these weapons under international customary or conventional laws. In its

159 OPCW Member States, <https://www.opcw.org/about-us/member-states> (last visited on 01 March 2026).

160 *Ibid.*

161 OPCW Mission, available at <https://www.opcw.org/about-us/mission> (last visited on 01 March 2026).

162 B. C. Nirmal, note 149, pp. 44-46.

163 B. C. Nirmal, note 149, p. 85. Also See, OPCW, Preventing the Re-Emergence of Chemical Weapons, available at <https://www.opcw.org/our-work/preventing-re-emergence-chemical-weapons> (last visited on 01 March 2026).

much debated advisory opinion of 1996, the International Court of Justice (ICJ) has observed that the use or threat to use nuclear weapons violate the rules and principles of IHL but the Court further held that it was inconclusive in determining precisely whether the use or threat to use nuclear weapons would be illegal in the extreme situations of self-defense when the very existence of the state is at stake.¹⁶⁴

The problem of nuclear weapons was on the UNGA agenda from the beginning. The very first UNGA resolution was addressed to the establishment of commission to deal effectively with the problems faced by the world due to discovery of atomic energy.¹⁶⁵ The focus was to ensure that the atomic energy should be used only for the peaceful purposes. A multilateral treaty, Treaty on the Non-Proliferation of the Nuclear Weapons 1968 (NPT) is an important international instrument with a goal of nuclear disarmament.¹⁶⁶ NPT does not prohibit the use or threat to use the nuclear weapons and its purpose is to prohibit the transfer or proliferation of nuclear weapons. Another important international instrument, though it has not come into force yet, is the Comprehensive Test Ban Treaty (CTBT) that prohibits nuclear testing. The use or threat to use nuclear weapon is prohibited by the Treaty on the Prohibition of Nuclear Weapons 2017.¹⁶⁷ This treaty came into force in January 2021 and as per the recent data, it has 74 state parties.¹⁶⁸ However, the efficacy of this treaty is seriously compromised by the fact that none of the states having nuclear weapons are party to it.

164 *Legality of the Threat or Use of Nuclear Weapons* Nuclear, note 72, para 105(2) (E).

165 UNGA Resolution 1(1). Establishment of a Commission to Deal with the Problems Raised by the Discovery of Atomic Energy, available at [https://docs.un.org/en/A/RES/1\(I\)?_gl=1*8i8fh5*_ga*MTI0MTMyMTYyOS4xNzI5OTkzMDM5*_ga_TK9BQL5X7Z*cZ3NjMzNzI0MTAkzI5JGcwJHhQxNzYzZmZcyNDEwJGo2MCRsMCRoMA](https://docs.un.org/en/A/RES/1(I)?_gl=1*8i8fh5*_ga*MTI0MTMyMTYyOS4xNzI5OTkzMDM5*_ga_TK9BQL5X7Z*cZ3NjMzNzI0MTAkzI5JGcwJHhQxNzYzZmZcyNDEwJGo2MCRsMCRoMA) (last visited on 01 March 2026).

166 Treaty on the Non-Proliferation of Nuclear Weapons, 1968, available at <https://disarmament.unoda.org/en/our-work/weapons-mass-destruction/nuclear-weapons/treaty-non-proliferation-nuclear-weapons> (last visited on 01 March 2026).

167 Treaty on the Prohibition of Nuclear Weapons, 7 July 2017, Article 1, available at https://treaties.un.org/doc/Treaties/2017/07/20170707%2003-42%20PM/Ch_XXVI_9.pdf (last visited on 01 March 2026).

168 Treaty on the Prohibition of Nuclear Weapons, 7 July 2017, <https://ihl-databases.icrc.org/en/ihl-treaties/tpnw-2017/state-parties?activeTab=> (last visited on 01 March 2026).

In the famous *Shimoda* case, the Tokyo District Court in 1963 held that the nuclear bombings on Hiroshima and Nagasaki were illegal because indiscriminate bombings over undefended territories were against the rules and principles of customary IHL.¹⁶⁹ Though a widely accepted convention to prohibit nuclear weapons are still lacking but it does not mean that the principles of distinction, military objectives and proportionality would not be applicable to judge the legality of any nuclear actions by belligerents.¹⁷⁰

5.4 Cluster Munitions and Lethal Autonomous Weapons System

The cluster munitions and lethal autonomous weapons do not strictly come under the rubric of WMDs but their use significantly compromise the application of many IHL rules and principles. The world is suffering from the menace of cluster munitions from many years, however, the lethal autonomous weapon systems are the new entrant to the war zones. The development and deployment of both these weapons remain critical to article 36 of AP I that prevent the state parties to acquire, develop or adopt any new weapon or means or methods of warfare whose deployment would violate IHL rules and principles.¹⁷¹

The international community has adopted Convention on Cluster Munitions in 2008 (CCM) to eradicate the humanitarian crisis caused by them and it thus, prohibits the use, production, transfer and stockpiling of the cluster munitions.¹⁷² Article 2(2) of the CCM defines cluster munitions as “conventional munition that is designed to disperse or release explosive sub-munitions each weighing less than 20 kilograms, and includes those explosive sub-munitions”.¹⁷³ It subsequently excludes some categories of sub-munitions from the definition.¹⁷⁴ Highlighting

169 *Shimoda case* (Compensation claim against Japan brought by the residents of Hiroshima & Nagasaki), Tokyo District Court, 7 December 1963, available at <https://ihl-databases.icrc.org/en/national-practice/shimoda-case-compensation-claim-against-japan-brought-residents-hiroshmina> (last visited on 01 March 2026).

170 *Ibid.*

171 AP I, note 41, Article 36.

172 Convention on Cluster Munitions 2008, Article 1, available at https://www.clusterconvention.org/files/convention_text/Convention-ENG.pdf (last visited on 01 March 2026).

173 *Ibid.*, Article 2 (2).

174 *Ibid.*

the characteristics of cluster munitions, G. S. Sachdeva, observes that “cluster munitions are a class of cognate weapons which when dropped from the air or fired from artillery guns tend to explode in mid-air to randomly scatter over a wide area a variety of sub-munitions or bomblets that may be hundreds in numbers and of size as small as eight centimetres.”¹⁷⁵

These munitions are indiscriminate in their action and their remnants cause untold threat to the humanity even long after the cessation of armed conflicts. These munitions are also termed as “slow weapons of mass destruction”.¹⁷⁶ As per the recent data, there are 112 state parties to CCM,¹⁷⁷ a figure still far away from the universal ratification. The world is still facing a threat of cluster munitions and its use resurfaced in many recent conflicts including Ukraine, Myanmar and Syria.¹⁷⁸

There is still no agreeable definition of lethal autonomous weapons but it is largely believed that states are preparing, developing and employing such weapons.¹⁷⁹ The contentious issue with such weapons is the element of human control over their operation and corresponding liability for their illegal use. UN Secretary General has already made a call, way back in 2023, to have a legally binding instrument by 2026 to prohibit such autonomous weapon system that operates without human control

175 G. S. Sachdeva, (2008) “Convention on Cluster Munitions: A Legal Appraisal”, *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 8, (2008) pp. 1-17, at p.2.

176 *Ibid.*

177 Convention on Cluster Munitions, State Parties, available at <https://ihl-databases.icrc.org/en/ihl-treaties/ccm-2008/state-parties> (last visited on 01 March 2026).

178 Cluster Munitions Monitor 2025: All Recorded Victims in 2024 Were Civilians, available at <https://www.hi-us.org/en/cluster-munitions-monitor-2025—all-victims-in-2024-were-civilians> (last visited on 01 March 2026).

179 UN Office of Disarmament Affairs, “Lethal Autonomous Weapons System”, available at <https://disarmament.unoda.org/en/our-work/emerging-challenges/lethal-autonomous-weapon-systems#:~:text=In%20his%202023%20New%20Agenda,compliance%20with%20international%20humanitarian%20law> (last visited on 01 March 2026). To know more about Lethal Autonomous Weapons System and IHL, please see, U.C. Jha, “Lethal Autonomous Weapon Systems and International Humanitarian Law”, *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 16, (2016-17), pp. 112-139.

or oversight.¹⁸⁰ Even before such legal prohibition or regulation, these autonomous weapons would remain under the regulatory ambits of IHL including Martens Clause. Hope the world will soon adopt a specific convention to ensure elements of human control over these weapons.

VI. INTERNATIONAL CRIMINAL TRIBUNALS AND IHL

IHL has close relationship with International Criminal Law (ICL). ICL has developed as a response to such serious and grave violations of the laws of war and peace that shake the conscience of international community.¹⁸¹ The development and evolution of ICL in its current form is the result of many successful and unsuccessful attempts throughout the last millennium.¹⁸² Prof. Nirmal highlights an instance of prosecution of Duke of Serbia for waging unjust war way back in 1268.¹⁸³ The concept of international crimes passes through many important stages and started to take a formal shape after the Second World War with the establishment of military tribunals at Nuremberg and Tokyo.¹⁸⁴ These tribunals in their true sense were multinational and not international because they were constituted by the victorious powers of the Second World War to prosecute only the accused of defeated powers.¹⁸⁵ This is the primary reason that a sole Indian Judge of the Tokyo Tribunal Dr. Radhabinod Pal criticized these tribunals as forum of victor's justice and while dissenting, he emphatically observed that "a victor's power under international law does not entitle him to sit on

180 *Ibid*, UN Office of Disarmament Affairs.

181 B. C. Nirmal, "Expanding Horizons of International Criminal Law" in Chia Jui Cheng (ed), *New Trends in International Law: Festschrift in Honour of Judge Hisashi Owada*, (Brill, Leiden, 2024), p. 271.

182 B. C. Nirmal, note 181, p. 270. Also see, Manoj Kumar Sinha, "Development of International Criminal Law: A Long Journey", *ISIL Yearbook of International Humanitarian and Refugee Law*, vol.11, (2011), pp. 139-160. To know more about International Criminal Law, please see, Anupam Jha, *International Criminal Law: Theory and Practice*, Satyam Law International, New Delhi, 2019.

183 B. C. Nirmal, note 181, p. 272.

184 *Ibid*, pp. 272-279.

185 Christopher Greenwood, "The Development of the International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia", *Max Plank Yearbook of United Nations Law*, vol. 2, (1998), pp. 97-140, at pp. 100-101.

trial over the vanquished for all his life doings".¹⁸⁶ These tribunals were also criticized for violating the principle of *nullum crimen sine lege* (no crime without law).¹⁸⁷

Despite these criticisms, both these tribunals contributed significantly to the development of IHL and ICL. The judgements and reasoning given by these tribunals significantly added to the then post-war euphoria of humanitarian values that ultimately resulted into the adoption of Genocide Convention of 1948, Universal Declaration of Human Rights, 1948 and the four Geneva Conventions of 1949.¹⁸⁸ These tribunals have been instrumental in the development of the concepts of individual criminal responsibility, non-availability of the defense of superior's orders and accountability of the Heads of the States for international crimes.¹⁸⁹ Both these tribunals have significantly contributed to the establishment and development of international rule of law vis-à-vis international crimes.

Prof. B. C. Nirmal has pointed out four important contributions of the Nuremberg and Tokyo tribunals. These are, first, it broke the state's monopoly to prosecute its own citizens for the international crimes committed by them while remaining within the jurisdiction of that particular state; second, crimes against humanity and crimes against peace gained a firm foothold in international law; third, these tribunals contributed significantly to the furtherance of international rule of law; and fourth, they have helped in the development of international criminal justice at large.¹⁹⁰

The next significant moment in the development of ICL comes with the establishment of two *ad hoc* criminal tribunals namely, International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for the Rwanda (ICTR). The ICTY has jurisdiction over the offences of grave breaches of the Geneva Conventions of 1949, genocide, crimes against humanity and violations

186 International Military Tribunal for the Far East, 1948. Judgement of Radhabinod Pal, p. 1018, available at <https://www.legal-tools.org/doc/2a3d21/pdf/> (last visited on 01 March 2026).

187 B. C. Nirmal, note 181, p. 276.

188 *Ibid*, pp. 276-277.

189 *Ibid*, p. 279.

190 B. C. Nirmal, note 181, p. 279.

of the laws or customs of war¹⁹¹ whereas ICTR has jurisdiction over genocide, crimes against humanity and violations of common article 3 to the Geneva Conventions of 1949 and violations of AP II¹⁹². In contrast to the Nuremberg and Tokyo tribunals, the ICTY and ICTR are truly international in the sense that they are established by an international body: the UN Security Council.

With the establishment of ICTY, first time in history, ICL was applied to all sides and shades of the conflicting parties.¹⁹³ The Security Council established both these tribunals under Chapter VII powers, highlighting the point that non-prosecution of serious crimes of international concern are threat to the international peace and security. The establishment of ICTY and ICTR has made it loud and clear that effective and judicious prosecution of crimes of international concerns occurring in any part of the world is essential to the maintenance of international peace and security in every part of the world.

Both these tribunals significantly contributed to the development of IHL. The ICTY added new dimension to the idea of non-international armed conflicts. It also developed the test of overall control while fixing individual criminal responsibility, a significant step from the test of effective control as developed by ICJ in *Nicaragua* for determining state's responsibility. The concept of joint criminal enterprises is also a significant addition by ICTY. The joint criminal enterprise means that each and every member of any joint criminal endeavor is equally liable as co-perpetrator even if s/he is materially or casually remote to the actual commission of the crime.¹⁹⁴ This doctrine has been used by ICTY for fixing the criminal responsibility of the persons occupying higher

191 Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, articles 2,3,4 and 5; available at https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (last visited on 01 March 2026).

192 Statute of the International Criminal Tribunal for Rwanda, articles 2, 3 and 4, Available at https://legal.un.org/avl/pdf/ha/ict_r_ef.pdf (last visited on 01 March 2026).

193 Ivan Simonovic, "The Role of the ICTY in the Development of the International Criminal Adjudication" *Fordham International Law Journal*, vol. 23, Issue 2, (1999) p. 444.

194 Giulia Bigi, "Joint Criminal Enterprise in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the Prosecution of Senior Military and Political Leaders: The Krajisnik Case" *Max Planck Yearbook of the United Nations Law*, vol. 14, (2010), pp. 54.

military and political positions and who have contributed to the causation of particular criminal act only in the wider context.¹⁹⁵ ICTY has significantly contributed to the development of crimes against humanity by firmly affirming that these crimes need not to have any connection with war or armed conflict.¹⁹⁶ ICTY subsequently adopted a referral strategy as a part of its wider completion plan, wherein it referred some of its pending cases to the respective national jurisdictions of the region.¹⁹⁷

The contribution of ICTR to the development of IHL is also not less important than ICTY.¹⁹⁸ ICTR was probably the first international criminal tribunal that successfully convicted a person for the offence of genocide as defined under the Genocide Convention 1948: a case in point is *The Prosecutor v. Jean Paul Akayesu*.¹⁹⁹ In *Akayesu*, ICTR argued that protected groups under Genocide Convention are not only limited to national, ethnic, racial or religious groups but also extend to include any other group similar to the above mentioned four groups in terms of ‘stability and permanence’.²⁰⁰ The intention of the drafters of the Genocide Convention, observes ICTR, ‘was clearly to protect any stable and permanent group’.²⁰¹ ICTR relied upon this logic to designate Tutsis as a protected group against genocide despite the fact that they share similar religion, nationality, race, language and historical contexts with the Hutus. There was no such difference between Hutus and Tutsis except the fact that latter have their Tusti’s identity cards issued by Rwandan government. The ICTR in subsequent cases excludes any mobile groups, like political or economic groups that one joins out of choice, from the

195 *Ibid.*

196 B. C. Nirmal, note 181, p. 282.

197 To know more about referral, Please see, B. C. Nirmal, “Referral of Indictments from the ICTY to National Courts under Rule 11 *bis*” *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 8, (2008) pp.18-37.

198 See, Senthil Kumar S, “The International Criminal Tribunal for Rwanda: A Legal Analysis”, *ISIL Yearbook of International Humanitarian and Refugee Law*, vol.5 (2005), pp. 226-248.

199 *The Prosecutor v. Jean–Paul Akayesu*, ICTR 96-4-T, 2 September 1998, available at <https://www.un.org/en/preventgenocide/rwanda/pdf/AKAYESU%20-%20JUDGEMENT.pdf> (last visited on 01 March 2026).

200 *Ibid.*, para 701.

201 *Ibid.*

ambit of protected groups under Genocide Convention.²⁰² The logic of ‘any stable and permanent’ group resurfaced again in Darfur Commission of Inquiry Report of 2005 wherein it was stated that this criteria has achieved the status of customary international law.²⁰³ However, this expansive interpretation of protected groups under the Genocide Convention has been criticized by scholars.²⁰⁴

Akayesu judgement significantly developed the jurisprudence of sexual violence particularly rape under international law. Rape is a form of aggression that are committed for the purposes of ‘intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person’.²⁰⁵ ICTR defines rape as ‘physical invasion of sexual nature, committed on a person under circumstances which are coercive’.²⁰⁶ This definition was a silent revolution in international criminal law that left behind such parochial understandings of rape in many domestic jurisdictions that meander around the particularities of gender, organ and consent. Rape under international law is gender neutral, is a path-breaking achievement of ICTR. ICTR is of the firm view that rape and sexual violence may amount to destruction of protected groups and thus constitute an offence of genocide.²⁰⁷ ICTR

202 *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgment and Sentence, 27 January 2000, para 162, available at <https://ucr.irmct.org/scasedocs/case/ICTR-96-13#eng> Also see, *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence, 6 December 1999, para. 57, available at <https://ucr.irmct.org/scasedocs/case/ICTR-96-03#eng> (Both these sources are last visited on 01 March 2026).

203 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, para 501, available at https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/F87E244D-B27C-4A0A-BE1B-D27CECB5649E/278008/Report_to_UN_on_Darfur.pdf (last visited on 01 March 2026).

204 William A Schabas, “Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide” *Rutgers Law Review*, vol. 61(1), pp. 161-192 at pp. 170-171. Also see, Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell and Alex Whiting, *Cassese’s International Criminal Law*, 3rd edition (Oxford University Press, Oxford, 2013) p. 120.

205 *The Prosecutor v. Jean-Paul Akayesu*, note 199, para 597.

206 *Ibid*, para 598.

207 B. C. Nirmal, note 181, p. 284.

also confirms that senior persons in media houses can also be held liable for inciting genocide.²⁰⁸

International Criminal Court (ICC) is the next important step in the development of ICL. It was established in 2002 as per the provisions of ICC Statute of 1998. ICC is the first permanent treaty body that was “established to end impunity for the perpetrators of the most serious crimes of concern for the international community”.²⁰⁹ It has subject matter jurisdiction over genocide, war crimes, crimes against humanity and aggression.²¹⁰ The definition of the offence of aggression was adopted in 2010 by Kampala Amendments, other crimes had already been defined in the statute since 1998.²¹¹

The ICC jurisdiction is complimentary to the jurisdiction of domestic tribunals. The ICC takes cognizance in only such matters wherein the domestic tribunals are either unwilling or unable to conduct trials in free and fair manner. ICC has jurisdiction over the nationals of a state party or upon individual who commits the said crimes on the territory of a state party.²¹² It also has jurisdiction when a matter is referred to it by the UN Security Council through its Chapter VII resolution. In the case of referrals by the UNSC, the consent of the states become immaterial. This power of the Security Council and other related

208 Sophia Kagan, “The Media Case before the Rwanda Tribunal: The Nahimana et.al Appeal Judgement”, *Hague Justice Journal*, vol.3 (2008), p. 89. Available at [https://www.haguejusticeportal.net/Docs/HJJ-JJH/Vol_3\(1\)/Media_Case_Kagan_EN.pdf](https://www.haguejusticeportal.net/Docs/HJJ-JJH/Vol_3(1)/Media_Case_Kagan_EN.pdf) (last visited on 01 March 2026).

209 B. C. Nirmal, note 181, p. 285.

210 Chandra Jeet, “Definitions and Elements of Crimes in the Rome Statute: Some Critical Reflections”, *ISIL Yearbook of International Humanitarian and Refugee Law*, vol.6, (2006), pp. 169-200.

211 ICC, Crime of Aggression, available at <https://asp.icc-cpi.int/reviewconference/crime-of-aggression> (last visited on 01 March 2026). Also see, Anupam Jha, “First Anatomy of the Rome Statute during Kampala Conference: A Critical Evaluation”, *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 11 (2011), pp. 161-188. Also see, Aftab Alam, “ICC and the Crime of Aggression: The Kampala Compromise or Consensus”, *Yearbook of International Humanitarian and Refugee Law*, vol. 10 (2010), pp. 149-181.

212 To know more about the jurisdiction of ICC, please see, B. C. Nirmal, “Jurisdiction of the International Criminal Court”, *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 3, (2003), pp. 116-134.

concerns are the reasons that India has not become party to the Rome Statute.²¹³

To claim jurisdiction over offence of aggression, both the state of nationality of accused as well as victim state must have affirmed the Kampala Amendments mechanisms. The UNSC through its chapter VII determination can also send the situations of aggression to be investigated by the ICC. The ICC has also a well-developed victim assistance system and victims are also given due consideration during trial procedures.²¹⁴ Despite all the big claims, it appears that ICC suffers with serious legal and practical jurisdictional constraints whenever a high stake accused's matter is involved and it appears that international criminal justice system is still not completely immune from the bare political considerations on the ground.²¹⁵

VII. EPILOGUE: THE NEED TO FOSTER RESEARCH IN IHL

IHL regulates the conduct of hostilities both during IAC and NIAC. Its application is non-negotiable and depends solely upon the existing facts on ground. The last few decades witnessed significant developments

213 See, B. C. Nirmal, "Crimes within the Jurisdiction of the International Criminal Court and the Indian Response", *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 6 (2006), pp. 106-125. Also see, Anuradha Rajesh Saibaba, "India and the International Criminal Court: Re-Invigorating and Re-Visiting the Non-Ratification Debate", *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 11, (2011), pp. 189-213.

214 To know more about victim's position at ICC, Please see, B C Nirmal, "International Criminal Court's Trust Fund for Victims: Challenges and Opportunities", *Indian Journal of International Law*, vol. 51(4), (2011), pp. 527-549. Also see, Anuradha Saibaba Rajesh, "Victims in the International Criminal Court: Vindicated or Vanquished?", *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 9, (2009), pp. 120-150. Also see, Ranjana Ferrao, "Justice to Victims of Enforced Prostitution and Sexual Slavery before the International Criminal Court", *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 18, (2018), pp. 141-165.

215 To know more about functioning of ICC during its first twenty years, please see, B C Nirmal & Amerandra Kumar Ajit, "A Critical Evaluation of Twenty Years of International Criminal Court: "Good Fences Make Good Neighbours"", *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 22, (2022), pp. 1-30. To know more about critique of international criminal adjudication system as a whole, please see, Anupam Jha, "Challenges before the International Criminal Tribunals: A Special Focus on International Criminal Court", *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 8, (2008), pp. 178-193.

and refinements of many IHL concepts that expanded its reach to regulate new and innovative realities. The ICTY and ICTR have significantly contributed to the developments of IHL. The ICC is also playing an impeccable role for the development of IHL through judicial means.

IHL has also faced many challenges due to new war realities. Increased participation of civilians in war scenarios and urban warfare are challenging the binary understanding of combatants and civilians. The precise determination of military objectives in respect of nature, location, purpose or use is also under strain due to emergence of cyber technologies and use of Artificial Intelligence in military operations. The issues of adequate protection to the environment and cultural objects during armed conflicts still challenge the efforts of international community. The fear of WMDs is still looming large. The international community is still witnessing many atrocious wars challenging the fine cannons of IHL.

All these challenges and emerging threats underlined the need to undertake extensive research in IHL. It is the time to dive deep into the fine cannons of IHL and to explore its dimensions and reaches so that the suffering humanity could be offered a dignified solace even in the face of the most brutal realities of armed conflicts.

There is a need to nurture a serious research culture in IHL and the established scholars should encourage and help younger generations in this pursuit. Prof. B. C. Nirmal is one among the scholars who always offers a helping hand to younger generations for pursuing teaching and research in IHL. Prof. Nirmal's writings are pivotal in addressing the contemporary IHL concerns and shaping its future debates. Restless for the causes of international humanitarianism and alert on the particularities of relevant concerns, Prof. Nirmal's writings are a guiding lamp to effectively map the developments and contemporary debates of IHL.

BUDDHA GOES TO WAR: FROM BUDDHIST PACIFISM TO APPLICATION OF BUDDHISM IN IHL

SANGEETATAAK*
SANKALPAKOIRALA**

ABSTRACT

This article explores the complex relationship between Buddhism and International Humanitarian Law (IHL), emphasizing how Buddhist teachings, despite their foundational pacifism, intersect with and can support the regulation of armed conflict. It examines Buddhism not only as a religion but also as a state philosophy, individual philosophy, and ethical framework that promotes non-violence, compassion, and mindfulness, which helps in compliance with key IHL principles. Buddhist teachings can foster moral discipline and accountability among combatants, which helps them make proper decisions in case of ethical dilemmas on the battlefield. It can help commanders comply with the test of a “reasonable military commander”. Buddhist teachings and their application on the battlefield can enhance compliance with the protection of non-combatants, prohibition of pillage, prohibition of sexual violence, and perfidy. Furthermore, compassion for all lives, despite any differences, as taught by Buddhism, can help in environmental protection and the protection of places of worship during conflict. Buddhism, despite its foundational pacifism, has made its way into state-functions of some modern nations, and can also make its way into regulation of armed conflict to ensure compliance with the IHL.

“Inquisitorial fires, or darkened with the smoke of heretic or heathen cities ablaze, or red with the blood of guiltless victims of religious hatred. Buddhism wields only one sword, the sword of wisdom, and recognizes only one enemy – ignorance. This is the testimony of history, and is not to be gainsaid.” – Prof. Bapat in “2500 Years of Buddhism”

Keywords: *Buddhism, Pacifism, Humanitarian Law, Armed Conflict, Military Commander.*

I. INTRODUCTION

A study on the intersections of religion and war must begin with a an acknowledgement that religion and war have existed since the

* Assistant Professor of Law, Rajiv Gandhi National University of Law, Punjab.

** Associate, Learned and Lawyers, Kathmandu, Nepal. Co-Founder, Eksana.

beginning of human civilization.¹ Religion and law have, historically², been inextricably linked with each other, and the same holds true in the case of International Humanitarian Law (hereinafter, IHL).³ While the study of IHL alongside religious⁴ principles was historically ignored, particularly by Western legal and political philosophy,⁵ it has recently gained attention. IHL is understood as a concept that synergizes with peaceful and right behaviour that has evolved over time and has been accepted by people.⁶ Therefore, IHL receives significant legitimacy from religious practices.⁷ The International Committee of the Red Cross (hereinafter, the ICRC) has also accepted the significance of religion in realising the goals of IHL.⁸ Religion has paved the way for the success of IHL, as it can tap into people's identities and motivations in ways

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- 1 Hans Küng, "Religion, violence and "holy wars"", *International Review of the Red Cross*, vol. 87 (2005), pp. 253-268 at p. 254.
 - 2 Andrew Bartles-Smith, "Religion and International Humanitarian Law", *International Review of the Red Cross*, vol. 104 (2022), pp. 1725-1761 at p. 1739.
 - 3 Sangeeta Taak, Sugandha Sawhney, and Madeeha Majid, "Sikhism and the International Humanitarian Law", *Indian Society of International Law Year Book on International And Refugee Law*, vol. 2018-2019, pp. 1-23 at p. 12.
 - 4 For details pertaining to Religion and Humanitarian Principles see <https://blogs.icrc.org/religion-humanitarianprinciples/about/>; also see, Michel Veuthey, "International Humanitarian Law and Spirituality", *Refugee Survey Quarterly*, vol. 21 (2002), pp. 45-110.
 - 5 Corri Zoli, "The 'God Gap' in International Humanitarian Law: Lessons Learned from Islamic Jurisprudence", SSRN Working Paper (1 January 2012), available at <http://dx.doi.org/10.2139/ssrn.2004537>; Carolyn Evans, "The Double-Edged Sword: Religious Influences on International Humanitarian Law", *Melbourne Journal of International Law*, vol. 6 (2005), pp. 1-32; see, Bartles-Smith, note 2, p. 1731.
 - 6 Tallyn Gray, "Buddhist Philosophy and International Criminal Law: Towards a Buddhist Approach to Reckoning with Mass Atrocity", in Morten Bergsmo and Emiliano J. Buis (ed.), *Philosophical Foundations of International Criminal Law: Correlating Thinkers* (Torkel Opsahl Academic E Publisher, Brussels, 2018), pp. 165-192 at p. 180.
 - 7 Bartles-Smith, note 2, p. 1726; International Conference of the Red Cross and Red Crescent, *Bringing IHL Home: A Road Map for Better National Implementation of International Humanitarian Law* (2019), preambular para. 13.
 - 8 International Committee of the Red Cross, *The People on War Report: ICRC Worldwide Consultation on the Rules of War* (Geneva, 1999).

that the provision of IHL cannot.⁹ A major finding by the International Committee of the Red Cross (ICRC) in the “Roots of Restraint in War” was that “*integrating the law into doctrine and training, linking it to local norms and values gives it greater traction that increases restraint on the battlefield*”.¹⁰ However, on the other hand, religion has also been interposed as a rationalization for violence, often due to the manipulation of religious principles.¹¹ Religious leaders, communities, and institutions thus entail significant importance during times of crisis.¹² Humanitarian norms receive “greater traction” when they are linked to norms (religious beliefs) that people believe in.¹³ The importance of religion can also be traced back to post-war situations. For instance, religious leaders, meditative religious practices, non-retaliation, and tolerance and forgiveness based on religious teachings can alleviate the suffering of victims, including veterans, by providing psychological support.¹⁴

9 *Religion and Humanitarian Principles*, note 4; Pimchanok Palasmith, “Ethical Paradigm of Buddhism: A Buttress for Compliance with International Humanitarian Law”, *Asia Pacific Journal of International Humanitarian Law*, vol. 4 (2023), pp. 64-88 at p. 65.

10 For details pertaining to The Roots of Restraint in War see <https://www.icrc.org/en/publication/4352-roots-restraint-war>

11 David Llewellyn and Victor Condé, “Freedom of Religion or Belief under International Humanitarian Law and International Criminal Law”, in David Llewellyn and Susan C. Breau (eds.), *Facilitating Freedom of Religion or Belief: A Deskbook* (Brill | Nijhoff, Leiden/Boston, 2004), pp. 125–146; Bartles-Smith, note 2, p. 1735 ; Ken Guest, “Dynamic Interplay between religion and armed conflict in Afghanistan”, *International Review of the Red Cross*, vol. 92 (2010), pp. 877-897 at p. 880.

12 *Religion and Humanitarian Principles*, note 4.

13 For details pertaining to Partnering with community and religious leaders to help people affected by conflict see <https://www.icrc.org/en/document/partnering-community-and-religious-leaders-benefit-people-affected-conflict>; Ioana Cismas and Ezequiel Heffes, “Not the Usual Suspects: Religious Leaders as Influencers of International Humanitarian Law Compliance”, *Yearbook of International Humanitarian Law*, (2020), pp.125-150; Veuthey, note 4.

14 *Religion and Humanitarian Principles*, note 4; Bartles-Smith, note 2, p. 1755-1756; Andrew Bartles-Smith *et al.*, “Reducing Suffering During Conflict: The Interface Between Buddhism And International Humanitarian Law”, *Contemporary Buddhism*, vol. 21 (2020), pp. 369-425; Alex Wakefield, “‘Freedom from Hatred’: The Role of *Khanti* in Contemplating the work of International Humanitarian Law (IHL)”, *Contemporary Buddhism*, vol. 22 (2021), pp. 281-289.

Religion can influence humanitarian aid.¹⁵ Furthermore, religion can be used as a strategic means to ensure (or at least improve) compliance with the IHL,¹⁶ even from persons who consider themselves to be outside the scope of IHL,¹⁷ or in a situation of “fog of war”,¹⁸ or in a situation of war where one or more of the parties is not a state.¹⁹ Therefore, an intersectional study of religion, a double-edged sword,²⁰ and IHL is of utmost importance.

In 1999, on the 50th anniversary of the Geneva Convention, the ICRC conducted a survey to understand the reasons for civilians and the military to implement and comply with the convention. The survey acknowledged that people largely rooted their reasoning in the notion of human dignity, religion, tradition, or personal code.²¹ The majority of the respondents answered that humanness and human dignity formed the centre of their beliefs. Thirty-seven percent of the participants answered that certain actions, which are prohibited by the IHL, are also prohibited by their religious beliefs. More specifically, where Islam was strongly present, such sentiments were strongly echoed.²² For instance, in Afghanistan, seventy-eight per cent of people cited religious beliefs and twenty-seven per cent cited laws as the reason for their compliance with the conventions. However, the report notes that those who cited the law might have been referring to Islamic laws.²³ Although the study did not extend to countries where Buddhism is prominent, the report highlights the impact of religious beliefs. Despite the

15 Jamal Krafess, “The influence of the Muslim religion in humanitarian aid”, *International Review of the Red Cross*, vol. 87, pp. 327-342.

16 Bartles-Smith, note 2, p. 1745

17 Evans, note 5.

18 Palasmith, note 9, p. 66; Sanskriti Sanghi, “Has the ‘Fog’ of War Lifted?”, *Review of International Humanitarian Law and Conflict Studies (RIHLCS)*, <https://cashrgnul.wixsite.com/rihlcs/post/has-the-fog-of-war-lifted> (where it has been argued that the concept of “Fog of War” is a paradox in the modern day).

19 Bartles-Smith, note 2, p. 1745

20 Evans, note 5.

21 *Ibid.*

22 *The People on War Report*, note 8, p. 15 (Afghanistan (78 per cent), among Muslims in Lebanon (71 per cent) and among Palestinians (80 per cent)).

23 *Ibid.*, p. 16, 71.

prevalence of armed conflict in parts of the Buddhist world, few contemporary studies have addressed these issues.²⁴

The survey participants also highlighted that religious leaders (eighteen per cent) play one of the biggest roles, after organizations like the ICRC, the Red Cross, or the Red Crescent (forty two per cent), the UN (thirty two per cent), and international humanitarian organizations or NGOs (twenty five per cent), in protecting civilians from harm and in providing relief during conflicts.²⁵ Seventy-four percent of respondents believed that independent representatives should be allowed to visit prisoners. Regarding the question as to who should be allowed to visit the prisoners, twenty-five per cent of these respondents stated that religious leaders should be allowed such visits.²⁶

Further, nine per cent of the respondents cited religious principles as the source of the rules of war.²⁷ Law and religion were found to be much more important elements among respondents belonging to war-torn countries.²⁸ During wartime, religion plays an important role in carrying out and facilitating humanitarian actions.²⁹ Therefore, what can be observed is that religion plays an important role in international humanitarian law and practice.

Justice Weeramentry, in his dissenting opinion in the Threat or Use of Nuclear Weapons Advisory Opinion case, referred to religion and its intersections with modern laws. Specifically, he referred to Buddhist

24 Andrew Bartles-Smith *et al.*, *Buddhism and International Humanitarian Law*, 1st Edition (Taylor & Francis, Abingdon, 2023), at p. 235.

25 *The People on War Report*, note 8, p. xiv, 37-38 (In predominantly Muslims nations, like Somalia and Palestine, the percentage of respondents citing the importance of religious leaders increased to 45% and 41% respectively. However, in Afghanistan, the percentage was only 11% and the respondents credited the UN as having a greater role.)

26 *Ibid*, p. xiv (72 per cent of the respondents cited ICRC representatives, 51 per cent cited representatives from human rights organizations, 32 per cent cited UN representation, and 21 percent cited journalists).

27 *Ibid*, p. xv, 45 (the report noted that predominantly Muslims – Afghans, Palestinians and Somalis – are about twice as likely as others to mention religious principles as the source for these rules.); see also, International Committee of the Red Cross, *What is International Humanitarian Law?*, 2004, p. 2 (stating that IHL has its roots in rules of ancient civilization and religion.)

28 *Ibid*, p. xvi, 62.

29 *Religion and Humanitarian Principles*, note 4.

principles. According to him, IHL is not a recent invention, nor is it a product only of culture, as it can be found in Hinduism, Buddhism, Chinese culture, Christianity, Islam, and traditional African Cultures.³⁰ He noted that while most such traditions accepted the limitations that need to be followed while fighting one's enemy. Nevertheless, Buddhism went further to promote absolute non-violence (i.e., pacifism). Since Buddhism outlaws violence altogether, it could under no circumstances condone the use of weapons of destruction.³¹ He noted, *"It would be a grave omission indeed to neglect the humanitarian perspectives available for this major segment of the world's cultural traditions."*³² While he noted that religious principles and teachings are important, and need to be discussed while discussing humanitarian perspectives, he did not clarify whether religion can qualify as a source of international law.³³ Nevertheless, the dissenting opinion highlights why religion-specific are important in the study of any branch of international law. Later, in one of his articles, he wrote, *"Buddhism being a very practical religion does have many insights to offer which could be useful in the application and development of modern humanitarian law. The matter assumes practical relevance also because Buddhist states are not without their standing armies. It is essential that the great depth of Buddhist teaching which has relevance to every aspect of humanitarian conduct should be brought to the attention of the armed forces in these and other countries ... the teachings contained in the revered texts of the great religions are a powerful source of inspiration, and the Buddhist scriptures can be brought into these discussions for stressing the importance of humanitarian conduct during military action."*³⁴ He further writes, *"In a system where the institution of war is not recognized [as truly valid] there will naturally be little or no discussion of actual conduct in warfare. The applicable principles will need to be worked out with reference to its general principles regarding the dignity and sanctity of human life, its general principles relating to the treatment of and attitudes towards other human beings,*

30 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, Dissenting Opinion of Judge Weeramantry, ICJ Reports 1996, pp. 433–555 at p. 478.

31 *Ibid.*, p. 259.

32 *Ibid.*

33 Evans, note 5, p. 19.

34 C.G. Weeramantry, "Buddhism and Humanitarian Law", in V.S. Mani (ed.), *Handbook of International Humanitarian Law in South Asia* (Oxford University Press, New Delhi, 2007), pp. 3–13 at p. 3.

its respect for nature and life-support systems and its concepts on proper behaviour in general."³⁵ For instance, Buddha's teachings on non-violence are reflected under Article 2, Paragraph 4 of the UN Charter.³⁶ As A.T. Ariyaratne, a Sri Lankan peace activist notes "*Long before the UN and other organizations developed humanitarian laws, 2600 years ago, the Buddha propounded what I may call a 'Declaration on Sanctity of All Sentient Life'.*"³⁷

Some "monotheistic religions" have been accused of being inclined to use force than "polytheistic religions"³⁸ or "non-theistic" religions (such as Buddhism).³⁹ Nevertheless, while Buddhism and IHL seem to begin at different starting points, Buddhism, as a way of life rather than a religion, can still be used to minimize suffering during armed conflict in accordance with IHL.⁴⁰ Buddhist canonical texts reflect that when ethically imperfect beings exist, there will inevitably be disharmony among them.⁴¹ Armies and non-state armed groups can be found in Buddhist-dominated countries and regions, with combatants identifying as Buddhists.⁴² Therefore, Buddhist teachings can be used to regulate such disharmony, especially to enhance compliance with the IHL.⁴³

II. INTRODUCTION TO BUDDHISM, INTERPRETATION OF BUDDHISM, AND ITS APPLICATION IN WAR

Some questions that need to be answered first while discussing Buddhism are as follows: Is Buddhism a religion? If yes, is it merely a

³⁵ *Ibid.*

³⁶ For details pertaining to A. T. Ariyaratne on Buddhism and Humanitarian Law see <https://blogs.icrc.org/religion-humanitarianprinciples/a-t-ariyaratne-on-buddhism-and-humanitarian-law/>.

³⁷ A.T. Ariyaratne, "Buddhism and International Humanitarian Law", *Sri Lanka Journal of International Law*, vol. 15 (2003), pp. 11-16 at p. 11.

³⁸ Manoj Kumar Sinha, "Hinduism and International Humanitarian Law", *International Review of the Red Cross*, vol. 87 (2005), pp. 285-294.

³⁹ Küng, note 1, p. 254.

⁴⁰ Isuru Liyanage and Thilini R. Galappaththige, "Protection of Places of Worship during Armed Conflicts: The Enrichment of International Humanitarian Law through Buddhism", *Beijing Law Review*, vol. 13 (2022), pp. 401-413 at p. 407; Bartles-Smith, note 14, p. 370.

⁴¹ Bartles-Smith, note 14.

⁴² *Ibid.*

⁴³ *Ibid.*, p. 372.

religion? Buddhism lacks any belief in or existence of a creator god. However, it recognises the existence of gods and spirits. Therefore, Buddhism cannot be categorised under the titles of “atheistic” or “theistic”. It has been suggested that the religion falls under a more appropriate title of non-theistic.⁴⁴ While Buddhism can be categorised as a religion, as its followers feel and identify themselves to be a part of a community, it is also true that Buddhism includes dimensions of philosophy, a way of life, a code of ethics, and the psychological roots of behaviour.⁴⁵

Buddhism is primarily based on a set of humanistic moral ways and is renowned for its ethical principle of *ahimsa* (non-violence). The Buddhist virtue of compassion and the guidance for alleviation of suffering, and its application are of great importance in the regulation of armed conflict. The concept of holy war (just war) seems alien to Buddhism, as it is based on the ethical principle of non-violence.⁴⁶ For instance, Buddha’s view on soldiers who die during wars is different from the Islamic or Hindu view on soldiers who die in a holy war.⁴⁷ Even Sikhism endorses the concept of *Dharam Yudh* (holy war), with established principles to be followed during such wars.⁴⁸ Buddha’s view was that such soldiers who die in war do not go to a special paradise but to hell, since at the moment of their death, the soldiers had the intention to kill.⁴⁹ It matters little if a war is fought in offence or in defence, since every way leads to loss of life. This violates the first precept of Buddhism

44 Damien Keown, *Buddhism: A Very Short Introduction*, 1st Edition (Oxford University Press, Oxford, 2013), p. 25.

45 Gray, note 6, p. 180; Rebecca Redwood French, “What Is Buddhist Law: Opening Ideas”, *Buffalo Law Review*, vol. 63 (2015), pp. 833-879.

46 *Legality of the Threat or Use of Nuclear Weapons*, note 30, p. 259; see, Ariyaratne, note 37, p. 13; Ramananda Sengupta, “Buddha Goes to War”, *Faultlines: The K.P.S. Gill Journal of Conflict & Resolution*, vol. 25 (2019), pp. 1-30 at p. 27.

47 Küng, note 1, p. 255. “Holy” wars are understood to be wars of aggression waged with a claimed missionizing purpose at the command of a given divinity.”; *Buddhism and Humanitarian Law*, note 36.

48 Taak, note 3, p. 6; see also, Norman Solomon, “Judaism and the Ethics of war”, *International Review of the Red Cross*, vol. 87 (2005), pp. 295-309.

49 Keown, note 44, p. 109; Maria Heim, “Compassion, Self-Sacrifice, and Karma in Warfare: Buddhist Discourse on Warfare as an Ethical and Soteriological Instruction for Warriors”, *Contemporary Buddhism*, vol. 22, No. 2 (2021), pp. 300-321 at p. 8-9.

(i.e., refraining from taking life).⁵⁰ It is for this reason that Buddhism lacks any guidance on the conduct of war, unlike other religions.⁵¹ Such pacifism is assumed to be the reason for the downfall of Buddhism in some modern nations.⁵² Due to the lack of a “social gospel” in Buddhism, as can, however, be witnessed in other religious structures, Buddhism has historically been ignored in the intersectional study of religion and IHL.⁵³ As Marco Sassoli has argued, “IHL does not seek to promote ‘love’, ‘mercy’, or ‘human empathy’... but respect based upon objective criteria”,⁵⁴ unlike Buddhism, which seeks to prevent violence in the first place without any exception. IHL is based on a realistic reconciliation between two contradictory issues of “humanitarian considerations” and “requirements of necessity”, wherein humanitarian considerations require amity, but necessity requires the use of force.⁵⁵ However, the principles laid down by Gautam Buddha have been extended to the principles of IHL based on various interpretations of Buddhism. For instance, Brian Daizen Victoria’s book titled “Zen at War” highlights how Buddhism and its interpretation have played an important role in war. While Buddhism’s fundamental tenet is the principle of non-violence, its followers have been involved in violence to defend their faith or their country, and even for personal gain.⁵⁶ Buddha did not appoint any successor and left his followers to interpret *dharma* for themselves.⁵⁷ It might be because of this reason that different interpretations and traditions have emerged in Buddhism.

50 Keown, note 44, p. 109.

51 Sinha, note 38, p. 291-293.

52 Sengupta, note 46, p. 4.

53 Gray, note 6, p. 183.

54 Marco Sassòli, “Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to Be Clarified”, *International Law Studies*, vol. 90 (2014), pp. 308-340 at p. 318.

55 Ahmed Zaki Yamani, “Humanitarian International Law in Islam: A General Outlook”, *Michigan Journal of International Law*, vol. 7 (1985), pp. 189-215; Bartles-Smith, note 14, p. 376.

56 Sengupta, note 46, p. 1, 19-22.

57 Keown, note 44, p. 30.

However, Buddhism has been exploited to justify military campaigns,⁵⁸ as Buddhism made its way into modern states' interests and regulations. It was Emperor Ashoka who adopted the normative principle of non-violence under Buddhism, even ignoring Kautilya's teachings on warfare.⁵⁹ Ancient history witnessed kings, under the influence of Buddhism, abolish capital punishment, punishments that inflict bodily injury, killing of beasts and birds, etc.⁶⁰ Ancient history has also witnessed kings abdicating their thrones to prevent bloodshed.⁶¹ However, such kings faced the wrath of the people.⁶² While the adoption of Buddhism in state regulation was observed in ancient politics, it has not been observed in modern politics. Until recently, Buddhism could be said to have lacked a philosophical framework for modern political and legal concepts.⁶³ Nevertheless, the concept of "engaged Buddhism" emerged as a means to apply Buddhist teachings to the practical realities of society and politics.⁶⁴ It is because of such practical experience that Buddhist ethics can be traced to the regulation of armed conflicts, rather than being limited to the idea of "absolute non-violence"⁶⁵ with no guidance on the regulation of conflicts. For instance, the emergence of *Bushido* ("way of warrior") was based on the amalgamation of Neo-Confucianism, Shintoism, and Buddhist thoughts.⁶⁶ While the relevance of Buddhism and its teachings is said to be relevant pre-war and post-war,⁶⁷ this article intends to highlight how Buddhist ethics and virtues are relevant in instances of war as well as in its conduct.

58 *Ibid*, p. 29, 109; Gray, note 6, p. 33; Elizabeth J. Harris, "Buddhist Empirical Realism and the Conduct of Armed Conflict", *Contemporary Buddhism*, vol. 22, Nos. 1–2 (2021), pp. 144–163; Pichamon Yeophantong, *Understanding Humanitarian Action in East and Southeast Asia: A Historical Perspective*, HPG Working Paper (Overseas Development Institute, London, February 2014).

59 *Buddhism and Humanitarian Law*, note 36; Ariyaratne, note 37, p. 13; Bartles-Smith, note 14.

60 *Buddhism and Humanitarian Law*, note 36; Ariyaratne, note 37, p. 13

61 *Ibid*.

62 *Buddhism and Humanitarian Law*, note 36.

63 Gray, note 6, p. 168.

64 *Ibid*; Sengupta, note 46, p. 1.

65 Keown, note 44, p. 109.

66 Yeophantong, note 58.

67 Wakefield, note 14, p. 284; *Religion and Humanitarian Principles*, note 4.

2.1 Zen Buddhism

Primarily, a different interpretation of Buddhism in the wake of wars can be observed in East Asia,⁶⁸ particularly under the influence of Zen Buddhism in Japan. The word “Zen” is derived from the Sanskrit word *dhyana*, meaning trance. Thus, meditation plays a significant role in Zen Buddhism.⁶⁹ Meditation results in heightened calmness and improved concentration.⁷⁰ It enables a person to go beyond pleasure and pain.⁷¹ Buddhism entails experimental and emotional aspects as well. Buddha’s lived experience guides his followers to live with compassion and kindness towards all living beings. Meditation, with the aim of gaining wisdom and compassion – to come in touch with one’s own spirituality, entails an important aspect of Buddhism.⁷² Such practices have also helped with issues such as anxiety, depression, chronic pain, etc.⁷³ While the initial understanding of Zen Buddhism was such, it changed according to the political requirements of the state at that time. It was only after the bombings of Hiroshima and Nagasaki during World War II that many Japanese sects emerged to promote non-violence and pacifism again.⁷⁴

The Zen and Pure Land schools gave financial support to Japanese nationalism, during its war against China and later against the Allies.⁷⁵ Zen Buddhism, in Japan, came to be known as the “religion of the warrior”.⁷⁶ During the First Sino-Japanese War, many opinions supporting Buddhist wars were published in local newspapers. An opinion was observed which asserted that Japanese Buddhists had a duty to awaken the Chinese and Korean Buddhists, who were indifferent to war, which stemmed from the pacifist nature of Buddhism in those

68 Chipamong Chowdhury, “Review of *Buddhist Warfare*, edited by Michael K. Jerryson and Mark Juergensmeyer”, *Journal of Religion and Culture*, vol. 23 (2012), pp. 63-64.

69 Keown, note 44, p. 82.

70 *Ibid*, p. 94.

71 *Ibid*.

72 *Ibid*, p. 26-27.

73 *Ibid*, p. 95.

74 *Ibid*, p. 111.

75 *Ibid*.

76 Bartles-Smith, note 2, p. 1748; Bartles-Smith, note 14.

countries.⁷⁷ Similarly, Indian and Thai Buddhists were criticized for a similar pacifist stance that they held.⁷⁸ Furthermore, it was stated that it was the Japanese Buddhists who saw the battlefield as a ground for the propagation of their faith. Yet another opinion asserted that while the destruction of all weapons of war was the Buddhist ideal, it was appropriate for Buddhists to support it when it came to a “just cause”.⁷⁹ While Buddhism does not have the concept of a “just war”, another opinion by Shaku Unshô, a Shingon-sect priest and pioneer of Meiji-period Buddhist charitable activities, stated that such wars should be supported as they prevent humanity from falling into misery.⁸⁰ During the Russo-Japanese War, Buddha’s teachings were interpreted and used to inspire Buddhist soldiers to march on the battlefield for a great and noble cause.⁸¹

Shaku Soen, a Zen Buddhist master, stated, *“In this world of particulars, the noblest and greatest thing one can achieve is to combat evil and bring it into complete subjection. The moral principle which guided the Buddha throughout his twelve years of preparation and in his forty-eight years of religious wanderings, and which pervades his whole doctrine, however varied it may be when practically applied, is nothing else than the subjugation of evil. . . . War is an evil and a great one, indeed. But war against evils must be unflinchingly prosecuted till we attain the final aim. In the present hostilities, into which Japan has entered with great reluctance, she pursues no egotistic purpose, but seeks the subjugation of evils hostile to civilization, peace, and enlightenment.”*⁸² He further goes on to state that *“This being the case, war is not necessarily horrible, provided that it is fought for a just and honorable cause, that it is fought for the maintenance and realization of noble ideals, that it is fought for the upholding of humanity and civilization.”*⁸³ When asked by Leo Tolstoi to join his pacifist views, in condemning the war between the two countries, Soen stated that although taking of life is prohibited under

77 Brian Daizen Victoria, *Zen at War*, 2nd Edition (Rowman & Littlefield Publishers, Lanham, 2006), p. 40.

78 *Ibid.*

79 *Ibid.*

80 *Ibid.*

81 *Ibid.*, p. 46.

82 *Ibid.*, p. 47.

83 *Ibid.*, p. 48.

Buddhism, the religion also states that until and unless all beings are united together in the feeling of compassion, peace can never be achieved. Therefore, to bring harmony to things that are incompatible, killings and wars are necessary.⁸⁴ One of the Japanese Buddhist priests also stated that fighting on behalf of living human beings is in accordance with the Buddhist teaching of compassion. Furthermore, he stated that the Japanese wars were intended to protect the lives of Japanese countrymen, along with people from China and Korea. Therefore, according to him, Russia was not just an enemy of the Japanese, but also an enemy of Buddhism.⁸⁵ Herein, a religious war has been depicted, as wars were interpreted to be a way of repayment of debt that they owe to both the Buddha and the emperor (who introduced and expanded Buddhism in Japan). Furthermore, Japanese soldiers were seen by the priests as *bodhisattvas* who are ready to make the ultimate sacrifice.⁸⁶ Various sects of Buddhism in Japan functioned on the principle that Zen should be followed and spread to protect the emperor and the state. Imperial Buddhism emerged as a result of the total and unequivocal subjugation of institutional Buddhism and the law of the sovereign, where institutional Buddhism and state policy met.⁸⁷

A Zen Buddhism percept also propagates that it would be just to punish anyone who disturbs public order, and thus whether one kills or not, the precept forbidding killing is preserved. Thus, the precept “wields the sword and throws the bomb”.⁸⁸ Therefore, under such an interpretation of Zen Buddhism, a sword can also give life. The sword is seen to function as a tool for justice, which is a merciful act. It is argued that if a swordsman had no intention to harm, and if the enemy had made themselves a victim, the swordsman cannot be held responsible for the death.⁸⁹ It was opined that under Zen teachings, extreme hardship leads to the brilliance of enlightenment, thus encouraging one to become a fine military man.⁹⁰

84 *Ibid*, p. 49.

85 *Ibid*, p. 50.

86 *Ibid*, p. 50-51.

87 *Ibid*, p. 103.

88 *Ibid*, p. 58.

89 *Ibid*, p. 136.

90 *Ibid*, p. 59.

In Japan, the sacrifice of self for the sake of the emperor was said to be what Buddhism says is the sacrifice of the small self, which is required to serve a greater cause.⁹¹ The doctrine of Zen and its practice have had a large impact on the Japanese military. The doctrine of emptiness, as seen in Buddhism and Zen, encourages soldiers to be self-sacrificial. However, Zen takes the interpretation that the world of life and the world after life are the same – that the ordinary world is the ideal world – and thus, no salvation is required. Zen views life and death indifferently.⁹² This encouraged a patriotic spirit among the people.⁹³ Zen extends Buddhist teachings to the warrior temperament.⁹⁴ The art of swordsmanship, as practiced under Zen, was said to distinguish between the sword that gives life and the sword that kills.⁹⁵ Some stated that Buddhism-sanctioned war was an act of compassion that annihilated the things that lay in the way of peace.⁹⁶ Buddhism was further interpreted to legitimize Japan's wars, its expansionism, and its battle against Western expansionism.⁹⁷

Such practice of legitimizing the state's war for the sake of the emperor was criticized as being a "*bourgeois Buddhism*", unlike "*Buddhism for the masses*".⁹⁸ After Japan's surrender in 1945, the imperial way of Buddhism came to an end. The wartime conduct of Buddhist leaders was also questioned.⁹⁹ Such practices were also called a great failing of Zen priests.¹⁰⁰ Leaders of traditional Buddhist sects were also said to be responsible or complicit in Japan's war efforts.¹⁰¹ Buddhist sects later apologised for their participation in the war and their erroneous

91 *Ibid*, p. 82.

92 *Ibid*, p. 132.

93 *Ibid*, p. 129.

94 *Ibid*, p. 130.

95 *Ibid*, p. 136.

96 *Ibid*.

97 James Edward Ketelaar, *Of Heretics and Martyrs in Meiji Japan: Buddhism and Its Persecution* (Princeton University Press, Princeton, 1990), pp. 134–135.

98 Victoria, note 77, p. 90.

99 *Ibid*, p. 191.

100 *Ibid*, p. 192.

101 *Ibid*, p. 197.

interpretation of Buddhism.¹⁰² The author of the book “Zen at War” himself states in the final chapter of the book that there is nothing in the four noble truths and the eight-fold paths that suggests support for violence; that “right action” and “right livelihood” clearly indicate the opposite.¹⁰³ These two admonitions encourage followers to live an honourable life without harming others.¹⁰⁴ A strong pacifist movement, in line with the actual teachings of Buddhism, was observed in Japan after the Second World War.¹⁰⁵

III. TEACHINGS OF BUDDHISM

Buddhism is neither monotheistic, Abrahamic, nor polytheistic. It is based on the teachings of Siddhartha Gautam, a prince of the Shakya dynasty, born in modern-day Nepal, who left his palace in search of the end of suffering, and later got the honorific title of Gautam Buddha (the enlightened one).¹⁰⁶ The goal of the teachings of the Buddha is to help people fulfil their potential for happiness and goodness, which leads to the end of suffering, and the achievement of nirvana (*summum bonum*) – the highest good.¹⁰⁷ Nirvana is a mixture of virtue and wisdom.¹⁰⁸ Nirvana is desired, but Buddhism provides a guide on how it can be attained. Buddha himself had left his comfortable lifestyle as a prince, in search of a spiritually satisfying way of life.¹⁰⁹ Buddha adopted meditation in search of a spiritual solution to the problems of human conditions like old age, sickness, and death.¹¹⁰

One of Buddha’s teachings includes the Four Noble Truths.¹¹¹ First, the Buddha addresses the truth of suffering (*dukkha*). He answers that birth,

102 *Ibid*, p. 199.

103 *Ibid*, p. 240.

104 *Ibid*.

105 Keown, note 44, p. 102.

106 Sengupta, note 46, p. 2.

107 Keown, note 44, p. 55.

108 *Ibid*, p. 56.

109 *Ibid*, p. 36.

110 *Ibid*, p. 37.

111 Justin M. Hewitson, “Mediating Suffering: Buddhist Detachment and Tantric Responsibility in Michael Ondaatje’s *Anil’s Ghost*”, *CLCWeb: Comparative Literature and Culture*, vol. 21 (2019), pp. 2-10 at p. 2 (The Buddha’s Four Noble Truths paralleled ancient Vedic and Tantric theories that life’s pleasures and pains were not random occurrences but inherited reactions.)

sickness, old age, death, pain, grief, lamentation, and despair are all forms of suffering. In short, the very factors of individuality such as the physical body, sensation and feelings, cognitions, character traits and disposition, and consciousness and sentiency cause suffering.¹¹² Second, he addresses why such suffering arises in one's life. He answers that thirst (*tanha*) for sensual pleasures and attachment to the self give rise to suffering.¹¹³ Third, he answers that the truth of cessation of suffering is cessation of cravings.¹¹⁴ Fourth, regarding the path that leads to the cessation of suffering, he provides the noble eight-fold path:

- i. Right view (acceptance and practice of Buddhist teachings.)
- ii. Right resolve (making commitments towards the development of the right attitude.)
- iii. Right speech (telling the truth and speaking in a thoughtful manner.)
- iv. Right action (abstain from wrongful behaviour like killing, stealing, etc.)
- v. Right livelihood (not to engage in occupations that harm other people.)
- vi. Right effort (gaining control over one's thought and developing positive state of mind.)
- vii. Right mindfulness (cultivation of constant awareness)
- viii. Right meditation.¹¹⁵ (developing deep levels of mental calm.)

These eight paths can be categorised into three titles of right morality (the first two paths), right wisdom (the third, fourth, and fifth paths), and right meditation (the last three paths). Meditation helps achieve moral virtues and intellectual virtues.¹¹⁶ Moral development is a pre-requisite to achieve meditation and wisdom.¹¹⁷

112 Keown, note 44, p. 57; Gray, note 6, p. 174

113 Keown, note 44, p. 58; Gray, note 6, p. 174

114 Keown, note 44, p. 61; Gray, note 6, p. 175

115 Keown, note 44, p. 74; Gray, note 6, p. 175

116 Keown, note 44, p. 62

117 *Ibid*, p. 102.

Therefore, the four noble truths are as follows:

1. Suffering (*dukkha*): Life inevitably involves suffering.
2. Origin of Suffering (*Samudaya*): Craving or thirst is the cause of suffering
3. Cessation of Suffering (*Nirodha*): Suffering can end by letting go of cravings and attachments.
4. Path to the Cessation of Suffering (*Magga*): The way to end suffering is by following the Noble Eightfold Path.

One of the noble truths of Buddhism teaches that suffering is caused by cravings. War and killings are inherently linked to such cravings such as: attachment to political power, wealth, territory, etc. A core attachment is an attachment to the illusion of self: myself, my religion, my nation, or attachment to any such identity.¹¹⁸ The Pali Canon (standard collection of scriptures in the Theravada Buddhist tradition) suggests that as long as humans continue to wield sensual desires, verbal and physical abuse, or violent crimes towards each other are inevitable.¹¹⁹

The ICJ has noted two cardinal principles of IHL: (a) the first being a distinction between a combatant and a non-combatant;¹²⁰ and (b) that unnecessary suffering should not be caused to combatants.¹²¹ IHL regulates hostilities based on three core principles: distinction, proportionality, and precaution.¹²² Any harm that is “greater than that unavoidable to achieve a legitimate military objective” is categorized

¹¹⁸ Gray, note 6, p. 174.

¹¹⁹ For details pertaining to Maha-dukkhakkhandha Sutta: The Great Mass of Stress see <https://www.accesstoinight.org/tipitaka/mn/mn.013.than.html>; Mahinda Deegalle (ed.), *Buddhism, Conflict and Violence in Modern Sri Lanka* (Routledge, London, 2006), p. 6.

¹²⁰ Additional Protocol I (adopted on 8 June 1977), 1125 UNTS 3, Article 48 (the civilian population itself must be distinguished at all times and cannot be the object of attack); Additional Protocol II (adopted on 8 June 1977), **1125 UNTS 609**, Article 13(2); Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law, Vol. I: Rules* (Cambridge University Press, Cambridge, 2005), Rule 11, 12, 71.

¹²¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, pp. 226-267, p. 257, para 78.

¹²² Bartles-Smith, note 14, p. 375.

as “unnecessary suffering”.¹²³ While IHL focuses on alleviating “unnecessary suffering”, the Buddhist guidelines aim to alleviate all kinds of suffering. Therefore, while “absolute non-violence” or pacifism under Buddhist teachings might not find a place under IHL, a watered-down understanding of Buddhist teachings is of importance in the modern world of warfare. Furthermore, while IHL primarily aims to alleviate suffering for others (i.e., opposing combatants), Buddhism aims to alleviate suffering from the self. Nevertheless, an intersection between IHLs and Buddhist intent to reduce suffering can be observed.

Karma is one of the laws of the universe that Buddhism believes in. *Karma* is linked to the concept of rebirth – that the actions of an individual in one life determine their results in another life.¹²⁴ Therefore, *Karma* ensures a cycle of suffering. Letting go of cravings is the way to end the cycle – an attainment of *nirvana*, where the cycle of repetitious suffering ends and liberation is attained. Therefore, the aim of Buddhism is the abandonment of self, which is the ultimate attachment.¹²⁵ The true goal of Buddhism is not to ensure rebirth (i.e., reincarnation) but to attain *nirvana*.¹²⁶

Buddhism places great importance on meditation to develop mindfulness, as a clouded mind is susceptible to wrongdoings, which obstructs the path towards *nirvana*.¹²⁷ Such mindfulness is important in situations of warfare as it allows combatants to perform with fewer lapses in judgement, ensuring compliance with the IHL,¹²⁸ and no deviation from military objectives.¹²⁹ Therefore, mindfulness enables combatants to comply with the three core principles of distinction, proportionality, and precaution. For instance, mindfulness of a person,

123 *Legality of the Threat or Use of Nuclear Weapons*, note 121, p.35, para 77, 78, 95.

124 Gray, note 6, p. 173

125 *Ibid.*, p. 175.

126 *Ibid.*

127 For details pertaining to Dhammapada’s verses see <https://www.buddhanet.net/dhammapada/> (Dhammapada’s Verse 103 states “Self-Conquest is the highest victory”, and Verse 104 states “Victory over oneself is unequalled”; Verse 105 “Victory over self cannot be undone”).

128 Bartles-Smith, note 14, p.411.

129 For details pertaining to Mindfulness for the Military see <https://www.hprc-online.org/mental-fitness/stress/mindfulness-military>; Additional Protocol 1 (adopted on 8 June 1977), 1125 UNTS 3, Article 48 and 52(2).

in Buddhist terms, would require a person to be compassionate towards suffering beyond the self (i.e., the suffering of other people). Therefore, this can ensure that a combatant complies with laws against sexual violence, torture, etc. which are particularly required in a post-conflict situation.

Warfare requires discipline from combatants, but they can still face with ethical dilemmas. Furthermore, military personnel lack the requisite training to tackle such dilemmas.¹³⁰ Herein, Buddhist teachings can enable military personnel to tackle such dilemmas, since ethics are inseparable from mindfulness and since Buddhism requires proper training to achieve such mindfulness (which largely includes self-control).¹³¹ It can also ensure that a combatant complies with the requirement of distinction between combatants and non-combatants, and the requirement against the indiscriminate use of weapons. Buddhist teachings also help ensure that there is proportionality in the military measures undertaken by considering the damages to civilian lives and the military objective sought to be achieved.¹³² Mindfulness can help a combatant take precautions during an attack as is expected by IHL.¹³³ Courts have adopted a “reasonable military commander” standard to determine proportionality of military actions.¹³⁴ A commander who has achieved a level of mindfulness can be expected to act more reasonably to fulfil the requirements of the “reasonable military commander” standard.¹³⁵

130 Bartles-Smith, note 2, p. 1745-1746.

131 *Ibid*, p. 1748.

132 Additional Protocol I (adopted on 8 June 1977), **1125 UNTS 3**, Article 51(5)(b), 57 and 85(3)(b); International Criminal Tribunal for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, para. 18.

133 Additional Protocol I (adopted on 8 June 1977), 1125 UNTS 3, Article 57.

134 *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, ICTY, Judgment (5 December 2003), para. 58; *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, note 132, para 50.

135 Ian Henderson and Kate Reece, “Proportionality under International Humanitarian Law: The ‘Reasonable Military Commander’ Standard and Reverberating Effects”, *Vanderbilt Journal of Transnational Law*, vol. 51 (2018), pp. 835-855 at p. 850.

IV. BUDDHISM AND THE IHL

Ariyaratne notes that Buddhism rejects any form of violence,¹³⁶ which is also echoed in the UN Charter.¹³⁷ Buddhism rests on the principle of non-violence (*ahimsa*), and Buddhist teachings and scriptures do not entail any discussions of *dharmic* (holy) wars or *adharmic* (unholy) wars,¹³⁸ as opposed to in some other religions.¹³⁹ IHL synergizes with the philosophies of peaceful behaviours of people that have evolved with them.¹⁴⁰ Buddhism not only has an inherent relation to IHL, but also has importance in the regulation of hostilities and the reduction of suffering during armed conflicts. Since Buddhism discourages any form of violence, the religion has very little to say about how to conduct wars and hostilities. Buddhism is highly relevant in preventing or resolving disputes and in coming to terms with the aftermath of a war. Therefore, the importance of Buddhism is highlighted in the pre-war and post-war stages.¹⁴¹ For example, *metta* (meditation) is a way for the victim to let go of attachments to resentments, which allows the victim to break free from their *dukkha* (suffering). However, to understand Buddhism's importance in the conduct of war, Weeramantry's opinion is of significance; *"In a system [referring to Buddhism] where the institution of war is not recognized [as truly valid] there will naturally be little or no discussion of actual conduct in warfare. The applicable principles will need to be worked out with reference to its general principles regarding the dignity and sanctity of human life, its general principles relating to the treatment of and attitudes towards other human beings, its respect for nature and life-support systems and its concepts on proper behaviour*

136 Ariyaratne, note 37, p. 11; *Buddhism and Humanitarian Law*, note 36.

137 The UN Charter (adopted on 26 June 1945), 1 UNTS XVI, Article 2(4) (All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.)

138 Ariyaratne, note 37, p. 13; *Buddhism and Humanitarian Law*, note 36.

139 Küng, note 1, p. 254 (arguing "monotheistic religions", of being more inclined to use force than "polytheistic" religions or "non-theistic" religions (such as Buddhism)).

140 Gray, note 6, p. 180.

141 *Ibid*, p. 183-188 (Ghosananda's Dhammayatra Peace Walks is an example of restorative actions under the Buddhist framework of forgiveness, as was observed after Cambodian Civil War.); For details pertaining to Project on the Interface between Buddhism and IHL see <https://blogs.icrc.org/religion-humanitarianprinciples/project-on-the-interface-between-buddhism-and-ihl/>

in general."¹⁴² Nevertheless, the noble eight-fold truth is enforceable in a legal context as well,¹⁴³ as observed under the IHL. Further, while the foundation of Buddhism is the principle of non-violence, Buddhism, during the mid-twentieth century opened up new intellectual discourses such as human rights, environmental preservation, development economics, and disarmament of nuclear weapons.¹⁴⁴ Until recently, the philosophical impact of Buddhism on state governance, was with regard to establishment of personal qualities that make a moral leader, rather than on the creation of a philosophical framework for state governance.¹⁴⁵ However, it can be observed that Ashoka, one of the greatest emperors who extended the Maurya Empire through conquest,¹⁴⁶ later adopted the principle of non-violence, which shows an example of the principles being translated into state policy.¹⁴⁷ He stated that "*conquest by dharma is the best conquest*".¹⁴⁸ Later, the relationship between the state and Buddhism also developed in China and Japan.¹⁴⁹ Furthermore, over the years, the concept of "engaged Buddhism", as termed by the Vietnamese monk, scholar and peace activist Thích Nh t H nh, has emerged as a way to apply Buddhist teachings to political spheres.¹⁵⁰ Similarly, Buddhism has been read and interpreted to extend its philosophy to wars.

Some authors argue that in the present world, wars can neither be regarded as just, holy, or clean.¹⁵¹ Buddhism has always been grounded in the principle of non-violence. In the West, Buddhism is therefore seen as a pacifist religion. However, wars have been justified in Buddhist terms in Asian societies. While Buddhism is absolutely against any form of violence, such "absoluteness" is not observed in practice.¹⁵² Some

142 Weeramantry, note 34.

143 Gray, note 6, p. 167.

144 *Ibid.*

145 *Ibid.*

146 Keown, note 44, p. 89.

147 Ariyaratne, note 37, p. 13; Victoria, note 77, p. 226.

148 Keown, note 44, p. 109.

149 Victoria, note 77, p. 246.

150 For details pertaining to Biography of Thích Nh t H nh see <https://plumvillage.org/about/thich-nhat-hanh/biography>.

151 Küng, note 1, p. 253.

152 Gray, note 6, p. 177.

argue that wars arising from the consequences of *karma*, are justified in a situation of fighting a greater evil.¹⁵³ What therefore arises, in some instances, is sets of religious rules that comply with the concepts of *jus ad bellum* and *jus in bello*. What has been observed is that even if a philosophy holds non-violence as the highest principle, there can be interpretations that make way for justifications for war, and naturally, make way for sets of reasonable and unreasonable conduct in such situations of war.¹⁵⁴

Karma, in Buddhism, is the law of cause and effect. Furthermore, the concept of rebirth is found in Buddhism. These two concepts, *karma* and rebirth, are linked to each other. A person's good and bad *karma* is returned in their present or future existence.¹⁵⁵ On the day of Buddha's enlightenment, it is said that he gained the power to look back into his past existences. He is also said to have gained power to see the dease and rebirth of all kinds of beings according to their good and bad deeds.¹⁵⁶ Now, noting that *karma* is a part of *dharma* (law of the universe or also referred to as the "teachings of Buddha" which leads to *nirvana*), it has been argued that they are inevitable but also irrelevant, as they form a part of a cycle.¹⁵⁷ If *karma* is a certainty, then there is no need to punish people. However, such a "leave it to *karma*" approach is a mistaken view of Buddhism. The religion does not suggest that only the cosmos can deal with suffering and injustice. It has been argued that the acts of Gautam Buddha himself evidence that the "leave it to *karma*" approach is not what Buddhism suggests. Buddha himself intervened during wartime to prevent violence.¹⁵⁸ For instance, the famous Angulimala's story highlights Buddha's intervention.¹⁵⁹ Therefore, this signifies that intervention in human affairs to stop violence is an important duty.¹⁶⁰ The story of "Greatly Compassionate" (one of Buddha's past lives) found in the *Upâyakauśalyasûtra*, one of the earlier

153 *Ibid*, p. 178.

154 *Ibid*, p. 178.

155 *Ibid*, p. 173

156 Keown, note 44, p. 38.

157 Gray, note 6, p. 179

158 *Buddhism and Humanitarian Law*, note 36; Ariyaratne, note 37, p. 12.

159 For details pertaining to Angulimala's story highlighting Buddha's intervention see <https://www.accesstosight.org/tipitaka/mn/mn.086.than.html>.

160 Gray, note 6, p. 179

Mahayana scriptures, is an example. In that story, five hundred merchants set sail under the captain “Greatly Compassionate” to find wealth. He was informed by the sea gods in his dreams that there was a robber on the ship, who would kill all the merchants (who were *bodhisattvas*, on their way towards enlightenment). He then decides to kill the robber to save the merchants. He also thought that if he informed the merchants, they would kill him with a bad state of mind, which would have stopped them from achieving enlightenment. Had he done nothing, the robber would have spent his future lives in hell. Therefore, out of compassion for both the robber and the merchant, the captain decides to kill the robber.¹⁶¹ The concept of *karma* can be used to regulate wars in accordance with the IHL. For instance, combatants with religious beliefs can be convinced that any violations of IHL will result in legal and karmic accountability.¹⁶²

While Buddhism is based on absolute pacifism, *Satyakaparivarta*, an early source to the *Mahayana* school, sets out that recourse to war can be made when other means have failed. Such an approach is said to save a king from rebirth in hell.¹⁶³ Furthermore, practical examples highlight that Buddhist leaders and followers have often transversed the concept of absolute non-violence,¹⁶⁴ despite Buddhism’s emphasis on pacifism. The *Mahayana* school argues that a *Bodhisattva*’s compassionate and self-sacrificial killings, which were conducted as a last resort, ultimately benefit oneself and others, and are skills in means. However, the *Satyakaparivarta* fails to explicitly mention if the king should kill only for the sake of the opponents themselves.¹⁶⁵ The death of the enemy warriors is depicted as a karmic effect.¹⁶⁶ Therefore, these scriptures also seem to move away from the “leave it to karma” approach. Another issue with the text of *Satyakaparivarta* is that it fails to clarify whether warfare should be used as a defence or an offence. It

161 Tsunehiko Sugiki, “Compassion, Self-Sacrifice, and Karma in Warfare: Buddhist Discourse on Warfare as an Ethical and Soteriological Instruction for Warriors”, *Religions*, vol. 11, (2020), pp. 1-22 at p. 10-11.

162 Harris, note 58, p. 158.

163 Keown, note 44, p. 109; Sugiki, note 161, p. 1.

164 *Ibid.*, p. 109-110.

165 Sugiki, note 161, p. 18.

166 *Ibid.*, p. 18-20.

merely mentions warfare as a means of protecting people.¹⁶⁷ However, the *Satyakaparivarta* can be interpreted to extend the guidance of compassion among the rulers to not just be limited to their own people but also towards the opponents.¹⁶⁸

There are two ways to respond to an already-existing situation of violence: either with more violence or in compliance with the sanctity of life.¹⁶⁹ The stories of the Buddha show that he chose the latter.¹⁷⁰ Violence can lead to new violence. Retaliation perpetuates the cycle of violence. However, the goal of Buddhism is to escape the cycle of *dukkha* and *karma*, and thus, prevention of violence and working out the consequences of the violence are the same process.¹⁷¹ This suggests that Buddhism extends to dealing with violence as well, rather than only preaching non-violence.

Furthermore, Buddhist canonical texts include many references to war, along with military images, similes, and metaphors. Buddhism accepts that wherever there are ethically imperfect beings, there arises disharmony and disputes.¹⁷² Therefore, Buddhism also seems to rest on the realist foundations of the society. Buddhists and Buddhist literature are aware of the institutions of war and the minimization of trauma within people. Thus, this suggests that Buddhism, despite being based on the principle of non-violence, accepts IHL.¹⁷³ The *Jataka* stories have references to inter-state wars. While some of these stories highlight the principle of non-violence,¹⁷⁴ others highlight the Buddhist ethical version of the conduct of war, which complies with the principles of IHL.¹⁷⁵

167 *Ibid.*, p. 17.

168 *Ibid.*, p. 15.

169 Gray, note 6, p. 180 (citing Ariyaratne, note 37.)

170 *Ibid.* p. 181 (The story of Kalayakkhini is an example. In this story, one barren wife used to poison the food for her husband's mistress each time the mistress was with a child. Later, throughout many incarnations of theirs, the women sought to kill each other's children, until Buddha suggested that the suffering would continue until and unless they both forgave each other. Hatred is not appeased by hatred but by kindness.)

171 Gray, note 6, p. 180

172 Bartles-Smith, note 14, p. 4.

173 *Ibid.*

174 Ariyaratne, note 37, p. 13-14.

175 *Ibid.*, p. 4.

The Karmic consequence of killing people and the encouragement of right action, as under Buddhism, prevents the use of deadly force. Followers of Buddhism are suggested to be guided by *kusala* (pious) and *punna* (karmically beneficial) acts, and to avoid acts that are *akusala* (impious) and *paapa* (karmically beneficial).¹⁷⁶ Such teachings can be extended to IH, as religious beliefs heavily impact the observation of IHL during wartime.

The eight-fold paths encourage right livelihood, which guides people not to take any occupation that harms people. For instance, such teaching also discourages trade in arms.¹⁷⁷ Furthermore, guidance on the right action can also be extended to discourage attacks on the wounded and medical facilities and encourage the protection and care of civilians along with the treatment of injured individuals.¹⁷⁸ Such notions can also be found in the five precepts (*panchasila*) of Buddhism as well, which state:

- i. Refrain from taking life
- ii. Refrain from taking what is not given
- iii. Refrain from misuse of the senses
- iv. Refrain from wrong speech
- v. Refrain from intoxicants that cloud the mind

Upholding the five precepts requires abstaining from taking life, stealing, sexual misconduct, etc.¹⁷⁹ Similar notions are highlighted by the “ten precepts” (*dasasila*), as can be observed in the Buddhist texts of *Adhidharma* and *Mahanyaya* schools.¹⁸⁰ These precepts constitute *dharma*.¹⁸¹ To not have desire, hatred, and delusion – the three poisons – is the psychological foundation for complying with these ten precepts.¹⁸²

¹⁷⁶ *Ibid*, p. 6.

¹⁷⁷ *Ibid*, p. 5.

¹⁷⁸ *Ibid*.

¹⁷⁹ Palasmith, note 9, p. 66.

¹⁸⁰ Keown, note 44, p. 103.

¹⁸¹ Sugiki, note 161, p. 4.

¹⁸² *Ibid*, p. 13.

The duty not to kill or torture is arguably highlighted in the first of the five precepts.¹⁸³ The guidance to refrain from the misuse of the senses suggests abstaining from rape and other forms of sexual violence during wartime. Further, the second of the five precepts and the guidance of right action suggest abstaining from stealing during an armed conflict. It is in such manner that Buddhist principles have been reflected in the IHL concerns.¹⁸⁴

Precepts are rules of great importance in Buddhism. While following rules is an important aspect of Buddhism, it teaches that rules should be followed for the right reasons and with correct motivation. Thus, herein, virtue comes into play.¹⁸⁵ In Buddhism, it is important to cultivate correct dispositions so that moral conduct is natural and spontaneous, rather than mere compliance with external rules. Therefore, compliance with the precepts must come naturally to a person.¹⁸⁶ Precepts must be practised with “correct motivations” so that any external impact on the laws of war would not have much impact on the people. Since the precepts are to be followed with “correct motivation”, such precepts have a large impact on people’s behaviour during war.

The Buddha suggests that if we wish to achieve happiness and avoid harm in our lives, we must stop harming others. When people are afraid of physical violence, they must stop violence against others. Moreover, Buddhism teaches that “*the physical and verbal harm we inflict upon others usually leads to hate and conflicts that, in turn, would bring harm to us and cost our happiness*”. A strong sense of self is what leads to a bifurcation from what is alien to the self (i.e., other people). Buddhism aims to dissolve such a sense of self, which in turn dissolves fear and hostility. Furthermore, Buddhism preaches patience (*kanti*), as a lack of tolerance or forbearance often leads to violence. The practice of patience leads to even-mindedness towards all, whether friends or enemies.¹⁸⁷ Such teachings can ensure compliance with war as the “last of last resort” principle in the just war theory.¹⁸⁸

183 Keown, note 44, p. 104.

184 Bartles-Smith, note 14, p. 5-7.

185 Keown, note 44, p. 104.

186 *Ibid*, p. 104.

187 Keown, note 44, p. 108.

188 Eamon Aloyo, “Just War Theory and the Last of Last Resort”, *Ethics & International Affairs*, vol. 29 (2015), pp. 187-201.

Buddha believed that a person's moral identity survives their death and is reborn.¹⁸⁹ Buddhism created six realms of rebirth in the forms of humans, gods, titans, animals, hell, and ghosts – the first three being more desirable than the last three. Hell is where people are tormented for their evil acts in their previous lives. Rebirth as an animal is also undesirable, as animals are governed by their lack of intellect and brute instincts. Ghosts are said to be past humans who held strong attachments, and are thus bound to the earth. Titans are depicted as demonic, war-like beings who are governed by violent impulses, lust for power, and conquests without fulfilment.¹⁹⁰ Being born as a god is also not highly desirable, as one can become easily complacent and lose sight of *nirvana*. Rebirth as a human, on the other hand, entails constant reminders of fragile life – sickness, old age, and death – and thus, provides an opportunity to seek a permanent solution to it. Human life provides a situation for an individual to balance pleasure and suffering.¹⁹¹

In Buddhism, Buddhahood is not limited to Gautam Buddha. Any person can attain Buddhahood, for instance, by adopting the path of the *bodhisattva*, wherein the person, rather than achieving *nirvana*, lives countless lives to help others reach *nirvana*, which entails solving their problem of suffering.¹⁹² Thirst is also inherent to human nature and is the cause of suffering.¹⁹³ The thirst for pleasure and new experiences can result in suffering. However, the thirst to destroy can also lead to suffering. The desire to destroy can result in self-denying and self-negating behaviours.¹⁹⁴ The cessation of craving or desire leads to *nirvana*. When *nirvana* is achieved, rebirth ceases, thus breaking the cycle. Therefore, Buddhism's ultimate goal of *nirvana*, and the teachings to be followed to achieve such *nirvana* is what leads to compliance with the IHL.

4.1 Respect and Protection of Persons who are no Longer Taking part in Hostilities (First Precept)

Buddhism teaches its followers not to harm others (the first precept). While such teaching of Buddhism is absolute, a more practical

¹⁸⁹ Keown, note 44, p. 57.

¹⁹⁰ *Ibid*, p. 46.

¹⁹¹ *Ibid*, p. 47.

¹⁹² *Ibid*, p. 65.

¹⁹³ *Ibid*, p. 58.

¹⁹⁴ *Ibid*, p. 59.

implementation of the religion in the modern-day warfare can be with regard to the treatment of civilians, detainees, prisoners of war, persons *hors de combat*, shipwrecked members, religious personnel, medical personnel, etc. who ought not to be subjected to any killings or dehumanization like torture, slavery,¹⁹⁵ violence, forced labour,¹⁹⁶ taking hostage, etc.¹⁹⁷ Further, the first precept would also prevent combatants from engaging in kills by using the agency of other persons, for instance, by using people as meat-shields to deter military engagements.¹⁹⁸ A breach of the first precept requires an element of “killing”. However, the Buddhist teachings on compassion would also ensure compliance with IHL, which prohibits corporal and collective punishment, mutilation, experiments on persons, etc.¹⁹⁹ The first precept and teachings on compassion would also extend to the special protections provided to children.²⁰⁰

195 Additional Protocol II (adopted on 8 June 1977), 1125 UNTS 609, Article 4(2)(f).

196 Geneva Conventions III (adopted on 12 August 1949), 75 UNTS 135, Article 49; Geneva Conventions IV (adopted on 12 August 1949), 75 UNTS 287, Article 40, 51, 95

197 Geneva Conventions IV (adopted on 12 August 1949), 75 UNTS 287, Article 34.

198 Henckaerts, note 120, Rule 97; Geneva Conventions III (adopted on 12 August 1949), 75 UNTS 135, Article 23; Geneva Conventions IV (adopted on 12 August 1949), 75 UNTS 287, Article 28; Additional Protocol I (adopted on 12 August 1949), 1125 UNTS 3, Article 51(7); *Prosecutor v. Karadzic and Mladic*, ICTY, Review of Indictments (July 1995), Case No. IT-95-5-I, para 46-48

199 Geneva Conventions I-IV (adopted on 12 August 1949), Article 3; Geneva Conventions I-II (adopted on 12 August 1949), Article 12; Geneva Convention III (adopted on 12 August 1949), 75 UNTS 135, Article 13, 17, 87, 89; Geneva Convention IV (adopted on 12 August 1949), 75 UNTS 287, Article 32, 34; Additional Protocol I (adopted on 8 June 1977), 1125 UNTS 3, Article 75; Additional Protocol II (adopted on 8 June 1977), 1125 UNTS 609, Article 4, 6; Rome Statute (adopted on 17 July 1998), 2187 UNTS 3, Article 8(2)(b)(x), 8(2)(b)(xxiii) and 8(2)(e)(xi).

200 Additional Protocol I (adopted on 8 June 1977), 1125 UNTS 3, Article 70 (para 1), 77 (para 1, 3, 4, and 5), 78; Additional Protocol II (adopted on 8 June 1977), 1125 UNTS 609, Article 3(c), 4 (para 3, 3(c), 3(d), 3(e)), 6 (para 4); Geneva Convention IV (adopted on 12 August 1949), 75 UNTS 287, Article 14, 17, 23, 24 (para 1 and 2), 38 (para 5), 49 (para 3), 50, 51 (para 3), 68, 76 (para 5), 82, 85 (para 2), 94, 119 (para 2), 132 (para 2); The Convention on the Rights of the Child (adopted on 20 November 1989), 1577 UNTS 3, Article 38; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted on 25 May 2000), 2173 UNTS 222, Article 1 and 2.

Compliance with the first precept would also ensure that combatants receive treatment.²⁰¹ Even if sin has already been committed by a person, Buddha's teaching highlights that a person can always give up on the path of *ahimsa* and follow the path of *dharma*. For instance, in the Buddhist story of Angulimala Sutta (as found in the Pali Canon), he was required to bring a thousand little fingers from humans, as per the requirement presented by his teacher. This quest turned him into a serial killer. When Angulimala encountered Buddha, as Buddha deliberately walked into Angulimala's territory, Angulimala wanted to take his life as well. He chased Buddha but could not catch up with him. Tired, Angulimala yells at Buddha to stop, to which Buddha replies that he has stopped, and now Angulimala should stop too. Buddha further stated;

*"I have stopped, Angulimala,
once & for all,
having cast off violence
toward all living beings.
You, though,
are unrestrained toward beings.
That's how I've stopped
and you haven't."*²⁰²

Angulimala then gave up his quest and followed Buddha's path to enlightenment. Therefore, despite being engaged in *ahimsa* a person can, at any time, choose to follow Buddha's teachings. While Angulimala acted upon a command by his teacher, he still had to face karmic consequences for his actions. Therefore, the story also aligns with IHL that military personnel must not obey unlawful commands by their seniors, and that it can bring individual consequences to the person under command.²⁰³

201 Wadigala Samitharathana Thero, "The Buddhist Real Concept of Peace in Theory and Up Wards (Pam isotagâmi) Practice Which Towards on Philosophical Revelation", *Journal of Advanced Research in Social Sciences*, vol. 2 (2019), pp. 40-56.

202 For details pertaining to Angulimala's story highlighting Buddha's intervention see <https://www.accesstoinsight.org/tipitaka/mn/mn.086.than.html>

203 *Prosecutor v. Dra•en Erdemoviæ*, Case No. IT-96-22-T, ICTY, Sentencing Judgment (12 November 1996), para. 19; *Prosecutor v. Dra•en Erdemoviæ*, Case No. IT-96-22-A, ICTY, Appeals Judgment (7 October 1997), para. 19.

4.2 Prohibition of Pillage (Second Precept)

The second precept prohibits stealing or appropriating private and public properties during any war, which is also prohibited under IHL. Under older jurisprudence, the crime of pillage required the element of depriving the owner of property and its appropriation for “private or personal use”.²⁰⁴ However, the jurisprudence developed by special courts has viewed the term “private and personal use” as an unwarranted restriction, and applied laws against pillage in cases of collective use of appropriated properties.²⁰⁵ The ICC also observed that the requirement of “private or personal use” is not reflected in IHL.²⁰⁶

Here, a follower of the second precept would be absolutely barred from committing the crime of pillage²⁰⁷ despite the potential jurisprudential loopholes created due to the requirement of “private or personal use”. Therefore, the second precept could help overcome any shortcomings that any law concerning pillage might have had. This would also extend

204 Geneva Convention IV (adopted on 12 August 1949), 75 UNTS 287, Article 33; Additional Protocol II (adopted on 8 June 1977), 1125 UNTS 609, Article 4(2)(g); *Prosecutor v. Zejnil Delalic et al.*, IT-96-21-T, ICTY, Judgment (16 November 1998), para. 591; Rome Statute (adopted on 17 July 1998), 2187 UNTS 3, Article 8(2)(b)(xvi), 8(2)(e)(v); See also *Prosecutor v. Kordić and Ćerkez*, Case No. IT-95-14/2-A, ICTY, Appeals Judgment (17 December 2004), para. 79; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, ICC, Decision on the Confirmation of Charges (Pre-Trial Chamber I) (30 September 2008), para. 332; *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, ICC, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (15 June 2009), para. 320.

205 *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, ICTY, Judgment (15 March 2006), para. 52; *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T, SCSL, Judgment (2 August 2007), para. 160; *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, SCSL, Judgment (22 February 2008), paras. 753-754.

206 *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-3343, ICC, Judgment pursuant to 74 of the Rome Statute (21 March 2016), para. 120 (However, the Appeal Chamber finds that the elements of crimes is a useful indication of the opinio juris of States and the ICRC customary IHL study concluded that pillage is the “specific application of the general principle of law prohibiting theft” thereby involving the “appropriation” of property “for private or personal use”); see *Prosecutor v. Fofana and Kondewa (CDF Case)*, Case No. SCSL-04-14-A, SCSL, Appeal Judgment (28 May 2008), paras. 403-404.

207 Bartles-Smith, note 14.

to any act of plundering of natural resources,²⁰⁸ as the second precept prevents “taking what is not given”. Since natural resources are not given to parties at war, any act of plundering of natural resources would violate the second precept. Furthermore, the precept can be extended to the law of preventing the destruction and appropriation of property during international armed conflicts, which are not justified by military necessity.²⁰⁹

4.3 Prohibition of Sexual Violence (Third Precept)

Any sexual activity that is done through coercion falls under “sexual violence” which is prohibited under the IHL.²¹⁰ The third precept also discourages sexual violence. While IHL strictly prohibits sexual violence against women,²¹¹ the third precept is not restricted to a particular gender. It is only the modern rethinking of IHL that introduced a more inclusive and non-discriminatory interpretation of laws concerning the prevention of sexual violence.²¹² Nevertheless, sexual violence, on a gender-neutral basis, can be prevented by undertaking a harmonious interpretation with other gender-neutral provisions within the IHL.²¹³ For instance, under common Article 3 of the Geneva Convention. Here,

208 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, pp. 168–353, paras. 242 and 245; Hague Regulations, Article 47; Geneva Convention IV (adopted on 12 August 1949), 75 UNTS 287, Article 33.

209 Rome Statute (adopted on 17 July 1998), 2187 UNTS 3, Article 8(2)(a)(iv), 8(2)(b)(xiii), 8(2)(e)(xii).

210 *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, ICTR, Judgment (2 September 1998), para. 688; *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, ICTR, Judgment (27 January 2000), para. 965; International Committee of the Red Cross, *Prevention and Criminal Repression of Rape and Other Forms of Sexual Violence during Armed Conflicts*, 2015.

211 Geneva Convention IV (adopted on 12 August 1949), 75 UNTS 287, Article 27(2); Additional Protocol I (adopted on 8 June 1977), 1125 UNTS 3, Article 76(1).

212 Henckaerts, note 120, rule 93.

213 *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, ICTR, Judgment (2 September 1998), paras. 687–688 (sexual violence could fall within the scope of inhumane acts, outrages upon personal dignity and serious bodily or mental harm, thereby violating Article 3); *Prosecutor v. Delalić, Mucić, Delić and Landžo (Ēlebić Case)*, Case No. IT-96-21-T, ICTY, Judgment (16 November 1998), paras. 475–496 (rape can constitute torture, outrage upon personal dignity, as well as crime against humanity).

the third precept can act as a gap filler, filling the serious shortcomings in the IHL. For instance, even before the gender-neutral approach by the IHL with regard to sexual violence, the third precept could be a reason for combatants not to indulge in any sexual violence despite gender.

4.4 Prohibition of Perfidy and Improper Use of Flag of Truce and Distinctive Emblems (Fourth Precept)

The fourth precept preaches abstention from wrong speech, which includes deceiving speech. Any form of deception, by any means, such as words, gestures, etc. would breach the fourth precept. Article 37(1) of Additional Protocol I includes a provision that prohibits killing, injuring, or capturing any adversary by undertaking perfidy.²¹⁴ However, the IHL does not prohibit all kinds of deception in war. For instance, military deceptions (ruses of war) are not unlawful under the IHL.²¹⁵ Therefore, while the IHL has exceptions to the rule against perfidy, the fourth precept does not. Therefore, the fourth precept can be used to strengthen the enforcement of the fourth precept to ensure that wars are conducted in a just manner. Furthermore, the fourth precept would also ensure compliance with the IHL law against the misuse of insignia (a white flag of truce).²¹⁶

4.5 Prohibition against Use of Intoxicants (Fifth Precept)

Observant Buddhists typically avoid consuming alcohol (*surâmerayamajja*, referring to types of intoxicating fermented beverages), as it violates the fifth of the Five Precepts, the basic Buddhist code of ethics, and can disrupt mindfulness and impede one's progress in the Noble Eightfold Path.²¹⁷ Drugs have historically been used by combatants in wars.²¹⁸ However, such use of intoxicants can lead to

214 Additional Protocol I (adopted on 8 June 1977), 1125 UNTS 3, Article 37 (1).

215 Henckaerts, note 120, Rule 57.

216 Additional Protocol I (adopted on 8 June 1977), 1125 UNTS 3, Article 38(1); Rome Statute (adopted on 17 July 1998), 2187 UNTS 3, Article 8(2)(b)(vii).

217 For details pertaining to the Five Precepts of Buddhist beliefs see <https://www.bbc.co.uk/bitesize/guides/zf8g4qt/revision/9>

218 For details pertaining to Drugs on the Front Line, see <https://globalinitiative.net/analysis/ukraine-synthetic-drugs-ocindex/>; Paul Rexton Kan, *Drug Intoxicated Irregular Fighters: Complications, Dangers, and Responses* (U.S. Army War College Press, Carlisle, PA, 2008), p. 1-8.

unpredictable fighting, commission of atrocities, etc.²¹⁹ The use of drugs can prevent combatants from practicing mindfulness during combats,²²⁰ which can prevent the combatant's ability to comply with IHL. Therefore, compliance with the fifth percept of prohibition of use of intoxicants can ensure mindfulness of combatants, and therefore ensure the combatant's compliance with IHL.

4.6 Protection of Places of Worship

The philosophical underpinnings of Buddhism can be used to enforce IHL relating to the protection of places of worship.²²¹ In the case of *Prosecutor v. Vlastimir Dordevic* (2011)²²² destruction of places of worship was defined as damage or destruction of a religious institution by a perpetrator who, with intent or with reckless disregard of substantial likelihood of destruction or damage, destroys or cause damage to the religious property. The destruction of places of worship can amount to a crime against humanity.²²³

Rule 9 of the Customary International Humanitarian Law provides that all objects other than "military objectives" are "civilian objectives" and therefore cannot be targeted.²²⁴ Since a place of worship cannot be a "military objective", it cannot be damaged during any war.²²⁵ In the *Mahaparinibbana Sutta*, when asked whether the state's attack against the Republic of Vajji will be a successful one or not, Lord Buddha had

219 Kan, note 218, p. 13-15.

220 See, Chapter-03 of this article above where the importance of Buddhist concept of mindfulness during warfare has been discussed.

221 Hague Convention (Convention for the Protection of Cultural Property in the event of Armed Conflicts) (adopted on 14 May 1954), Article 1; Additional Protocol I (adopted on 8 June 1977), 1125 UNTS 3, Article 53; Additional Protocol II (adopted on 8 June 1977), 1125 UNTS 609, Article 16; Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted on 25 May 1993), Article 3(d); Rome Statute (adopted on 17 July 1998), 2187 UNTS 3, Article 8 (2) (b) (ix), 8 (2) (e) (4); Henckaerts, note 120, Rule 38, 39 and 40.

222 *Prosecutor v. Vlastimir Dordevic*, Case No. IT-05-87/1, ICTY, Judgement (23 February 2011) paras. 1770-1773.

223 *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, ICTY, Judgment (26 February 2001); *Prosecutor v. Blaškić*, Case No. IT-95-14-T, ICTY, Judgment (3 March 2000).

224 Henckaerts, note 120, Rule 9 and 38.

225 *Ibid*, Rule 38.

replied that “‘as long as they (Vajjians) honour, respect, venerate, and do homage to the shrines both inside and out, they cannot be defeated by anyone.’” This has been interpreted to mean that if anyone disrespects or destroys places of worship, the outcome will be dangerous.²²⁶ It is understood that Buddha praised people who invested in building public places and that the karmic fruits of such deeds are received by such people. This has been interpreted to mean that, according to the Buddha, public places (including places of worship) must not be destroyed for any reason. For this reason, Buddha’s birthplace in Lumbini hosts stupas, pagodas, and monuments built by various countries with Buddhist inclinations.²²⁷ Therefore, since Buddhism itself places great importance on shrines and public places (without emphasizing any specific religious place of worship),²²⁸ it can be understood that Buddhism enhances IHL’s intent to protect places of worship.

4.7 Weapons and Prisoners of War

The teachings of Gautam Buddha and their later expansions further ensure compliance with the IHL. For instance, trading in weapons falls under the category of “wrong livelihoods”.²²⁹ Storing weapons is against the secondary precepts of *bodhisattva* in the Mahâyâna *Brahmajâla Sûtra*: ‘A disciple of the Buddha should not store weapons such as knives, clubs, bows, arrows, spears, axes or any other weapons, nor may he keep nets, traps or any such devices used in destroying life’.²³⁰ *Dhammapada* verse 137 states that a person who harms anyone unarmed will experience suffering due to karmic consequences. Therefore, such teachings should prevent any person from inflicting violence on prisoners of war.²³¹

226 Liyanage, note 40, p. 409.

227 For details pertaining to Buddha’s birthplace, see <https://visitworldheritage.com/en/buddha/lumbini-the-birthplace-of-the-lord-buddha/199f9dfb-8831-42e9-9259-6f4c286feaf1>

228 Liyanage, note 40, p. 410.

229 For details pertaining to the Five Wrong Livelihood, see <https://suttacentral.net/an5.177/en/thanissaro?lang=en&reference=none&highlight=false>

230 Bartles-Smith, note 14, p. 412.

231 *Ibid*, p. 411.

4.8 Environment Protection

Buddhism holds that the world undergoes cycles of evolution. The beings who inhabit the physical universes are affected by these cycles. Buddhism teaches that a world with selfish and ignorant people deteriorates faster. Buddhism thus teaches that the beings of the physical universe are not just caretakers but also creators of their environment.²³² The principle of avoiding harm during warfare is emphasized in Buddhist stories.²³³ This has been reflected in the recent Advisory Opinion of the ICJ regarding the Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, in which it was asserted that *“the use of natural resources in the occupied territory must be sustainable, and it must avoid environmental harm”*.²³⁴

The ethical and legal dimensions of Buddhism teach its followers to respect all lives, including that of plants and animals. For instance, Buddhism has rejected the orthodox Brahmanical tradition of animal sacrifices.²³⁵ The first precept itself is a profound understanding of the relationships between living beings.²³⁶ Therefore, the first precept itself preaches the protection of all living beings.

Judge Weeramantry, in his Separate Opinion in the case of Gabčíkovo-Nagymaros Project, relied on various sources of Buddhism. While providing his opinion on the importance of water resources, he relies on a chronicle maintained by Sri Lankan Buddhist monks which states, *“Also by many mountains, thick jungles, and by wide-spread swamps my kingdom is much straitened. Truly, in such a country not even a little water that comes from the rain must flow into the ocean without being made useful to a man”*.²³⁷ The Separate Opinion also cited a Buddhist

232 For details pertaining to the Buddhist Universe see https://www.bbc.co.uk/religion/religions/buddhism/beliefs/universe_1.shtml

233 Bartles-Smith, note 14, p. 370.

234 *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion, ICJ Reports 2024, pp. 753-1050 at p. 804

235 Keown, note 44, p. 103.

236 *Ibid.*, p. 104.

237 Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Separate Opinion of Judge Weeramantry, p. 98, Citation 38.

sermon that made the King of the state renounce hunting. The sermon stated, *"O great King, the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou. The land belongs to the people and all living beings; thou art only the guardian of it."* The sermon consists of the principle of trusteeship among earth resources, which he opined is the first principle of modern environmental laws.²³⁸ He cited that such Buddhist teachings of the protection of flora and fauna extended well into the eighteenth century.²³⁹ He stated that *"the notion of not causing harm to others and hence sic utere tuo ut alienum non laedas was a central notion to Buddhism. [...] Alienum in this context would be extended by Buddhism to future generations as well, and to other component elements of the natural order beyond man himself, for the Buddhist concept of duty had an enormously long reach."*²⁴⁰

V. CONCLUSION

This article underscores the intersections between Buddhism and the IHL, highlighting how interpretations of Buddhism and original Buddhist teachings and principles compliment and reinforce the objective of IHL, despite Buddhism's foundational pacifism. Buddhism is a pacifist religion, and therefore could not be incorporated into state functioning in its original form. However, various interpretations of Buddhism have shaped the functioning of some modern nations. Furthermore, the interpretations also seem to have created a notion of "just war" which is unknown to Buddhism itself. While Buddhism is unique among various religions due to its pacifist, its interpretations align with other religions in practice in Asia. Therefore, it would be wrong to assume that Buddhist teachings are utopian or impractical. It is herein pertinent to recall that Justice Weeramantry wrote *"Buddhism being a very practical religion does have many insights to offer which could be useful in the application and development of modern humanitarian law"*.²⁴¹ The noble truths, eight-fold paths, the five precepts, and other Buddhist religious teachings can be used to enforce IHL during wartime.

²³⁸ *Ibid*, p. 99.

²³⁹ *Ibid*.

²⁴⁰ *Ibid*; Tanaya Thakur, "Accountability and Accountability only: Sri Lanka's Submissions at the ICJ Advisory Opinion on Climate Change", *Indian Blog of International Law*, 27 December 2024.

²⁴¹ Weeramantry, note 34, p. 3.

Buddhist teachings can be used as a “gap-filler” to address any shortcomings of IHL. Furthermore, Buddhist teachings and their focus on meditation can be used to ensure that combatants make the best decisions, even from a “reasonable military commander” standard, since they face various ethical dilemmas during wartime.

THE GREEN PRINCIPIA OF JUS AD BELLUM AND JUS IN BELLO: AN INDISPENSABLE UNRAVELLING OF ENVIRONMENTAL SAFEGUARDS UNDER INTERNATIONAL HUMANITARIAN LAW

DR. MIRZA JUNED BEG*

ABSTRACT

This article provides a thorough critical examination of the legislated frameworks prepared to protect the environment during armed conflict. We argue that the legal principles contained in International Humanitarian Law (IHL) prohibiting widespread, long-term, and severe damage to the environment are outdated, anthropocentric, and rather impossible to enforce. We examine in a methodical way the level of protection afforded to the environment will in terms of both the law on the use of force (*jus ad bellum*) and the law of armed conflict (*jus in bello*). By evaluating historical cases and climate threats, we will promote a transition to “Green Principles” that will not only strengthen legal standards and provide stronger accountability but will also recognize the environment as a protected value rather than a covered civilian object.

Keywords: *International Humanitarian Law, Jus ad Bellum, Jus in Bello, Environmental Safeguards, Armed Conflict.*

I. INTRODUCTION AND CONCEPTUAL FRAMEWORK

Armed conflicts are becoming more widely acknowledged in modern international law for their terrible effects on the environment as well as the unspeakable human suffering they cause. Deforestation, soil contamination, air and water pollution, and ecosystem collapse are examples of environmental degradation that occurs during war and poses long-term risks to biodiversity, human health, and global sustainability. This reality necessitates a green reorientation of conventional just war norms, which leads to a critical analysis of the “green principles” incorporated into the doctrines of *jus in bello* (the conduct of war) and *jus ad bellum* (the right to resort to war), particularly as they relate to International Humanitarian Law (IHL).

* Associate Professor, Faculty of Law, Integral University, Lucknow.

In contemporary IHL scholarship, the conceptual difference between *jus ad bellum* and *jus in bello* is fundamental. *Jus in bello* governs how wars are fought to minimize human suffering without judging the justice of their causes, while *jus ad bellum* determines whether a State may lawfully initiate the use of armed force based on the UN Charter's prohibition on the use of force, with exceptions for self-defense or Security Council authorization.¹

The environment has long been marginalized despite IHL's historical anthropocentric focus on protecting combatants and civilians. But its significance has gradually come to light, especially in light of the severe environmental harm caused by wars like the Gulf War (burning oil wells) and the Vietnam War (defoliation from Agent Orange), which sparked calls for stricter legal protection of the environment.² The 1977 Additional Protocol I to the Geneva Conventions was an important step forward. Article 35(3) prohibits methods or means of warfare that aim to cause widespread, long-lasting, and serious damage to the natural environment. Article 55(1) states that combatants must take care to protect the natural environment during warfare and also forbids reprisals against it.³ However, the high standard set by the conjunctive requirement damage being severe, extensive, and persistent has been repeatedly criticized for its unclear and limited application, which lessens its operational effectiveness.⁴

Additionally, the ENMOD Convention (1976), the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, refers to damage to the environment purely as damage to the environment, prohibiting the use of environmental modification as a weapon without reference to the intent to harm human life. Furthermore, ENMOD employs a lower standard of

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- 1 What are *jus ad bellum* and *jus in bello*? see https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0?utm_source=chatgpt.com, (last accessed on 12th November, 2025).
 - 2 Environment, natural resources, and IHL see https://www.diakonia.se/ihl/resources/international-humanitarian-law/protection-environment-natural-resources-ihl/?utm_source=chatgpt.com. (last accessed on 12th November, 2025).
 - 3 Environmental impact of armed conflicts, Council of Europe Report 2023, Doc. 15674.
 - 4 Yvonne Breitwieser-Faria, "Environmental Protections During Armed Conflict as Supportive Mechanisms for the Prevention of Atrocity Crimes", *Journal of International Humanitarian Legal Studies*, vol. 15 (2024), pp. 267-296.

prohibition, prohibiting damage to the environment that is widespread or long-lasting or severe, as opposed to the three-tiered standard in Additional Protocol I.

In addition, customary international law has evolved to reflect environmental protection in armed conflict. The ICRC study recognized rules that required “*due regard for the natural environment*”, and to take, where feasible, precautions aimed at reducing incidental environmental damage, regardless of prevailing scientific uncertainty.

Still, there are significant gaps. *For example*, while Article 55(2) prohibits reprisals against the natural environment, there is no equivalent prohibition in relation to individual accountability through IHL or the Rome Statute. This means that similar acts may not directly limit accountability for individuals, thereby undermining deterrence effects and strengthening environmental protection.

This article, therefore, occupies a “*grey area*” between jus ad bellum, jus in bello, and some reconsideration of our developed contemporary environmental norms. The article will explore how these norms typically analyzing the legal basis for the initiation of armed conflict and the conduct of warfare have been utilized, or could soon be thought of as an implication of both customary and treaty-based environmental norms. In doing so, the article will analyze treaty-based protections, customary protections and enforcement measures, identifying gaps of gap protections and systemic issues.

Moreover, against the backdrop of increasing support for initiatives like the proposed recognition of “*ecocide*” as an international crime within the jurisdiction of the International Criminal Court, this research considers the prospects for these innovations to rebalance war law in the name of sustainability and intergenerational justice. This research observes defined domain boundaries between humanitarian law and environmental law in this urgent context with the aim of facilitating the norm development of a Green Humanitarian Law and the legal and policy reform that internationally guarantees environmental protection and environmental protection is recognized as a central, actionable obligation in the laws of armed conflict.

II. DEFINITION OF JUS AD BELLUM AND JUS IN BELLO

The term *jus ad bellum* literally means “the law pertaining to the right to war.” It regulates the situations in which States you can lawfully use armed force. The modern law on *jus ad bellum* is encapsulated in the UN Charter, mainly 2(4) and 51.

Carsten Stahn defines *jus ad bellum* as:

*“Jus ad bellum is traditionally perceived as the body of law which provides grounds justifying the transition from peace to armed force...”*⁵

Stahn states that *jus ad bellum* matters the legal state desires to commence hostilities, providing the legal test for assessing whether the use of force is lawful.

Jus ad bellum principle defines by the **Christine Gray** as:

*“Jus ad bellum, the law governing the resort to force, has been transformed by the UN Charter, which imposes a general prohibition on the use of force in Article 2(4) and allows only two narrow exceptions: self-defence and collective security action authorized by the Security Council.”*⁶

Gray offers a modern legal definition that explicitly connects the UN Charter framework to *jus ad bellum*.

According to **Michael Walzer**:

*“Jus ad bellum requires us to make judgments about aggression and self-defense about which wars are just and which are unjust.”*⁷

Jus ad bellum is distinguished in Walzer’s seminal philosophical book as the legal and moral standard for determining whether to declare war.

5 Carsten Stahn, “‘Jus ad Bellum’, ‘Jus in Bello’...‘Jus Post Bellum’?” *European Journal of International Law* 17, no. 5 (2006), 921–943, at p. 927.

6 Christine Gray, *International Law and the Use of Force*, 4th Edition (Oxford University Press, 2018), p. 3.

7 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th Edition (Basic Books, 2006), p. 21.

Jus in bello is the body of law that governs the conduct of wars (notwithstanding whether *jus ad bellum* has been followed). The primary purpose of *jus in bello* is to protect those not participating in the hostilities and to impose restrictions on means and methods of warfare.

According to **Carsten Stahn**:

*“... while *jus in bello* is deemed to define ‘the conduct and responsibilities of belligerent nations, neutral nations and individuals engaged in armed conflict in relation to each other and to protected persons’.”⁸*

According to **Yoram Dinstein**:

*“The law of armed conflict, also known as the *jus in bello*, is a branch of international law that regulates the conduct of hostilities and seeks to protect persons who are not, or are no longer, taking part in the fighting, as well as to restrict the means and methods of warfare.”⁹*

III. HISTORICAL EVOLUTION OF ENVIRONMENTAL PROTECTION IN WARFARE

Warfare has been connected to the environment for a long time. Even though modern day international laws, like the 1976 ENMOD Treaty, talk about how warfare affects the environment, there is a long history of how warfare has either destroyed the environment for its own sake or used as a strategy in warfare to hurt an enemy. The way in which ecological destruction occurred beginning with the first organized wars continues until this very day. History shows that there has always existed a long history of destroying the environment as a part of warfare, and even when we look at modern day wars, the destruction of the environment for military gain was the basis for beginning to create laws that would eventually protect the environment.

Nature is not simply a formless land and at times an actual use of nature during the actual execution of a military operation. Ecosystems serve as a food source, water source, shelter, and an economic source (i.e.,

8 Carsten Stahn, Op.cit at p. 927.

9 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd Edition(Cambridge University Press, 2016), p. 2.

income for the people living in proximity to them) therefore the destruction of the natural environment near the ecosystem will negatively impact the economy, the environment and the people that depend on the ecosystem. Therefore, according to military doctrine, protecting the environment while engaged in war constitutes protecting the civilian population, as well as protecting the ability of the ecosystem to provide for future generations after the conflict has ended.¹⁰

In ancient times, the size and seriousness of warfare were determined by the available population and the abilities of technology. On the other hand, warfare had the potential to be of an extreme and deliberate nature on the environment as well. The most common tactic was what we would call today “scorched-earth.” This tactic was used to ensure that resources were denied to invading armies and to break the will of the civilian population. The Assyrian Empire, which was known throughout history for being exceptionally brutal in the conduct of war, systematically destroyed the agricultural centres of their enemies. Historian **Geo R. Hughes** states that:

“cut down their orchards, burned their standing grain, and piled the ashes of their fields at the gates of their cities as a psychological as well as an economic weapon.”¹¹

In other words, this was not a case of incidental damage; it was a calculated policy of famine and of complete domination of the land so that the land would be incapable of continuing to sustain life nor rebel.

The Classical Era of Greek history demonstrated how warfare devastated the environment. The Peloponnesian War fought from 431-404 BCE between Athens and Sparta illustrates this very point. The strategy utilized by The Spartan leader **King Archidamus II** was to invade and destroy annually the land in Attica to pressure Athenians, who were protected by the Long Walls they built, to witness the destruction of their livelihood. Thucydides indicated that the Spartans cutdown the trees and laid waste to the land.¹² While this tactic was ineffective against a naval power like Athens, it established a precedent to target

10 Elizabeth Maruma Mrema, Carl Bruch et.al, *Protecting the environment during armed conflict : an inventory and analysis of international law* (United Nations Environment Programme, 2009), p. 10.

11 G. R. Hughes, *Assyrian Military Practices: The Conquest of a World* (University of Chicago Press, 2006), p. 46.

12 Thucydides, *The History of the Peloponnesian War* (Book Jungle, 2009), p. 2.19.

an enemy's agricultural foundation. The environmental effects were tremendous due to the forest (deforestation) which led to greater soil erosion, and the continual destruction of farming land (cropland) would result in the long-term destruction of fertility causing farmers' inability to farm for subsequent generations.

The Second Punic War saw the Roman Republic use a tactic that has earned Hannibal, the Carthaginian general, notoriety as a prime example of Environmental Warfare. Scipio Africanus crossed into North Africa and instructed his troops to systematically and completely devastate Hannibal's homeland by destroying agricultural fields, setting fire to homes and buildings, and massacring anyone who stood in their path.¹³ Along with providing troops with unlimited food stores, the Roman forces' systematic destruction of agricultural infrastructure would effectively cripple the Carthaginian economy and logistical support structure. Ultimately, this strategy culminated in the total destruction of Carthage in 146 BCE when the Romans supposedly spread salt on the fields to symbolize everlasting desolation; this salt symbolizes, though perhaps fictitiously, the symbolic intent of the Romans to render the environment of their enemies eternally barren.¹⁴

Apart from scorched-earth tactics the logistical requirements of ancient military forces represented a type of ecological damage. Extensive military encampments depleted amounts of nearby resources. **Tacitus** noted that Roman legions on the move would clear an area of wood for fortifications and firewood and forage for the animals frequently causing deforestation in the vicinity. The demand, for wood to build siege machinery, vessels and defensive structures exerted strain on forested regions. Building the navy for example necessitated the cutting down of thousands of trees leading to the deforestation of Attica and other regions of Greece.¹⁵

The philosophical and legal objections, to this devastation were subtle yet existent. Within the Greco-Roman sphere early ideas of "war" (*bellum iustum*) emerged which although mainly focused on the causes for engaging in war sometimes addressed behavior during conflict. The

13 Polybius, *The Histories* 14.

14 R. T. Ridley, "To Be Taken with a Pinch of Salt: The Destruction of Carthage", *Classical Philology*, 81(2) (1986), p. 144.

15 R. Meiggs, *Trees and Timber in the Ancient Mediterranean World* (Clarendon Press, 1982), p. 117.

Roman speaker **Cicero** contended that war had boundaries asserting that faith must be kept with an enemy and condemning harshness.¹⁶ However, these notions were not codified into laws protecting the natural environment. The environment was viewed as a resource or an obstacle, not as an entity with intrinsic value worthy of protection. The primary protection afforded to land and resources was based on their perceived future utility for the victor, not on any ethical principle.

The initial history of warfare is characterized by a trend of ecological devastation as a key aspect of military tactics. From the Assyrians to the Romans forces understood that attacking an opponent's life-sustaining elements such as fields, forests and water supplies was just as impactful, as attacking its troops. This deliberate environmental damage was intensified by the large-scale resource use of the armies themselves. For ages, there was no idea of protecting the environment in times of war. The only limits placed upon the destruction of an environment were logistical, and on occasion moral or pragmatic ideas relating to the dirty spoils of war. The Earth was an unblemished landscape, all power and fear were painted on it. This was the horrible foundation that forever molded the way wars will be fought from that point forward. To move to protecting the environment will require a dramatic shift in how we view the environment from simply an instrument of war to an ancestral heritage, and that destruction of it represents the greatest crime against future generations.

3.1 Development of Environmental Norms Post-World War- II

The era after World War II saw the emergence of environmentalism resulting in a fundamental change in worldwide standards. At first the focus after the war was on rebuilding and economic development driving industrial growth and the use of resources. Yet the ecological impacts of this surge sharply highlighted by incidents such, as the 1952 London Smog which caused thousands of deaths started to spark awareness among the public and the scientific community. The development of post-war environmental norms can be traced through the rise of ecological awareness, the institutionalization of protection through landmark events, and the evolution from conservation to systemic global governance.

16 Andrew P. Peabody, *Cicero De Officiis* (Little Brown and Co., 1887), p. 34-36.

After World War II the legal and political architecture for protecting the environment developed in three overlapping waves:

- (i) early post-war technical and resource-management rules,
- (ii) the political and normative breakthrough of the 1960s–1970s that internationalized environmental protection, and
- (iii) the consolidation of broad principles (including sustainable development) from the 1980s onward.

In the immediate postwar decades environmental concerns were largely addressed through sectoral, technical measures (fisheries, navigation, public-health sanitation) and by domestic public-health and conservation laws rather than a coherent “environmental law.” Scholarly accounts identify a clear institutional gap between 1945 and the 1970s: the UN system and treaty practice provided fora for discussion, but few general international environmental instruments existed until states began to perceive pollution and resource depletion as transboundary problems requiring collective action.¹⁷

The trajectory was severely altered by two unique catalysts. Scientific and popular consciousness were awakened to the risks that had been hidden from view in the 1960s through the evidence presented in Rachel Carson’s *Silent Spring*¹⁸, the book helped to bring public awareness of pesticide contamination and ecological interrelatedness and provided a foundation for the political momentum for regulatory reform.

The establishment of the Stockholm Declaration during the 1972 United Nations Conference on the Human Environment further consolidated the notion of the environment as a global political priority and afforded it the status of a human right and development issue through the provision of the principles set forth in the Stockholm Declaration.¹⁹ With this conference also came an explicit call for international cooperation; national institutional arrangements; and recognition of transboundary pollution as a form of environmental degradation, creating the initial framework for shifting environmental protection from a simply technical and domestic policy issue to one of an official international obligation.

17 Philippe Sands, *Principles of International Environmental Law*, 4th Edition (Cambridge University Press; 4th edn., 2018), p. 26-33.

18 Rachel Carson, *Silent Spring* (Mariner Books, 1962), p. 7.

19 Stockholm Declaration, 1972, Principles 1-7.

Stockholm also produced concrete institutional change: the General Assembly followed the conference by creating a UN environmental programme to coordinate emerging international work on environment,²⁰ laying the organizational basis for subsequent treaty-making and normative development.

The 1970s–1990s then saw rapid proliferation of treaties and the enshrinement of general legal principles. Multilateral agreements (on marine pollution, long-range air pollution, ozone depletion, biodiversity and later climate change) and soft-law instruments (conference declarations, programme documents) established recurring legal ideas prevention, the no-harm rule, state responsibility, and cooperative information-sharing—that today read as customary or at least foundational for treaty law.²¹

Ultimately the normative framework expanded during the 1980s to include development. The Brundtland Commission's *Our Common Future* (1987) combined environment and development into a policy issue introducing the concept of "*sustainable development*" and incorporating intergenerational fairness into international policy discussions which influenced the 1992 Rio Summit along, with numerous later legal documents and national constitutions.²²

However, the post-World-War-II development of environmental norms moved from scattered technical rules to a dense architecture of treaties, institutions (notably UNEP), and principles driven by scientific revelation, public mobilization, high-level diplomacy (Stockholm), and conceptual synthesis (Brundtland) that together transformed environmental protection into an enduring component of international law and policy.

3.2 Environmental Safeguards Under Jus Ad Bellum Principle

Jus ad bellum regulates the legality of resorting to armed force, and has indirect but serious implications for environmental protection. Contemporary armed conflicts have shown us that war is incredibly destructive to the environment, even before the fighting starts, and that

20 UN General Assembly Resolution 2997 (XXVII), 15 December 1972.

21 Philippe Sands, *Op.cit* at pp. 29–46 and pp.197–217.

22 World Commission on Environment and Development, *Our Common Future* (Brundtland Report), 1987), "What is sustainable development?" (pp. 43–44).

war often leads to devastating environmental destruction. Jus ad bellum is primarily concerned with the use of force between States, but some scholars have suggested that if States accounted for the environmental impacts of war when determining whether resorting to war was justified, that jurisdictional regulation could have some bearing on the consideration of jus ad bellum.

Gray's emphasis on the above provided definition conveys that jus ad bellum is the legal basis for deciding when a State has sufficient authority to use armed force. In environmental terms, commencing war without sufficient legal justification could render the State internationally liable for environmental damage due to aggression.

Stahn's analysis on the above provided definition is important for environmental law because decisions to go to war often lead to natural ecosystems facing forthcoming destruction, such as during the Gulf War of 1991, when Iraqi soldiers torched Kuwaiti oil wells on their retreat, causing devastating pollution. It is possible to take into account damages as part of an inquiry into whether a decision to go to war was a State's violation of the jus ad bellum principles of necessity and proportionality.

The level of destruction to the environment, especially on a large scale, may be a factor in determining the legality of resort to force under Article 2(4) of the Charter.²³ This indicates that environmental destruction can be a consideration of aggression, is a principled approach to expand jus ad bellum away from strict military or territorial issues to include environmental destruction.

3.3 Environmental Safeguards Under UN Charter Provisions

The main clauses of the UN Charter regarding the use of force Article 2(4) and Article 51 were not created with protection as a focus. Nevertheless the serious and cross-border impact of environmental damage has sparked academic discussion about their possible use as mechanisms, for environmental protection.

Article 2(4) forbids threatening or employing force, against the integrity or political sovereignty of another state. Certain academics suggest that significant state-endorsed environmental harm might qualify as a forbidden "*use of force*." **Professor Richard Falk** asserts that "*ecological*

23 Alexandre Kiss and Dinah Shelton, *International Environmental Law*, 3rd edn (Brill, 2004), p. 281.

warfare” or “*environmental terrorism*” that makes a region unliveable could breach Article 2(4) as it fundamentally undermines a states “integrity.”²⁴ For instance, the deliberate destruction of another state’s agricultural or water systems could be seen as an attack on its territorial viability.

Article 51 of the United Nations Charter provides for the use of individual or collective self-defence in the event of armed attack.²⁵ It is debated whether or not environmental disasters are armed attacks; **Dinah Shelton** proposes extreme scenarios where this could be the case.²⁶ For example, she argues that if one state deliberately created an environmental disaster that resulted in massive harm, then this would create a legal justification for the principles of self-defence as stated in Article 51 of the Charter. However, she cautions that it would be a very rare and complicated situation, requiring evidence to link the environmental devastation to two states or several states acting in concert. Additionally, the precedent for the extent of damage caused by an environmental disaster, and whether or not it can be classified as an armed attack, would have to be carefully defined and established. Ultimately, the application of these provisions demonstrates the seriousness of acts that are clearly intended to destroy the environment on a large scale and how such acts may jeopardise national sovereignty and undermine the protections offered by the Charter.

3.4 Environmental Safeguards Under Jus In Bello

Jus in bello (or International Humanitarian Law) is a body of law that regulates the conduct of hostilities once the war has begun, regardless of whether it was a lawful war under jus ad bellum. Jus in bello’s fundamental principle is to limit suffering, through the protection of civilians, combatants, and, increasingly, the natural environment.

According to **Yoram Dinstein’s** definition, the environment can be seen as a civilian object under IHL. Article 55 of Additional Protocol I, for example, requires parties to “*ensure that the natural environment is protected against widespread, long-term and severe damage.*”

24 R. Falk, *This Endangered Planet* (Random House, 1971), p. 83.

25 UN Security Council Resolution 1403 of 2002.

26 D.Shelton, “Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?” *Denver Journal of International Law and Policy*, 35(1) (2006), 129-171.

According to the **ICRC Customary International Humanitarian Law**:

“Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.”²⁷

By incorporating environmental concerns directly into jus in bello, this customary rule binds all parties to armed conflicts to protect the environment. Michael Walzer advocates that, *“Jus in bello concerns the observance or violation of the customary and positive rules of engagement.”*²⁸ According to Walzer’s traditional definition, when environmental destruction causes needless suffering or disproportionate harm, it may be against these guidelines.

3.5 Additional Protocol I to the Geneva Conventions, 1977

Additional Protocol I (1977) to the Geneva Conventions sets forth safeguards for the environment amid armed conflicts. Article 35(3) forbids “methods or means of warfare which are intended or may be expected to cause long-term and severe damage to the natural environment.”²⁹ In addition Article 55 requires that *“care shall be taken to protect the environment against such damage”*, explicitly emphasizing the ban, on reprisals.³⁰ These provisions, as **Solf** and **Carnahan** note, mark a “revolutionary step” in international law by recognizing the environment as a civilian object worthy of direct protection, though their high threshold of damage has proven difficult to meet in practice.³¹

27 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol. I* (Cambridge University Press, 2005), Rule 43, p. 143.

28 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th edn (Basic Books, 2006), p. 49.

29 ICRC, Protocol I, p.27.

30 ICRC, Protocol I, p.29.

31 Michael Bothe, *New Rules for Victims of Armed Conflicts* (Martinus Nijhoff Publishers, 1982), p.347.

IV. ENVIRONMENTAL MODIFICATION CONVENTION AND ITS LIMITATIONS

The 1976 Environmental Modification Convention (ENMOD) prohibits military or hostile use of environmental modification techniques having “*widespread, long-lasting or severe effects*” as the means of destruction (Article I). This preemptive, disarmament-focused treaty aims to protect the environment as a civilian object by prohibiting its use as a weapon, a concept echoed in Additional Protocol I to the Geneva Conventions.³²

The ENMOD Convention, however, suffers from major ambiguities that restrict its effectiveness. The treaty does not provide specific quantitative definitions for widespread, long-lasting and/or severe, as this critical triad was identified in the ENMOD Convention. Although the subsequent understanding issued by the CCD provides some suggested interpretations (for example, that the term severe should refer to significant interruption of lives or resources), these suggestions are only non-binding guidance.³³ Because there are no clearly articulated thresholds for proving violation of the ENMOD Convention, this uncertainty creates an extremely high burden of proof for demonstrating a violation.

Additionally, the scope of the ENMOD Convention is extremely limited. The ENMOD Convention only covers military applications of techniques used as weapons in international armed conflict; the ENMOD Convention does not cover techniques that may cause environmental harm as a result of their use in warfare, and thus does not cover the collateral environmental damage caused by the use of the weaponry in war.³⁴ Therefore, anything that creates massive environmental devastation, such as the Gulf War oil fire, will probably fall outside of the ENMOD Convention’s authority. This creates a serious gap in the legal framework to protect the environment during armed conflict.

V. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (CIHL) RULES ON ENVIRONMENTAL PROTECTION

A basic principle is the ban, on techniques or approaches to warfare that are designed or likely to inflict extensive, lasting and serious harm

32 ICRC, 1977, Article 35(3).

33 Report of the Conference of the Committee on Disarmament. United Nations. International Committee of the Red Cross (ICRC).

34 A. P. V. Rogers, *Law on the Battlefield*, 2nd Edition (Manchester University Press, 2004), p. 175.

to the natural environment. This principle, acknowledged as customary in as well as non-international armed conflicts sets a strict standard reflecting the stipulations of Additional Protocol I (API) yet extends its application widely. The ICRC's commentary notes that this prohibition is based on the "*underlying assumption... that the environment is a civilian object and as such enjoys the protection accorded to civilian objects by IHL.*"³⁵

Supporting this are regulations that enforce IHL principles specifically for the environment. Principle 45 of the ICRC Study asserts that the destruction of any portion of the environment is forbidden, except when demanded by imperative military necessity. This embodies the principle of distinction and the ban on destruction. Additionally appropriate consideration, for the environment must be observed during military activities (Rule 44). This regulation, stemming from the Martens Clause and the precautionary principle requires conflicting parties to account for the consequences of their military actions in order to prevent or, at least reduce, unintended harm.

Finally, Rule 45 specifically prohibits the use of "*herbicides as a method of warfare*" if they would cause widespread, long-term and severe damage, a rule crystallized by state practice following the environmental devastation caused by Agent Orange in the Vietnam War. These customary rules create a vital, though sometimes difficult to enforce, legal framework for safeguarding the environment from the worst effects of war.

VI. ROLE OF PROPORTIONALITY AND MILITARY NECESSITY PRINCIPLES

The concepts of necessity and proportionality are fundamental foundations of international humanitarian law (IHL) establishing a crucial yet often delicate balance with environmental conservation in times of armed conflict. Military necessity permits actions to achieving total victory, in war provided they are not prohibited by international law.³⁶ However, this is not an unlimited license; it is tempered by the principle of proportionality, which prohibits attacks where the anticipated incidental environmental damage would be excessive in

35 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (Cambridge University Press, 2005), p. 148.

36 Lieber Code, 1863 Art. 14.

relation to the concrete and direct military advantage anticipated.³⁷ Environmental protection during armed conflict is shaped fundamentally by the principles of military necessity and proportionality, which seek to balance legitimate military objectives with the obligation to prevent excessive environmental harm. Under Additional Protocol I, Articles 35(3) and 55 prohibit warfare that causes “widespread, long-term and severe” environmental damage. As **Dinstein** observes, these provisions embed environmental considerations directly into the legality of hostilities, constraining the scope of military necessity.³⁸

The principle of military necessity allows only those measures indispensable for securing a definitive military advantage, and it cannot justify actions causing disproportionate environmental destruction. **Sassòli** explains that environmental harm must be evaluated alongside civilian harm in proportionality assessments, requiring commanders to account for both direct and reverberating ecological impacts.³⁹ Proportionality further requires that incidental environmental damage not exceed the anticipated concrete military advantage. **Schmitt** notes that contemporary analyses also consider cumulative ecological consequences, such as soil degradation or ecosystem collapse, when judging excessiveness.⁴⁰ **Birnie, Boyle, and Redgwell** reinforce that IHL’s proportionality framework aligns with broader principles of international environmental law, emphasizing sustainable protection even amid conflict.⁴¹

VII. JUDICIAL DEVELOPMENTS AND STATE PRACTICES

Safeguarding the environment has grown to be an issue in international law heavily influenced by judicial rulings and changing state behaviors. International tribunals and courts have steadily viewed duties as integral

37 Additional Protocol I to the Geneva Conventions, 1977, Art. 51(5)(b) and 55(1)).

38 Yoram Dinstein, *The Conduct of Hostilities under International Humanitarian Law*, 3rd Edition (Cambridge University Press, 2016), pp. 166–170.

39 Marco Sassòli, *International Humanitarian Law*, 2nd Edition (Edward Elgar, 2023), pp. 423–428

40 Michael N. Schmitt, “Green War: An Assessment of the Environmental Law of International Armed Conflict,” *Yale Journal of International Law*, Vol. 22 (1997), pp. 56–60

41 Patricia Birnie et al., *International Law and the Environment*, 3rd Edition (Oxford University Press, 2009), pp. 219–223.

to wider international responsibility principles. The groundbreaking ruling by the International Court of Justice (ICJ), in the *Gabcíkovo–Nagymaros Project*⁴³ highlighted the importance of development acknowledging that environmental standards should direct state actions even under treaty commitments.⁴⁴ Subsequent jurisprudence, particularly the *Pulp Mills case*,⁴⁵ strengthened this approach by affirming procedural duties such as environmental impact assessments as customary requirements for transboundary harm.⁴⁶ The Court's 1996 Advisory Opinion on the legality of the threat or use of nuclear weapons,⁴⁷ underscored the serious and long-term environmental consequences of certain weapons, concluding that use of such weapons would generally be contrary to the rules of international humanitarian law because of their indiscriminate and severe environmental effects.

Experts observe that the ICJ's case law develops duties mainly via interpretive synthesis relying on treaties, customary law and changing State behavior instead of establishing independent ecological rights.⁴⁸ Viñuales's recent evaluation contends that the Court's role has been gradual yet important, in shaping principles. Likewise, case notes on Pulp Mills highlight the judgment's practical advance in treating EIA as an emerging duty under international law.

Municipal courts have further broadened the scope of rights. The Indian Supreme Court via rulings under Article 21 interpreted the entitlement to a healthy environment as integral to the right to life particularly in instances such as *Vellore Citizens' Welfare Forum v. Union of India*,⁴⁹ where the Court incorporated the precautionary and polluter-pays doctrines, within Indian environmental law. Similarly, constitutional courts in Latin America, particularly Colombia's Constitutional Court, have recognized the legal rights of ecosystems, highlighting a shift in state practice towards eco-centric governance.⁵⁰

43 *Hungary v Slovakia*, [1997] ICJ Rep 3.

44 ICJ Reports 1997, p. 78.

45 *Argentina v Uruguay*, [2006] ICJ Rep 113.

46 ICJ Reports 2010, pp. 82–83.

47 I.C.J. Rep. 1996, p. 226.

48 Alexander H. McCabe, "Balancing "Aggression" and Compassion in International Law: The Crime of Aggression and Humanitarian Intervention" *Fordham Law Review*, 83(2) (2014), p. 991-1003.

49 AIR 1996 SC 2715.

50 Decision T-622/16, pp. 12–15.

State actions mirror this progression. The implementation of environmental systems like the European Union's Environmental Liability Directive and local climate responsibility regulations such as Germany's Federal Climate Change Act, 2019 which states' readiness to align internal policies, with global standards.⁵¹ UN documents, including the UNEP Global Environment Outlook emphasize that nations are increasingly recognizing protection as vital, for development and worldwide harmony.⁵² Collectively, judicial decisions and evolving state practices illustrate a dynamic shift toward integrating environmental protection into the foundational principles of international and domestic governance.

VIII. CONCLUSION AND SUGGESTIONS

The definitions of *jus ad bellum* and *jus in bello* originally focused on military or humanitarian concerns, but recent developments indicate an emerging consensus on the environment as a protected interest. While *jus ad bellum* can take environmental annihilation into account in assessing aggression, *jus in bello* puts environmental protective mechanisms in place via treaties like Additional Protocol I and customary international law. This evolution reflects an ever-growing need for a form of "*Green Humanitarian Law*" to ensure balance between military necessity and sustainability.

This research article highlights a transformation in modern legal perspectives: the environment is now recognized not as a passive victim of warfare but, as a matter warranting normative protection and moral accountability. The evolution of IHL from the rudimentary protections in the Hague Regulations to the explicit ecological safeguards of Additional Protocol-I reveals a growing consciousness that environmental devastation generates long-term, often irreversible, harm affecting ecosystems, human health, livelihoods, and post-conflict recovery. By synthesizing *jus ad bellum*'s preventive ethos with *jus in bello*'s regulatory constraints, a "*Green Principia*" emerges as a cohesive doctrinal framework capable of harmonizing the imperatives of military necessity with ecological stewardship.

This research emphasizes a number of observations. Initially safeguarding the environment in times of war is no longer marginal; it

51 EU Directive 2004/35/EC, p. 4.

52 UNEP GEO-6, 2019, pp. 22–25.

is integrated into the doctrines of proportionality, distinction and avoidance of suffering. Furthermore, contemporary wars spanning from Vietnam to the Gulf War have shown that damage, to the environment is not just incidental but can be intentionally caused, requiring robust legal frameworks. Third, contemporary judicial and quasi-judicial interpretations, including those by the International Court of Justice and UN bodies, increasingly affirm that ecological well-being constitutes a component of civilian protection and intergenerational equity. Thus, the Green Principia represents both a doctrinal consolidation and a normative aspiration: the recognition that safeguarding the environment is indispensable to humanity's collective security and sustainable peace. Few suggestions to make Codification of a Dedicated Treaty on Environmental Protection in Armed Conflict; Strengthening Accountability Mechanisms; Integration of Environmental Impact Assessments (EIAs) into Military Planning; Enhanced Role for International Monitoring Bodies; Strengthening the role of the ICRC and environmental NGOs in monitoring compliance; Post-Conflict Environmental Restoration as a Legal Obligation; Integrating sustainable development norms into IHL; Promotion of Green Military Technologies; and Capacity-Building for Armed Forces. Together, these suggestions reinforce the Green Principia as not merely an academic exploration but a pragmatic blueprint for enhancing ecological resilience within the fabric of IHL.

FOREIGNERS AT THE GATE: CONSTITUTIONAL RIGHTS, INTERNATIONAL OBLIGATIONS GOVERNING MIGRATION AND BORDER CONTROL UNDER THE IMMIGRATION OF FOREIGNERS ACT, 2025

B. C. NIRMAL *
AYUSH SHUKLA **

"Change is the law of life. And those who look only to the past or the present are certain to miss the future." -John F Kennedy

"If the Trumps and the Shahs of the world insist on building walls on international borders, creating detention camps and piling up regulations hostile to migrants, the post-democratic nations will inevitably reverse the advent of man." - G N Devy

ABSTRACT

Migration of people between countries is one of the most significant legal and moral challenge of the 21st century. The presence of a huge number of international migrants and forcibly displaced persons underscores the need for a thorough scholarly analysis of the effectiveness of the domestic legal systems in accommodating the complex needs of migrants, refugees, asylum seekers, and stateless persons in the background of the existing provisions and international norms governing migrants. India has never been a signatory to the 1951 Convention on the Status of Refugees and its 1967 Protocol, and has long been administering the migrant and refugee population through colonial-era laws, executive circulars, and an ever-shifting body of judicial decisions.

The Immigration of Foreigners Act 2025 ('Foreigners Act 2025' or 'the Act') is the most comprehensive statutory reform of India's immigration landscape since the Foreigners Act 1946. The present article provides a multi-disciplinary and systematic analysis of the IFA 2025 from the point of view of international law, constitutional law, administrative law and legal philosophy. This article analyzes the strengths and weaknesses of the Act, offers constructive suggestions for reforms, and concludes by situating

* Former Head & Dean, Faculty of Law, Banaras Hindu University, Varanasi & Former Vice Chancellor, National University of Study and Research in Law, Ranchi.

** BA.LLB.(Vth Year), School of Law, Justice & Governance, Gautam Buddha University, Greater Noida.

the Indian government's approach to migration in the overall evolution of the Supreme Court's constitutional interpretation of non-citizen vis-à-vis citizenship. The IFA 2025 is a worthy step, but it is apparently not in full accord with international human rights standards and international norms concerning global migration.

Keywords: *Immigration of Foreigners Act 2025, Migrants, Refugees, Asylum Seekers, Stateless Persons, Non-refoulement, Article 21, International Human Rights Law, Sovereign Power, Constitutional Jurisprudence, India*

I. INTRODUCTION

Transnational migration of people is not a new phenomenon, but the new heights that it is now scaling. Due to the advances in the field of communication and transport technologies and the increasing interdependence of nation states that international migration is unprecedented in the history of humankind. In today's globalised world, as well as the 'global village', the movement of men and women within a continent or from one continent to another for different reasons is altering the very meaning of human existence.¹ The phenomenon of migration has brought people and nations to the threshold of modernity. In post-industrial societies, outward migration has significantly affected economic transitions as well as political trends.²

Turning to the current global migration crisis, there are two profound paradoxes of this twenty-first century: the further entanglement of the planet rendered by globalisation, and a parallel escalation of exclusionary right-wing politicians, xenophobia, and literal and figurative building of border walls.³ The rising trend in border tightening by right-wing governments around the world is a sign of

1 B C Nirmal, "Hague Convention on the Recognition of Validity of Marriages, Decrees of Divorce and Decisions Relating to Maintenance Obligations," in V C Govindaraj and C. Jayaraj (eds.), *Non Resident Indians and Private International Law*, (ISIL: New Delhi, 2008), p. 35

2 G N Devy, *Citizen Under Siege*, (Westland Non-Fiction) p. 55

3 See Sabelo J. Ndlovu-Gatsheni and Innocent Moyo, "Human Planetary Entanglements and Challenges of Living Together" in Innocent Moyo and Sabelo J. Ndlovu-Gatsheni (eds.), *The Paradox of Planetary Human Entanglements: Challenges of Living Together* (Routledge, London, 2022) pp. 1-3. For the Westphalian context see Leo Gross, "The Peace of Westphalia, 1648-1948", *American Journal of International Law*, vol. 42 (1948), pp. 20-41 at p. 20, available at <https://link.springer.com/book/10.1007/978-3-030-92513-1> (last visited June 18, 2026).

the waning of democracy, liberalism, rule of law and humanitarianism. As noted earlier, migration is, however, not a new occurrence. It dates back to the very early history of man. The present global migration crisis has its roots in borderisation and territorialisation that began with the Treaty of Westphalia (1648), the Berlin Conference (1884), and the finalisation of other treaties.⁴

As aptly stated by G N Devy, “*World Migration Report* (2018) produced with the data available from UN agencies opens with the sentence: ‘International migration is a complex phenomenon that touches on a multiplicity of economic, social and security aspects affecting our daily lives in an increasingly interconnected world’. It goes on to state that 244 million persons now live outside the country of their birth.”⁵

Coming home, “India has an age-old unbroken history of welcoming and providing warm hospitality to an endless inundation of men and women of diverse creeds, cultures and races who came to this ancient land from distant regions and climes in the noble tradition of ‘live and let live’ and Guests are Gods”.⁶ As has been aptly observed by the Supreme Court, India has rich tradition of giving refuge to individuals in need of shelter. This kind of compassionate refuge brought many benefits to India, adding its varied creeds, faiths and cultural diversity to the India of its celebrated unity-in-diversity. And those who came before arrived here and are now the proud citizens of this country. But this generous tradition does not demand that the laws of foreigners’ entry, residence and legal standing remain unchanged. The spirit of humanity and hospitality should in no case be lost in the process of

4 Sabelo J. Ndlovu-Gatsheni and Inocent Moyo, *opt cit.*

5 G N Devy, *Citizen Under Siege*, p. 43. International Organization for Migration, *World Migration Report 2024* (IOM, Geneva, 2024) ch. 2 (estimating around 281 million international migrants worldwide, 2020 figure), available at <https://worldmigrationreport.iom.int> (last visited July 25, 2026); UNHCR, *Global Trends: Forced Displacement in 2023* (UNHCR, Geneva, 2024) p. 2 (117.3 million forcibly displaced persons at the end of 2023), available at <https://www.unhcr.org/publications/global-trends-2023> (last visited July 25, 2026).

6 See Re Kerala Education Bill (1959) SCR995 AT 1017-8. Sir Radhakrishnan was more eloquent in this regard: “India is a symphony where there are, as in an orchestra, different instruments, each with its particular sonority, each with its special sound, all combining to interpret one particular score...” Constituent Assembly Debates, vol. I, p. 38, quoted in P.P. Rao, Report on Judicial Symposium on Refugee Protection (1999) p. 11.

adjusting the legal framework to regulate migration for the needs of the present; the two are not at odds. Time and again, legal philosophers, political thinkers, jurists and statesmen have repeatedly spoken in favour of change in law in response to advancements in the fields of human progress.⁷ As the ancient sages knew:

*"What is right in a certain time and place may change to being wrong and what is wrong in a certain time and place may change to being right."*⁸

This is something that rings true in all cultures. In Western literary terms, Tennyson said,⁹

"That the old order changeth, yielding place to the new."

Both traditions, after two millennia and two civilisations, reach the same conclusion: law and custom must evolve to deal with the times. Looking from this perspective, India's refugee and immigration policy should not be conceived of merely as a set of dogmas, preconceived notions and wild assumptions but rather as a dynamic and constantly evolving policy that preserves and respects a thousand-year-old civilisational tradition of hospitality while meeting today's needs for security, sovereignty, and responsibility towards the international community.¹⁰ Whether the new immigration policy meets this litmus test is apparently a highly controversial and contentious issue, the answer to which needs an objective, impartial, and dispassionate discussion in the broader context of relevant constitutional provisions, India's human rights obligations under treaties and International Law governing refugee protection, asylum, statelessness, and migration. Apparently, an offspring of majoritarianism, exclusionary policy, and anti-Muslim sentiments of the ruling dispensation, the new policy owes its existence to two primary postulates, namely-India is not a *Dharamshala* and a lurking apprehension of the presence of *ghuspaithiyas*: a euphemism for Bengali Muslim infiltrators (especially in the election bound states),

7 For an example Thomas Jefferson rightly observes, "I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind."

8 Mahabharat Santi Parva, 79.31

9 A. Tennyson, "The Passing of Arthur" in *Idylls of the King* (Edward Moxon & Co., London, 1869).

10 B.C. Nirmal, *Refugee and Human Rights*, ISIL Yearbook of International Humanitarian and Refugee Law, Vol 1 (2001), 94-117

have all potential to generate avoidable dust, dirt, and debris in the intellectual discourse on it. The complexity of the issue is further exacerbated by the judicial attitude, which is sadly not so liberal as it was in earlier time and more often than not echoes the ruling party's perspective on the issues of migration and refugee protection.¹¹ It in turn completes the cycle towards a more security minded restrictive stance that makes refugee protection an executive choice and national interest issue rather than a humanitarian responsibility.

Indian Parliament passed the Immigration of Foreigners Act 2025 ("IFA 2025") in February 2025, which came into force in September 2025.

11 Two recent pronouncements of the Supreme Court illustrate this trajectory with clarity. In *Mohammad Salimullah v. Union of India, Writ Petition (Civil) No. 793 of 2017 (decided 8 April 2021)*, the Court declined to interfere with the deportation of approximately 150–170 Rohingya refugees who had been detained in a sub-jail in Jammu, pending deportation to Myanmar — a country in the grip of ethnic violence and, subsequently, military coup. The Court held that the right against deportation is ancillary and concomitant to the right to reside or settle in any part of the territory of India guaranteed under Article 19(1)(e) of the Constitution — a right available only to citizens. In doing so, the Court disregarded the principle of non-refoulement and neither held the impugned deportation order unlawful nor conducted a fact-sensitive evaluation of the conditions then prevailing in Myanmar, instead justifying the executive's approach on the ground that India is neither a party to the 1951 Refugee Convention nor its 1967 Protocol. The Court also took serious note of the Union of India's submissions regarding the threat to internal security posed by the continued presence of Rohingya refugees and the organised influx of illegal immigrants facilitated through porous land borders — considerations rooted in national security rather than humanitarian obligation. This security-centred and executive-deferential posture has only hardened in subsequent years.

In *Subaskaran @ Jeevan @ Raja @ Prabha v. State, Diary No. 21310-2025 (order dated 19 May 2025, per Datta and Vinod Chandran JJ.)*, the Supreme Court refused to grant any relief to a Sri Lankan Tamil national who had completed a seven-year sentence under the Unlawful Activities (Prevention) Act, 1967, and was facing deportation pursuant to a Madras High Court direction. The petitioner's counsel had submitted that he faced a genuine threat of torture and persecution if returned to Sri Lanka, given his alleged past association with the LTTE, and requested that he be allowed to remain in India in a refugee camp indefinitely. The Court not only declined to intervene but made pointed and revealing oral observations, asking "Is India to host refugees from all over the world?" and declaring that "this is not a Dharmshala that we can entertain foreign nationals from all over." The Court further directed that if the petitioner's life was truly in danger in Sri Lanka, he should seek refugee status in another country — a response that effectively externalises India's humanitarian responsibility and treats the petitioner's protection claim as a matter for other jurisdictions to resolve.

The Act repeals and replaces the foreigner laws like the Foreigners Act 1946, Registration of Foreigners Act 1939, Passport (Entry into India) Act 1920 and Immigrants (Expulsion from Assam) Act 1950, which for the first time bring into a single statutory framework the immigration law in India.¹² As we shall see, the Act has meaning beyond its content and also has an absent dimension: the absence of a substantive refugee clause, the absence of domestic codification of the principle of non-refoulement, the absence of an independent check on refugee decisions and the absence of the recognition of asylum seekers as a distinct category, deserving of special procedural rights.¹³

Against this background, the present study endeavours to offer a critical analysis of the Act at the intersection of constitutional doctrines, international law and legal philosophy by systematically engaging with the stated objects and latent premises of the Act and its personal, territorial and temporal scope. It also aims to discuss and examine the machinery the Act provides for the implementation of its promises and highlight the institutional deficits of the immigration regime. The present article follows the following progression. Part II explores the definition and legal threshold of “migrant”, and Part III looks at the conceptual and legal difference between migrants, refugees, asylum seekers, and stateless people. In Part IV, the international architecture of rights of non-citizens is surveyed. The fifth part deals with the object and scope of the IFA 2025 and its legislative history; Part VI offers a section-by-section constitutional analysis of the Act, and Part VII critically explores the strengths and structural weaknesses of the Act and offers suggestions for plugging the loopholes of the Act.

II. WHO IS A MIGRANT? MEANING, DEFINITION, AND LEGAL CONTOURS

2.1 Etymological and Conceptual Foundations

The term “migrant” is derived from the Latin word “migrare,” which means to move, shift, or relocate. Migration is as old as migratory

12 Immigration of Foreigners Act 2025 (Act No. 7 of 2025), Statement of Objects and Reasons. The repealed statutes are: Foreigners Act 1946 (31 of 1946); Registration of Foreigners Act 1939 (16 of 1939); Passport (Entry into India) Act 1920; Immigrants (Expulsion from Assam) Act 1950, available at <https://egazette.gov.in/WriteReadData/2025/245678.pdf> (last visited June 18, 2026).

13 For further details see, section VII of this article, pp. 28- 32.

movements of human beings. What was new about modernity was that the nation-state replaced the city-state as the primary form of political organisation, and that migration became a sociological fact of life and was intensely regulated by the law.¹⁴

An International migrant is “any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, irrespective of his/her legal status; whether the move is voluntary or involuntary; the reason for the move; or the duration of the stay”.¹⁵ This is a deliberately ‘broad’ definition, suitable for demographic use, but inadequate for the legal analysis because it fails to capture the important differences between the nature, causes and voluntariness of movements, which have significant consequences for the rights framework that should be applied to various types of movements.

From a legal-philosophical perspective, migration is an issue that is at the juncture of at least three traditions of normativity. The Westphalian tradition views the state as a territorial entity whose authority is limited to its own territory and which has monopolistic control over access and exit. Liberal cosmopolitanism, represented by Joseph Carens, holds that immigration restrictions are like the feudal privilege of birthplace and that there is a human right to freedom of movement. The communitarian tradition, which goes back to Michael Walzer, argues that political communities have the right to restrict membership, which is necessary for an atmosphere of social solidarity. Migration law reflects these

14 International Organization for Migration, Key Migration Terms, IOM Glossary on Migration, 3rd edn. (IOM, Geneva, 2019) p. 132, available at <https://publications.iom.int/books/iom-glossary-migration-3rd-ed> (last visited June 18, 2026).

15 *Ibid.*

tensions, and in most circumstances prioritizes the rights of the state, while providing a place for human protection.¹⁶

2.2 Rights of Migrants within the Legal Framework¹⁷

Migrants can be broadly classified as: (i) regular migrants — migrants who come and live in another country with a paper in hand and proper

16 Joseph H. Carens, “Aliens and Citizens: The Case for Open Borders”, *Review of Politics*, vol. 49 (1987), pp. 251-273 at p. 258; Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, New York, 1983) pp. 31-63, available at <https://www.cambridge.org/core/journals/review-of-politics/article/aliens-and-citizens-the-case-for-open-borders/4AB4D3E05B3F5BD0DE4C69E4DB26F4B1> (last visited June 18, 2026); Joseph H. Carens, “Aliens and Citizens: The Case for Open Borders”, *Review of Politics*, vol. 49 (1987), pp. 251-273 at p. 258, available at <https://www.cambridge.org/core/journals/review-of-politics/article/aliens-and-citizens-the-case-for-open-borders/4AB4D3E05B3F5BD0DE4C69E4DB26F4B1> (last visited June 18, 2026); Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, New York, 1983) pp. 31-63, available at <https://www.basicbooks.com/titles/michael-walzer/spheres-of-justice> (last visited June 18, 2026).

17 Weissbrodt, David S. *The Human Rights of Non-citizens*. Oxford University Press (2008). Online access (abstract/overview): <https://doi.org/10.1093/acprof:oso/9780199547821.001.0001> (OUP Academic); Benhabib, S. (2004). *The Rights of Others: Aliens, Residents, and Citizens*. Yale University Press / Cambridge University Press. Info & overview: <https://www.amazon.com/The-Rights-Others-Residents-Citizens/dp/0521538602> (politicalscience.yale.edu); Tiburcio, C. (2001). *The Human Rights of Aliens under International and Comparative Law* (International Studies in Human Rights, Vol. 65). Brill. https://books.google.com/books/about/The_Human_Rights_of_Aliens_under_Interna.html?id=8Mn7EAAQBAJ (Google Books); Johnson, H. L. (2014). *Borders, Asylum and Global Non-Citizenship: The Other Side of the Fence*. Cambridge University Press. Overview: https://en.wikipedia.org/wiki/Borders%2C_Asylum_and_Global_Non-Citizenship (Wikipedia); Ngai, M. M. (2004). *Impossible Subjects: Illegal Aliens and the Making of Modern America*. Princeton University Press. Wikipedia summary: https://en.wikipedia.org/wiki/Impossible_Subjects (Wikipedia); Goodfellow, M. (2019). *Hostile Environment: How Immigrants Became Scapegoats*. Verso Books. Summary: https://en.wikipedia.org/wiki/Hostile_Environment%3A_How_Immigrants_Became_Scapegoats (Wikipedia); Ruffer, G. B. (2015). *Rights of Aliens*. In *The Encyclopedia of Civil Liberties in America* (pp. 818–820). Taylor & Francis. Article overview: <https://www.scholars.northwestern.edu/en/publications/rights-of-aliens> (Scholars at Northwestern); Cholewinski, R. (1997). *Migrant Workers and Their Families as Aliens: Development of International Law and Applicability of Universal and Regional Human Rights Instruments*. In *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*. Oxford University Press. Chapter PDF (Oxford): <https://doi.org/10.1093/oso/9780198259923.003.0003> (OUP Academic); Ziegler, K. (2025). *Political Rights of Aliens: Articles 10, 11* (Brill Chapter).

authorisations; (ii) irregular or undocumented migrants — migrants who come and live in another country without a paper in hand or authorisations; (iii) labour migrants — migrants who migrate mainly for the purpose of labour; (iv) family migrants — migrants who migrate to join their family members; (v) student migrants; and (vi) forced migrants — migrants who are forced to migrate by persecution, conflict, and environmental disaster. The last category overlaps significantly with the legal categories of refugee, asylum seeker and IDP.

The categories are not mutually exclusive: a person can cross the boundaries in between at any point in time. Someone who has moved to a new country for economic purposes can then be prevented from leaving because of a change in the political situation in the country of origin and thus take on refugee characteristics. Individual protection implications of this tendency of the legal system to treat these categories as hermetically sealed are real: those who do not neatly fit into any of the legal categories may neither enjoy the protection of Convention refugees nor the basic protection of labour rights of regular migrants.

But international law recognizes that deportation of illegal immigrants is a legitimate state power that is bound by human dignity, the consideration of the individual case, access to a lawyer, and the prohibition on deportation to a country where the deported person would be likely to suffer serious harm. The standards are commonly and consistently not met. The deportation of 104 undocumented Indian nationals aboard a military C-17 aircraft in February 2025, despite keeping them shackled at the wrists and ankles for some 40 hours while on the aircraft, including during meals and bathroom breaks, is a stark example of the degrading and inhuman practice. In the India–Bangladesh context, another controversy that has come to light is the alleged unilateral workings out of India’s borders without proper verification or diplomatic channels, known in the country as push-ins. Bangladesh’s government and Border Guard Bangladesh (BGB) have

Online: <https://centaur.reading.ac.uk/99011/8/Brill%20Chapter%208%20final%20ZIEGLER.pdf> (CentAUR); de León Azcárate, J. L., & González, L. U. (2024). *The Treatment of the Migrant Alien (gcr) in the Legal Codes of the Torah: Lessons for Today?* *Deusto Journal of Human Rights*, 13, 67–92. <https://doi.org/10.18543/djhr.3096> (djhr.revistas.deusto.es); Nyakabawu, S. (2022). *Legal Aliens: Experiencing Civic Marginalisation in Entrepreneurship in South Africa*. *Frontiers in Human Dynamics*, 4:860406. <https://www.frontiersin.org/articles/10.3389/fhumd.2022.860406/full> (Frontiers)

denied these unilateral repatriation movements and have stated that nationalities should be verified and all repatriation workings out of the country should be through bilateral channels.¹⁸

III. MIGRANTS, REFUGEES, ASYLUM SEEKERS, AND STATELESS PERSONS: MAPPING THE LEGAL DISTINCTIONS

It is crucial to any thorough analysis of immigration law to have an understanding of the conceptual and legal difference between the four categories. These differences impact much more than language; they create very different rights, protection duties and processes under international and domestic law. In each of these cases, the classifications can be merged either accidentally or deliberately, and in the process, a human toll is incurred. A refugee, who is mistakenly considered an economic migrant, can be deported to be subjected to persecution. An asylum seeker who is prosecuted for “irregular entry” might never have the opportunity to have their protection claim considered at all.

18 UN Office of the High Commissioner for Human Rights (OHCHR), Guidance from UN Human Rights Mechanisms on Human Rights of Migrants, Asylum-Seekers, Refugees and Stateless Persons, Geneva: OHCHR, 2024. Available at: <https://europe.ohchr.org/news-events/news/guidance-un-human-rights-mechanisms-human-rights-migrants>[Accessed 22 June 2026], p. 1 ; CNN, “Treated like criminals”: Shackling of Indians aboard 40-hour migrant flight sparks outrage, 7 February 2025. Available at: <https://www.cnn.com/2025/02/07/india/india-trump-shackles-deportations-intl-hnk/index.html> [Accessed 22 June 2026]; see also Al Jazeera, “Degrading”: India opposition MPs protest US deportees’ return in shackles, 6 February 2025. Available at: <https://www.aljazeera.com/news/2025/2/6/degrading-india-opposition-mps-protest-us-deportees-return-in-shackles>[Accessed 22 June 2026]; Awaz The Voice, India must set up protocol for repatriation of illegal Bangladeshis, 17 June 2026; The Wire, India cites Bilateral Deportation Mechanism as Bangladesh Resists, 5 June 2026. Available at: <https://thewire.in>[Accessed 22 June 2026]; The Daily Star (Dhaka), 5,000 Bangladeshis deported from India: West Bengal CM Suvendu, 8 June 2026. Available at: <https://www.thedailystar.net>[Accessed 22 June 2026]. Office of the United Nations High Commissioner for Human Rights (OHCHR). (2006). *The Rights of Non-Citizens* (UN Guidance, PDF).<https://www.ohchr.org/Documents/Publications/noncitizensen.pdf> (OHCHR); United Nations – Rule of Law Blog. (2006). *The Rights of Non-Citizens*. Online: <https://www.un.org/ruleoflaw/blog/document/the-rights-of-non-citizens/> (United Nations); Immigration and Nationality Law Review (annual journal article source). Journal overview: https://en.wikipedia.org/wiki/Immigration_and_Nationality_Law_Review (Wikipedia); Carens, J. H. (2013). *The Ethics of Immigration*. Oxford University Press. Book summary: https://en.wikipedia.org/wiki/The_Ethics_of_Immigration (Wikipedia)

3.1 Refugees: The Convention Definition and the Principle of Non-Refoulement

Refugees are a specific subspecies of migrants; while all refugees are migrants, all migrants are not refugees. It is the element of persecution and lack of state protection which distinguishes refugees from migrants. According to the definition of a refugee in the 1951 Convention Relating to the Status of Refugees, a refugee is a person who, “owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country”.¹⁹ The OAU Refugee Convention 1969 applies the same definition to persons forced to leave their country because of “external aggression, occupation, foreign domination or events seriously disturbing public order” which is more expansive than the 1951 Convention and which India has always applied by analogy in its practice.²⁰ The Cartagena Declaration on Refugees 1984²¹ goes even further, extending the definition to persons who have fled their country because their lives, security or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

Refugees have a plethora of rights under international law.²² The most important protection to refugees is the “non-refoulement” principle,

19 Convention Relating to the Status of Refugees, 189 UNTS 137 (adopted 28 July 1951, entered into force 22 April 1954), Arts 1A(2), 31, 33, available at <https://www.unhcr.org/1951-refugee-convention.html> (last visited June 18, 2026).

20 Convention Relating to the Status of Refugees, 189 UNTS 137 (adopted 28 July 1951, entered into force 22 April 1954), Art 33(1), available at <https://www.unhcr.org/1951-refugee-convention.html> (last visited June 18, 2026).

21 1984_cartagena_declaration_on_refugees.pdf

22 B C Nirmal, Refugees and Human Rights, ISIL Yearbook of International Humanitarian and Refugee Law, Vol 1 (2001), 94-117; B.C. Nirmal, “The Legal Status of Refugees in India” in Bimal N. Patel (ed.), India and International Law (Martinus Nijhoff, Leiden, 2005) pp. 175-188 at pp. 187-188, available at <https://brill.com/view/title/7766> (last visited June 18, 2026); Anupam Jha and Shabnam Khan, “International Refugee Law and India’s Practice: Contextualizing Professor B C Nirmal’s Writings”, IJIL, Vol 64 (2024), 3172-344. On a related aspect, see B C Nirmal, “Some Aspects of the Right to Leave, the Right to Return and the question of Right to Remain with special reference to Indian Law and Practice”, ISIL Yearbook of International Humanitarian and Refugee Law, Vol. 7 (2007), pp. 2292-264.

which is enshrined in the Convention of 1951, which bans a refugee's return "in any manner whatsoever" to a territory where his life or freedom would be threatened on any ground covered by the Convention. It is a principle widely accepted as forming customary international law, even by non-signatories like India, as was stated by the Gujarat High Court in *Ktaer Abbas Habib Al Qutaifi v Union of India*, and supported by the majority of international scholarly opinion.²³

3.2 Asylum Seekers: Rights Pending Determination

Asylum seekers are those people who have applied for refugee status but are awaiting their applications to be determined. An asylum-seeker may not be deported or otherwise returned to his or her place of origin until a final decision has been made. Refugees are not subject to penalties for their illegal entry or presence if they present themselves without delay and establish good cause for their illegal entry, according to the Convention of 1951. This is especially significant in countries such as India which do not have a formal Refugee Status Determination (RSD) procedure. Given the true nature of an asylum seekers' journey, the criminalisation of illegal entry under Section 16 of the IFA 2025 could have the opposite effect to the humanitarian spirit behind international refugee law, as it creates the real danger of genuine asylum seekers being prosecuted for seeking asylum.²⁴

3.3 Stateless Persons: The Legal Void

Under the terms of Article 1 of the 1954 Convention Relating to the Status of Stateless Persons, a stateless person is defined as a "person who is not considered as a national by any State under the operation of its law. The estimated number of people affected by statelessness is 4.4 million worldwide, and is caused by gaps or conflicts in nationality laws, discrimination, or state succession, or through deliberate

23 *Ktaer Abbas Habib Al Qutaifi v. Union of India*, AIR 1999 Guj 114 (Gujarat High Court), at p. 1008. See also James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, Cambridge, 2005) pp. 363-369; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd edn. (Oxford University Press, Oxford, 2007) pp. 201-212, available at <https://indiankanoon.org/doc/528538/> (last visited June 18, 2026).

24 Convention Relating to the Status of Refugees, 189 UNTS 137 (adopted 28 July 1951, entered into force 22 April 1954), Art 31, available at <https://www.unhcr.org/1951-refugee-convention.html> (last visited June 18, 2026).

deprivation of nationality as a means of persecution. Stateless people have extreme challenges accessing healthcare, education, employment, and justice and can be indefinitely detained if the state cannot deport them because no state will accept them. It is true that India is not a party to the 1954 and 1961 conventions on statelessness, but this fact does not allow India to ignore their ethical and normative importance. It is to be noted that these conventions provide the global definition of statelessness, established customary rules of International Law, and guidance for diplomatic and domestic policy purposes. It is therefore surprising that the IFA 2025 neither makes any mention of statelessness nor does it confer any rights or protection to stateless persons. This may be seen as a notable omission in view of United Nations' 10 years “#IBelong Campaign” (1954) to end statelessness, supported by such important documents as the Global Alliance to end and UNHCR's strategic plan on statelessness.”²⁵

3.4 The Spectrum of Legal Categories and the Risk of Conflation

The most immediate risk from this lack of distinction of categories is the risk of refoulement. The IFA 2025 does so because of its undifferentiated definition of “foreigners” and their denial of the right to asylum, effectively establishing a legal pathway through which those with a legitimate protection claim could be removed to be subjected to persecution. In the refugee case of India, lack of a legal procedure for identification of individual refugees results in “matters relating to admission and treatment of asylum seekers being treated by administrative authorities within a framework of certain vague and general guidelines, not in conformity with the rule of law and the right to equality and non-discrimination”.²⁶

IV. RIGHTS OF NON-CITIZENS UNDER INTERNATIONAL LAW: THE NORMATIVE ARCHITECTURE²⁷

4.1 International Bill of Human Rights

The Universal Declaration of Human Rights 1948 (UDHR) is the cornerstone of the international human rights system. The UDHR was

25 #IBelong Campaign to end statelessness | UNHCR

26 B.C. Nirmal, “The Legal Status of Refugees in India” in Bimal N. Patel (ed.), *India and International Law* (Martinus Nijhoff, Leiden, 2005) pp. 175-188 at pp. 187-188, available at <https://brill.com/view/title/7766> (last visited June 18, 2026).

27 Refer to literature already mentioned the footnote 19.

adopted by the United Nations General Assembly by unanimous vote, and states that rights belongs to “all members of the human family” without exception based on nationality.²⁸

The ICCPR (1966), of which India is a signatory since 1979, puts into effect the civil and political obligations of the UDHR as treaty obligations. Article 2(1) of the ICCPR has the language: “all individuals within its territory and subject to its jurisdiction,” which is purposely wide enough to encompass non-citizens, undocumented migrants, asylum seekers and refugees.²⁹

The International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, which India has ratified in 1979, is an equally binding treaty that extends the economic, social and cultural rights of the UDHR. Article 2(2) means that discrimination is forbidden in the enjoyment of Covenant rights on the basis of a number of factors including national origin and social origin. The Committee on Economic, Social and Cultural Rights, in its General Comment No. 20 (2009), noted that the Covenant extends to all people, including non-citizens, such as refugees or asylum-seekers, but that some differentiation between citizens and non-citizens might be allowed if it serves a legitimate aim and is proportionate.³⁰

28 Universal Declaration of Human Rights, Adopted by the General Assembly on 10 December 1948 at its third session, UNGA Res 217A(III): Art 2 (non-discrimination including as to national origin); Art 3 (right to life, liberty, and security of person); Art 5 (freedom from torture); Art 9 (freedom from arbitrary arrest); Art 14 (right to seek and enjoy asylum); Art 15 (right to a nationality); Art 22 (right to social security); Art 23 (right to work); Art 25 (right to adequate standard of living); Art 26 (right to education), available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (last visited June 18, 2026).

29 International Covenant on Civil and Political Rights, 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976): Arts 2(1), 6, 7, 9, 10, 12, 13, 14, 16, 17, 23, 24, 26. India ratified the ICCPR on 10 April 1979, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (last visited June 18, 2026).

30 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (adopted 16 December 1966, entered into force 3 January 1976): Arts 2(2), 6, 7, 9, 10, 11, 12, 13. Committee on Economic, Social and Cultural Rights, General Comment No. 20 (2009). India ratified the ICESCR on 10 April 1979, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights> (last visited June 18, 2026).

In the past, the HR Committee has established that ICCPR rights can never be denied to aliens, because of their immigration status, and that restrictions on aliens' rights are justified only where they are proportionate, non-arbitrary, and non-discriminatory.³¹

The 1985 UN Declaration of the Human Rights of Individuals Who are not Nationals of the Country in which They Live makes it clear that these are fundamental rights outside of citizenship. It ensures the non-nationals' freedom from discrimination on the grounds of race, color, sex, language, religion, or political opinion, and provides them with the right to safe working conditions, fair wages, and the right to trade unions. Most importantly, it also prevents arbitrary acts of deportation on the basis of their country of origin, colour or religion and guarantees freedom of communication between a non-national and the consular or diplomatic mission of his country of origin. The 1985 Declaration works in conjunction with the other UN declarations of human rights, most notably with the Universal Declaration of Human Rights (UDHR), which states that all persons, irrespective of their citizenship, are entitled to human rights, such as the right to leave and return home. Although states such as India still do not have a specific refugee law, they use domestic laws and discretion in applying these international principles at the national level.³²

4.2 The Convention Against Torture 1984

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT) arguably has the strongest anti-refoulement principle in the international treaty system. The CAT requires that no State Party shall "expel", "return" ("refouler") or "extradite" a person to another State, where there are "substantial grounds for believing" that he would be in danger of being subjected

31 Human Rights Committee, General Comment No. 15: The Position of Aliens Under the Covenant (11 April 1986), UN Doc HRI/GEN/1/Rev.9 (Vol I), p. 189, available at <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-15-1986-position-aliens-under> (last visited June 18, 2026).

32 United Nations General Assembly, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, Adopted by the General Assembly on 13 November 1985 at its fortieth session, UN Doc A/RES/40/144, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-human-rights-individuals-who-are-not-nationals> (last visited June 18, 2026).

to torture. (Article 3). This obligation is unconditional, and is not subject to exceptions as are Article 33(2) of the 1951 Refugee Convention, which grants the States Parties the authority to refuse admission to persons because of their actions before they came to the State, or to their current conduct. Under Article 2(2), “no exceptional circumstances whatsoever, whether of a state of war or a threat of war, or of internal political instability or of any other public emergency, may be invoked as a justification of torture”. India signed the CAT on 14 October 1997, but has not ratified it; it is generally accepted that the absolute prohibition on refoulement to a risk of torture has become customary international law.³³

4.3 Rights of the Child and Gender-Specific Instruments

The Convention on the Rights of the Child 1989 (CRC), to which India has been a party since 1992, is of importance for child migrants, unaccompanied minors and the children of asylum seekers. Article 2 calls on States to respect the Convention rights of all children “without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s national, ethnic or social origin ... or any other status”.³⁴

The Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW) was adopted by India with reservations in 1993, and India recognizes the specific vulnerabilities of migrant women. Article 9 of the Law of Nationality prevents discrimination on grounds of nationality and ensures equal rights with regard to the nationality of children, such as women losing their nationality when marrying foreign nationals. The CEDAW Committee has specifically discussed the issue of migrant women in its General Recommendation No. 26 (2008), which urges states to provide protection for migrant

33 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (adopted 10 December 1984, entered into force 26 June 1987): Arts 1, 2, 3, 10, 11, 12, 13, 16. India signed the CAT on 14 October 1997 but has not ratified it, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading> (last visited June 18, 2026).

34 Convention on the Rights of the Child, 1577 UNTS 3 (adopted 20 November 1989, entered into force 2 September 1990): Arts 2, 3, 6, 7, 8, 9, 10, 22, 37, 38. India ratified the CRC on 11 December 1992, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> (last visited June 18, 2026).

women, including those in irregular situations, from trafficking, gender-based violence and labour exploitation.³⁵

4.4 The International Convention on the Elimination of All Forms of Racial Discrimination 1965

ICERD (International Convention on the Elimination of All Forms of Racial Discrimination) 1965, which was ratified by India in 1968, bans discrimination on the basis of race, colour, descent, national or ethnic origin. Article 1(2) allows a distinction between citizens and non-citizens in respect of citizenship and naturalisation, without specifying any grounds for such distinction; however, Article 1(3) makes it clear that such a distinction may not be based on race, colour or ethnic origin. In the General Recommendation XXX (2004) on Discrimination Against Non-Citizens, the Committee on the Elimination of Racial Discrimination confirmed that differential treatment – in particular, differential treatment on the basis of citizenship – may amount to racial discrimination if it affects persons of a particular national or ethnic origin without a legitimate reason, and where it has a disproportionate impact.³⁶

4.5 The International Convention on the Rights of All Migrant Workers and Members of Their Families 1990

The most comprehensive treaty-specific approach to the situation of migrant workers is offered by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990 (ICRMW). Part III of the Convention (Arts 8-35) lays the ground floor of rights for any migrant worker, irrespective of legal status. Additional rights are bestowed on documented migrant workers in Part

35 Convention on the Elimination of All Forms of Discrimination Against Women, 1249 UNTS 13 (adopted 18 December 1979, entered into force 3 September 1981): Arts 2, 9, 15, 16. CEDAW Committee, General Recommendation No. 26 (2008). India ratified CEDAW on 9 July 1993 with reservations, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women> (last visited June 18, 2026).

36 International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195 (adopted 21 December 1965, entered into force 4 January 1969): Arts 1(1), 1(2), 1(3), 2, 5, 6. Committee on the Elimination of Racial Discrimination, General Recommendation XXX (2004). India ratified ICERD on 3 December 1968, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial> (last visited June 18, 2026).

IV (Arts 36–56). Inconsistency exists in India's position, as it is not a member of the ICRMW, although it is one of the world's largest sources of migrant workers.³⁷ It needs to be recognized that despite India not being a party to this convention, its legal consequences and importance should receive the attention of policy makers in this country. The convention, it needs to be mentioned, holds significance indirect, normative, interpretive and persuasive importance under international law. It is a reflection of pre-existing human rights authoritative standards. Its principles can shape global soft law³⁸ frameworks, regional guidelines and bilateral labour agreements.

4.6 The Vienna Convention on Consular Relations 1963 and the Right to Consular Assistance³⁹

India is a signatory to the Vienna Convention on Consular Relations 1963 (VCCR) which establishes an enforceable right to the individual of foreign nationals who are arrested or detained. The detaining authority must notify the arrested person "without delay" of his right to request consular notification. The consular office of the sender shall be informed immediately on the request of the person. In *Avena, Mexico v United States of America*, the International Court of Justice in The Hague ruled that Article 36 is a right that can be exercised in every

37 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Adopted by the General Assembly on 18 December 1990 at its forty-fifth session, UN Doc A/RES/45/158: Arts 8-26. India is not a party to the ICRMW, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers> (last visited June 18, 2026).

38 For the conceptual parity and importance of soft law, see, P S Rao, "Role of Soft Law in the Development of International Law: Some Random Notes", *Essays in International Law*, p. 62 etc sec., <https://www.aalco.int>; Alan Boyle, "Some Reflections on the Relationship of Treaties and Soft law", *ICLQ*, Vol. 48 (1999), pp. 901-912; C M Chinkin, "The Challenge of Soft Law: Development and Change in International Law", *ICLQ*, Vol. 38 (1989), p. 850.

39 Vienna Convention on Consular Relations, 596 UNTS 261 (adopted 24 April 1963, entered into force 19 March 1967): Art 36. See Appeal Relating to the Jurisdiction of the ICAO Council (LaGrand Case), (Germany v. United States of America), ICJ Reports 2001, pp. 466-516; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, ICJ Reports 2004, pp. 12-85. India ratified the VCCR on 28 October 1977, available at https://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf (last visited June 18, 2026).

case, rather than merely a diplomatic privilege, and that a state's lack of notice to a foreign national of his rights to consular assistance constitutes a violation of international law. Consular assistance can play an important role in immigration matters, beyond any immigration issues of detention, including in relation to documentation of identity, legal assistance, and the prevention of statelessness.

4.7 International Labour Organization Standards on Migrant Workers

The International Labour Organization has set the main multilateral rules on the labour rights of migrant workers. The obligations contained in the Migration for Employment Convention (Revised) 1949 (ILO No. 97) include the provision of free assistance to migrants and that migrant workers lawfully in the territory are treated no less favourably than nationals with regard to remuneration, hours of work, rest periods, membership of trade unions, accommodation, and social security. The Migrant Workers (Supplementary Provisions) Convention 1975 (ILO No. 143) goes further in two ways: it requires States to prevent clandestine migration and to prevent the use and retention of migrants in irregular employment and, at the same time, to ensure that all migrant workers, whether in regular or irregular situation, are entitled to the basic human rights in the fields of employment, social security and cultural rights; and it places a positive duty on States to promote equality of opportunity and treatment for migrant workers and nationals in these three areas. The Migrant Workers Recommendation 1975 (No. 151) provides detailed instructions on implementation. India is not a signatory to ILO Convention No. 97 or No. 143, which is especially true in the context of the number of migrant workers in India from neighbouring states.⁴⁰

40 On related issue see, B.C. Nirmal and Arti Nirmal, "Human Rights in the Global Compact for Migration" in Inocent Moyo and Sabelo J. Ndlovu-Gatsheni (eds.), *The Paradox of Planetary Human Entanglements: Challenges of Living Together* (Routledge, London, 2022) pp. 53-63 at p. 58. See also Migration for Employment Convention (Revised) 1949 (ILO No. 97), 120 UNTS 71; Migrant Workers (Supplementary Provisions) Convention 1975 (ILO No. 143), 1120 UNTS 323. India has not ratified ILO Conventions No. 97 or No. 143, available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C097 (last visited June 18, 2026).

4.8 The Global Compact for Safe, Orderly and Regular Migration 2018

The Global Compact for Safe, Orderly and Regular Migration (GCM) set out 23 objectives for a rights-based approach to migration governance and has been endorsed by the United Nations General Assembly in December 2018, with India voting in favour. The GCM is a political commitment and soft-law benchmark and not a binding obligation. Its goals are to provide migrants with legal identity and documentation (Objective 4); pathways for regular migration (Objective 5); reduce and prevent irregular migration (Objective 11); improve consular protection (Objective 7); alternatives to immigration detention (Objective 13); and access to basic services for all migrants, regardless of their legal status (Objective 15). The GCM makes a clear statement that states have the sovereign right to exercise control over migration, but that this right must be exercised in accordance with international human rights law, humanitarian law and refugee law.⁴¹

41 United Nations Global Compact for Safe, Orderly and Regular Migration, Adopted by the General Assembly on 19 December 2018 at its seventy-third session, UN Doc A/RES/73/195. India voted in favour. See also B.C. Nirmal and Arti Nirmal, “Human Rights in the Global Compact for Migration” in Inocent Moyo and Sabelo J. Ndlovu-Gatsheni (eds.), *The Paradox of Planetary Human Entanglements: Challenges of Living Together* (Routledge, London, 2022) pp. 53-63 at pp. 61-63, available at <https://undocs.org/A/RES/73/195> (last visited June 18, 2026). B.C. Nirmal and Prakash Sharma, “Responsibility Sharing Under International Law with Special Reference to the Compact on Refugees”, *ISIL Yearbook of International Humanitarian and Refugee Laws* (Indian Society of International Law, New Delhi), vol. 19 (2019), pp. 1-30, available at <http://www.isil-aca.org> (last visited June 21, 2026).

42 Law Commission of India, Report No. 267 (Government of India, New Delhi, 2017). See also Ministry of Home Affairs, Expert Committee Report on Immigration Reform (Government of India, New Delhi, 2022), available at <https://lawcommissionofindia.nic.in/reports/Report267.pdf> (last visited June 18, 2026). Immigration of Foreigners Act 2025 (Act No. 7 of 2025), Statement of Objects and Reasons, paras 1-4. The repealed instruments are: Foreigners Act 1946 (Act 31 of 1946); Registration of Foreigners Act 1939 (Act 16 of 1939); Passport (Entry into India) Act 1920; Immigrants (Expulsion from Assam) Act 1950, available at <https://egazette.gov.in/WriteReadData/2025/245678.pdf> (last visited June 18, 2026).

V. THE IMMIGRATION OF FOREIGNERS ACT 2025: OBJECT, LEGISLATIVE HISTORY, AND SCOPE

5.1 Legislative History and Context

The Foreigners Act 1946 was a product of the colonial emergency during the Second World War, primarily designed to control enemy aliens and ‘undesirable’ persons. Its framework was designed at a time when there was little emphasis on international rights and high levels of border control. Over the decades, it was stretched to accommodate the developing constitutional values, but its foundations were painstakingly old fashioned. The requirement for a comprehensive overhaul of the existing statute was noted in the 267th Report of the Law Commission of India (2021) which made two recommendations, one for a comprehensive immigration statute and the other for a separate National Refugee Law.⁴²

During the Winter Session of Parliament 2024, the IFA 2025 was presented, and in February 2025 it was passed. The main purpose of the law as outlined in the Statement of Objects and Reasons is: (i) Consolidation and modernization of law relating to entry, stay and departure of foreigners in India; (ii) strengthening national security by improving monitoring of foreign nationals; and (iii) expeditious removal of illegal immigrants. However, what is missing from the Statement of Objects is any mention of humanitarian factors, India’s responsibility under the ICCPR and other ratified international documents, or the separate legal status of refugees and asylum seekers.⁴³

5.2 Scope and Personal Application

The definition of foreigners is broadly casted under the Act and covers all “foreigners”, who are not citizens of India. This legally non-differentiated category includes the business visa holder, the unaccompanied Rohingya child, the recognised Sri Lankan refugee, the stateless person who was born on an unmarked border, and the Tibetan who has been residing in India for over half a century. All are “foreigners,” caught within the same regulatory system, and there are direct channels through this categorical blindness to arbitrary detention and refoulement, as this analysis demonstrates.

43 IFA 2025, *supra* note 12, Statement of Objects and Reasons, paras 1-4, available at <https://egazette.gov.in/WriteReadData/2025/245678.pdf> (last visited June 18, 2026).

The territorial reach of the Act is wide, and as per Section 3, the Act extends not just to those who enter India but to those who “attempt to enter” India as well, implying that the Act’s penal force would apply to people intercepted at the frontier before they’re allowed to enter India. Such a refugee would face criminal penalties under the Act for an “attempt” to enter without authorization, which is an outcome that is incompatible with the obligations of customary international law, and with the procedural guarantees in Article 21 as understood in *Ktaer Abbas*.

VI. INSIDE THE ACT: A SECTION-WISE CONSTITUTIONAL ANALYSIS

6.1 Definitions

The definitional architecture of the statute is in Section 2. The concept of a “foreigner” is very similar to the one already in place, with a few sub-categories: “immigrant” (foreigner who comes in with a valid entry document); “prohibited immigrant” (persons who are prohibited by criminal record, security concerns, public health risks, or previous deportation); and “transit passenger”. The missing term from a definition is “refugee” and/or “asylum seeker. The legislature’s omission of these categories is inconsistent with the rule of law, and with international practice, and confirms the continued lack of any legal rules governing refugee and asylum seeker status. The exclusion of these categories is not in line with legal principles and international practice, and continues to leave refugee and asylum seeker status without any legal rules.⁴⁴

The Union Parliament’s constitutional authority to enact on foreigners is in relation to Entry 17 of the Union List of the Seventh Schedule. While the definitional exclusion of refugees does not make the section unconstitutional as such, it does result in a downstream constitutional issue: the processing of those who have a legal right to international protection through the same system as those who are seen as irregular economic migrants creates a systemic lack of fair and reasonable procedures, which is guaranteed by Article 21.⁴⁵

44 IFA 2025, s 2(d) (definition of “foreigner”); s 2(e) (“immigrant”); s 2(n) (“prohibited immigrant”). See Philip Alston (Special Rapporteur), Report on the Human Rights of Migrants, UN Doc A/HRC/20/24 (2 April 2012), para 37, available at <https://undocs.org/A/HRC/20/24> (last visited June 18, 2026).

45 *Re Kerala Education Bill*, AIR 1959 SC 995, at pp. 1017-1018.

6.2 Entry Conditions and Biometric Enrolment

All foreign nationals entering the country of India must be in possession of a valid passport with a valid visa or authorisation, as per Section 4. It also calls for biometric enrolment at predetermined ports of entry and the maintenance of a centralised Immigration Database by the Bureau of Immigration. The biometric requirement has been considered as highly unconstitutional in the wake of the Supreme Court's holding in *Justice K.S. Puttaswamy (Retd) v Union of India* recognising privacy as a fundamental right. There is a lack of statutory provisions for a rights-respecting biometric regime around data minimisation, purpose limitation, data retention limits, data security standards and independent oversight in the Act.⁴⁶

A further constitutional issue is that of those intending to seek asylum who come without a valid travel document, the Act makes no mention of what happens to them. This is one of the most frequent scenarios for genuine refugees as persecutors do not normally issue any sort of orderly departure documentation to their victims. Whereas Section 4, read together with Sections 16 and 21, would establish a statutory pathway enabling a Rohingya Muslim who escaped from Myanmar without a passport as a result of genocide, to be immediately returned to Myanmar for prosecution for illegal entry, a result that is patently uncalled-for in light of the humanitarian spirit reflected in Article 21 of the Constitution.⁴⁷

6.3 Registration and the FRRO System

All foreigners having stayed in India for more than 14 days needs to register with the Foreigners Regional Registration Officer (FRRO) within 14 days of their arrival in India. Section 6 begins with the creation of a

46 *Justice K.S. Puttaswamy (Retd) v. Union of India*, (2017) 10 SCC 1, at paras 312-315 (per Chandrachud, J.) (Supreme Court of India). See also Digital Personal Data Protection Act 2023 (22 of 2023), s 17(2)(a), available at <https://indiankanoon.org/doc/127517806/> (last visited June 18, 2026).

47 B.C. Nirmal, "Rohingya Refugee Protection and Search for Durable Solutions: International Norms and India's Legal and Policy Response", ISIL Yearbook of International Humanitarian and Refugee Law (Indian Society of International Law, New Delhi, 2018), available at https://www.academia.edu/68574809/ROHINGYA_REFUGEE_PROTECTION_AND_SEARCH_FOR_DURABLE_SOLUTIONS_INTERNATIONAL_NORMS_AND_INDIA'S_LEGAL_AND_POLICY_RESPONSE (last visited on June 22, 2026)

digital registration portal, a much-welcomed upgrade in the previous paper registration procedure. Persons who cannot register, however, because of fear of persecution, language barriers, or illiteracy are not exempted, and there is no simplified procedure for this purpose. *Bona fide* asylum seekers face criminalisation under Section 16 for not registering, which goes against the spirit of Article 31 of the 1951 Refugee Convention, which explicitly bars action against refugees for “irregular entry or presence” if they present themselves “without delay”.

6.4 Detention Powers

It seems that Section 11 is the most contentiously placed provision in the Act. It gives permission for foreigners to be detained awaiting deportation and allows a tribunal to be held within thirty days. This in turn gives rise to some constitutional issues. Thirty days’ detention prior to pre-review is inconsistent with Article 22(2), which provides that any person detained shall be taken before a magistrate within twenty-four hours after his or her arrest. Extended immigration detention without the participation of magistrates remains unstudied by Indian jurisprudence, and could be the subject of a judicial inquiry. A second issue is that there is no provision for bail while awaiting the action of the tribunal, which stands in sharp contrast to the constitutional rule that pre-trial detention is a last resort. Thirdly, despite the Supreme Court in *Hussainara Khatoon v. State of Bihar* holding that the right to free legal assistance is a part of the guarantee of Article 21, no legal aid is mandated by law. Moreover, detention conditions are not subject to any minimum standards or independent inspection system but are left to the discretion of the executive.⁴⁸

6.5 The Foreigners Tribunal and Reverse Burden

Section 14 keeps the Foreigners Tribunals (FT) system in place as under the Foreigners Tribunals Order 1964, and maintains the reverse burden of proof, where the burden rests with the person to prove that he is not a foreigner, not the State to prove that he is. The validity of the reverse burden in criminal proceedings has been confirmed in *Ebrahim Vazir Mavat v. State of Bombay*, but that case was decided before the advent of transformative constitutionalism in Maneka Gandhi’s era, and should be reviewed in the wake of the recognition of the proportionality

⁴⁸ *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1360 (Supreme Court of India, 1979), available at <https://indiankanoon.org/doc/1693847/> (last visited June 18, 2026).

principle as the constitutional yardstick for all state action impacting life and liberty.⁴⁹

The FT mechanism has been widely and consistently criticised in the context of the Assam NRC process. From fact-finding missions to scholarly research, the same disturbing trends have been reported: decisions are reached on increasingly similar evidence and the time allowed for the respondents' response to provide documentation is too short, language barriers exist, and essentially no one is represented by lawyers in the tribunals. The National Human Rights Commission has voiced concern on the inadequacy of the Foreign Tribunal mechanism in protecting the procedural rights of the respondents, as set up under Article 21.

6.6 The Humanitarian Clause

Section 18 is available as the sole gesture of humanity in the Act. It allows the Central Government, by notification, to allow "temporary stay" to a class of foreigners who are at risk of being subjected to "grave danger to life" in their home country (the first instance of a "protection-based consideration" analogous to complementary protection under international law in the Indian immigration statute). This is a legally important measure which goes beyond the narrow framework of the Foreigners Act 1946 and owes its importance to its genuinely democratic provisions.⁵⁰ But as it stands, Section 18 is woefully inadequate for this purpose, because it neither requires UNHCR consultation or independent assessment nor does it contain any provision for judicial review of the government decision. Besides, it does not establish a standard for determining the existence of grave danger. It also does not provide a mechanism of applying on an individual basis. In brief, Section 18 'suggests' humanitarian protection with executive discretion firmly in the driver's seat. It is "complementary protection" that is purely

49 *Ebrahim Vazir Mavut v. State of Bombay*, AIR 1954 SC 229 (Supreme Court of India, 1954). See *Noor Aga v. State of Punjab*, (2008) 16 SCC 417 for the proportionality requirement in reverse burden cases, available at <https://indiankanoon.org/doc/502170/> (last visited June 18, 2026).

50 IFA 2025, s 18(1). See UNHCR, Guidelines on International Protection No. 10: Claims to Refugee Status Related to Military Service Within the Context of Article 1A(2) of the 1951 Refugee Convention, UN Doc HCR/GIP/13/10 (3 December 2013), para 61, available at <https://www.unhcr.org/publications/legal/52b2febafc5/guidelines-international-protection-10.html> (last visited June 18, 2026).

discretionary and unreviewable, in Professor Goodwin-Gill's words in the context of refugee law.⁵¹

6.7 Criminalisation of Illegal Entry

Violations of the requirement to come on board or stay for an illegal period will be subject to penalties of up to 5 years' imprisonment and fine (higher fines for repeat offences) as outlined in Section 16. The blanket prohibition of all illegal presence, including the distinction between asylum seekers and economic migrants, is contrary to Article 31 of the 1951 Refugee Convention, and the Supreme Court's own recognition in the Chakma cases that asylum seekers are in a different legal situation from other undocumented migrants. More fundamentally, the interplay of Section 16 with the reverse burden in Section 14 increases the injustice: the person is arrested on suspicion of illegal presence and has to prove their citizenship or lawful status – and do so without assistance from the legal system or any knowledge of it, unless they are to be convicted of a crime.⁵²

6.8 Removal Powers

The Central Government may order the removal of a foreigner for contravention of this Act or an unfavourable security report, and this is permitted under section 29. The term "adverse security report" is not defined anywhere in the Act; there is no right of the affected person to be told and/or respond to an adverse security report; there is no minimum procedural threshold on which to base a removal order; and there is no right to appeal to the merits of the removal order itself. The biggest failure of the Act from an international law perspective is that it fails to include any *non-refoulement* assessment before a removal order is issued. A person who has a 'well-founded fear of persecution' may be expelled based on an 'adverse security report' which may be based on

51 Guy S. Goodwin-Gill, "Complementary Protection in International Refugee Law", *International Journal of Refugee Law*, vol. 22 (2010), pp. 1-20 at p. 15, available at <https://academic.oup.com/ijrl/article/22/1/1/1527397> (last visited June 18, 2026); *Immigration of Foreigners Act 2025*, s 18(1). See also Guy S. Goodwin-Gill, "Complementary Protection in International Refugee Law", *International Journal of Refugee Law*, vol. 22 (2010), pp. 1-20 at p. 15, available at <https://academic.oup.com/ijrl/article/22/1/1/1527397> (last visited June 18, 2026).

52 *State of Arunachal Pradesh v. Khudiram Chakma*, 1994 Supp (1) SCC 615 (Supreme Court of India, 1994). See also Nirmal, note 14, pp. 181-182, available at <https://indiankanoon.org/doc/599077/> (last visited June 18, 2026).

an undefined decision, and without having any opportunity to argue whether their removal would place them in danger.⁵³

6.9 Carrier Liability

Sections 17-19 establish a system of carrier liability, which gives financial consequences to airlines and shipping companies for the transportation of inadmissible persons. Section 17(9) stipulates that a foreigner who is refused entry must be “handed over to the carrier” for removal “without delay”. The lack of any obligation on the Immigration Officer to undertake a *non-refoulement* assessment before making a refusal means that this provision provides a legal framework for institutionalised and privatised refoulement. Rational actors in response to financial exposure will do pre-emptive screening at the point of embarkation – in refugee movements. This means preventing people from using the territory where a protection claim may be made.⁵⁴

6.10 Immunity Clause

Section 32 states that there shall be no suit or proceeding against any person for anything done or intended to be done “in good faith” under the Act. There is no definition of “good faith”, no statutory duty of care of immigration officers to those they exercise their powers over and no independent oversight mechanism, limiting accountability to the costly and uncertain process of constitutional writ proceedings which is beyond the reach of most of the targets of the Act. The immunity clause must be interpreted rigidly and in accordance with the constitutional

53 James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, Cambridge, 2005) pp. 357-390; B.C. Nirmal, “The Legal Status of Refugees in India” in Bimal N. Patel (ed.), *India and International Law* (Martinus Nijhoff Publishers, Leiden, 2005) pp. 175-188 at p. 188, available at <https://www.cambridge.org/core/books/rights-of-refugees-under-international-law> (last visited June 18, 2026).

54 *Ktaer Abbas Habib Al Qutaifi v. Union of India*, AIR 1999 Guj 114 (Gujarat High Court), at p. 1008; *National Human Rights Commission v. State of Arunachal Pradesh*, AIR 1996 SC 1235, at para 17 (Supreme Court of India); *Louis De Raedt v. Union of India*, (1991) 3 SCC 544, at p. 552 (Supreme Court of India), available at <https://indiankanoon.org/doc/528538/> (last visited June 18, 2026).

principles of access to justice in accordance with Article 32 and Article 226 of the Constitution.⁵⁵

6.11 The Immigration & Foreigners Order, 2025

Amnesty International has condemned the regulatory regime established under the Immigration and Foreigners Act 2025, including the Immigration and Foreigners Order, 2025, gazetted on 1st September 2025 under Sections 3, 7 and 11 of the Immigration and Foreigners Act 2025. The organisation has said, the Order gives massive powers to authorities to put restrictions on movement, curtail expression, detain and deport citizens without proper safeguards and extend powers of biased foreigners' tribunals, which are at odds with India's international human rights commitments. Amnesty International has pointed out that the restriction of foreigners from leaving India on the vague basis of 'public interest' while the Order is in force, does not fall under the ambit of Article 12 ICCPR, which mandates judicial oversight or procedural safeguards in such a case; that the requirement for foreigners to seek prior approval for their employment, including the creation of a committee for the same, is inconsistent with Articles 19 and 22 of ICCPR; and that the detention and deportation provisions in the Order, particularly in relation to Rohingya and other refugees, violate the non-refoulement principle and Articles 6, 7 and 9 of ICCPR. The Organisation has thus urged the Government of India to withdraw this Order and make the immigration policy in line with the principles of legality, necessity and proportionality.⁵⁶

VII. STRENGTHS, CRITICAL DEFICIENCIES, AND REFORM PATHWAYS

7.1 Genuine Strengths of the Act

On a fair evaluation, the IFA 2025 marks real enhancements over its colonial forebears. First, the merger of four overlapping statutes into

55 S. Krishnamurthy, "India's New Immigration Law: Modernisation Without Rights", *National Law School of India Review*, vol. 37 (2025), pp. 112-130 at pp. 115-118; Philip Alston (Special Rapporteur), Report on the Human Rights of Migrants, UN Doc A/HRC/20/24 (2 April 2012), para 37, available at <https://undocs.org/A/HRC/20/24> (last visited June 18, 2026).

56 Amnesty International, India: Immigration and Foreigners (Exemption) Order Threatens Human Rights and Expands Unchecked Government Power, Index No. ASA 20/0530/2025 (Amnesty International, London, 2025), available at <https://www.amnesty.org/en/documents/asa20/0530/2025/en/> (last visited June 20, 2026).

one legislative framework will decrease administrative complexity and possible legal conflicts, which is a welcome change for practitioners and immigration officers.

Secondly, the biometric enrolment framework (Section 4) modernizes India's border management system and brings it in line with standards recommended by the International Civil Aviation Organization (ICAO), which may enhance the accuracy and efficiency of the border management system. Thirdly, digital registration of Section 6 will hopefully decrease the burden of paperwork for genuine visitors and business migrants. Fourthly, Section 18's humanitarian clause, though insufficient, is a first in statutory history which allows protection-based consideration. Fifthly, the Foreigners Tribunal mechanism (Section 14) is a quasi-judicial forum with appeal rights to the High Court and is preferable to solely executive deportation decisions, though there are some flaws with it.

7.2 Critical Deficiency I: The Absent Framework — No Refugee or Asylum Law

The most obvious shortfall of IFA 2025 is the lack of any legal protection for refugees. Despite India's own claim to be a rising global power, with a rule of law tradition, it remains one of the few major democracies in Asia-Pacific without a dedicated refugee legislation, an untenable position as a nation becomes more and more recognised as a rising global major power. The IFA 2025 has instead missed a real opportunity for statute to enshrine the principles of refugee protection which the Supreme Court has developed patiently over the past 40 years through constitutional interpretation. The need of the hour in the field of migration governance is a National Refugee Law that contains provisions for individual Refugee Status Determination by an independent authority, procedural safeguards, rights of persons of concern, and conditions for durable solutions. As is well known, India does not have any dedicated domestic refugee legislation. It addresses refugees through an ad hoc, case-by-case approach based on diplomatic and geopolitical consideration. It is, therefore, no wonder that demand for the enactment of a specific refugee legislation has been made by scholars, Law Commission, the National Human Rights Commission, and expert bodies from time to time. As noted earlier, Law Commission of India had recommended the enactment of two legislations, one related to immigrants and the other with refugee protection. While the first

course of action has been followed, the agenda of refugee legislation has been kept aside till today for reasons not known in the public domain.

As already noted, since there is no refugee specific legislation, ‘matters relating to admission and treatment of asylum seekers’ are dealt with by bureaucratic minds, which may not have sufficient knowledge of the humanitarian principles of international refugee law. This is still true even after 20 years – and now more urgent – the IFA 2025 has created the same structural issue, only this time in modern statutory terms.⁵⁷

7.3 Critical Deficiency II: Detention Without Adequate Safeguards

The framework of detention pending deportation, the 30 days detention period before the mandatory review under the tribunal, detention without bail, without mandatory legal assistance, and without providing minimum standards for detention conditions, altogether violate the minimum standards provided in the Constitution, as in *Maneka Gandhi and Hussainara Khatoon*. These provisions also run counter to the obligations imposed upon India by Article 9 and Article 2(3) of the ICCPR, which mandate independent judicial controls and a right to an effective remedy for anyone subjected to a deprivation of liberty.

The path forward is simple: the period of detention before review should be no longer than 48 hours; there should be mandatory legal representation for detained foreigners without legal resources; a rebuttable presumption that detention is not the preferred approach should be inserted into the statutes; and detention facilities should have a minimum standard, subject to independent review with publicly available reporting.

7.4 Critical Deficiency III: The Reverse Burden — A Structural Injustice

The retention of the burden of proof in Section 14 continues a system that is constitutionally questionable and is very unfair in practice. Basic fairness (in a Rawlsian sense or in terms of basic norms of the rule of

57 B.C. Nirmal, “The Legal Status of Refugees in India” in Bimal N. Patel (ed.), *India and International Law* (Martinus Nijhoff Publishers, Leiden, 2005) pp. 175-188 at pp. 187-188, available at <https://brill.com/view/title/7766> (last visited June 18, 2026).

law) rests on the principle that the burden of proof should be appropriately shared among the parties to bear it. The State has far greater resources than an individual respondent. It has access to national databases, FRRO data, census and electoral rolls. There is no equivalent capacity for an individual respondent, particularly a stateless person, a person who is illiterate or who fled persecution without documentation. To force such persons to do so is structurally impossible — and a violation of the Article 21 guarantee of fair procedure. **For these reasons a graduated approach is required:** If the State has *prima facie* evidentiary burden based on objective criteria, the burden shifts to the individual only after the evidentiary burden of the State to establish a reasonable basis for the classification has been satisfied. In criminal proceedings under Sections 21-23, the presumed innocence should be fully restored as held by the Supreme Court in *Noor Aga v State of Punjab*.⁵⁸

7.5 Critical Deficiency IV: The Non-Codification of Non-Refoulement

The most significant omission in the Act is its lack of a legal definition of non-refoulement, if measured by international law. The concept of *non-refoulement*, which bars the return of any person to a State where there is a real risk that they will be subjected to inaction by the State, is generally considered part of the customary international law of all States, regardless of their treaty obligations. The *non-refoulement* obligation does not, therefore, cease to exist in India because it has not ratified the 1951 Refugee Convention; rather, it is that the obligation has been invoked from the customary international law (CIL) channel and not through the treaty channel, which is relevant for the enforcement mechanism and not for the substantive obligation.⁵⁹

⁵⁸ *Noor Aga v. State of Punjab*, (2008) 16 SCC 417, at paras 49-53 (Supreme Court of India, 2008), available at <https://indiankanoon.org/doc/1784943/> (last visited June 18, 2026).

⁵⁹ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd edn. (Oxford University Press, Oxford, 2007) pp. 201-235; James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, Cambridge, 2005) pp. 357-390; E. Lauterpacht and D. Bethlehem, “The Scope and Content of the Principle of Non-Refoulement” in Erika Feller, Volker Turk and Frances Nicholson (eds.), *Refugee Protection in International Law* (Cambridge University Press, Cambridge, 2003) pp. 87-177 at p. 149, available at <https://www.cambridge.org/core/books/refugee-protection-in-international-law/B2A0F06C9A47B6C6F1C5B9E3D29B04C1> (last visited June 18, 2026).

The obligation to consider an individual application mechanism, including the necessary procedural safeguards (notice, hearing, legal representation, and reasoned decision) should be significantly expanded in Section 18, with the establishment of an independent adjudicatory body (either through delegation to the UNHCR, or by creating a National Refugee Board), should be added in Section 18, and non-refoulement should be made an operative principle, judicially enforceable, in Section 18; and judicial review of adverse decisions by the High Courts should be provided in Article 226.

7.6 A Comprehensive Reform Agenda

Based on this analysis, there are three categories of proposals for reform that may be mentioned here. At the legislative level: individual RSD with procedural safeguards, with pre-review detention of no more than 48 hours and the obligation to grant bail and access to a lawyer in cases of detention, a graduated burden of proof under Section 14; the establishment of individual protection mechanisms with independent adjudication and judicial review under Section 18, and the codification of the duty of *non-refoulement* assessment before any removal order under Section 29. At the institutional level: establishment of an independent National Immigration and Refugee Board; creation of an Independent Immigration Oversight Commission, which has the power to conduct inspections of detention facilities and report annually; and investment in legal aid infrastructure, specifically for immigration proceedings. There is also a need to fine-tune the IF Act with the norms, standards, and rules set forth in the 1951 Refugee Convention and its 1967th protocol, the 1954 Convention on Stateless Persons, and the International Convention on all Migrant Workers and make it in sync with international standards on the one hand and fundamental rights, the rule of law and constitutionalism on the other.

VIII. CONCLUDING OBSERVATIONS

The foregoing discussion reveals that, in a way, global migration has now become a huge structural problem requiring its solution in a coherent manner by the combined knowledge and cooperation of the international community, human rights activists, and states. International migration is undoubtedly a defining characteristic of the present-day world public order. Yet, today's world is a world of paradoxes: while the interdependence of nations is more profound than ever, many States have responded to migration by building walls,

criminalising the movement of human beings and turning to exclusionary ultra-nationalist policies, which aim to play on the popular fears and anxieties rather than address the root causes of migration. Due to the current escalation of xenophobia, the politics of fear has left the path of building humane and effective migration governance extremely challenging. There is, therefore, a need to shift the paradigm from state-centric control and exclusion to a rights-based, needs-centric model that places the dignity and security of the human person at its core. The sovereign right of states to manage migration and human rights obligations of all states are not conflicting principles but rather complementary aspects of good governance, as stated in the Global Compact for Safe, Orderly and Regular Migration 2018.

Against this backdrop, the Immigration and Foreigners Act 2025 (IFA 2025) is the most comprehensive change in the Indian immigration landscape since colonial times. It is a positive feat of the Administration to bring four ancient and overlapping laws together in a single coherent modern law. The move towards a digital registration system, biometric enrolment at ports of entry, and the centralisation of immigration databases are important strides towards modern immigration governance that would be in line with international civil aviation and security protocols. In this context, it is fair to say that the IFA 2025 is a much-awaited and overdue effort on the Indian government's part to overhaul the immigration regime in India — in response to the recommendations of the Law Commission, expert committees and the academic community for a holistic review of the immigration regime and its restructuring.

Some positive and progressive features of the Act worthy of notice are already mentioned above. Section 18 of the Act, for instance, provides protection based on humanitarian consideration by providing powers to the Central Government in granting 'temporary stay' to persons who face 'grave danger to life' in their country of origin. Although embryonic and inadequate as it stands, the IFA represents a legislative move away from the architecture of the Foreigners Act 1946 which was purely security-focused, and sets a norm that will in time enable a more thorough humanitarian architecture to be built. At the same time, it must also be acknowledged that the IFA 2025 is not about what it does; it's about what it doesn't. The pre-existing non-formal and *ad hoc* migration policy in India was influenced by a secular, inclusive and compassionate tradition, defined partly not only by security concerns,

but also by the humanistic aspects of the policy, which is embedded in the fundamental rights enshrined in the Constitution of India. The incremental jurisprudence of the Supreme Court, extending the protection of Article 21 to any person on Indian soil, citizen or not, has shaped this policy.

The IFA 2025, it is to be noted, brings to the fore various constitutional issues which require proper negotiation by the courts and, if possible, by executive orders until legislatures amend the law. These are not secondary issues, but rather fundamental concerns of the constitutional arrangement between the State and all persons under its jurisdiction. As a sovereign state, India has plenary legislative power to control immigration in the interest of the nation as per Entry 17 of the Union List of the Seventh Schedule of the Constitution. The power is, however, limited by the fundamental rights enshrined in the Constitution, by the obligations of international human rights treaties to which India has voluntarily committed, and also by customary international law norms that are binding on all states. Besides, the right to legislate doesn't bestow the right to legislate without regard to these constraints. Be that as it may, the provisions of the IFA 2025 Act that clash with India's treaty obligations and the guarantee of equality, liberty and privacy in the Constitution cannot be considered a good law.

Apart from treaty obligations, there are higher expectations from India as a great and prestigious nation in the community of nations. It needs to be recognised that India is the biggest democracy, a continuous staker of claim to permanent membership in the United Nations Security Council and a nation which strives to be a home for the persecuted. That standing is accompanied by a moral and political expectation that rulers of the country will exercise leadership in the governance of migration, not just in terms of its efficiency, but also in terms of justice.

The deportation of Indian nationals without proper formalities and under conditions that have hurt the sentiments of the Indian people in recent years by the United States administration has rightly elicited a diplomatic outcry in this context. But that feeling of outrage also has an implied obligation of reciprocity. It is pertinent to mention here that India has the world's largest immigrant population, with over 18.5 million people of Indian origin living overseas as of 2024. In this circumstance, can India afford to have different standards for inward and outward migration?

As is well known, law is simultaneously both static and dynamic. Static, because it has to provide stability and predictability, and dynamic because it must be able to adapt to the changing needs, values, and situation of society. Like everything else, no legislation exists that has no expiry date, and the IFA 2025 is no exception. Legislation, it needs to be emphasised, is a reflection of a specific historical moment, and can be revised, amended, and replaced as we gain increasing knowledge and understanding, and as new issues emerge. For this reason, there should not be any hesitation in saying that the IFA Act 2025 is not the last word on the immigration architecture of India; rather, it is the first incremental and evolutionary step away from the colonial, anachronistic, and outdated regime towards a modern statutory framework for India's Immigration architecture. But it's up to Parliament, the judiciary, the executive, and civil society to work within the framework of the Act, to fill in the gaps in it and bring it in harmony with the multiple and contradictory demands of national security, efficient border management, and the respect for migrants' and refugees' and asylum seekers' rights and dignity. The question is not whether or not to opt for sovereignty or for sanctuary, but how to manage the interplay between these two apparently irreconcilable concepts on the one hand and the rights and liberties of the affected individual human beings in a constitutionally appropriate manner, on the other.

The 'Karuna model' of refugee protection, which was in existence until recently, was based on the constitutional and civilisational principle of human dignity and could have been enshrined in statute itself, not left to the *ad hoc* creativity and grace of the Judiciary. The IFA 2025 raises a larger question, one which is constitutional in nature, rather than technical: what is India's desired polity? A constitutional order that gives all persons the dignity of due process, not because that person is a citizen, but because he or she is a person — is a constitutional order that has really taken a stand for its own universalist principles. A state that confines refugees, denies them documentation, states that their children are illegal, and denies legal counsel and remedy to those desiring asylum; a state that treats the child as an illegal immigrant, the stateless as a threat to security, and the asylum seeker as a criminal — without procedure, without legal aid, without remedy — is a state that has traded the demands of justice for administrative convenience. As the matter stands now, the IFA 2025 doesn't meet this challenge of such constitutional order. The road to reform described in this article provides

the needed framework to fulfil the promises of the Act, to address its structural shortcomings, and to raise India's voice anchored in strategic realism but calibrated with the traditional values of humanity, human solidarity, and universal brotherhood in the global chorus of migration governance for its values and aspirations on equal footing. It is true that many conservative, undemocratic, and right-wing governments have in recent years tightened border control measures in the name of national security or aggressive nationalism. The question, however, arises whether India, with its new immigration architecture, can claim moral high ground in the family of nations.

Migration, according to its current understanding, is not a problem in itself; it is the failures on the part of host states which make the migration issue complex. National governments will do well to acknowledge that migration is not a burden on the resources of the host state and should accordingly tailor their immigration policies in the light of the letter and spirit of the Compact for Migration. The war on migration launched by certain governments and the erection of walls and barbed wire fencing to prevent inward migration is likely to affect outward migration, which may prove pernicious for the evolution of man and humanity.

FROM SOVEREIGNTY TO EXPULSION: ANALYSING THE DEPORTATION CRISIS UNDER RIGHT-WING REGIMES IN INDIAN AND U.S. IMMIGRATION LAW

ABHILASH AGGARWAL*

ABSTRACT

In a time of increased right-wing nationalism, the deportation crises in India and the US are vivid indicators of growing friction between state sovereignty and international responsibility under refugee law. This article compares how populist practices have amplified mass expulsions, often in violation of the right to a fair individual consideration and of the principle of non-refoulement. In India, the BJP-led government has upped deportations of Bangladeshi immigrants on a security-based rhetoric, where operations like “Operation Sindoor” have resulted in thousands of unverified pushbacks as per Human Rights Watch reports dated July 2025. Special Intensive Revision of election rolls in India has caused panic among purported infiltrators in early November 2025 and pushbacks among Muslims and Rohingyas. In the United States, “Project 2025” of a second Trump administration has seen deportations sped up with at least 139,000 removals by November 2025, including 37,375 Mexicans, concurrent with racial profiling and visa denials on health grounds. Only three weeks ago, 69% of border encounters were with Mexicans, with new ICE leaders from Border Patrol implementing national raids. By examining recent news India’s Calcutta High Court questions, and U.S. data on Texas crackdowns this study illuminates how these regimes are placing border control and national security above global refugee norms. Applying doctrinal and comparative analysis, it demonstrates demographic pressure, resource scarcity and human rights abuses before concluding with policy recommendations for fair reform. Finally, the article posits that unconstrained nationalism may trigger a humanitarian disaster and recommends an adjustment toward collective international arrangements to ameliorate the policy dilemmas in each country. The present study adopts a doctrinal and comparative legal methodology to interrogate the intricate nexus between right-wing political ideologies, evolving refugee laws, and deportation crises in India and the United States. This qualitative, comparative case-study approach enables a nuanced examination of policy shifts and their ramifications, elucidating shared patterns and distinctive national traits within divergent legal and political frameworks.

* Head of Department and Assistant Professor, School of Law, Rai University, Ahmedabad.

KEYWORDS: *Deportation, Right Wing Nationalism, Immigration, Human Rights, Non-Refoulement*

I. INTRODUCTION

The global rise of right-wing nationalism has profoundly reshaped the refugee policies, transforming humanitarian imperatives into tools of sovereign assertion. In the dominant right wing regimes in *India* and the *United States of America* (US)¹ specifically in the past half a decade deportation practices illustrate a paradigm shift of expulsion over with mass deportation enabled under the guise of national security while contradicting international obligations of ‘non-refoulement’. In mid of 2025, there has been increase in instances of such pushbacks of suspected Bangladeshi immigrants², with reports of more than 2,500 deported since May, 2025 amid operation “Operation Sindoor”, while tension prevails in *West Bengal* along with arrests in states like *Gujarat* and *Rajasthan*, amongst others tied to anti-infiltration rhetoric and enforcement policy embedded *Citizenship Amendment Act* (CAA) stun narrative.³ Likewise, in the USA, the Donald Trump administration has aggressively enforced deportation, accounting for over 527,000 deportations as of October 2025, involving unprecedented scrutiny of ‘Mexicans’ under threat of racial profiling, expedited removals and new health-related exclusions, according to the latest *Department of Homeland Security* (DHS) and *Migration Policy Institute of Statistics* (MPIS)⁴. These events highlight a battleground in which sovereignty precedes

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- 1 Jiachuan Wu, *et. al.*, “Tracking Crossings and Attempted Crossings at the Southwest Border”, *NBC News*, 6 Oct. 2025, available at: <<https://www.nbcnews.com/data-graphics/us-immigration-tracker-follow-arrests-detentions-border-crossings-rcna189148>> accessed on 10 September 2025.
 - 2 Alisha Dutta, “Stop Unlawful Deportation of Bengali Muslims, Human Rights Watch Tells Government”, *The Hindu*, 24 July 2025, available at: <<https://www.thehindu.com/news/national/stop-unlawful-deportation-of-bengali-muslims-human-rights-watch-tells-govt/article69851943.ece>> accessed on 10 September 2025.
 - 3 Tora Agarwala, “India intensifies expulsion of suspected foreigners to Bangladesh”, *Reuters*, June 10, 2025, available at: <<https://www.reuters.com/world/asia-pacific/india-intensifies-expulsion-suspected-foreigners-bangladesh-2025-06-10/>> accessed on 10 September 2025.
 - 4 Muzaffar Chishti and Valerie Lacarte, “U.S. Immigrant Detention Grows to Record Heights under Trump Administration”, *Migration Policy Institute*, Oct. 29, 2025, available at: <<https://www.migrationpolicy.org/article/trump-immigrant-detention>> accessed on 10 September 2025.

sanctuary, a complicated tableau creating demographic pressures and a scarcity of resources.

In recent years, forced migration and asylum around the world has changed profoundly and conflictually, but much of the debate has been engendered by the rise of nationalist as well as right-wing political ideologies in tumultuous times in many states. This analysis scrutinizes rising deportation crises in India and the United States, reflecting the new contours of refugee law and policy under more openly nationalistic governmental agendas. Current developments such as the one in India include the postponement of the CAA cut-off date to December 31, 2024, as part of the new *Immigration and Foreigners Act, 2025* that offers refuge to minorities persecuted in Afghanistan, Bangladesh and Pakistan who are not Muslims⁵. While developmental trends around restrictive immigration policy in the US, including efforts to reinstall 'Title 42' like measures and pass the 'Asylum Transit Rule', highlight a clear global pattern of border securitization and contraction of humanitarian accountability.⁶ The re-emergence of discourse on the human rights serves to justify more stringent immigration policies. These policies under the pretext of national security, lead to the displacement of entire population thereby reconfiguring the concept of state sovereignty.⁷

A Critical theoretical approach is necessary in order to reveal the dynamics of state power underlying Refugee Law. Advocates of "Third World Approaches to International Law" (TWAIL), argue the role of international inclusive to refugee law in promoting and protecting the interests of the most powerful states and classes within society. Such an approach would further demonstrate how 'universal norms' can be

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- 5 Bharti Jain, "Relief for Minority Migrants from Afghanistan, Bangladesh & Pakistan", *The Times of India*, 4 Sept. 2025. *The Economic Times*, available at: <<https://timesofindia.indiatimes.com/india/relief-for-minority-migrants-from-afghanistan-bangladesh-pakistan/articleshow/123687782.cms>> accessed on 11 September 2025.
 - 6 Hiroshi Motomura, "The Future of Humanitarian Protection in the United States", *Carnegie Endowment for International Peace*, 25 Sept. 2025, available at: <<https://carnegieendowment.org/posts/2025/09/humanitarian-protection-tps-asylum-us-future?lang=en>> accessed on 13 Nov. 2025.
 - 7 S.C. Ballentyne and J. Drury. "Boundaries beyond Borders: The Impact of Institutional Discourse on the Identities of Asylum Seekers." *Current Research in Ecological and Social Psychology*, vol. 5, 2023, p. 100130. <https://doi.org/10.1016/j.cresp.2023.100130>.

invoked and instrumentalised to legitimise exclusionary practices vis-à-vis refugees whose origin is located in the developing world, re-instigating a North-South power dynamics through which the *Global South* tends to bear a disproportionate load of refugee inflows.⁸

The ‘securitization’ of migration complicates this tensed amalgam of state power and human rights commitments. This perspective constitutes migration as a threat to national security, thereby providing the rationale for more restrictive border controls and asylum policies. Such securitizing discourse tends to result in a security and human rights dilemma, whereby states rhetoric gestures towards humanitarian values while adopting repressive practices to please national interest.⁹ The *EU Asylum and Migration Pact* illustrates this development reflecting upon securitization motif which shapes judicial discourses while complicating legal practice within international obligations under obligation of principle of non-refoulement.¹⁰ This constant crisis modality, coupled with the securitization of migration, conditions how obligations are respected by states in practice, often leading to an increasing mismatch between normative expectations and operational approach towards non-refoulement.¹¹

Conversely, there are ongoing academic and policy discussions which argue for the “rethinking” of non-refoulement rights and even for the possible broadening of cessation clauses criteria for ending refugee status.¹² Such discussions are frequently driven by stories of unequal sharing of the burden in refugee protection which to some extent indicate

8 Vincent Chetail, “Third World Approaches to International Law (TWAIL)” In *Elgar Concise Encyclopaedia of Migration and Asylum Law* (Edward Elgar Publishing, 2025), pp. 575–80. <https://doi.org/10.4337/9781802204155.00105>.

9 Tjaša Uèakar, “Securitization, Humanitarianism, and the Religious Dimension of European Migration Policy.” *Religions*, vol. 16, no. 9, Sept. 2025, p. 1190. <https://doi.org/10.3390/rel16091190>.

10 Giuseppe Gambazza, “The EU New Pact on Migration and Asylum: Policies and Discourses for a ‘Fresh Start.’” *Space and Polity*, vol. 28, no. 2, May 2024, pp. 289–96. <https://doi.org/10.1080/13562576.2024.2412578>.

11 Iris Goldner Lang and Boldizsár Nagy, “External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement.” *European Constitutional Law Review* 17.3 (2021) pp. 442–470.

12 James C. Simeon and Joseph Rikhof. “Ending Exclusion from Refugee Protection and Advancing International Justice.” *Laws*, vol. 11, no. 4, Aug. 2022, p. 61. <https://doi.org/10.3390/laws11040061>.

a systemic trend to downsize state obligations vis-à-vis non-nationals. These endeavours are even more disquieting as the non-refoulement principle has broadened to shelter all persons suffering from flagrant abuses of their fundamental rights and not only those perceived as persecuted according to the classical criteria of demarcation.¹³

This critical interrogation serves to underline the structural inadequacies in the extant global refugee protection regime as well. The definition of 'refugee' in the 1951 Refugee Convention has been criticised as insufficiently broad in scope, leaving considerable protection gaps which are only partially filled by loose ideas of complementary protection.¹⁴ The coverage of the Convention is narrow, as it primarily addressed individuals who had been refugees in Europe before 1951, reflecting in particular a historic-geographical context.¹⁵ The nature of this distinction between 'refugees' and 'migrants', as well as the very arbitrariness of state-specific interpretations apply to further complicate the ways in which power is wielded by states, circumcising humanitarian protective space in a complex globalized world.¹⁶ *Denmark* has a 'zero' asylum policy, explaining such restrictive actions as attempts to avoid dangerous journeys and combating trafficking.¹⁷ These strategies point to a more general trend of "humanitarianized border control", whereby states draw on human rights discourse to legitimise containment and control

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- 13 Meltem Ineli-Ciger, "The Global Compact on Refugees and Burden Sharing: Will the Compact Address the Normative Gap Concerning Burden Sharing?" *Refugee Survey Quarterly*, vol. 38, no. 2, 2019, pp. 115–38.
 - 14 Maciej Grzeœkowiak, "Empirical Consequences of Normative Inadequacies: The Principle of Temporary Refuge and Protection Gaps." *Journal of International Migration and Integration*, vol. 25, no. 2, June 2024, pp. 573–94. <https://doi.org/10.1007/s12134-023-01093-x>.
 - 15 Edwin O. Abuya, *et al.*, "The Neglected Colonial Legacy of the 1951 Refugee Convention." *International Migration*, vol. 59, no. 4, Aug. 2021, pp. 265–67. <https://doi.org/10.1111/imig.12898>.
 - 16 Vladislava Stoyanova, "Addressing the Legal Quagmire of Complementary Legal Pathways." *European Journal of Migration and Law*, vol. 25, no. 2, May 2023, pp. 164–99. <https://doi.org/10.1163/15718166-12340149>.
 - 17 Marie Sandberg, "Denmark's Approach to Immigration and the Debate on EU's Asylum and Migration Policy | Northern Europe", *Bundeszentrale für politische Bildung*, 17 Mar. 2025, available at: <<https://www.bpb.de/themen/migration-integration/regionalprofile/english-version-country-profiles/northerneurope/560206/denmark-s-approach-to-immigration-and-the-debate-on-eu-s-asylum-and-migration-policy/>> accessed on 12 November, 2025.

practices that seek effectively to close access routes for asylum seekers, subverting international norms of protection, by strategically deploying humanitarian rhetoric to rationalize repressive policies, amounting to a serious challenge of the legitimacy of the international asylum regime, as it allows states to disclaim collective responsibility for how asylum systems function and focus responsibility on entities like smugglers.¹⁸ The result can often be production of precarity within asylum regimes, even in states with strong humanitarian profiles.¹⁹

1.1 Defining Deportation in International and National Legal Framework

Deportation constitutes a formal removal of a foreign national from a country, typically initiated by state authorities due to violations of immigration laws or perceived national threats to the security of the sovereign nation.²⁰ While this term is often used broadly is distinct from “expulsion” and “extradition”, as *expulsion* generally pertains to the administrative removal of aliens, which can be categorized into ‘administrative deportation’ and ‘administrative removal’, largely governed by domestic legislation and international human rights frameworks.²¹ While *extradition*, conversely, is a legal mechanism through which one state requests and obtains the surrender of an individual accused or convicted of a crime from another state, fundamentally operating as a state-to-state cooperative measure with limited individual rights for the individual.²² In the context of refugee and immigrant populations, deportation carries profound implications that often intersects with international human rights law and the principle

18 Paolo Novak, “Re-Producing the Humanitarian Border.” *Geopolitics*, vol. 30, no. 1, Jan. 2025, pp. 46–67. <https://doi.org/10.1080/14650045.2022.2105699>.

19 Jessica Schultz and Delphine Nakache, “Unsettling Expectations of Stay: Probationary Immigration Policies in Canada and Norway.” *Comparative Migration Studies*, vol. 12, no. 1, Apr. 2024, p. 19. <https://doi.org/10.1186/s40878-024-00379-y>.

20 Sarah Tosh, *et al.*, “Introduction: The Criminalization-to-Deportation Pipeline in the United States—A Special Issue for Critical Criminology.” *Critical Criminology*, vol. 32, no. 2, June 2024, pp. 209–15, <https://doi.org/10.1007/s10612-024-09789-x>.

21 Sanzhuan Guo, “A Critical Review of Chinese Law on (Mass) Expulsion of Aliens through a Lens of International Law.” *Griffith Law Review*, Mar. 2025, pp. 1–25, <https://doi.org/10.1080/10383441.2025.2477950>.

22 Walter Kälin, Aliens, “Expulsion and Deportation” In *Max Planck Encyclopedias of International Law* (Oxford Public International Law, 2020).

of non-refoulement. Although the act of “forcible transfer” of any individual or group has been recognised as a crime against humanity under Article 7(1)(d) of the *Rome Statute* post-World War II but the right of states to deport individuals remains an accepted prerogative.²³

The laws governing deportation in India and USA reveal distinct approaches shaped by their respective historical, political and socio-economic landscapes. In USA, this concept has increasingly been intertwined with the criminal justice system through what is termed “criminalization to deportation pipeline”, encompassing institutional policies and procedures that channel criminalized immigrants towards “detention” and “removal”, stemming from dynamic punitive policies shaped over the past four decades, leading to a significant rise in enforcement activities.²⁴ The foundational principle in US law regarding deportation was established in *Fong Yue Ting v. United States*²⁵ of 1893, which affirmed the inherent and inalienable right of every sovereign and independent nation to exclude or expel aliens, upon certain conditions in times of war and peace. This judgment underscored the power of Congress to expel aliens and exclude them from citizens. However, it was in the landmark judgment of *Department of Homeland Security v. Regents of the University of California*²⁶ of 2020, wherein the US Supreme Court directed to defer deportation of children also titled as “Dreamers” by rescinding the “Deferred Action for Childhood Arrivals” (DACA) immigration program holding it to be ‘arbitrary’ and ‘capricious’ under “Administrative Procedure Act” (APA), thus demonstrating the power of court to review executive decisions in immigration and subjecting them to be judicially scrutinized in adherence to due administrative process.

Conversely in India, deportation is the compulsory removal of a foreign national from Indian Territory, staying illegally or posing as a security threat to the sovereignty of the country as per *Foreigners Act* of 1946. This legal process involves detention, legal proceedings, identity verification with foreigner’s home country and followed by courts

23 *Prosecutor v. Milomir Stakic*, Case No. IT-97-24-T. (2006).

24 Tosh, note 20.

25 149 U.S. 698 (1893).

26 591 U.S. 1 (2020).

approval to deport back to the country of origin.²⁷ Although, under the recent right wing regime of India, the concept of ‘citizenship’ and ‘residency’ have scaled blurred lines giving rise to the concept of “precarious citizenship” for the certain religious minorities seeking citizenship acquisition post CAA from 2019.²⁸ The Supreme Court of India has struggled with consistent interpretation of ‘*non-refoulement*’ due to lack of explicit domestication of international refugee law. In *Mohd. Salimullah v. Union of India*²⁹, the Supreme Court in 2021 ruled in favour of Rohingya immigrants right to not to be deported unless prescribed under the procedure established by law and held it concomitant to the right to settle under article 19(e) of the Indian Constitution. Similarly in the year 1996, the Apex court of India, in *National Human Rights Commission v. State of Arunachal Pradesh*³⁰, directed the State government to consider the applications of citizenships of Chakma Refugees and carry out its legal obligation to safeguard the life, health and their wellbeing as an obligation under article 21 of the Indian Constitution.

Thus, while both the countries exercise their sovereign right to deport, their national legal frameworks and interpretations of international law diverge.

1.2 Defining Sovereignty in the Context of Migration Control

Customarily, a state’s ‘sovereignty’ provides a country with an exclusive authority over its territory and population, inclusive of the right to reside and enter its borders. Yet, in a time of unparalleled global movement, this sovereignty is being reimagined and had claimed to control the displaced undesirable individuals or groups. Such a reinterpretation is not just modern but historically deep, shaped by colonial rulers, where the integration of non-Europeans into the body of international law was always imbedded in that very same colonial encounter and projects

27 Vijaita Singh, “What Are the Issues around Deportation? | Explained.” *The Hindu*, 28 June 2025, *The Hindu*, available at: <<https://www.thehindu.com/news/national/what-are-the-issues-around-deportation-explained/article69749333.ece>> accessed on 13 Nov. 2025.

28 Nazimuddin Siddique and Sujata Ramachandran. “The Punitive Gap: NRC, Due Process and Denationalisation Politics in India’s Assam.” *Comparative Migration Studies*, vol. 12, no. 1, July 2024, p. 34. <https://doi.org/10.1186/s40878-024-00393-0>.

29 LL 2021 SC 202.

30 AIR 1996 SC 1234.

of the government making that idea of sovereignty inherently linked to racial discrimination and cultural subordination.³¹

‘Northern’ states, in an increasingly restrictive approach, have externalised violence by externalisation of measures intended to prevent refugees from everreaching their shores and systematically destroying the post-World War II asylum institution. This “externalization of migration controls” means that states relocate border management functions to areas outside their own territory, either via agreements with transit countries or also by privatization of border management fiduciaries, often by couching territoriality of human rights obligations in their justification.³² These measures include ‘visa restrictions’, ‘carrier sanctions’ and ‘elaborate deterrence’ to prevent *asylum* seekers not only from receiving protection, but also from reaching the territory of the state, thereby precluding there protection claims and fundamentally reshaping the geopolitics of re-routed refugee paths.³³ This strategic exclusion serves to redefine ‘territorial sovereignty’ in a way that governs asylum seekers long before their arrival by ensuring that they never reach host countries, thus creating “non-entrée” regimes.³⁴

A critical dimension is the use of “documentary citizenship regimes”, to mobilize issues of citizenship and migration, as to legitimize, facilitated and obfuscated states operating under ideologies of the rule of law. These regimes intensively legalise their means of driving the vulnerable minorities into insecurity of citizenship status and act as the “legalface of citizenship deprivation”.³⁵ For example, the bureaucratic

31 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005).

32 Annick Pijnenburg, “Externalisation of Migration Control: Impunity or Accountability for Human Rights Violations?” *Netherlands International Law Review*, vol. 71, no. 1, May 2024, pp. 59–88. <https://doi.org/10.1007/s40802-024-00250-y>.

33 Salvatore Fabio Nicolosi, “Externalisation of Migration Controls: A Taxonomy of Practices and Their Implications in International and European Law.” *Netherlands International Law Review*, vol. 71, no. 1, May 2024, pp. 1–20. <https://doi.org/10.1007/s40802-024-00253-9>.

34 Iram Siddeeqa, “Reimagining the Asylum Law in India: A Study on the Duty of Non-Refoulement.” *National Law School of India Review*, vol. 36, no. 1, Jan. 2025, <https://doi.org/10.55496/SDBS1501>.

35 Mohsin Alam Bhat, “(Un)Credible Citizen: Citizenship Dispossession, Documents and the Politics of the Rule of Law.” *Journal of Ethnic and Migration Studies*, vol. 50, no. 19, Nov. 2024, pp. 4867–90, <https://doi.org/10.1080/1369183X.2024.2376412>.

adjudications of citizenship in India's *Assam*, through *National Register of Citizens* (NRC) where the status of millions of Bangladeshi refugees has been imperilled, show how documentation can become an instrument of exclusion rather than inclusion, allowing the state to weaponized the documentation requirement to denationalise as "illegal residents."³⁶ This is a part of wider nationalist movements that claim "cultural sovereignty" through an "us versus them" dichotomy that, ultimately, entails a "moral emergency" intending to vilify and dehumanises immigrants and refugees. This process promotes support for 'restrictive immigration' through policies and can lead to negative social consequences.³⁷ Thus, resulting in a systematic procedure granting power to the state to grant or deny 'legal personhood'.

II. THE LEGAL AND POLITICAL DIMENSIONS OF EXPULSION

Expulsion consists of both the outright removal of individuals and policies that prevent people from entering or make their presence uncertain. A current strategy like this is of '*non-refoulement*', that advocates an advanced concept in which states purposefully avoid their duty to protect by creating methods to block refugees and asylum seekers from reaching their sovereign territory. Unlike traditional *refoulement*, where an individual is interdicted from within the territory of a state and returned, *neo-refoulement* utilizes externalised migration policy which most often are developed in partnership with third countries to ensure that the principle of '*non-refoulement*' is never engaged. Such practices are showcases of the growing tendency to externalise migration management to actors and territories, based on the premise that human rights obligations are territorial in nature.³⁸

The assertion of redefined sovereignty manifests in various legal and political dimensions of expulsion, ranging from direct deportation to more subtle forms of exclusion that effectively deny access to protection. Expulsion, in this conceptualisation, extends beyond the physical

36 Siddique, note 28.

37 Austin Van Loon, *et al.*, "Imagined Otherness Fuels Blatant Dehumanization of Outgroups." *Communications Psychology*, vol. 2, no. 1, May 2024, p. 39. <https://doi.org/10.1038/s44271-024-00087-4>.

38 Heli Askola, "Governing through 'Externalisation': Avoiding Responsibility for Refugees, Migrants and Citizens." *Transnational Legal Theory*, Nov. 2025, pp. 1–29. <https://doi.org/10.1080/20414005.2025.2583790>.

removal of individuals to include policies designed to prevent their entry or to render their presence precarious. One such contemporary strategy is “*non-refoulement*”, a sophisticated tactic wherein states actively circumvent their protection responsibilities by devising techniques to prevent refugees and asylum seekers from ever reaching their sovereign territory.³⁹ Unlike traditional *refoulement*, which occurs when an individual is returned from within a state’s territory, *non-refoulement* employs externalised migration policies often in collaboration with third countries to ensure that the principle of *non-refoulement* is not triggered by the physical presence of asylum seekers.⁴⁰ These practices are illustrative of an increasing trend to shift the burden of migration management onto other actors often under the assumption that human rights obligations apply only territorially.⁴¹

Furthermore, the implementation of citizenship determination procedures create a “punitive gap”, impeding conspicuous inconsistencies in processes such as India’s NRC, which brought upon a massive economic cost, intensified social inequalities including gender and religion-based, increased state control through social suspicion and unpredictable outcomes for marginalized communities. These bureaucratic inefficiencies and procedural ambiguities serve as a potent, albeit indirect, mechanism of expulsion, pushing vulnerable populations into a state of protracted legal precarity and effectively denying them the rights and protections associated with citizenship.⁴²

III. GLOBAL REFUGEE CRISES AND RIGHT-WING POLITICS

The history of refugee crises is inter-woven with the geopolitical changes, evolving in parallel with the shifts in the socio-political landscape,

39 Cynthia S. Gorman, “Redefining Refugees: Interpretive Control and the Bordering Work of Legal Categorization in U.S. Asylum Law.” *Political Geography*, vol. 58, May 2017, pp. 36–45, <https://doi.org/10.1016/j.polgeo.2016.12.006>.

40 Yota Negishi, “Constructive Refoulement as Disguised Voluntary Return: The Internalised Externalisation of Migrants.” *Netherlands International Law Review*, vol. 71, no. 1, May 2024, pp. 155–76. <https://doi.org/10.1007/s40802-024-00256-6>.

41 Nicolosi, note 33.

42 Allison J. Petrozziello, “StreetLevel Bureaucrats Manufacturing Migrants: An Implementation Study of Policy Measures to Address Statelessness in the Dominican Republic.” *Social Policy & Administration*, vol. 59, no. 4, July 2025, pp. 666–78. <https://doi.org/10.1111/spol.13155>.

continuously leading to differential patterns of displacement.⁴³ Over the past few decades, however, the nature of this landscape has changed drastically, with the simultaneous emergence of right-wing politics in India and the United States, among other nations. These ideologies commonly utilise xenophobic narratives and nationalist sentiments to manipulate attitudes and determine political outcomes on refugees and asylum claimants. In the past decade, the global rise of right-wing populism has been branded as a reaction against the economic, political and socio-cultural aspects of globalisation.⁴⁴ Visible “migration waves” like the *refugee crisis* in Europe from 2015, have been immediate triggers embedding ‘renewed’ calls for the reinstatement of national borders and societal orders.⁴⁵

Meanwhile, right-wing populist parties with nationalist and anti-immigration agendas frequently powered by ‘gaining economies’ and ‘identity crisis’ have also made major electoral gains in Europe, such as in *Italy*.⁴⁶ For instance in *Hungary*⁴⁷, right-wing populist discourses have tended to focus on immigration and the protection of national borders. Similar shifts are visible in radical-right parties across other countries such as *France* and *Austria*, who have modified their position on Europe to offer European solutions to border control and asylum policy,

43 Berna Turam, “The Geopolitics of Fear: Pro-Refugee Resistance to Europe’s Racial Security.” *Political Geography*, vol. 109, Mar. 2024, p. 103047. <https://doi.org/10.1016/j.polgeo.2023.103047>.

44 Saroj Kumar Aryal and Simant Shankar Bharti. “Changing the Media Landscape in India under the Modi Government: A Case Study Based on the Narrative Policy Framework.” *Studia z Polityki Publicznej*, vol. 9, no. 3(35), Dec. 2022, pp. 47–64. <https://doi.org/10.33119/KSzPP/2022.3.3>.

45 Joyce Sebag and Jean-Pierre Durand. “Conclusions: Migrants Through Images.” *Visual Methodology in Migration Studies*, edited by Karolina Nikielska-Sekula and Amandine Desille, Springer International Publishing, 2021, pp. 161–73. https://doi.org/10.1007/978-3-030-67608-7_9.

46 Francesco Campo, *et al.*, “Refugee Crisis and Right-Wing Populism: Evidence from the Italian Dispersal Policy.” *European Economic Review*, vol. 168, Sept. 2024, p. 104826. <https://doi.org/10.1016/j.euroecorev.2024.104826>.

47 Katinka Linnamäki, “Populism, Familialism, and Borders: The Interplay of Family and Anti-Muslim Immigration Policies in Hungary.” *Frontiers in Political Science*, vol. 6, Dec. 2024, p. 1490608, <https://doi.org/10.3389/fpos.2024.1490608>.

advancing an “exclusionary Europeanness”.⁴⁸ While in Western societies, political elites often present immigration as an ‘existential threat.’ With the rising scores of majorities of anti-immigration voters, leaders have made statements equating migrants with “terrorists”, showcasing anti-immigrant ideas as not limited to far-right parties but increasingly entering the mainstream political discourse.⁴⁹

As *Canada*⁵⁰ prides itself on ‘multiculturalism’, there has been a marked rise in exclusionary politics and a new scepticism towards federal multiculturalism policy, while the anti-Islam narrative has gained some legitimacy in the public discourse. Public attitudes towards immigration have also been sensitive to changes in immigration flow and broader macroeconomic conditions, with preferences for lower immigration levels observed at times. In *Australia*⁵¹, the underlying anti-asylum sentiment and racist constructions of Muslim asylum seekers reflect comparable phenomena of such exclusionary attitudes.

Often *nationalism* proclaim “cultural sovereignty” creating an “us against them” scenario, turning immigration and refugee resettlement into a “moral emergency” that vilifies the latter. Such rhetoric fosters popular anti-immigrant attitudes that can be fuelled by dehumanizing terminology, perceptions of existential threats and acculturation demands.⁵² When such rhetoric is put forth by parties in mainstream politics, its effect on social attitudes is amplified, as such messages are believed more credible, while being addressed to a larger electorate. Such politicization of migration is more often based on narratives

48 Michalis Moutselos, “Exclusionary Europeans: Radical-Right Party Construction of Europeanness in Response to the 2015 Refugee ‘Crisis.’” *Comparative European Politics*, vol. 21, no. 3, June 2023, pp. 400–17. <https://doi.org/10.1057/s41295-023-00333-9>.

49 Emmanuelle Blanc, “The EU in Motion through Emotions: Fear and Migration Policy in the Euro-Mediterranean Context.” *Mediterranean Politics*, vol. 30, no. 1, Jan. 2025, pp. 1–26. <https://doi.org/10.1080/13629395.2023.2265258>.

50 Justin Tetrault, *Thinking Beyond Extremism: A Methodological Reorientation to Studying Right-Wing Nationalism and the Far-Right Movement in Canada* (Ph.D. Thesis, University of Alberta Library, 2021) <https://doi.org/10.7939/R3-94R2-8N27>.

51 Ashleigh L. Haw, “‘Tarred with the Same Brush’: Racist and Anti-Racist Constructions of Muslim Asylum Seekers in Australia.” *Journal of Muslim Minority Affairs*, vol. 42, no. 1, Jan. 2022, pp. 56–74, <https://doi.org/10.1080/13602004.2022.2064050>.

52 Loon, note 37.

associating immigration with economic costs and security issues.⁵³ Such hypothesis has been found to be true in a study of heterogeneous urban areas, where increase in the share of asylum seekers in Italian municipalities was positively associated with support for radical-right anti-immigration parties, resulting in the loss of public support for centre-left.⁵⁴ Such trends underscore the extent to which the high salience positioning of political actors with regard to xenophobia often harnesses previously existing anti-foreigner sentiment, while their strategic anti-immigration discourse and policy have a critical effect on overall migration inflow, especially among high-skilled immigrants.⁵⁵

Beyond a direct rhetoric, it is now common practice to ‘securitize’ and ‘externalize’ migration control. Securitization as the concept in the *European Union* policies, incorporated migration from *Africa* has created a dilemma between “principles of humanitarianism” on one hand and “national security” on the other. The former consists of implementing restrictive policies and dealing as “threat-based extraversion”, whereby non-European transit states are incentivized to behave as proxy implementers of potential destination states based on restrictive migration policies.⁵⁶ Though its refugee laws have been more liberal than the global standard in the past, recent mass displacement events, including the flight of ‘Venezuelans’, have witnessed a trend of rising xenophobia at both institutional and grassroots levels in countries across *Latin America*.⁵⁷ However, the ascendance of the far-right in some countries, notably *Brazil*, *El Salvador* and *Argentina*, signals a move to

53 Joshua Jackson, *Whose Nation Is It? A Critical Analysis of the Impacts of Conservative Nationalism and Migration Security on Marginalized Groups in America* (Chapman University, 2023) <https://doi.org/10.36837/chapman.000475>.

54 Francesco, note 46.

55 Kirsti M. Jylhä, *et al.*, “Xenophobia among Radical and Mainstream Right-Wing Party Voters: Prevalence, Correlates and Influence on Party Support.” *Ethnic and Racial Studies*, vol. 45, no. 16, Dec. 2022, pp. 261–86. <https://doi.org/10.1080/01419870.2022.2061866>.

56 Sibel Yanık Aslan, “Securitization of Migration in the EU and Africa: A Case Study.” *Insight Turkey*, vol. 24, no. Winter 2022, Mar. 2022, pp. 153–72. <https://doi.org/10.25253/99.2022241.9>.

57 Leiza Brumat and Marcia Vera Espinoza, “Actors, Ideas, and International Influence: Understanding Migration Policy Change in South America”, *International Migration Review*, vol. 58, no. 1, Mar. 2024, pp. 319–46. <https://doi.org/10.1177/01979183221142776>.

greater national security focused strategies on migration management, even while the region's trend had been towards liberalized policies in the past.⁵⁸

However, in *Southeast Asia* with a very diverse and long history of migrations within and across the region, but the rhetoric differs from Western counterparts with the former populist refraining to mobilize anti-migrant policies and evoking anti-minorities sentiments as a primary means of mobilizational strategy as seen among their later counterparts. However, nativism and anti-migrant politics can tend to emerge during intra-state migration booms.⁵⁹

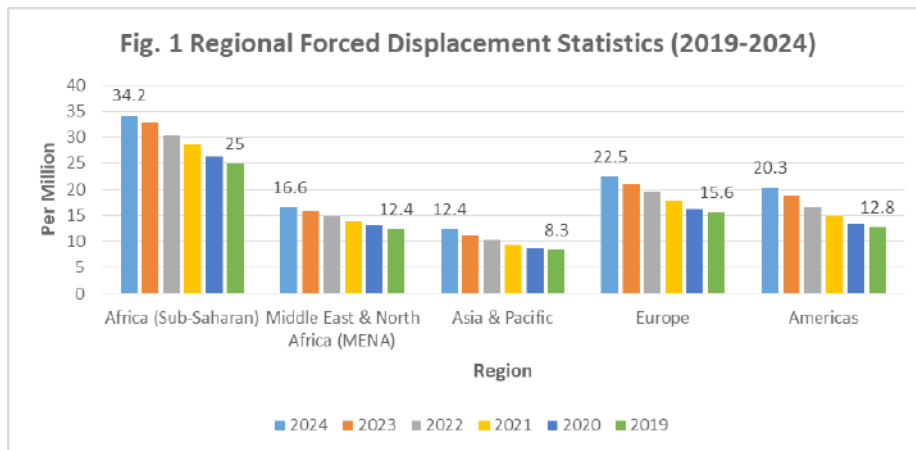
A. Global Deportation Crisis amid Forced Displacement

The rise in forced displacement rates have always reflected a broader global event and geopolitical trends that have moved and changed the causes of refugee crisis globally. The global ethnography changed dramatically over the past few decades, with the simultaneous rise of forced displacement figures as depicted in *Figure 1* growing to 123.2 million in 2024, marking one of the sharpest rise observed in modern history as compared to 79.5 million in 2019. This rise is mainly due to certain factors like "persecution", "internal conflict", "violence",

58 Léonie De Jonge, *et al.*, "Is the Far Right a Global Phenomenon? Comparing Europe and Latin America: A Scholarly Exchange", *Nations and Nationalism*, vol. 31, no. 1, Jan. 2025, pp. 7-24. <https://doi.org/10.1111/nana.13074>.

59 Thomas Pepinsky, "Migrants, Minorities, and Populism in Southeast Asia", *Pacific Affairs*, vol. 93, no. 3, Sept. 2020, pp. 593-610. <https://doi.org/10.5509/2020933593>.

“human rights abrogation’s” and events leading to “government failures”.⁶⁰



Source: ‘Forced Displacement Survey’ (2019-2024), United Nations High Commissioner for Refugees.⁶¹

In *Sub-Saharan Africa*, largely driven by increasing conflicts, bear the brunt of refugee protection with more than 75% of the world’s refugees housed in its low or middle income countries. This crisis is affecting the host forced countries like *Uganda* and *Chad* facing cycles of resource scarcity and underfunding as to prioritize humanitarian assistance.⁶² Under such conditions recourse to “ad-hoc expulsions” and “pushbacks” at borders or “administrative detentions” becomes pervasive, but the externalization policies of European states characterised by “threat-based extraversion”, makes the non-European states as a transit states are rewarding (financially or politically) with the prospect of less restrictive approaches to migration (or transit), becoming somewhat like proxy implementers of restrictive migration

60 Sandra V. Rozo and Guy Grossman. *Refugees and Other Forcibly Displaced Populations* (Washington, DC: World Bank, 2025). <https://doi.org/10.1596/1813-9450-11123>.

61 United Nations High Commissioner for Refugees. *Forced Displacement Survey*. UNHCR, available at: <www.unhcr.org/what-we-do/reports-and-publications/data-and-statistics/forced-displacement-survey> accessed on 15 Nov. 2025.

62 Luke Kelly, *Lessons from the Refugee Response in Eastern Chad Since 2003* (Institute of Development Studies, 2024) <https://doi.org/10.19088/K4DD.2024.009>.

policies as to be seen in this region.⁶³ Whereas, the long standing crises in *Middle East* and *North Africa* region (MENA) remain the main drivers of displacement (widening funding gaps), with the lead host countries such as *Lebanon* and *Jordan* restricting residency rules, thus pushing refugees in greater danger of deportation. Further research is suggestive of this concept leading to “erosion of protection” and “volatility of policy” with development of ‘deportation cycles’ that are especially prevalent during domestic economic recession.⁶⁴

The *Asia–pacific* region has undergone a huge shift in displacement, as most states in this part of the world have no real formal asylum regime and displaced populations tend to exist with an ‘irregular status’, vulnerable to detention and deportation. According to data from the UNHCR, refugees who are “undocumented” in countries like *India*, *Malaysia*, *Indonesia* and *Thailand* are specifically susceptible to these drives.⁶⁵ For instance due to internal migrant surges in the region.⁶⁶ In *Europe*, migration is sometimes politicized through narratives that connect immigration to ‘costs’ and ‘security’ concerns. Proponents of restrictive immigration policies have gained influence in many European nations, including right-wing populist parties in *Italy*, *Hungary*, *France* and *Austria*. Recently in the past half a decade the “Ukraine Conflict” and pre-existing migration corridors has reshaped Europe’s displacement profile. Despite the EU triggering “Temporary Protection for Ukrainians”, non-European asylum seekers

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- 63 Ronald Nsubuga, “How Shrinking Refugee Funding Threatens Human Rights and Social Cohesion in the East and Horn of Africa.” *Center; Human Rights Research*, 23 Oct. 2025, available at: <<https://www.humanrightsresearch.org/post/how-shrinking-refugee-funding-threatens-human-rights-and-social-cohesion-in-the-east-and-horn-of-afr>> accessed on 15 Nov. 2025.
- 64 Mohammed R. M. Elshobake and Alaa Sakka, “Forced Returns and Fragile Lives Strategies for Safeguarding Syrian Refugees and Ensuring Their Protection.” *Journal of International Humanitarian Legal Studies*, vol. 16, no. 1, Oct. 2024, pp. 66–97. <https://doi.org/10.1163/18781527-bja10099>.
- 65 Sal Clark, “Contested Worldmaking from ‘above’ and ‘below’: Bordered Spaces and Bordered Subjects in Search of Asylum.” *Political Geography*, vol. 106, Oct. 2023, p. 102940. <https://doi.org/10.1016/j.polgeo.2023.102940>.
- 66 Choo Chin Low, “Reforming Malaysia’s Deportation Regime: Digitalisation, Integration, And Militarisation” *Journal of International Studies*, vol. 20, no. 2, Aug. 2024, pp. 65–94. <https://doi.org/10.32890/jis2024.20.2.3>.

experience pushbacks and rapid removals.⁶⁷ These parties present immigration as an existential threat to the fabric of their societies calling for a stricter border control and limited access to ‘asylum’, as reflected from *EU Asylum and Migration Pact*.⁶⁸ For instance, under the pretext of avoiding perilous journeys, *Denmark* has adopted “zero” asylum seeker policies that exemplify a trend of “humanitarianised border control”, using humanitarian rhetoric to mask restrictive border control measures and undermine international protection norms. A new post-Brexit immigration regime has also emerged in the UK with the two main components being the closing down upon asylum opportunities and the development of new humanitarian channels.⁶⁹

Multiple states in *Americas* have implemented emergency measures during Venezuela Crisis. Haiti and Central American Violence due to a displacement surge that allowed for *expedited expulsions* and in some cases, even bypassing legal procedure norms granting asylum.⁷⁰ The criminalization to deportation pipeline in the US immigration system has become increasingly enmeshed with the criminal legal system and nearly half of all individuals are deported each year having a criminal record with many for low-level, while policies such as ‘Title 42’ and the ‘Transit Rule’ have been used to deny entry to asylum seekers, representing a “securitized management” of displacement that conflates humanitarian protection and deportation operations.⁷¹

IV. EVOLUTION OF REFUGEE LAW IN INDIA

India’s refugee policy is shaped by its post-partition experience that involved population exchanges in masses and absorption of millions

67 Michaela Benson and Nando Sigona, “Reimagining, Repositioning, Rebordering: Intersections of the Biopolitical and Geopolitical in the UK’s Post-Brexit Migration Regime (and Why It Matters for Migration Research)” *International Migration Review*, vol. 58, no. 4, Dec. 2024, pp. 2040–65. <https://doi.org/10.1177/01979183241275457>.

68 Gambazza, note 10.

69 Benson, note 69.

70 Malene H. Jacobsen and Rhys Machold. “Refusing Deterrence.” *Journal of Ethnic and Migration Studies*, Jan. 2025, pp. 1–18. <https://doi.org/10.1080/1369183X.2024.2441604>.

71 Francesca Rolandi, “Yugoslavia Is (Not) a Refugee Country? Refugees between Transit and Integration in an Ever-Changing Socialist State.” *Nationalities Papers*, vol. 53, no. 2, Mar. 2025, pp. 468–88. *Cambridge University Press*, <https://doi.org/10.1017/nps.2025.6>.

driven away during sectarian violence from 1947 to 1950.⁷² However, this fundamental experience did not translate into a universally applicable refugee law, but as an *ad-hoc approach* to be applied for different sects of refugees from ‘Parsis’, ‘Jews’, ‘Hindu’, ‘Muslim’ and ‘Sikh’ refugees post-partition, ‘Tibetans’ from 1959, ‘Bengali’ refugees post-1971 war from *Bangladesh*, ‘Tamil’ refugees during the civil war in *Sri Lanka*, ‘Afghan’ refugee in 1979, followed by ‘Chakmas’, ‘Hajongs’ and most recent being ‘Rohingyas’.⁷³ This “ad hoc and discretionary” practice has translated to the fact that India’s approach towards these varied (*de jure*) refugee groups has not been uniform. Even though India is not a state party to international treaties, it has consistently articulated its commitment to the principle of *non-refoulement* resting its protection regime on the constitutional guarantees of fundamental rights and provisions of law.

Despite hosting some of the largest refugee settlers worldwide, India does not have a cohesive national legislative architecture towards refugee protection. It is not a party to the 1951 Refugee Convention or its 1967 Protocol, an attitude that significantly informs its stance on asylum seekers. It is this reason that, perennially, refugees in India are merely considered as “foreigners” under the meandering bindings of domestic laws with no less by virtue of its statutory prescriptions as per “The Foreigner’s Act, 1946” and “The Citizenship Act, 1955”. This lack of a legal framework requires asylum seekers to be considered on a case-by-case basis, with the central government holding considerable power.⁷⁴

Over the last five years, right-wing political forces have deftly exploited this vacuum, creating a public narrative in which refugees are equated with security threats and illegal infiltrators. For the ‘Rohingya’ this has resulted in a *refoulement* policy where states acting directly with the

72 Siddeeqa, note 34.

73 Priyanka Shankar, “India’s Stateless Babies: How Lawless Asylum Rules Leave Refugees in Limbo.” *Al Jazeera*, January 5, 2024, available at: <<https://www.aljazeera.com/features/2024/1/5/stateless-babies-in-northeast-india-refugee-mothers-pray-for-nationhood>>accessed on 16 Nov. 2025.

74 Abhishek Goyal, “Ethnic Cleansing and Trails of Tears: Is India’s ‘Closed-Door Policy’ and Denial of Non-Refoulement Principle Defensible.” *SCC Times*, 17 June 2022, available at: <<https://www.sconline.com/blog/post/2022/06/17/ethnic-cleansing-and-trails-of-tears-is-indias-closed-door-policy-and-denial-of-non-refoulement-principle-defensible/>>accessed on 16 November, 2025.

prosecuting regime to enable returns.⁷⁵ For those deemed to be ‘Bangladeshi’ infiltrators, it has initiated a mega *anti-infiltration drive* like in Assam and a localised deportation drive that is as much a political war game as they are associated with migration management.⁷⁶ The outcome is a system in which the guidance for what happens to people seeking refuge is less law or humanitarian principle and largely the shifting currents of political expedience. Yet, academic analysis as late as 2024 reveals how the Supreme Court continues to have difficulty with performing consistent construction of *non-refoulement* from absence explicit domestication of international refugee law. Scholars argue that Article 21’s provision for reasonable restrictions based on “procedure established by law” could be used to invoke national security considerations to limit the right it is thought, however, not to be uniformly accepted who can claim *non-refoulement* protection.⁷⁷

Prior to 2020, there was an increasing practice of identification of “irregular migrants”, especially in certain geographic areas. For example, the update to the NRC in Assam, which ended in August 2019, had tagged 1.9 million as “illegal migrants” who are largely Bengali speaking people. This exercise brought to the fore major procedural shortcomings and it created apprehension of statelessness for a vast number.⁷⁸ The deportation statistics in India since 2019 till date reflect a marked escalation in enforcement measures, driven by nationalist imperatives that emphasize by nationalist imperatives that emphasize border securitization and anti-infiltration rhetoric. Multiple pushbacks episodes have been directed towards illegal immigrants and infiltrators across the India’s Border States majorly identified as Bangladeshi

75 Stephanie Schwartz, “Refugee Return without *Refoulement*!: Rethinking State Strategies to Evade Asylum Norms.” *International Migration Review*, July 2025. <https://doi.org/10.1177/01979183251359175>.

76 Sreeparna Datta, “Why Is India Pushing Back Suspected Infiltrators to Bangladesh?” *The Diplomat*, 3 July 2025, available at: <thediplomat.com/2025/07/why-is-india-pushing-back-suspected-infiltrators-to-bangladesh/> accessed on 16 November, 2025.

77 Sabreen Ahmed, “Proportionality Analysis and Non-Refoulement Jurisprudence in India: A Comparative Approach.” *The Age of Human Rights Journal*, no. 24, 2025, pp. e8728–e8728. <https://doi.org/10.17561/tahrj.v24.8728>.

78 Salah Punathil, “Precarious Citizenship: Detection, Detention and ‘Deportability’ in India.” *Citizenship Studies*, vol. 26, no. 1, Jan. 2022, pp. 55–72. <https://doi.org/10.1080/13621025.2021.2013444>.

nationals and Rohingya refugees. Administrative authorities have presented such rhetoric as law enforcement responses to ‘document fraud’ and ‘illegal entry’, implementing stricter laws like *Immigration and Foreigners Act, 2025*, while in contrary civil society group and liberals have raised refoulement concerns.⁷⁹

Deportation incidents grew more frequent in India, between 2018 and 2025 based on a systematic supervision pushback regime against people believed to be undocumented Bangladeshi migrants enforced after *Operation Sindoor*, implemented in the wake of the April 22, 2025 “Pahalgam Terror Attack” that left 10 dead in the valley of Kashmir.⁸⁰ Caught between ‘coats of saffron’ and the ‘madrasas’, is a crumpled ASPIRIN pill, to cure the menace of *Bengal*, to rake through the muck at the bottom of the furnace while raining down suppressive fireworks and forgetting about the submerged lifeless doses of pain, for at this moment, almost five years, thousands of Bengali-speaking migrants are predicted to have been torn from the flesh of their oppressed souls hushed away and deported at an event which the Union Government framed as an operation to combat infiltration, drug trafficking, human smuggling and extremist linkages threatening national security.⁸¹

More than 2,500 Bengali migrants have been detained and surreptitiously deported from different parts of India as reported in May, 2025, without due process or judicial oversight on a real time nationwide basis, without deportation orders in flagrant violation of Indian law as well as international human rights standards. They involve *swift airlifting* of undocumented migrants using aircraft of the *Indian Air*

79 Pramanik Amritava. “Guarding India’s Borders: The Immigration and Foreigners Act, 2025 and the Crackdown on Forged Documents.” *LawArticle*, 30 Sept. 2025, available at: <<https://lawarticle.in/guarding-indias-borders-the-immigration-and-foreigners-act-2025-and-the-crackdown-on-forged-documents/>>accessed on 11 November, 2025.

80 Aniket Udayrao Bhavthankar, “Operation Sindoor, Strategic Restraint, And The Teachings Of The Mahabharata.” *The Defence Horizon Journal*, 13 Oct. 2025, available at: <<https://tdhj.org/blog/post/operation-sindoor-strategic-restraint/>> accessed on 13 Nov. 2025.

81 Tanya Arora, “India’s Stealthy Pushback: Thousands of Alleged ‘Bangladeshi Immigrants’ Deported without Due Process across States.” *CJP*, 3 July 2025, available at: <<https://cjp.org.in/indias-stealthy-pushback-thousands-of-alleged-bangladeshi-immigrants-deported-without-due-process-across-states/>>accessed on 13 November, 2025.

Force from interior states to border areas, like *Tripura*, *Meghalaya* and *Assam*, where they are handed over to the *Border Security Force* (BSF) for pushback across the India-Bangladesh barrier, often within hours.⁸² In some instances deportees are given *Bangladeshi* currency (500 Taka) and little provisions before driving them into the *Bangladeshi* territory. Criticism from human rights groups, including *Amnesty International* and *HRW* has been posted stating, lack of “right to be produced before a magistrate in 24 hours”, “right to a lawyer” and “right to verification” via *Foreigners Tribunals* leading to arbitrary detention, as they say, in contravention of articles 21 and 22 of the Indian Constitution, the *Foreigners Act* of 1946 and custom under international law on non-refoulement.⁸³

It is suggestive of the rights activist that though the majority deportees are *Bangladeshi* nationals and *Rohingya* refugees, it also includes cases of Indian citizens, especially Bengali-speaking Muslims from the West Bengal districts of *Cooch Behar* and *Murshidabad*, who are targeted for their language, physical appearance or inability to provide necessary documentation at the drop of a hat. Wider ramifications encompass the creation of a “shadow deportation regime” bypassing diplomatic processes, chain deportations involving Bangladesh subsequently expelling individuals to Myanmar and aggravated statelessness, condemned as illegal “push-ins” by the *Ministry of Foreign Affairs* and *Border Guard Bangladesh* that could have serious ramifications in bilateral relations.⁸⁴ Although such practice doesn’t connect these operations directly to the CAA or NRC, they point out how such measures are in step with the sharpening anti-infiltrator narrative in BJP-ruled states which target minorities and may disrupt socio-economic fabrics in places with high migrant populations. With calls for a transparent investigations and adherence to human rights norms, legal interventions

82 Singh, note 27.

83 Report, “India: Hundreds of Muslims Unlawfully Expelled to Bangladesh”, *Human Rights Watch*. 23 July 2025, available at: <<https://www.hrw.org/news/2025/07/23/india-hundreds-of-muslims-unlawfully-expelled-to-bangladesh>> accessed on 13 Nov. 2025.

84 Angshuman Choudhury, “India’s Pushback Policy in 2025: Legal Violations and Humanitarian Crisis at the Assam-Bangladesh Border.” *Frontline*, 16 May 2025, available at: <<https://frontline.thehindu.com/the-nation/human-rights/india-pushback-policy-2025-assam-deportation-rohingya-migrants/article69583482.ece>> accessed on 15 November, 2025.

in the form of Supreme Court stays and high court bails offer only intermittent relief, even as they highlight systemic gaps.

4.1 Case Study 1: Delhi Clusters and Hidden Identity

A blend of ‘logistical’ efficiency and ‘procedural’ opacity exemplified the deportation activities in the National Capital Region of Delhi, India, from late 2024 to exemplify large scale verification drives and coordinate removal across districts with detainees transited via *Hindon* or *Ghaziabad* airports to *Agartala* in North East India for BSF handovers to Bangladeshi authorities.⁸⁵ Approximately 700 undocumented migrants were deported between the end of 2024 and July 2025, with the numbers increasing after a “Pahalgam attack” in April that year, when 470 Bangladeshi nationals and 50 visa over stayers were detected. These include the detention of 13 Bangladeshi nationals (with five minors) in *Auchandi* during a verification exercise on May 16, followed by the detention of 121 Bangladeshi nationals on May 23, and an airlift on May 25 of 160 undocumented Bangladesh immigrants from Ghaziabad’s *Hindon* Air Base to *Agartala*, Tripura, by an IAF plane for pushback after examination by the BSF.⁸⁶

A series of such operations included 3 to 4 special flights from *Hindon* to *Agartala*, land movement via temporary holding facilities, biometrics and seizure of any Indian identificatory document before expulsion, between the coordinated effort of the Delhi police, *Foreigners Regional Registration Office* (FRRO) and BSF. These individuals belonged to various communities namely Bangladeshi nationals, Rohingya migrants and visa over stayers, usually associated with syndicates implicated in crafting documents in the investigations under the *Bharatiya Nyaya Sanhita* (BNS) and *Foreigners Act*. Critics pointed to the denial of legal representation and avoidance of due process, while the *Ministry of Home Affairs* instructions issued in late 2024 have further intensified the expulsions, including over 500 through the eastern border in a single month. On May 8, 2025, Bangladesh expressed concerns over violations

85 Arora, note 81.

86 Akshat Trivedi, “121 Bangladeshi Migrants Detained in Delhi, 5 Indians Suspected of Aiding Them.” *India Today*, 23 May 2025, available at: <<https://www.indiatoday.in/india/story/bangladesh-migrants-detained-delhi-police-indian-nationals-suspected-foreigners-regional-registration-office-2729559-2025-05-23>> accessed on 15 November, 2025.

of protocols through forced entries.⁸⁷ Delhi stories are not subject specific, but the larger picture is one of speed and securitization forcing a breach in non-refoulement, with families suffering the impact and possible refoulement.

4.2 Case Study 2: Demolitions and Deportation in Gujarat

Gujarat's deportation operations from April 2025 to July 2025 illustrate the increasing domestic profile of the interior states in the securitisation of immigration enforcement in India, utilising decentralised authority to conduct mass-scale detentions and deportations, which constitute a significant share of national efforts under the post-Pahalgam directives. The state conducted its largest ever round-up on April 26, 2025 when police detained 1,024 suspected to be undocumented nationals from Bangladesh (890 in Ahmedabad and 134 in Surat), after overnight raids carried out simultaneously in the morning by the Crime Branch, a *Special Operations Group* (SOG), *Economic Offences Wing* and local units on areas like "Chandola Lake" on intelligence inputs that forged passports and other verification documents were brought from networks based in *West Bengal*.⁸⁸

Harsh Sanghavi, Minister of State for Home, termed this "historic success" against infiltration and said it was a "final warning" to illegal intruders to surrender before their detection, as he linked undeclared migrants to drug trafficking, human trafficking, and even establishing radical extremist cells. Most of the detainees, including women and children, are primarily migrant labourers in 'textiles' and 'construction'. By late April, screenings of more than 6,500 suspects across the state had confirmed around 450 as illegal, while hundreds were released after

87 Mahender Singh Manral, "770 Illegal Migrants Deported from Delhi to Bangladesh in Last Six Months." *The Indian Express*, 2 June 2025, available at: <<https://indianexpress.com/article/india/detection-of-illegals-intensified-post-pahalgam-terror-attack-in-last-6-months-at-least-770-from-delhi-alone-deported-to-bangladesh-as-part-of-crackdown-10035085/>> accessed on 13 November, 2025.

88 Harshit Das, "Over 1,000 Illegal Bangladeshi Migrants Detained in Surat and Ahmedabad." *India Today*, 26 Apr. 2025, available at: <<https://www.indiatoday.in/india/story/gujarat-ahmedabad-surat-bangladeshi-illegal-migrants-detained-2715461-2025-04-26>> accessed on 14 November, 2025.

verification of Indian citizenship from states such as *Bihar* and *West Bengal*.⁸⁹

Deportations were boringly fast indicating air transfers to *Agartala* in Tripura for BSF push backs, involving around of 300 individuals being deported as a part of coordinated central-state response.⁹⁰ The techniques centred on biometric verification, document seizures and probes under the BNS and the Foreigners Act, however, human rights activists such as, HRW noted the circumvention of judicial procedures to effectuate deportation; the arbitrary targeting of Bengali-speakers for arrests on linguistic grounds and the risk of imminent wrongful removal of several individuals, as the operations extended into the wider projects of national verification drives.⁹¹ Although mainstream reports donot feature direct quotes from detainees, they nevertheless link up to the post-Pahalgam rhetoric portraying migratory streams as potential security threats hence, tightening the state political will to multiply the central policies, which see regional resource allocation pressures growing, accompanied by demolitions in such places as a *Chandola Lake*. This exemplifies how the breadth of local enforcement reaches beyond geography, while simultaneously placing additional burdens of discrimination upon migrant labourers without uniform protections, as due process and humanitarian efforts are still an ongoing discussion.

4.3 Caste Study 3: Rohingya Vulnerabilities

Since 2021, estimates place the Rohingya population in India at 20,000-95,600 scattered across informal settlements as have been repeatedly detained from *Jammu*, *Hyderabad*, *Uttar Pradesh*, *Tripura* and *Delhi*, receiving scarce access to the UNHCR and prolonged detention without formal recognition. By 2025, the Rohingya were swept into wider pushbacks for instance, in UP and Tripura, they were rounded up with

89 Jamuna Shah, “How Gujarat Crackdown on Illegal Bangladeshi Settlers Has a ‘Pahalgam’ Backdrop.” *India Today*, 30 Apr. 2025, available at:<<https://www.indiatoday.in/india-today-insight/story/how-gujarat-crackdown-on-illegal-bangladeshi-settlers-has-a-pahalgam-backdrop-2717482-2025-04-30>>accessed on 14 November, 2025.

90 Singh, note 27.

91 Human Rights Watch, note 83.

Bangladeshis.⁹² Supreme Court in 2021⁹³, upheld sweeping government powers to deport but was critiqued for lacking meaningful engagement with international law. 6th to 9th May, 2025 saw 40 UNHCR verified Rohingya including 13 women and 27 men from Delhi's *Shaheen Bagh* detained and flown to the Andaman Islands and sent to Myanmar via sea route into its *Tanitharyi* region enduring blindfolds under the pretext of biometric verification.⁹⁴ Furthermore deportation of 103 from Assam's *Matia Camp* to Bangladesh was reported in May, 2025.⁹⁵

Notably, in 2025, a few such incidents of “wrongful detention” of those who were wrongly assumed to be immigrants were reported in Rajasthan, where 13 workers from Cooch Behar, West Bengal were detained on May 13 and released after nine days after citizenship verification. Similarly, in Maharashtra, 7 men were detained and deported by BSF. This entailed profiling in the form of ‘deportation raids’, wherein deportees were bunched and taken to the borders in the dark of night were evident in other Indian states like *Uttar Pradesh*, where 90 were detained from *Mathura* and *Bihar* without any magisterial procedure.⁹⁶ Such incidents underlining linguistic profiling, raids, biometric verifications and expedited pushbacks are criticized, yet depicting such groups as challenges to national security and thereby risks further refolement.

4.4 Case Study 4: Northeast Border Operations

The deportation and push-back operations that took place along the north-eastern frontiers of India especially in *Tripura* and *Assam* between 2024 and the end of November 2025 represent an expedient but risky

92 Alanah Vargas, “From Haven to Hostility: India’s Changing Immigration Policy on Rohingya Refugees”, *Jurist News*, 11 June 2025, available at: <<https://www.jurist.org/commentary/2025/06/from-haven-to-hostility-indias-changing-immigration-policy-on-rohingya-refugees/>> accessed on 16 November 2025.

93 *Mohammad Salimullah vs. Union of India*, AIR 2021 SC 1789.

94 Samira Hussain, “India Put Us on the Boat like Captives - Then Threw Us in the Sea”, BBC, 28 Aug. 2025, available at: <<https://www.bbc.com/news/articles/c4g0p0522zeo>> accessed on 16 November 2025.

95 Esha Mitra, ‘How India Secretly Sent Refugees Back to the Land Accused of Committing Genocide against Them.’ *CNN*, 14 Sept. 2025, available at: <<https://www.cnn.com/2025/09/13/world/india-secret-deportations-rohingya-myanmar-intl-hnk-dst>> accessed on 16 November 2025.

96 Arora, note 81.

form of border management. These actions focus on direct expulsions in conditions of increased surveillance regimes and attract significant attention of human-rights observers who fear possible violations of the due process and the international norms. These escalated operations were triggered by political unrest in August, 2024 in Bangladesh, when the exiled former Prime Minister, Ms. *Sheikh Hasina* was removed and radical groups under *Muhammad Yunus* ascended to power. At that time, the Indian authorities defended the restriction of the undocumented migration of Bangladeshi nationals and Rohingya refugees, by mentioning the security considerations, in the wake of infiltration, drug trafficking and extremism.⁹⁷ However, critics like HRW, Amnesty International and the UN argue that this practice endangers to create statelessness, refoulement and discrimination, mainly to the Bengali speaking Muslims and disadvantaged subgroups like women and children.⁹⁸ They stress the necessity of being empathetic to all the affected groups and balancing national sovereignty with humanitarian necessities. The wider implications are poor 'diplomatic relationships' with Bangladesh, 'population imbalances' in the receiving districts and 'complex' socio-economic, political harmony and humanitarian crises.⁹⁹

Tripura shares border with Bangladesh on a "porous boundary", measuring 856 kilometre, with the *Mobile Task Force* established in 1975 being in the centre of directives provided by the Director General of Police, the Union Home Ministry and other state departments aiming the detection, prosecution and deportation. From 2022 to 31st October 2024, law enforcement officers arrested 2815 illegal immigrants of Bangladeshi descent, push backing 1746 across the border, imprisoning detention upon 1069 in temporary centres or shelter homes or releasing

97 Akm Ahsan Ullah, "India-Bangladesh Borders after the July–August 2024 Uprising: A Future Unfolds beyond Our Conventional Knowledge." *Asian Journal of Comparative Politics*, July 2025, <https://doi.org/10.1177/20578911251355725>.

98 Hannah Ellis-Petersen and Shaikh Azizur Rahman, "India Illegally Deporting Muslim Citizens at Gunpoint to Bangladesh, Say Rights Groups." *The Guardian*, 19 June 2025, available at: <<https://www.theguardian.com/global-development/2025/jun/19/india-deporting-indians-muslim-citizens-bangladesh-say-rights-groups-border>> accessed on 16 November, 2025.

99 Agarwala, note 3.

on bail.¹⁰⁰ Between 1st January, 2024 and 28th February 2024, 816 Bangladeshi citizens and 79 Rohingya were detained, with many transmitting to other states in India like *Kerala* or *Karnataka*. In 2024 in general, 738 Bangladeshi nationals and 71 Rohingya were arrested whereas January, 2025 to February 2025 witnessed 78 Bangladeshi nationals and 8 Rohingya detained.¹⁰¹ As of September 2024, 239 Bangladeshi nationals and 18 Rohingya were arrested, while in November, 2024 reporting a total of 623 arrests for the year.¹⁰²

It was on 9th June, 2025 arrest of *Pranajit/Ray*, a 35 year old Bangladeshi citizen of *Sylhet* and an Indian 'tout' was caught in a joint operation by GRP-RPF-BSF, with documents and currency heading towards *Kolkata*. Similarly on 23rd July, 2024 four Bangladeshi males at were apprehended at Agartala station, while on 28th July, 2025, 28 Bangladeshi nationals and 2 Rohingya detained by in BSF-Tripura Police coordinated operations¹⁰³ and on 26th October, 2025, 6 Bangladeshi nationals were detained in Dhalai. The modes of operation included "joint patrols" in riverine and land areas, temporary holding centres with no permanent detention facility or Foreigners Tribunal as in Assam and deportation under the *Passport Act* of 1920 and the *Immigration and Foreigners Act* of 2025, often challenged by lack of sufficient identity proof leading to BGB refusals.¹⁰⁴

100 Dibakar Dutta, "Read How Tripura Is Cracking down on Illegal Immigrants, Deporting Them Back to Bangladesh." *OpIndia*, 3 May 2025, available at: <<https://www.opindia.com/2025/05/bangladeshis-are-caught-in-tripura-arrests-identification-laws-deportation-process-explained/>> accessed on 16 November, 2025.

101 Priyanka Deb Barman, "1045 Foreign Infiltrators Held in Tripura since January 2024: Police." *Hindustan Times*, 8 Mar. 2025, available at: <<https://www.hindustantimes.com/cities/others/1045-foreign-infiltrators-held-in-tripura-since-january-2024-police-101741446474192.html>> accessed on 16 November, 2025.

102 TNN, "623 Bangla Nat'ls, Rohingya Arrested in Tripura so Far This Yr." *The Economic Times*, 11 Nov. 2024, available at: <<https://timesofindia.indiatimes.com/city/agartala/over-600-bangladeshi-nationals-and-rohingya-arrested-in-tripura-this-year/articleshow/115155275.cms>> accessed on 16 November, 2025.

103 Abhishek Deb, "28 Bangladeshi Nationals, 2 Rohingya Arrested in Tripura", *Tripura Chronicle*. 28 July 2024, available at: <<https://tripurachronicle.in/local-news/28-bangladeshi-nationals-2-rohingya-arrested-in-tripura/>> accessed on 16 November, 2025.

104 Shafi Md. Mostofa, *Minorities in Bangladesh Caught within Political Upheaval*. East Asia Forum, 22 Mar. 2025. <https://doi.org/10.59425/eabc.1742637600>.

Large-scale operations accomplished with a nationwide airlift have been part of the push-backs, with Chief Minister *Himanta Biswa Sarma* of Assam reporting over 30,126 illegal migrants deported or pushed-back, most recently under a cabinet approved SOP issued on 9th September 2025 in order to step-up the detection under the *Immigrants (Expulsion from Assam) Act* of 1950. In May, 2025 alone, 330 purported immigrants have been pushed back with HRW recording at least 300 from Assam among hundreds deported national wide. In August, 2025, saw 51 Bangladesh nationals of *Sribhum*i district detained and then deported in 48 hours with families, followed by 39 in September, from the same sector in the early morning.¹⁰⁵ A crucial judgment was delivered by the Supreme Court of India on June 24, 2025, wherein “interim stay of deportation” of *Jaynab Bibi* who is a woman declared a foreigner on February, 2017 by a Foreigners Tribunal in *Nagaon* district, affirmed by the *Gauhati High Court* in February, 2025 was pronounced. The court ordered not take coercive measures until August, 25 and emphasized that, “it puts a heavy burden on authorities to demonstrate suspicions and the admissibility of verified gram panchayat certificates of lineage”.¹⁰⁶ This decision is an attack on opaque Tribunal proceedings, in which *ex-parte* orders are frequently rejected without evidence or due trial.

V. U.S. IMMIGRATION POLICIES UNDER RIGHT-WING ADMINISTRATIONS

The historical development of the U.S. refugee policy shows its strong involvement in the geopolitical strategies, especially throughout the ‘Cold War’ period, when the admissions of refugees had been used as the tools of *soft power* and *ideological warfare*.¹⁰⁷ A National Security Council

105 Biswa Kalyan Purkayastha, “39 Infiltrators Pushed Back to Bangladesh from Sribhum: Assam CM.” *Hindustan Times*, 12 Sept. 2025, available at: <<https://www.hindustantimes.com/cities/others/39-infiltrators-pushed-back-to-bangladesh-from-sribhum-assam-cm-101757684937644.html>> accessed on 17 November, 2025.

106 Krishnadas Rajagopal, “Supreme Court Stays Deportation of Woman from Assam, Directs Government to Not Take Any Coercive Steps.” *The Hindu*, 24 June 2025, available at: <<https://www.thehindu.com/news/national/supreme-court-stays-deportation-of-woman-from-assam-directs-government-to-not-take-any-coercive-steps/article69732947.ece>> accessed on 15 November, 2025.

107 Michael John McBride, *The evolution of US Immigration and Refugee policy: Public opinion, domestic politics and UNHCR*. Centre for Documentation and Research, United Nations High Commissioner for Refugees, 1999.

paper of 1953, directly placed the refugee policy to deter defection within the Soviet and satellite states, which would cause ‘psychological’ damage to communism in addition to giving a more favourable treatment to defectors of the communist regimes, regardless of personal *persecution* allegations.¹⁰⁸ The 1980 Act sought to address this cause, but in the decades since then, there have been swings and roundabouts, about where policies have been subject to executive whims and influence, including recent suspensions in 2025 which have reverted to historical style in politicising the Act, although attracting criticism of undermining its original purpose.

The Refugee Act of 1980 is one of the most significant legislative accomplishments in U.S. law dealing with ‘refugees’ and ‘asylum’, which effectively changed the way the country has historically handled the issue by reconciling national norms with the international standards of the UN and transitioned the national policy towards one that ostensibly relies on humanitarian principles. This Act did not only codify the refugee and adjustment procedures but procedural protection of the asylum seekers followed as well given a wider scope of practises to protect refugees around the world as conventions following the World War II.¹⁰⁹ The definition of a refugee under the *Immigration and Nationality Act* is quite clear under section 101(a)(42) that states, “a *refugee* is an individual who is outside his or her country of origin and who cannot or does not want to come home because of well-founded fear of persecution because of race, religion, nationality and membership in a certain social grouping or political opinion which still remains intact regardless of the changed interpretations”.¹¹⁰ Conversely, an “asylee” satisfies the same requirements but is physically in the U.S. or is requesting entry at a port, which enables defensive or affirmative applications within the system.¹¹¹

108 Michael S. Teitelbaum and Myron Weiner, eds. *Threatened peoples, threatened borders: World migration and US policy*. WW Norton & Company, 1995.

109 Odessa Gonzalez Benson, “Refugee resettlement policy in an era of neoliberalization: A policy discourse analysis of the Refugee Act of 1980.” *Social Service Review* 90.3 (2016): 515-549.

110 Von Sternberg, Mark R., and Eric A. Jones. “Immigration and Nationality Law.” *The International Lawyer* (2008): 679-692.

111 Gorman, note 39.

Although the Act was aimed at depoliticizing the process of admitting refugees by setting an annual cap on the number of refugees, as accessed through the ‘presidential determination’ of 125,000 in FY 2025¹¹², but it has not been spared of administrative manipulations, by which the *security narratives* and *migration surge* are contributing to restrictive policies, as to make the “access to protections” more difficult. Executive actions by the Trump administration as of November, 2025 have permanently suspended the *U.S. Refugee Admissions Programme* (USRAP) as of January 27, 2025 pending 90-day reports on its compliance with national interests, rescinding prior expansions and ending funding to resettlements, but may still admit on case by case basis if deemed beneficial to the nation. This act of suspension or resettlement programme and funds was challenged in February, 2025 and is *sub judice* in the court of the US District Court of Washington.¹¹³

5.1 “Zero Tolerance” and Border Enforcement Strategies

The policy of *Zero Tolerance* and related border management approaches of right-wing regimes in the US over the last several decades have illustrated a strict stance to immigration control, where national security and deterrence over humanitarian considerations, are more likely to be prioritised among the country’s diverse groups. Enacted in 2018 during the first term of Trump administration, this policy mandated the prosecution of all unauthorised border crossers, leading to a systematic separation of over 5,600 migrant children from their parents or guardians. This enforcement action was largely supported among some constituencies while provoking global condemnation for its inhumane nature and long-term psychological consequences on families.¹¹⁴ Moreover, placing children in overcrowded detention centers plagued where abuse, neglect and poor care have been reported in significant

112 U.S. Department of State. *Report to Congress on Proposed Refugee Admissions for Fiscal Year 2025*. 5 Sept. 2024. U.S. Department of State.

113 *Pacito vs. Trump*, 2:25-cv-00255, (W.D. Wash.).

114 Shamim E. Butt-Garcia, “Migrant Family Separations During the Trump Administration”, *The Pardee Atlas Journal of Global Affairs*, available at: <<https://sites.bu.edu/pardeeatlas/research-and-policy/back2school/migrant-family-separations-during-the-trump-administration/>> accessed on 21 Nov. 2025.

numbers, highlighting a historical pattern of family separation as a mechanism of oppression in U.S. migration policy.¹¹⁵

Complementing this enforcement policy, “Title 42” a public health order invoked in the name of mitigating COVID-19 prohibited entry into the U.S. to more than one million asylum seekers and refugees between March, 2020 and May, 2023, allowing rapid expulsion without any asylum procurement and bypassing the legal requirements of the 1980 Refugee Act.¹¹⁶ Upon its expiration, it was replaced with the revived Trump-era *Asylum Transit Rule* a.k.a *CLP* (Circumvention of Lawful Pathways) rule, implanted in May 2023, which deemed migrants ineligible to receive the protection, upon failing to procure appointment through the “CBP One App” or seek asylum protection in transit countries.¹¹⁷ In 2025, plans to renew Title 42 style measures citing health risks like *tuberculosis* to justify summary expulsions under the *Public Health Service Act* and *INA Section 212(f)* potentially overriding protections and facing anticipated legal challenges over due in the court.¹¹⁸

Under the *second* Trump administration in 2025, elements of the ‘Zero Tolerance’ are reinstated, with the supporters alleging the administration of renewed family separations, by purporting to misclassify accompanied minors, coercing parents into self-deportation by threatening indefinite separation and limiting release from custody to relatives with substantiated proof. Since January 2025, over 2350 minors have been detained and transported via contractors, such as *Global Crossing Airlines*, without any due process and as to provide access to

115 Shela Sridhar, *et al.*, “Child Migrants in Family Detention in the US: Addressing Fragmented Care.” *Children*, vol. 11, no. 8, Aug. 2024, p. 944. <https://doi.org/10.3390/children11080944>.

116 Anne G. Beckett, *et al.* “Misusing Public Health as a Pretext to End Asylum — Title 42.” *New England Journal of Medicine*, vol. 386, no. 16, Apr. 2022. <https://doi.org/10.1056/NEJMp2200274>.

117 Kaylee Ramage, *et al.*, “‘When You Leave Your Country, This Is What You’re in for’: Experiences of Structural, Legal, and Gender-Based Violence among Asylum-Seeking Women at the Mexico-U.S. Border.” *BMC Public Health*, vol. 23, no. 1, Sept. 2023, p. 1699. <https://doi.org/10.1186/s12889-023-16538-2>.

118 Camilo Montoya-Galvez Washington, “Trump Officials Prepare Plans to Revive Title 42 Policy to Expel Migrants, Documents Show”, *CBS News*. 23 Feb. 2025, available at: <<https://www.cbsnews.com/news/trump-title-42-migrants-documents/>>accessed on 18 November 2025.

an attorney, violating *Ms. L Settlement* of 2019, who were majorly decedents from *China, Afghanistan and Mongolia*.¹¹⁹ The CLP Rule was reinstated and the Supreme Court in November, 2025 agreed to review the federal powers to stop asylum seekers, amid *Proclamation 10888's* indefinite asylum claims at the southern border.¹²⁰ While, the CBP One App was discontinued on January 20, 2025 and it was renamed "CBP Home", focusing on "self-deportation" incentives, such as payments of \$1000 and free flights.¹²¹ This app reported about 25,000 voluntary returns by early October, 2025 claiming to be a *cost-effective* tool to achieve the reduction of removals voluntarily. However, there are reports of politically motivated quotas that have forced the criminal targets to wider raids in cities where there is a Democratic leadership, posing risks to both the agents and the communities, with some of the operations having an average of 1,200 to 1,500 arrests per day.¹²²

5.2 Enforcement Priorities and Statistics on Deportation

The US deportation crises of 2025 are the product of a combustible mix of politico legal operational catalysts, as all seeped in right-wing nationalist discourses that privilege sovereignty and security while casting unauthorized immigration as an 'invasion', legitimized by active targeting of internal suspect communities.¹²³ At the heart of this is legislative and budgetary expansion, including July, 2025's "One Big

119 Maanvi Singh, "Trump Revives Family Separations amid Drive to Deport Millions: 'A Tactic to Punish.'" *The Guardian*, 2 Oct. 2025. US News. *The Guardian*, available at: <<https://www.theguardian.com/us-news/ng-interactive/2025/oct/02/trump-immigration-family-separations-deportations>>accessed on 17 November 2025.

120 John Fritze, "Supreme Court to Review Rescinded Trump Policy of Turning Away Asylum Seekers at the Border | CNN Politics." *CNN*, 17 Nov. 2025, available at: <<https://www.cnn.com/2025/11/17/politics/supreme-court-trump-asylum-seekers>>accessed on 18 November 2025.

121 Maanvi Singh, "US Rebrands Immigration App to CBP Home with 'Self-Deport' Function." *The Guardian*, 10 Mar. 2025. US News. *The Guardian*, available at: <<https://www.theguardian.com/us-news/2025/mar/10/us-self-deport-app-cbp-home-immigration>> accessed on 18 November 2025.

122 Maria Sacchetti, "ICE Is Told to Boost Arrests and Fill Beds at Detention Centers in Trump's Second Term." *The Washington Post*, 26 Jan. 2025, available at: <www.washingtonpost.com/immigration/2025/01/26/ice-arrests-raids-trump-quota/>accessed on 19 November, 2025.

123 Ryan Scott, "'Freedom Lives Hence, and Banishment Is Here': The Weaponization of Immigration Law to Punish Political Dissidents." *Washington and Lee Journal of Civil Rights and Social Justice*, vol. 31, no. 2, Apr. 2025, p. 391.

Beautiful Bill Act” adding \$45 billion over three years up to the FY 2025, turning detention budgets x3 to fund for 41,000 new detention beds as well as congressional commands shoehorning 41,500 beds each day.¹²⁴ ICE’s enforcement data of May 2025, indicates about 70% of arrests of those with ‘criminal convictions’ or ‘awaiting trial’ as charged with *murder* (752) and *sexual assault* (1693), aligning with the directives to focus on public safety threats. As of September 2025, 71% of the detained amounted 42,755 out of 59,762, having no criminal record, with many charged with minor offense, like “traffic violations”, illustrating misuse of overreach and innocuous nature of power.¹²⁵ These trends are indicative of decreased focus on high-risk populations and increased impact on low threat individuals.

Whereas, policies targeting transnational gangs such as Venezuela’s *Tren de Aragua* designated as a foreign terrorist organization in March, 2025 is an example of “expedited deportations” of alleged members, framing migration as intertwined with terrorism and justifying enhanced scrutiny.¹²⁶ In May, 2025, the U.S. Supreme Court¹²⁷ blocked any effort to invoke the *Alien Enemies Act, 1798* to grant broad power, ruling it inapplicable without formal war, but third-country deportations continued in June, 2025 allowing deportations to countries *Brazil, China* and *Colombia*, with no connexion to the individual with little due process and narrowing their choices.

Family detentions resumed with an average of 358 families a day, pushing the *Flores Settlement* of 1997 to its maximum 24 hour child custody conditions, as overcrowding and poor care have been reported.¹²⁸ Economically, private entities like *GEO Group* and *Core Civic*

124 Juliana Kim, “How Trump’s Tax Cut and Policy Bill Aims to ‘supercharge’ Immigration Enforcement.” *NPR*, 3 July 2025, available at: <<https://www.npr.org/2025/07/03/g-s1-75609/big-beautiful-bill-ice-funding-immigration>> accessed on 18 November, 2025.

125 TRAC Reports. “Quick Facts: Immigration” Syracuse University, 2024.

126 John Otis, “Tren de Aragua — All You Need to Know about the Venezuelan Gang.” *NPR*, 16 Mar. 2025, available at: <<https://www.npr.org/2025/03/16/nx-s1-5329777/tren-de-aragua-all-you-need-to-know-about-the-venezuelan-gang>> accessed on 18 November, 2025.

127 *Trump vs. J.G.G.*, 604 U.S. ____ (2025).

128 Priscilla Alvarez, “‘We Didn’t See the Daylight’: Migrant Families Describe Prolonged Detention in Border Facilities”, *CNN*, 18 June 2025, available at: <<https://www.cnn.com/2025/06/17/politics/migrant-families-children-detention>> accessed on 18 November, 2025.

manage 86% detentions making a profit on the contracts, while compensating detainee labour by \$1 dollar per day, which is practice upheld by law and despite the ongoing litigations regarding minimum wage violation.¹²⁹ The states like *Texas* and *Louisiana* have become the centres of deportation with more than 40,000 transits being processed in the early 2025 with the state benefiting with federal funds with scrutiny over inhabitable conditions and refusal of oversight.¹³⁰ All these factors question the international responsibilities, especially non-refoulement, where the alarms were raised by the UN professionals regarding the resurgence of deportation of third countries and possible returning to harm, which exacerbates the demographic changes and causes pressures on recipient countries driven by American aid.

The unauthorised population was estimated to reach 13.7 million by mid of 2023, growing by 3 million since 2019 due to “economic instability” and “violence” in the country of origin. *Latin American* nationalities are overrepresented in deportations, with 5.5 million (40% share, down from 62% in 2010) of migrants deported in *Mexico* and over 50% of deportations in May 2025 from “Northern Triangle” countries (*El Salvador*, *Guatemala* and *Honduras*). The migration patterns and U.S. accords expanded to *Brazil*, *China*, *Colombia* and almost 60 other for third country placements. This distribution is driven by ‘poverty’, ‘violence’ and ‘climate issues’, with U.S. policies leveraging on aid or sanctions to gain cooperation, though amplifying vulnerabilities in low relief situations.¹³¹

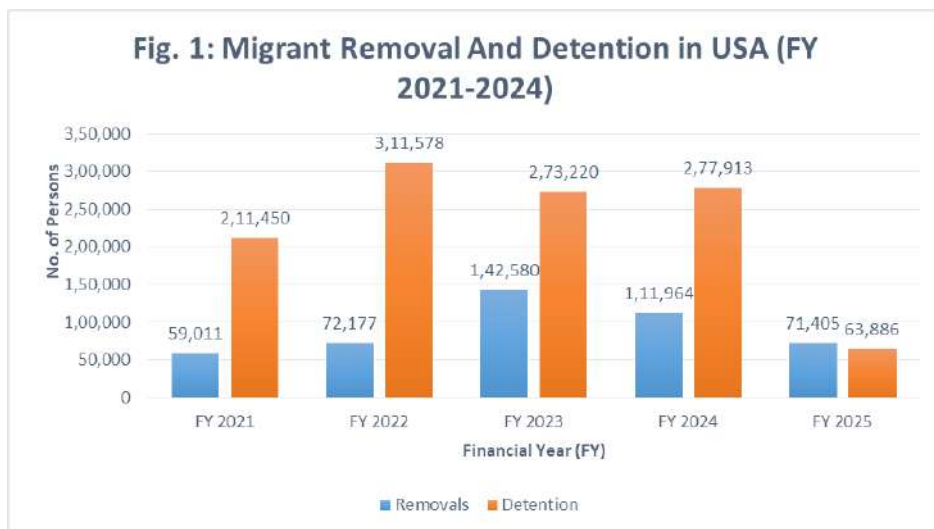
The US deportation crises of 2025 under the second Trump administration exemplify a dramatic intensification of immigration policing peaking with higher-than-ever detention rates, ambitious

129 Daniel Wiessner, “GEO Group Loses Latest Bid to Nix \$23 Mln Verdict Over Immigrant Detainee Pay.” *Reuters*, 13 Aug. 2025, available at: <www.reuters.com/legal/government/geo-group-loses-latest-bid-nix-23-mln-verdict-over-immigrant-detainee-pay-2025-08-13/> accessed on 17 November, 2025.

130 Brent McDonald et al. “How Louisiana Built Trump’s Busiest Deportation Hub.” *The New York Times*, 31 July 2025. U.S. *NYTimes.com*, available at: <<https://www.nytimes.com/interactive/2025/07/31/us/ice-deportation-hub-alexandria-louisiana.html>> accessed on 19 November, 2025.

131 Stephanie Kramer Passel and Jeffrey S. “What the Data Says about Immigrants in the U.S.” *Pew Research Center*, 21 Aug. 2025, available at: <<https://www.pewresearch.org/short-reads/2025/08/21/key-findings-about-us-immigrants/>> accessed on 19 November, 2025.

removal objectives and a tinderbox politics terrain with the ecology of policy, law and humanitarian imperatives. The Trump administration took office in January 2025 promising the largest mass deportation campaign in American history, with more than 10 million unauthorized immigrants as its target.



Source: ICE Enforcement and Removal Operations Statistics

The Fig. 1 depicts the data of immigrants being removed and prosecuted for crimes in USA from Financial Year 2021-2025.¹³² As of October 2025, the DHS reported more than 527,000 formal deportations, with an additional 1.6 million volunteer self-deportations for a total of over 2 million departures, by this speed the administration was on pace for almost 600,000 deportations in its first year, substantially more than previous averages but below the 1 million a year target. Daily deportations have doubled from 600 in January, 2025 to 1,200 since June, 2024 with more than 600 deportation flights in charters as well as military planes, later curtailed after March, 2025 due to financial exigencies.

Detentions have hit record levels, climbing from 39,000 in January, 2025 to 61,000 as of late August, 2025 and on to 66,000 in early November, 2025 the most recorded. The average daily population surpassed 50,200

¹³² “ICE Enforcement and Removal Operations Statistics”, *U.S. Custom and Immigration Enforcement* (2025), available at: <<https://www.ice.gov/statistics>> accessed on 10 September 2025.

in the first time since FY2019 with a detainee stayed an average of 44 days at \$152 per detainee. The number of ICE arrests has nearly doubled since January; the emphasis now is on interior operations, even as border crossings have declined markedly because of tougher policies. As of September 21, 2025, ICE noted a figure of detained 59,762 people and continued to house detainees in private contractor expansions which were at 86% of capacity, state prisons, tent structures on military bases like *Fort Bliss* and *Guantánamo Bay* and then foreign confinement spaces in countries including *El Salvador* and *Eswatini*.¹³³

Humanitarian considerations elevate the crises as there were at least 23 deaths in ICE custody in 2025, compared with 24 over the previous four years combined. Accounts have cited overcrowding, spoiled food and insufficient medical care and abuse as leading to extended detentions that promote giving up asylum claims or voluntary departure. Backlogs in immigration courts played a role, with 470,213 deportation orders finalized through August 2025 equalling to 54.9% of completed cases. Only 23.3% of people ordered removed in August had legal representation and relief such as asylum, was granted in only 2,852 cases that month.

Future trends indicate of self-deportations and expansion of detentions to rise, projecting approximately 600,000 removals in the first year, tempered by legal contests over policies such as the *Alien Enemies Act* invocations and *Title 42* relays.¹³⁴ Economic benefits for the stakeholders are opposed to lapses in the oversight denial of congressional access whereas international tensions are experienced due to human rights concerns in facilities like *El Salvador* prison.¹³⁵ Although, with the increasing judicial review, the controversial balance between sovereignty

133 *Ibid.*

134 John Gramlich, “Key Facts about Title 42, the Pandemic Policy That Has Reshaped Immigration Enforcement at U.S.-Mexico Border.” *Pew Research Center*, 27 Apr. 2022, available at: <<https://www.pewresearch.org/short-reads/2022/04/27/key-facts-about-title-42-the-pandemic-policy-that-has-reshaped-immigration-enforcement-at-u-s-mexico-border/>> accessed on 19 November, 2025.

135 Khalea Robertson and Chase Harrison, “Tracking Trump and Latin America: Migration—Ecuador Enters “Safe Third Country” Agreement”, *AS/COA*. 17 Nov. 2025, available at: <<https://www.as-coa.org/articles/tracking-trump-and-latin-america-migration-ecuador-enters-safe-third-country-agreement>> accessed on 19 November, 2025.

and refuge can change and decrease aggressive expansions, resolving the problem of population and resource overload of those who benefit.

VI. LEGAL CHALLENGES AND HUMANITARIAN CONSEQUENCES

Besides border control, the administrations of the right have actively attempted to make changes in asylum processes and the refugee resettlement programmes, which makes it significantly harder to seek and get protection in the US. Although the anti-immigrant and anti-asylum rhetoric of the Trump administration, with its expressive racism and dehumanising language, was a historical departure, it is, according to the first three years of the Biden Administration, proven that little has been done to build a fair and humane immigration system that protects human rights, dignity and the well-being of all immigrants. These changes in policies have not been without criticism. They have had to face far-reaching legal challenges by civil rights groups, humanitarian groups and even state governments, along with broad protest and international criticism.

Case Study 1: *The Double Punishment of Long Term Legal Residents*¹³⁶

Juan Manuel Montes came to the United States in 1984 as a *child refugee* who had a home in *Cambodia* and later gained legal status of a *lawful permanent resident* (LPR). In 1996, he was found guilty of an aggravated felony of “armed robbery”, to which he received an 11 year sentence in a state prison. On his release in 2007, he had shown a tendency towards rehabilitation and had set up a family including a U.S citizen wife and children. Upon the expiration of his term, instead of granting a *parole* he was detained as an *Immigration and Customs Enforcement* (ICE) prisoner, while serving his sentence all through the *extended period of negotiation* during which the US negotiated with Cambodia to ensure that he is repatriated. Eventually, he was deported to the latter in 2017, to which he had no personal acquaintance since childhood.

Under the two enactments *Illegal Immigration Reform and Immigrant Responsibility Act* of 1996 (IIRIRA) and the *Antiterrorism and Effective Death Penalty Act* (AEDPA), expanding the definition of aggravated

¹³⁶ Rory Carroll, “Deportation of ‘Dreamer’ to Mexico Appears to Be First under Trump.” *The Guardian*, 19 Apr. 2017. US News. *The Guardian*, available at: <<https://www.theguardian.com/us-news/2017/apr/18/trump-first-deportation-dreamer-daca-mexico>> accessed on 19 November, 2025.

felony, implied a mandatory deportation of a larger number of crimes, even of LPRs who had been living in the United States long enough. More importantly, these laws took away a significant level of discretionary power of immigration judges, making it hard to consider mitigating factors like 'rehabilitation', 'family ties' or 'refugee status'. Before 1996, *criminal aliens* had the "right to request the waiver of deportation", allowing judges to consider such factors like, 'duration of residence' in the country, 'education level', 'work record' and 'evidence of good character'. These conciliatory provisions were replaced by the IIRIRA with a hard lined system of cancellations of removal.

This case highlighted the concept of "double punishment", where a person is punished by first giving a criminal sentence and then the life-long exile, repelling with extreme effects of the law of compulsory deportation applied to long term legal residents. This instance raised a critical question upon the determination of suitability of punishment to the crime particularly when any individual is deported to a place unknown.¹³⁷

Case Study 2: Systematic Enforcement and Collateral Damage

The 2008 ICE raid on the "Agri-processors" meatpacking plant in *Postville, Iowa*, is a landmark event in the US immigration enforcement policy, as it highlights the collateral damage of large scale operations. Being one of the largest one-site operations in history, involving 1,000 agents and helicopters, as a result of which 389 workers were arrested. The enforcement issue in this case were systemic in nature and focused on enforcement methodology rather individual allegations, as the government had significantly added new charges to the employees that have increased "civil immigration" infractions to criminal acts like "aggravated identity theft". Such tactic pressured defendants into rapid plea deals and with paucity of time to hire a lawyer or to prepare for their defence. There were strong shortcomings in the legal process as employees were tried in makeshift courts and often pleaded guilty *en masse*, while most being deported after serving a short jail terms.¹³⁸

137 Michael T. Light, "Punishing the 'Others': Citizenship and State Social Control in the United States and Germany." *European Journal of Sociology*, vol. 58, no. 1, Apr. 2017, pp. 33–71. <https://doi.org/10.1017/S0003975617000029>.

138 Bill Ong Hing, "Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime." *Texas A&M Law Review*, vol. 5, no. 2, Jan. 2018, pp. 253–321. <https://doi.org/10.37419/LR.V5.I2.1>.

This raid caused a severe impact on the town of Postville, which destroyed families and crippled the local economy, even leading to dropouts from school and showcasing social disorganization. Following the Postville raid, another strategic shift took place in the enforcement of immigration policy towards a nuance method of ‘silent raid’ via administrative audits of employment documents. This aimed to force the employers to “fire” the illegal immigrant workers and thus promote self-deportation without the pomp and show of physical raids. This practice still leads to the dismissal of thousands of workers being fired and facing economic precarity.¹³⁹

Case Study 3: Central American Caravans and Title 42

In the early months of 2018, large groups of migrants who were mainly families and unaccompanied children escaping violence in Central America crossed the border of US in ‘caravans’ while searching to seek asylum. Despite connoting to right to asylum under the U.S. and abiding the international law, the administration of *President Trump* and later *President Biden*, under the disguise of Title 42, which was a public health order based on the COVID-19 pandemic commanded and permitted the instantaneous deportation of asylum seekers on the edge, robbing them of the legal recourse to making litigations or undergoing the customary asylum measures. These migrants were either refused entry into the ports or deported back within a short time into *Mexico* or their respective place of nationalities without the customary screening as required by the immigration law. As a result, a great humanitarian crisis was created with thousands of vulnerable migrants stranded in dangerous situations at Mexican border cities.¹⁴⁰

Critics argued that, Title 42 did not have a substantive public health justification to be so broadly applicable to asylum seekers and violated domestic and international legal and legal commitments, such as the principle of non-refoulement. The policy was disproportionately applied against Central American asylum seekers, despite some exception like unaccompanied minors being introduced later, massive expulsions

139 Oded Stark and Marcin Jakubek, *Employer Sanctions: A Policy with a Pitfall?* 2024, pp. 205–23. https://doi.org/10.1142/9789811248122_0008.

140 Veronica Øverlid, “Barriers and Collaboration in ‘North America’: The Case of the Migrant Caravans.” *Transnational Activism in North America*, edited by Laura Macdonald et al., Springer Nature Switzerland, 2026, pp. 179–200. https://doi.org/10.1007/978-3-031-95816-8_8.

continued during both administrations. Thus, highlighting the ability of the state to impose effective nullification of historic protections of refugees, making summary immigration of vulnerable groups beyond due process protection.

Case Study 4: *The Due Process and Court Review*

*Wesley Pereira*¹⁴¹, the petitioner, was a Brazilian citizen who was placed in removal proceedings due to his 'overstayed visa' as per IIRIRA. The government issued him with a "Notice of Appear" (NTA), with an intent to initiate process of deportation, but it did not specify the *date* and *time* of his hearing as required by law. This defect was the basis of the legal issue, against which the government claimed its action as valid and sufficient to prevent the accrual of Pereira's "continuous residence". The US Supreme Court voted by 6-3 in favour of Pereira and decided that an NTA was invalid without any mention of the time and place of the hearing, as to stop the 'continuous clock of residence'.

Important to realise here is, that the government should abide by its own laws, as this ruling was a winning mark that acknowledged to overturn a deportation order on technical grounds by federal authorities, thus safeguarding the due process and rights of non-citizens. The full focus on a complete NTA by the Court highlighted the significance of clear procedural norms in achieving the fairness and relief in immigration courts.¹⁴²

VII. CONCLUSION & SUGGESTIONS

The right of the sovereign to expel the non-citizens (*jus excludendi*) is one of the strongest, but controversial, features of the modern nation state. In this comparative analysis of the United States and Indian deportation regimes, the jurisprudential dialectic is deep-rooted, as the prerogative of the state to regulate its borders is always at 'war' with the changing principles of human rights, due process and non-discrimination. Although both countries explain their deportation policy in convergent rhetoric of 'national security' and the 'rule of law', it is the manner in which these two operationalize is vastly different, highlighting a continuum of democratic states in balancing sovereignty

141 *Pereira vs. Sessions*, 585 U.S. ____ (2018).

142 Louisa Edzie, "Pereira v. Sessions and the Future of Deportation Proceedings." *Immigration and Human Rights Law Review* 1.2 (2019): 1.

with constitutional and human rights violations. Thus, in this study, it is deduced that legal architecture and practices of enforcement in the two countries, which have divergent constitutional traditions, tend to yield similar human impact, thus undermining the legitimacy and effectiveness of the respective systems.

The US deportation machine has become defined by a complicated, hyper-technical body of law, which gradually refuses to tolerate discretionary relief in favour of enforced action. This was the fundamental change with the AEDPA and the IIRIRA. These statutes brought in an earthquake of change to the immigration law as they enlarged the category of aggravated felonies and imposing mandatory arrest under its modern day criminal justice system. The outcome of these legislative nuances is the phenomenon of the “collateral consequences on steroids”. Unlike the codified complexity of the U.S., the deportation regime of India can be characterised by the overarching statutory simplicity that leaves the executive with tremendous power to be executed without much control. The *Foreigners Act, 1946* which was a law of colonial times and defines what a foreigner is loosely, while allowing the government to detain and expel any citizen it considers to be a ‘foreigner’ is the cornerstone of deportation process. The most significant difference and source of deep human rights susceptibility is India not being a signatory to the 1951 Refugee Convention and the 1967 Protocol, while having no national refugee legislation.

In each of these two settings, the underlying logic that ‘aggressive deportation’ is a useful deterrent is legally invalid. Decades of increased enforcement at the Southwest border have not stopped irregular migration in the U.S. and instead pushed migrants towards more dangerous routes to cross the border, resulting in thousands of deaths. Similarly, in India, ‘economic circular migration’ persists despite its rudeness and pushbacks and suggests that enforcement has minimal effects against strong socio-economic forces. Studies on nativist policies propose that the Trumpian politics of the nativist rhetoric has both positive and negative effects on the migration decisions, affecting skilled Chinese and Indian migrants. The creation of the ‘criminal alien’ by the U.S., conceals the fact that most of the deported are long term residents who have committed minor or older offences. The issue of the Muslim infiltration of Bangladesh in India is a mix of migration and terrorism while containing demographic threat as studied in the states

of West Bengal and Assam, justifying a majoritarian politics of the nation and support the majoritarian politically convenient group's narrative.

The *Family*, which is the basic social unit in any community is being violated in the systematic way in both countries through deportations. The development of 'transnational families' has occurred involuntarily in the U.S. with U.S. citizen children being split from their parents. Studies point out that the enforcement of immigration through workplace raids and other programmes like the *Secure Community* is a contributing factor to family breakages, economic instability, poor educational achievement and poor health outcomes amongst U.S. citizens and non-citizens. While, deportation and threat of detention in India disintegrates generations of family lives in this country into an underclass of people who lack legal status and protection.

Thus, the U.S. model, with its mazes and illusory due process and the Indian, with its executive arbitrariness and its constitutional blank slate, are unable to reconcile sovereign authority with the human rights. In US, there is a needs of jurisprudential re-calibration of the entailing laws to reinstate judicial discretion and a feeling that proportionality should be injected back into immigration sanctions. In contrast, India requires enacting a refugee law to codify protective measures and place executive power before the judiciary, as the legitimacy of the legal system of any nation is judged not by its ability to inflict exclusion, but also by its dedication to the deliver justice to every individual in its jurisdiction.

A forward-looking reform requires an organised recalibration of enforcement, legal protections and institutional capacity for India and the US. In the case of India, the first step would be to prioritise the adoption of a comprehensive national refugee and asylum law that would differentiate between refugees, asylum seekers and economic migrants, as a move that has always been advocated by institutional bodies of domestic policy and international rights monitors. Such legislation would do away with its *ad hoc* and highly discretionary enforcement procedure. In parallel, India must pursue 'formalised readmission' and 'repatriation policies and protocols' with *Bangladesh* and *Myanmar*, ensuring establishment of *Independent Refugee Protection Authority* (IRPA) which would process asylum seekers, control detention and public complains through proper channel. Furthermore, with the increased adoption of AI enhanced biometric systems under emerging digital governance frameworks may improve identity verification

requiring stringent bias, data processing rules and external review to prevent discriminatory impacts. Lastly, citizenship verification mechanism like NRC or SIR, should be restructured to include legal aid guarantees, anti-statelessness safeguards and mandatory review procedure for vulnerable immigrants.

In US, the priority reform shall be the acute expansion of the legal immigration channels along with significant investments in the adjudicatory capacity. Legislative proposals such as the *Dignity Act* (H.R. 4393, 118th Cong. 2025) offers a structure to enhance regional humanitarian cooperation through employment based permits, providing alternative to mitigate irregular flow. In addition to these second-tier reforms would include “crimmigration” reform, by narrowing the ambit to trigger deportation for minor offences and the reinstatement of discretionary balancing, long proposed by the American Bar Association, the Migration Policy Institute and policy critiques of mandatory deportation. However, equally critical is the robust congressional funding to achieve the proposed expansion to 800 or more immigration judges as a necessary step to alleviate chronic adjudicatory delays and restore access to relief. While, administrative tools such as ‘E-Verify’ mandates and voluntary return programs may continue as per due process.

At the multilateral level, both the nations ought to champion regional burden sharing and international mechanism of regulated migration. India, advocating multilateralism in the global south in UN forums is well placed to convene a South Asia initiative for refugee protection, whereas US can expand safe processing centres and resettlement pledges across American continent. Nonetheless across both jurisdictions, any introduction of AI-governed migration related policies, be it in terms of biometric identity systems, automated risk intake or computerised surveillance of the border, should be complemented by both independent supervision and transparency requirements with effective appeals mechanisms.

REVISITING THE INTERNATIONAL REFUGEE LAW AND GLOBAL REFUGEE CRISIS FROM A THIRD WORLD PERSPECTIVE

KAILASH JEENDER*

NAMRATA GOGOI**

ABSTRACT

Amidst the continuously rising number of refugees all over the world, the restrictive refugee-policies brought in by the Trump Administration since the beginning of the year 2025 have deepened the crisis. President Trump has not only shut the United States borders, but labelled the asylum-seekers as criminals, spies and potential terrorists also. This attitude typically reflects the colonial approach, which has surfaced again prominently. Therefore, by using the Third World Approaches to International Law, the author intends to re-emphasize the impact of colonial outlook on the development of international refugee law. The author seeks to explain how the politics of difference towards refugees is ill-founded; how it tries to justify the entry-restrictions for the Third World refugees, and how it promotes xenophobia. In order to counter the Western politics of burden-shifting, the author plans to discuss how the colonialist and interventionist policies of the West are the major reasons of the Third World refugee crisis. Lastly, the author intends to debunk the myth of Western superiority in this regard, and explain that the Third World has been more open towards hosting refugees and adopting comprehensive regional instruments for refugee protection.

Keywords: *Refugee crisis, refugee law, TWAIL, Third World refugees*

I. INTRODUCTION

The refugee crisis in the twenty-first century has become a huge humanitarian challenge. The increasing number of refugees, fleeing Afghanistan, Syria, Gaza, Ukraine, Myanmar and several other countries over the past few decades, has worsened the crisis. By June 2024, the total number of refugees under the mandate of the United Nations High Commissioner for Refugees (UNHCR) has gone up to 43.7 million.¹ While this challenging situation demands international

* Associate Professor, National Law University and Judicial Academy, Assam.

** Assistant Professor, National Law University and Judicial Academy, Assam.

1 For UNHCR's mandate on refugee protection, see UNHCR, "Who We Protect: Refugees", available at: <<https://www.unhcr.org/about-unhcr/who-we-protect/refugees>> accessed on 5 January 2025.

co-operation, the West has been adopting restrictive policies towards refugees. The Trump Administration's recent policies are a latest example of how casually the humanitarian crisis is dealt with by the powerful Western countries.² There exists a sharp distinction between the way the advanced countries look at the refugee crisis and how the Third World deals with it.

The Third World adopts a compassionate approach to this global problem. Despite being a major source of refugees, the Third World hosts majority of them.³ They do so regardless of their internal tensions on economic, social and political fronts. The regional instruments⁴ adopted by the Third World seek to fill in the gaps left by the Convention relating to the Status of Refugees, 1951, an international instrument negotiated under the influence of the Western nations.⁵

On the other hand, the former colonizers treat the people fleeing the Third World countries as economic migrants (so that the 1951 Convention does not become applicable), call them potential terrorists and gangs, and prevent them from entering into their territories.⁶ The recent suspension of refugee-policy and condemnation of refugees by the United States explain the situation.⁷ This approach of the West ignores their own movement and settlement in South Asia, Africa and America, a few centuries back, for economic and political gains.⁸ Furthermore, the West holds the Third World responsible for generating refugees and points out irregularities in the refugee-protection afforded by the Third World. This outlook hints towards the assumed racial superiority of the West and reminds us of the colonial logic of difference.

2 See, Part III, for further explanation.

3 See, Part V, for further explanation.

4 Convention Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969) 1001 UNTS 45 and The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America (22 November 1984).

5 Convention relating to the Status of Refugees (28 July 1951) 189 UNTS 150.

6 See, Part III, for details.

7 *Ibid.*

8 Almost 50 million people settlers migrated from the West between 1845 to 1924: Widgren, cited in B. S. Chimni, "The Geopolitics of Refugee Studies: A View from the South", *Journal of Refugee Studies*, vol. 11(4) (1998), pp. 350-374 at p. 358.

In order to debunk these narratives, the Third World Approaches to International Law (TWAIL) provide a methodological tool.

TWAIL is a collective of critical, racial, Marxist, feminist and post-colonial approaches.⁹ Its fundamental arguments are colonial origins of international law, hierarchical nature of international law, exclusion of the Third World from the framing and application of international law for a long time, and racist, hegemonic and discriminatory nature of international law.¹⁰ It helps in explaining the impact of colonialism and imperialism on the origin and development of international law. Further, it demonstrates how the discriminatory character of international law contributes to the poor condition of the Third World. It also unveils the hegemonic outlook of the global North. Therefore, TWAIL is intended to use in order to understand the current global refugee crisis and the position of the Third World and the developed countries in this regard. There exists some literature¹¹ covering some of the aspects of refugee crisis from the standpoint of the Third World. However, a relook from the Third World perspective taking into account the recent developments

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- 9 Antony Anghie, "Rethinking International Law: A TWAIL Retrospective", *The European Journal of International Law*, vol. 34(1) (2023), pp. 7-112 at p. 18.
 - 10 Antony Anghie and B. S. Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts", *Chinese Journal of International Law*, vol. 2(1) (2003), pp. 77-103 at pp. 80, 84; Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press, Oxford, 2016), p. 209.
 - 11 For example, Chimni, "The Geopolitics of Refugee Studies: A View from the South", note 8, pp. 350-374; B. S. Chimni, "From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems", *Refugee Survey Quarterly*, vol. 23(3) (2004), pp. 55-73; Lucy Mayblin, "Colonialism, Decolonisation, and the Right to be Human: Britain and the 1951 Geneva Convention on the Status of Refugees", *Journal of Historical Sociology*, vol. 27(3) (2014), pp. 423-441; Jay Ramasubramanyam, "TWAIL, Archives, and Refugee Law", *Journal of Refugee Studies*, vol. 37(4) (2024), pp. 994-1007; B. S. Chimni, "Globalization, Humanitarianism and the Erosion of Refugee Protection", *Journal of Refugee Studies*, vol. 13(3) (2000), pp. 243-263; Srinivas Burra, "The Global Compact on Refugees and India: Reinforcing the Status Quo", in Jessica Field and Srinivas Burra, (eds.), *The Global Compact on Refugees: Indian Perspectives and Experiences* (Academics Working Group & UNHCR India, New Delhi, 2020), pp. 65-74; Vinai Kumar Singh, "'Group Refugee Determination' and 'Durable Solutions': A South Asian View on the Global Compact On Refugees", in Jessica Field and Srinivas Burra, (eds.), *The Global Compact on Refugees: Indian Perspectives and Experiences* (Academics Working Group & UNHCR India, New Delhi, 2020), pp. 131-148.

and the latest data is needed. It is imperative considering the magnitude of the crisis in present times. It must be strongly argued that the West cannot shy away from its responsibility arising out of its own wrongdoings in the Third World.

The paper is divided into six parts. Part I introduces the theme to build a premise for further discussion. Part II sheds light on the colonial origins of international law on refugees and explains how it discriminates between the refugees coming from Europe and those fleeing other parts of the world. Part III, deals with the politics of discrimination conducted with refugees coming from the Third World, and explain how the logic of difference is used to justify entry-restrictions on the refugees intending to enter into the West. With this, the Xenophobic outlook of the West is also underlined. Part IV of the paper tries to explain why an extraordinary majority of refugees originate in the Third World and how the colonialist and interventionist policies are responsible for the exodus. In Part V, in order to debunk the narrow-mindedness of the West and illustrate the lenient approach of the Third World, it is explained with the help of data as to how the Third World is more open and flexible towards welcoming refugees, despite their own internal struggles on several issues. Part VI concludes the paper.

II. COLONIAL ORIGINS OF INTERNATIONAL REFUGEE LAW

The colonial origins of international refugee law are marked by few characteristic features, including the “dynamic of difference”¹² between civilized and uncivilized,¹³ the exclusion of colonies from the negotiating space,¹⁴ the European bias in refugee-protection, projection of European predicament as global crisis and the absence of self-reflection. The 1951 Refugee Convention is just another example of Eurocentric development of international law and reflects a pattern of colonial development of international law. TWAIL scholars have been unearthing these problematic foundations and exposing the pattern in the historical development of international law. In order to demonstrate this, reference

12 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, New York, 2004), p. 37.

13 R. P. Anand, *Sovereign Equality of States in International Law* (Hope India Publications, New Delhi, 2008), pp. 48-49.

14 For instance, the Conventions adopted in the Hague Conference, 1899 and 1907.

can be made to the exercise preparatory to the adoption of the 1951 Refugee Convention.

As a part of the preparatory work for the Convention, the Commission on Human Rights¹⁵ adopted a resolution emphasizing upon the need of an urgent attention of the United Nations to the legal position of stateless persons who do not have protection of any government, and are awaiting the grant of nationality.¹⁶ It also recommended that a study be conducted on the question of persons who await legal protection of a government.¹⁷ Eventually, the Economic and Social Council urged the United Nations Secretary General to undertake a study on the status of stateless persons, the concerned national and international legal framework for their protection and the requirement of adopting an international convention on this issue.¹⁸ The category of “stateless persons” as conceived in these documents referred to the European experience in the first half of the Twentieth century, especially during the Second World War, when thousands of people became stateless in some parts of Europe. The reason behind the sole focus on Europeans and neglect of people fleeing other parts of the world is that colonies did not possess statehood. They were not considered sovereign States under the Westphalian system because they were treated as “uncivilized” as compared to the European standards.¹⁹ They were not the subjects of international law.²⁰ The exclusive focus on European problem of statelessness became apparent from the Report of the Secretary General also as it mainly shared the number of stateless persons produced by or coming to Europe only.²¹ Apparently, there

15 Established by the Economic and Social Council through resolution, E/RES/5(1), 16 February 1946.

16 United Nations, “A Study of Statelessness”, (1949) E/1112; E/1112/Add.1, para I.1, available at: <https://www.refworld.org/legal/leghist/ahcrsp/1949/en/40644> accessed on 15 January 2025. The suggestion was based on the Report of the Working Party on an International Convention on Human Rights. See, Report of the Working Party on an International Convention on Human Rights, UN Doc E/CN.4/56, 11 December 1947, p. 15.

17 United Nations, “A Study of Statelessness”, *note 16*, para I.1.

18 *Ibid.*

19 Anghie, *Imperialism, Sovereignty and the Making of International Law*, *note 12*, pp. 26-27.

20 Anand, *note 13*, p. 10.

21 United Nations, “A Study of Statelessness”, *note 16*, para II.2(1)-(2).

was no reference to the question of nationality or statelessness of colonized people and those fleeing any of the colonies. Moreover, the study of the Secretary General specifically excluded refugees who were not stateless or who were to be granted nationality (citing the examples of Hindus fleeing Pakistan to settle in India or Muslims fleeing India to reside in Pakistan).²² The recommendations made in the Report narrowed down the scope of the refugee-problem, yet they were fundamental to the draft-Convention to be negotiated in the Conference of Plenipotentiaries, 1951.

The negotiating table was dominated by colonizing nations, like the United States, the United Kingdom and France. Colonies, whom the colonizers treated as “uncivilized” and unworthy of any humanitarian consideration were not invited to participate in the Conference.²³ The Western Powers determined and dictated the terms of the Convention. The dominating among them succeeded in adopting a narrow definition²⁴ of refugee. The most problematic part of the definition was the temporal and geographical boundaries drawn in respect of a refugee.²⁵ The criteria were limited only to the events occurring before 1 January 1951 “in Europe” or “in Europe or elsewhere”.²⁶ The similar temporal limits were incorporated in Article 6(B)(ii) of the Statute of UNHCR, 1951 as well. Under the Convention, the expressions “in Europe” or “in Europe or elsewhere” were formulated in “either-or” proposition. Therefore, a State willing to become a party to the treaty has to choose and declare any of the two locations so that such a State may be bound by the treaty-obligations in respect of refugees originating from anyone of the two areas. Thus, the Convention was made to operate retrospectively, prioritize the European²⁷ concerns and

22 *Ibid*, para IV.

23 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-fifth Meeting, UN Doc A/CONF.2/SR.35, 3 December 1951, p. 2.

24 See, Convention relating to the Status of Refugees, *note* 5, Article 1.

25 *Ibid*, Article 1A(2).

26 *Ibid*, Article 1B(1). (Emphasis added)

27 UNHCR, “What is the difference between the 1951 Convention and its 1967 Protocol?”, available at: <https://www.unhcr.org/about-unhcr/overview/1951-refugee-convention> accessed on 18 January 2025.

confine the rest of the world in the expression “elsewhere”.²⁸ It presented the notion of refugee as a European phenomenon²⁹ and excluded colonized people “from the remit of refugee rights”.³⁰ These temporal and geographical limitations were, though, removed under Article 1 of the Protocol Relating to the Status of Refugees (1967), however, the geographical limitation was still applicable to the States who had already made the above declaration under the Convention, opting for “events occurring in Europe”.

The delegates present in the Conference criticized the selectivity in the criteria by describing it as “unfair and lamentably shortsighted” (Chile) and “arbitrarily limited” (Netherlands).³¹ The concerns raised by the newly independent Third World countries were not addressed.³² Notably, thousands of people were living as refugees in colonies when the Convention was being negotiated,³³ however, the Conference overlooked their predicament and took a myopic view of the crisis. The application of the Convention to colonies was left at the mercy and discretion of the colonizers under the Territorial Application Clause which reads as follows: “Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible”.³⁴ This came

28 According to Krause: “The framing reflects the structural and strategic subordination of refugees in regions beyond Europe, and “makes (Western) Europe the centre of the world while the “Rest” is only “elsewhere”.” See, Ulrike Krause, “Colonial Effects on the Founding of the 1951 Refugee Convention”, 30 March 2021, available at: <<https://voelkerrechtsblog.org/colonial-effects-on-the-founding-of-the-1951-refugee-convention/#:~:text=A%20considerable%20body%20of%20research,Conference%20of%20Plenipotentiaries%20in%201951>> accessed on 22 January 2025.

29 Mayblin, *note 11*, p. 434.

30 *Ibid*, p. 428.

31 “Refugee and Stateless Persons”, UN Doc A/C.3/SR.325, 24 November 1950, paras 34, 24, cited in Edwin O. Abuya, Ulrike Krause, Lucy Mayblin, “The Neglected Colonial Legacy of the 1951 Refugee Convention” *International Migration* 59 (2021), pp. p. 266.

32 Ramasubramanyam, *note 11*, pp. 998-999.

33 J. Cels, cited in B. S. Chimni, “The Geopolitics of Refugee Studies: A View from the South”, *note 8*, p. 355.

34 Article 40(1). For the negotiating history on this point, see Mayblin, *note 11*, pp. 433-434.

despite acknowledging in the preamble to the Convention that human beings shall enjoy fundamental rights and freedoms without discrimination. This idealism does not reflect in the international legal commitments. The restricted and exclusionary application of the Convention was not accidental³⁵ but a part of entrenched racial superiority and imperialistic tendencies of the West. The negotiations projected European crisis as a global crisis and once again sought to establish racial hierarchies through an international instrument.

III. POLITICS OF DIFFERENCE, ENTRY-RESTRICTIONS AND DEPORTATIONS

Differences, whether cultural, racial, religious or economic,³⁶ have been a tool with imperial nations that has been used by them to the disadvantage of poor people all over the world and for securing privileges and immunities for their own. The differences have often been employed as a justifying factor for colonial policies and barbarism. Chimni in this regard argues that the “myth of difference” (between European and non-European refugees) which was prevalent in colonial mindset at the time of 1951 Convention took a strategic turn during the Cold War.³⁷ This shift in approach can be elaborated in two ways: one, the new basis of distinction between the Western and non-Western refugees and, two, the objectives to be realized by the new strategy.

The new grounds of difference advanced by the West at that time included the following: only European refugees met the criteria of political persecution; non-Western asylum seekers were economic migrants as contrast to political refugees, and refugees are generated in the Third World because of internal strife which attracts the responsibility of the concerned post-colonial State only.³⁸ These novelties suffered from the colonial prejudices. They were biased in favor of the North and considered only “white, male, anti-communist”³⁹ as a normal

35 Abuya *et al.*, note 31, p. 265.

36 Anghie, *Imperialism, Sovereignty and the Making of International Law*, note 12, p. 37; B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Cambridge University Press, Cambridge, 2017), p. 31.

37 B. S. Chimni, “The Geopolitics of Refugee Studies: A View from the South”, note 8, p. 355.

38 *Ibid*, p. 356.

39 *Ibid*, p. 357.

refugee. The binary of “normal-abnormal” and “insider-outsider”, like any other binary, was employed in order to legitimize the legal status of one group and exclude and dismiss that of the “other”. This normalization and exclusion were meant to justify the entitlement to the international refugee protection regime for a particular section of people. The castigation of Third World refugees as economic migrants not only deprives them of the legal protection but also brands them as opportunists, undeserving, cheaters and greedy. They are projected as those who abuse the hospitality⁴⁰ offered by the North. It not only disentitles them to the refugee protection framework but also justifies the use of harsh language towards them, spreads hatred and gives rise to xenophobia.⁴¹ Recently, the United States President Donald Trump issued an Executive Order in order to prevent entry of “illegal aliens” into the United States describing them as “potential terrorists, foreign spies, members of cartels, gangs, and violent transnational criminal organizations, and other hostile actors with malicious intent”.⁴² Yet another Executive Order issued by him uses a similar language of scorn:

“Many of these aliens unlawfully within the United States present significant threats to national security and public safety, committing vile and heinous acts against innocent Americans. Others are engaged in hostile activities, including espionage, economic espionage, and preparations for terror-related activities. Many have abused the generosity of the American people, and their presence in the United States has cost taxpayers billions of dollars at the Federal, State, and local levels.”⁴³

The arbitrary distinctions also accuse the Third World of political instability and internal disturbances, and render them responsible for the outcomes. While it is true that majority of the Third World States

40 *Ibid.*

41 *Ibid.*

42 The White House, Executive Order, “Securing Our Borders”, 20 January 2025, available at: <<https://www.whitehouse.gov/presidential-actions/2025/01/securing-our-borders/>> accessed on 30 January 2025.

43 The White House, Executive Order, “Protecting the American People against Invasion”, 20 January 2025, available at: <<https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-american-people-against-invasion/>> accessed on 5 February 2025.

struggle while trying to establish and maintain political and economic stability, it is incorrect to solely blame them for the unrest and the consequent predicaments. This accusation ignores the fact that it is the colonial policies, and colonial loot and plunder that brought the misfortunes to those nations. Additionally, interventions in the Third World by the United States and other powerful countries have often worsened the internal conflicts and led to mass displacement. This will be argued with more details in Part 3 of the paper. Thus, these insensitivities are part of the colonial mindset and hegemonic politics. Actually, these statements necessitate introspection and self-reflection by the Western nations in order to realize the real causes of internal conflicts and consequent forced migration of people.

The invocation of the new grounds of difference was meant “to justify institutionalization of non-entry regime” by the West.⁴⁴ The policies restricting the entry of refugees include stricter control on borders and stringent processing of visas. The border control policy includes initiatives, such as preliminary screening,⁴⁵ registration of applicants, assessment of vulnerability,⁴⁶ access to legal consultant,⁴⁷ construction of wall,⁴⁸ and detention.⁴⁹ On the other hand, stringent visa conditions for refugees cover requirement of residence, proof of persecution and

44 B. S. Chimni, “The Geopolitics of Refugee Studies: A View from the South”, *note 8*, p. 356.

45 United Nations, *Human Rights and Screening in Border Security Pocketbook* (United Nations, New York, 2018).

46 International Organization for Migration, “Humanitarian Border Management”, available at: <<https://www.iom.int/humanitarian-border-management#:~:text=The%20primacy%20of%20human%20rights,for%20refugees%20and%20asylum%2Dseekers>> accessed on 15 February 2025.

47 OHCHR, “Recommended Principles and Guidelines on Human Rights at International Borders”, p. 18, available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf> accessed on 15 February 2025.

48 The White House, Executive Order, “Securing Our Borders”, *note 42*.

49 “Promotion and Protection of Human Rights, Including Ways and Means to Promote the Human Rights of Migrants”, Report of the Secretary-General, UN Doc A/69/277, 7 August 2014, p. 6.

medical fitness.⁵⁰ Just to illustrate the complexities, the screening process in the United States for all refugees involved the following layers of checks: “registration, interview, grant of refugee status, referral for settlement, another interview, background check, finger-print screening, review, extensive interview, Homeland Security approval, health check-up, cultural orientation and multi-level security checks”.⁵¹ At the beginning of this year, the Trump Administration declared the following measures in order to stop the entry of “illegal” foreigners into the United States: “establishing a physical wall, deterring and preventing illegal aliens, detaining, removal of illegal entrants, complete operational control of borders and deployment of personnel”.⁵² It has also suspended its Refugee Admission Program⁵³ but with a “racial twist”⁵⁴ as the

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- 50 See, for instance, “Refugee Visa to Australia”, available at: <<https://ferratagroup.com/en/visa-bezhenec-au/#:~:text=The%20Australian%20government%20also%20encourages,the%20right%20for%20additional%20assistance.&text=Persons%20outside%20the%20territory%20of,the%20media%2C%20videos%2C%20cyberbulling>> accessed on 20 February 2025.
- 51 Haeyoun Park and Larry Buchanan, “Refugees Entering the U.S. Already Face a Rigorous Vetting Process”, 29 January 2017, available at: <<https://www.nytimes.com/interactive/2017/01/29/us/refugee-vetting-process.html>> accessed on 24 February 2025.
- 52 The White House, Executive Order, “Securing Our Borders”, *note* 42.
- 53 The White House, Executive Order, “Realigning the United States Refugee Admissions Program”, 20 January 2025, available at: <<https://www.whitehouse.gov/presidential-actions/2025/01/realigning-the-united-states-refugee-admissions-program/>> accessed on 25 February 2025. Subsequently, the order was temporarily stayed by the Federal judge in Seattle: Gary Grumbach and Dareh Gregorian, “Judge blocks Trump order that paused refugee admissions”, 26 February 2025, available at: <<https://www.nbcnews.com/politics/trump-administration/judge-blocks-trump-order-paused-refugee-admissions-rcna193709>> accessed on 1 March 2025. However, recently, the Program has been suspended till further orders: “U.S. Refugee Admissions Program suspended until further notice, Welcome Corps terminated”, 12 May 2025, available at: <<https://welcome.us/explainers/us-refugee-admissions-program-suspended-until-further-notice-welcome-corps-terminated>> accessed on 18 May 2025.
- 54 Bill Frelick, “The Racial Twist in Trump’s Cutoff of Refugee Admissions”, 27 February 2025, available at: <<https://www.hrw.org/news/2025/02/27/racial-twist-trumps-cutoff-refugee-admissions>> accessed on 15 March 2025; The White House, Executive Order, “Addressing Egregious Actions of The Republic of South Africa”, 7 February 2025, available at: <<https://www.whitehouse.gov/presidential-actions/2025/02/addressing-egregious-actions-of-the-republic-of-south-africa/>> accessed 20 March 2025.

suspension was soon subjected to an exception in favor of white Afrikaners. The stringent policy has also affected the Temporary Protected Status of thousands of people. The United States has vacated the Temporary Protected Status for Venezuelans, Nicaraguans, Afghans, Hondurans and Haitians.⁵⁵ The implications of the order are likely to be severe so far as the renewal of Temporary Protected Status of “other qualifying nationals of Cameroon, Somalia, South Sudan, Afghanistan, Myanmar, Nepal, Syria, Yemen, El Salvador, Honduras, Nicaragua and Ukraine”⁵⁶ is concerned. Moreover, after the recent approval by the United States Supreme Court, the Trump Administration is also set to deport foreign nationals to a third country as well. The United Nations human rights experts, however, have raised concerns over neglect of the international obligations and apprehensions of torture in the third country.⁵⁷

Between 2022 and 2024, the United Kingdom also restricted the entry of refugees and adopted a policy to send them to Rwanda for processing their claims. The plan consisted of a legislation and a treaty with Rwanda, however, it was discontinued by the newly elected government.⁵⁸ Thus, by employing the notion of difference, the powerful countries are gradually shifting the responsibility to the countries of origin and shutting their doors for asylum seekers.

IV. THE WEST CAUSES MAJORITY OF REFUGEE CRISIS

The West has industriously tried to project only one-side of the picture that the Third World is the source of refugees because of its inability to

55 Ted Hesson, “Trump to end deportation protections for thousands of Hondurans and Nicaraguans”, 8 July 2025, available at: <<https://www.reuters.com/legal/government/trump-terminate-deportation-protection-thousands-hondurans-nicaraguans-us-2025-07-07/>> accessed on 9 July 2025.

56 Bill Frelick, “Ten Harmful Trump Administration Immigration and Refugee Policies”, 20 February 2025, available at: <<https://www.hrw.org/news/2025/02/20/ten-harmful-trump-administration-immigration-and-refugee-policies>> accessed on 15 March 2025.

57 OHCHR, “UN Experts Alarmed by Resumption of US Deportations to Third Countries, Warn Authorities to Assess Risks of Torture”, 8 July 2025, available at: <<https://www.ohchr.org/en/press-releases/2025/07/un-experts-alarmed-resumption-us-deportations-third-countries-warn>> accessed on 9 July 2025.

58 Peter William Walsh, “Q&A: The UK’s former policy to send asylum seekers to Rwanda”, 25 July 2024, available at: <<https://migrationobservatory.ox.ac.uk/resources/commentaries/qa-the-uks-policy-to-send-asylum-seekers-to-rwanda/>> accessed on 6 April 2025.

maintain political and economic stability and law and order. However, it refrains from engaging with the root causes of the Third World internal conflicts and does not introspect as to how the colonialist and interventionist policies of the powerful countries have contributed to the Third World internal strife. According to the UNHCR, there were 43.7 million refugees as per the UNHCR's⁵⁹ mandate, by the end of June 2024.⁶⁰ A large number of refugees originate predominantly from the Third World countries, such as Afghanistan, Myanmar, Syria, Iran, Sudan, Venezuela, Democratic Republic of Congo, Lebanon and Chile.⁶¹ Out of them, Syria, Venezuela, Afghanistan, South Sudan, and Myanmar were the top five countries generating refugees in 2020.⁶² These countries were ruled as colonies or mandates and oppressed⁶³ by the powerful Western States. The colonial rule in the guise of "civilizing mission"⁶⁴ was actually a period of loot of resources,⁶⁵ divide and rule policy,⁶⁶ economic exploitation,⁶⁷ oppression of people⁶⁸ and political chaos. After the establishment of the United Nations, focus on the right to self-determination⁶⁹ of people living in non-self-governing territories

59 UNHCR, "Who We Protect: Refugees", *note 1*.

60 *Ibid*.

61 UNHCR, *Global Trends: Forced Displacement in 2023* (UNHCR, 2023), p. 18, available at: <<https://www.unhcr.org/global-trends-report-2023>> accessed on

62 Christine Nisbet, Kassandra E. Lestrat and Hassan Vatanparast, "Food Security Interventions among Refugees around the Globe: A Scoping Review", *Nutrients*, 14(3) (2022), pp. 522-566 at p. 522.

63 See, Article 22, Covenant of League of Nations (June 28, 1919) 108 LNTS 188.

64 Anand, *note 13*, p. 51.

65 Edward W. Said, *Culture and Imperialism* (Vintage Books, New York, 1994), p. 89.

66 Matthew Lange, Tay Jeong, Emre Amasyali, "The Colonial Origins of Ethnic Warfare: Re-examining the Impact of Communalizing Colonial Policies in the British and French Empires", *International Journal of Comparative Sociology*, 62(2) (2021), pp. 141-165 at p. 143.

67 Srinivas Burra, "Four Geneva conventions of 1949: A Third World View", in M. J. K. Bhuiyan and B. U. Khan (eds.), *Revisiting the Geneva conventions: 1949-2019*, (Brill/Nijhoff, Leiden, 2020), p. 197.

68 Vasuki Nesiah, "Human Shields/Human Crosshairs: Colonial Legacies and Contemporary Wars", *AJIL Unbound*, vol. 110 (2016), pp. 323-328 at p. 326.

69 Article 1(2), Charter of the United Nations (October 24, 1945) 1 UNTS XVI; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc A/RES/2625 (October 24, 1970).

increased gradually. Post-decolonization, economic growth and political stability were the major challenges for many of the formerly colonies. Some of them, for instance, Pakistan, Congo, Syria and Sudan, witnessed frequent internal tensions and civil wars too⁷⁰ and consequent generation of refugee-population. The roots of the internal conflicts can be traced back to the colonial history.

The colonial policies significantly contributed to the ethnic civil wars in many decolonized nations.⁷¹ The policies “recognized and institutionalized communal divisions among colonized populations which had influential effects on the conflicts”.⁷² It has been argued, for instance, that community-based representation in military, administration and politics solidified communal differences during colonial times in Syria, and contributed to the communal violence post-independence.⁷³ The colonizers dismantled the power structures in several colonies and divided people on the basis of religious, linguistic and cultural differences. Tensions between majority and minority in India and Sri Lanka after decolonization underscore the consequences of discriminatory British policies.⁷⁴ Post-colonial ethnic conflicts in Africa are also a result of the lasting impact of the French and British colonial maneuvers. While the indirect rule of British style led to unranked ethnic stratification, the centralized French system of rule brought in hierarchical ethnic stratification.⁷⁵ It has been observed that the former caused a greater number of violent ethnic conflicts in Africa post-decolonization.⁷⁶

70 Lange *et al.*, note 66, pp. 141-142.

71 *Ibid*, p. 142.

72 *Ibid*.

73 *Ibid*.

74 Imanuel Geiss, “Post - Colonial Conflicts in the Third World”, *Pakistan Horizon*, vol. 44(1) (1991), pp. 45-61 at p. 60.

75 Robert Blanton, T. David Mason and Brian Athow, “Colonial Style and Post-Colonial Ethnic Conflict in Africa”, *Journal of Peace Research*, vol. 38(4) (2001), pp. 473-491 at p. 473.

76 *Ibid*, p. 481; Swati Parashar and Michael Schulz, “Colonial Legacies, Postcolonial “Selfhood” and the (Un)doing of Africa”, *Third World Quarterly*, vol. 42(5) (2021), pp. 867-881 at p. 877. See also, for the impact of British colonial rule: Luke O. Feltz, “Civil War and Globalization: The Effect of Colonialism on Political Globalization”, 5 May 2012, <<https://cupola.gettysburg.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1337&context=celebration>> accessed on 25 April 2025.

Equally ostensible is the notion of (military) humanitarian intervention in the Third World. After the Cold War period, the trend towards aggressive interventions⁷⁷ is growing.⁷⁸ During the last fifty years, Third World States, such as Iraq, Afghanistan, Rwanda, Congo, Somalia and Kosovo have met with humanitarian interventions by the United States and the European Union. Several military interventions have been authorized by the United Nations Security Council also but in a selective fashion.⁷⁹ Armed interventions in these countries have been violent and atrocious to the local inhabitants. Thousands of civilians have lost their lives during these attacks, and millions had to flee their homelands. Use of violence to curb violence often exacerbated the already existing problems.⁸⁰ Imposition of Western notions of democracy, capitalism and development did not suit the failed, messy and grieved nations.⁸¹ Thus, “humanitarian” interventions have enhanced the instability in these States and the number of refugees leaving them.⁸²

For instance, after September 11, 2001 attacks, America launched counter-terrorism military campaign (War on Terror) in Afghanistan in order to eliminate al-Qaeda and uproot the Taliban. In this campaign, more than 243,000 people have been killed including more than 70,000 civilians in both Afghanistan and Pakistan.⁸³ According to a 2023 UNHCR–Report, Afghanistan produced the highest number of refugees

77 Contrary to Article 2(7), Charter of the United Nations (October 24, 1945) 1 UNTS XVI.

78 Shashi Shukla, “Humanitarian Intervention: Power Politics or Global Responsibility”, *India Quarterly*, vol. 57(3) (2001), pp. 79-96 at p. 79.

79 Adam Roberts, “The Road to Hell...: A Critique of Humanitarian Intervention”, *Harvard International Review*, vol. 16(1) (1993), pp. 10-13, 63 at p. 11.

80 Alex Palmer, “Evil by Any Other Name: Humanitarian Intervention for the 21st Century”, *Harvard International Review*, vol. 32(3) (2010), pp. 31-35 at p. 33.

81 *Ibid.*

82 Seung-Whan Choi, “What Determines US Humanitarian Intervention?”, *Conflict Management and Peace Science*, vol. 30(2) (2013), pp. 121-139 at p. 135.

83 Swaraj Parameswaran, “The Impact of the 9/11 Wars on Afghanistan and the Physical Health of its Population”, 18 February 2024, available at: <<https://reliefweb.int/attachments/26190c1d-1b83-4a34-8632-8051301eddbdf/EN.pdf>> accessed on 5 May 2025.

(more than 6.4 million).⁸⁴ The second highest number of refugees are from Syria⁸⁵ who has also been a recipient of intervention. Since 2011, the interventionist steps taken by the United States in Syria include deployment of special forces, airstrikes on Islamic State of Iraq and the Levant, formation of Syrian Democratic Forces and providing it with military support, airstrikes on suspected chemical weapon base, bilateral economic sanctions and recent ban on Syrian refugees.⁸⁶ Thus, the colonial rule and interventions in the Third World by the powerful States have aggravated the problems and suffering of the people, and contributed to the mass exodus. Yet, the Third World is blamed for generating refugees.

V. WHO IS MORE FLEXIBLE AND OPEN TOWARDS REFUGEES?

The West often alleges that the Third World countries produce highest number of refugees because of their failures, and therefore should own the responsibility. Is it because the West has been hosting majority of the refugees fleeing the Third World and, therefore, wants to reduce its burden? According to the UNHCR, 73 per cent of the total refugees were hosted by developing world by the end of 2022.⁸⁷ As per the data of 2023, 75 per cent of the refugees and other people seeking international protection were welcomed by low- and middle-income countries.⁸⁸ This share includes 17 percent of the refugees hosted by low-income countries (including Chad, Democratic Republic of Congo, Sudan, Ethiopia and Uganda) and 28 per cent of the refugee population hosted by lower-middle-income nations (such as, Bangladesh, Iran and Pakistan).⁸⁹ The

84 UNHCR, *Global Trends: Forced Displacement in 2023*, note 61, p. 18; UNHCR, "Afghanistan Refugee Crisis Explained", 20 July 2024, available at: <<https://www.unrefugees.org/news/afghanistan-refugee-crisis-explained/>> accessed 29 April 2025.

85 UNHCR, *Global Trends: Forced Displacement in 2023*, note 61, p. 18.

86 "Timeline: US Intervention in Syria's War Since 2011", 7 October 2019, available at: <<https://www.aljazeera.com/news/2019/10/7/timeline-us-intervention-in-syrias-war-since-2011>> accessed on 10 May 2025.

87 UNHCR, "Classifying Refugee Host Countries by Income Level", available at: <<https://www.unhcr.org/refugee-statistics/insights/explainers/refugee-host-countries-income-level.html>> accessed on 10 May 2025.

88 UNHCR, *Global Trends: Forced Displacement in 2023*, note 61, p. 2.

89 *Ibid*, p. 21.

UNHCR Report also reveals that in 2023 “eighty per cent of the world’s refugee population was hosted by countries that together produced less than 20 per cent of the world’s income”, which mainly comprises of the Third World countries. The statistics thus reveal that Third World has been more open to hosting refugees. However, the West does not acknowledge this fact and, furthermore, points out irregularities in hosting refugees by the Third World States.⁹⁰ India has been a target of such allegations.

India has not ratified the 1951 Refugee Convention; however, its State-practice shows that it is not averse to hosting refugees. India has hosted refugees fleeing the neighboring countries, such as Bangladesh, Myanmar, Afghanistan, Sri Lanka and Tibet. To illustrate, India has hosted thousands of Tibetan refugees starting with establishment of camps without seeking any assistance from the United Nations since 1959.⁹¹ Despite the humanitarian gesture beyond and irrespective of a binding international agreement, the subsequent official exchanges of the European governments and international agencies with India “reveal a great deal of distrust towards Indian officials and also demonstrate that European governments perpetually cast aspersions on the ability of the Indian government to assist refugees”.⁹² Similar reactions were communicated and doubts were raised on India’s ability to host refugees as per international standards during the conflict situation between the East and West Pakistan. During the turmoil, India realized the urgent need to provide shelter to the fleeing masses of East Pakistan,⁹³ rehabilitated them in camps and provided material aid with the help of governmental and other relief agencies. It has been aptly observed that “India’s emphasis was on developing a refugee protection practice as opposed to a superficial ratification of the Convention and Protocol”.⁹⁴ However, the lack of acknowledgment of India’s contribution and the aspersions made on India’s refugee practice by the colonizers make no mention of their own oppressive treatment inflicted on colonized people and the adoption of a narrow refugee

90 Ramasubramanyam, *note 11*, pp. 998-1003.

91 *Ibid*, p. 1000.

92 *Ibid*, p. 1001.

93 Arguably, “the largest movement of refugee population in human history”: Vinai Kumar Singh, *note 11*, p. 137.

94 Ramasubramanyam, *note 11*, p. 1004.

regime in 1951. This fabricated superiority of the West is typical of the rhetorical colonial discourse.

In addition to the compassionate state-practice of hosting refugees, the Third World has adopted regional refugee instruments with wider application and reflecting the lived experiences of the Third World. They sought to fill in the gaps in refugee protection caused by the 1951 Refugee Convention. The Convention adopted by the Organization of African Unity (now African Union) sought to complement the 1951 Refugee Convention at the regional level.⁹⁵ It is applicable to every person,

“who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”⁹⁶

The provision does not prescribe any temporal restrictions.⁹⁷ It specifically addresses the concerns of freedom fighters who had to leave their countries, especially during wars of liberation.⁹⁸ On the other hand, the Refugee Convention 1951 was time-specific and limited to the European experience only. It ignored the plight of people fleeing colonies during foreign occupation and anti-colonial wars. It reflects the colonial mindset that the problems of the West are problems of the whole world, but not vice-versa. The definition of refugee in the African Union Convention has been appreciated as “the Convention’s most significant contribution”.⁹⁹ Additionally, the Convention prohibits refoulement of a person seeking asylum from a member-State without any exception in the following terms:

95 Convention Governing the Specific Aspects of Refugee Problems in Africa, *note 4*, Article VIII (2).

96 *Ibid*, Article I (2).

97 *Ibid*.

98 Tsion Tadesse Abebe, Allehone Abebe and Marina Sharpe, *The 1969 OAU Refugee Convention at 50* (UNHCR, Institute for Security Studies, 2019), p. 4, available at: <<https://www.jstor.org/stable/resrep62802>> accessed 15 May 2025.

99 *Ibid*, p. 5.

“no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened.”¹⁰⁰

However, the 1951 Convention provides for an exception in the interests of security of a country.¹⁰¹ Therefore, it has been rightly pointed out that the African Union Convention “goes much farther than the comparable provision in the 1951 Convention”.¹⁰² The Convention was a response to the narrow-mindedness of the so-called civilized colonizers. Later, it also influenced the Cartagena Declaration on Refugees, Arab Convention on Regulating Status of Refugees in the Arab Countries (though not adopted) and the UNHCR’s mandate.¹⁰³

VI. CONCLUSION

This paper has tried to put forward a Third World perspective to the present global refugee crisis and the international refugee law. It has taken into account the legal developments that took place on international level in respect of refugees, such as the international and regional Conventions, State practice on the question of refugees and the politics around the crisis. The Third World standpoint has shown that the inception of international refugee law suffered from the vice of colonial outlook. The West wants to avoid its responsibility of hosting refugees despite generating a great number of refugees. Therefore, it has constructed the “myth of difference” and closed its doors for refugees. The TWAIL perspective has debunked the argument of the West that the Third World States are responsible for the exodus. It has established how colonialization, imperialism and interventions by the West have led to massive migration from the Third World. The paper has also illustrated that the Third World has been generous towards hosting refugees, regardless of their already existing internal

100 Convention Governing the Specific Aspects of Refugee Problems in Africa, *note 4*, Article II (3).

101 Convention relating to the Status of Refugees, *note 5*, Article 33.

102 George Okoth-Obbo, “Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa”, *Refugee Survey Quarterly*, vol. 20(1) (2001), pp. 79-138 at p. 88.

103 Abebe *et al.*, *note 98*, p. 6.

disturbances and instability. Overall, the paper has tried to put forward the reality of global refugee crisis, the Western outlook and the refugee law, from a Third World perspective.

TREATIES AND OTHER INTERNATIONAL ACTS SERIES 25-117.2

DEFENSE

Atomic Energy

**Agreement between the
UNITED STATES OF AMERICA
and OTHER GOVERNMENTS**

With Annexes and Understanding

Signed at Washington August 5, 2024

Entered into force January 17, 2025



NOTE BY THE DEPARTMENT OF STATE

Pursuant to Public Law 89—497, approved July 8, 1966
(80 Stat. 271; 1 U.S.C. 113)—

“ . . . the Treaties and Other International Acts Series issued under the authority of the Secretary of State shall be competent evidence . . . of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and international agreements other than treaties, as the case may be, therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof.”

AGREEMENT AMONG
THE GOVERNMENT OF THE UNITED STATES OF AMERICA,
THE GOVERNMENT OF AUSTRALIA,
AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND
NORTHERN IRELAND
FOR COOPERATION RELATED TO NAVAL NUCLEAR PROPULSION

The Government of the United States of America ("United States"), the Government of Australia ("Australia"), and the Government of the United Kingdom of Great Britain and Northern Ireland ("United Kingdom") (collectively, "Parties"),

REAFFIRMING their respective obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, done at London, Moscow, and Washington 1 July 1968, and entered into force 5 March 1970 ("NPT");

RECOGNIZING that Australia, as a non-nuclear-weapon State Party to the NPT, has undertaken not to receive the transfer of nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices;

RECOGNIZING that the United States and the United Kingdom, as nuclear-weapon States Party to the NPT, have undertaken not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices;

RECOGNIZING that Australia, in furtherance of its obligations, has entered into the Agreement between Australia and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, done at Vienna 10 July 1974 ("Australia-IAEA Comprehensive Safeguards Agreement"), and the Protocol Additional to the Agreement between Australia and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, done at Vienna 23 September 1997 (collectively, "Australia-IAEA Safeguards Agreements");

FURTHER RECOGNIZING that Australia has announced its intention to negotiate and conclude an Article 14 arrangement with the International Atomic Energy Agency (“IAEA”) pursuant to the Australia-IAEA Comprehensive Safeguards Agreement, related to cooperation under this Agreement;

RECOGNIZING Australia’s obligations under the South Pacific Nuclear Free Zone Treaty, done at Rarotonga 6 August 1985, and entered into force 11 December 1986;

RECALLING the naval nuclear propulsion cooperation between the United States and the United Kingdom under the Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for Cooperation on the Uses of Atomic Energy for Mutual Defense Purposes, done at Washington 3 July 1958, as amended (“U.S.-UK MDA”);

RECALLING their leaders’ 15 September 2021, announcement of an enhanced trilateral security partnership among Australia, the United Kingdom, and the United States called AUKUS, of which the first initiative is a shared ambition to support Australia in acquiring conventionally armed, nuclear-powered submarines for the Royal Australian Navy while setting the highest nonproliferation standard;

RECALLING the Agreement between the Government of the United States of America, the Government of Australia, and the Government of the United Kingdom of Great Britain and Northern Ireland for the Exchange of Naval Nuclear Propulsion Information, done at Canberra 22 November 2021, and entered into force 8 February 2022 (“ENNPIA”);

DESIRING to support the leaders’ announcement on 13 March 2023, regarding their optimal pathway for Australia’s acquisition of conventionally armed, nuclear-powered submarines (“Announcement”);

RECOGNIZING the intention in the Announcement to pursue a phased approach based on mutual commitments from the United States, Australia, and the United Kingdom to support Australia’s development of the infrastructure, technical capabilities, industry, and human capital necessary to produce, maintain, operate, and steward a sovereign fleet of conventionally armed, nuclear-powered submarines;

RECOGNIZING the principles, standards, and quality that have supported the U.S. and UK naval nuclear propulsion programs’ unmatched safety records and that Australia has committed to upholding these same principles and standards to safely steward naval nuclear propulsion technology;

CONSIDERING that the Announcement is to be implemented consistent with the Parties' respective international and domestic obligations and that this Agreement is a necessary step to fulfill those obligations to support the secure communication and exchange of information and the transfer of necessary Material and Equipment;

CONSIDERING that the Parties are participating in international agreements and arrangements pursuant to which they are making substantial and material contributions to their mutual defense and security;

RECOGNIZING that their common defense and security will be advanced by the exchange of information, including Naval Nuclear Propulsion Information, and the transfer of Material and Equipment for conventionally armed, nuclear-powered submarines, in accordance with this Agreement; and

BELIEVING that such exchanges and transfers can be undertaken without unreasonable risk to each Party's common defense and security,

Have agreed as follows:

ARTICLE I **General Provision**

While the United States, the United Kingdom, and Australia are participating in international agreements and arrangements for their mutual defense and security and making substantial and material contributions thereto, each Party may communicate to and exchange with the other Parties information, and the United States and the United Kingdom may transfer Material and Equipment relating to conventionally armed, nuclear-powered submarines to Australia, in accordance with this Agreement, provided that the Originating Party determines that such cooperation will promote and will not constitute an unreasonable risk to its defense and security.

ARTICLE II **Definitions**

For the purposes of this Agreement:

- A. "Atomic Information" means Naval Nuclear Propulsion Information designated as "Restricted Data" by the United States, "ATOMIC" by the United Kingdom, and "SOUTHERN APEX" by Australia.

- B. "Classified Information" means any information, data, services, or any other matter with the security designation of United Kingdom "OFFICIAL-SENSITIVE Naval Nuclear Propulsion Program Information" or higher, United States "Confidential" or higher, and Australia "Protected" or higher applied under the laws, regulations, and policies of the Parties respectively, including Atomic Information and that designated by the United States as National Security Information.
- C. "Controlled Unclassified Information" means information created or possessed by the United States that requires safeguarding or dissemination controls pursuant to and consistent with applicable U.S. law, regulations, and government-wide policies but is not Classified Information.
- D. "National Security Information" means information that has been determined pursuant to U.S. Executive Order Number 13526 or any predecessor or successor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form.
- E. "Naval Nuclear Propulsion Information" or "NNPI" means information concerning the design, arrangement, development, manufacture, testing, operation, administration, training, maintenance, or repair of the Naval Nuclear Propulsion Plants of naval nuclear-powered vessels and prototypes, including the associated shipboard and shore-based nuclear support facilities, and can be Classified Information or Controlled Unclassified Information.
- F. "Equipment" means any instrument, apparatus, or facility, and includes any facility capable of making use of or producing Special Nuclear Material, and component parts and spare parts thereof, and includes Naval Nuclear Propulsion Plants or component parts and spare parts thereof. "Equipment" does not include a nuclear explosive device or component parts thereof.
- G. "Material" means Source Material, Special Nuclear Material, or Byproduct Material, or any other material as mutually decided by the Parties.
- H. "Source Material" means uranium, thorium, or any other material as mutually decided by the Parties.
- I. "Byproduct Material" means any radioactive material (except Special Nuclear Material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing Special Nuclear Material.
- J. "Special Nuclear Material" means plutonium, uranium 233, or uranium enriched in the isotope 235, or any other material as mutually decided by the Parties.

- K. “Naval Nuclear Propulsion Plant” means the Power Unit and such control, primary, auxiliary, steam, and electric systems as may be necessary for propulsion of conventionally armed, nuclear-powered submarines.
- L. “Power Unit” means an apparatus in which a self-supporting fission chain reaction is maintained and controlled for use in naval nuclear propulsion.
- M. “Person” means:
1. any individual or entity subject to the jurisdiction of a Party, including corporations, partnerships, firms, associations, trusts, estates, public or private institutions, groups, government agencies or government corporations, and employees of the foregoing entities; and
 2. any legal successor, representative, agent, or agency of the foregoing entities.
- N. “Originating Party” means the Party that communicated, exchanged, or transferred information, Material, or Equipment, as applicable, pursuant to this Agreement or the ENNPIA, unless the information, Material, or Equipment was first communicated, exchanged, or transferred pursuant to the U.S.-UK MDA. If the information, Material, or Equipment was originally communicated, exchanged, or transferred pursuant to the U.S.-UK MDA, the “Originating Party” means the Party that originally communicated, exchanged, or transferred the information, Material, or Equipment, as applicable, pursuant to that agreement.
- O. “Recipient Party” means the Party that received the communication, exchange, or transfer of information, Material, or Equipment, as applicable, pursuant to this Agreement.
- P. “Article 14 Arrangement” means the arrangement between Australia and the IAEA to be negotiated and concluded pursuant to Article 14 of the Australia-IAEA Comprehensive Safeguards Agreement and provisions of implementing mechanisms to the Article 14 Arrangement or to the Australia-IAEA Safeguards Agreements that relate to the Article 14 Arrangement or activities carried out pursuant to this Agreement.
- Q. “Nuclear Risks” means those risks attributable to the radioactive, toxic, explosive, or other hazardous properties of Material.

ARTICLE III**Communication or Exchange of Information Related to Naval Nuclear Propulsion**

- A. Each Party may communicate to or exchange with a Recipient Party NNPI and other related technical data and technology subject to any of the Parties' export control requirements, as is determined to be necessary for the research, development, or design of Naval Nuclear Propulsion Plants, including their manufacture, operation, maintenance, regulation, and disposal, and may provide support to facilitate such communication or exchange, to the extent and by such means as may be mutually decided.
- B. Subject to terms and conditions acceptable to the Originating Party, each Party may authorize Persons to communicate, exchange, or receive information described in paragraph A of this Article.

ARTICLE IV**Naval Nuclear Propulsion Plants, Related Equipment, and Material**

- A. Subject to terms and conditions acceptable to it, the United States or the United Kingdom may directly, or may authorize Persons to, transfer to Australia or Persons authorized by Australia, the Naval Nuclear Propulsion Plants of conventionally armed, nuclear-powered submarines, including component parts and spare parts thereof, and other related Equipment. Such transfer shall be by sale and subject to terms and conditions that are mutually decided in writing by the applicable Parties.
- B. If any Naval Nuclear Propulsion Plants are to be transferred pursuant to paragraph A of this Article, the United States or the United Kingdom shall transfer to Australia by sale agreed amounts of Special Nuclear Material contained in complete, welded Power Units, and other Material as needed for such Naval Nuclear Propulsion Plants, subject to such terms and conditions as may be mutually decided in writing by the applicable Parties.
- C. If a sale of Special Nuclear Material occurs pursuant to paragraph B of this Article, Australia shall compensate the United States or the United Kingdom, as applicable, for Special Nuclear Material at a price based on the fair market price of comparable enriched uranium at the time of sale. For types of enriched uranium that do not have a commercial market, compensation for sale shall be made at a price to be mutually determined by the United States and the United Kingdom.
- D. Australia shall be responsible for the management, disposition, storage, and disposal of any spent nuclear fuel and radioactive waste resulting from the operation of Naval Nuclear Propulsion Plants transferred pursuant to this Article, including radioactive waste generated through submarine operations, maintenance, decommissioning, and disposal.

E. Australia shall indemnify, subject to paragraph F of this Article, the United States and the United Kingdom against any liability, loss, costs, damage or injury (including third-party claims) arising out of, related to, or resulting from Nuclear Risks connected with the design, manufacture, assembly, transfer, or utilization of any Material or Equipment, including Naval Nuclear Propulsion Plants and component parts and spare parts thereof, transferred or to be transferred pursuant to this Article.

F. The indemnity pursuant to paragraph E of this Article shall not apply:

1. To the extent that the United States or the United Kingdom, as applicable, has received payment from a third party for the same liabilities arising out of, related to, or resulting from Nuclear Risks; or
2. To a conventionally armed, nuclear-powered submarine that has been in service with the U.S. Navy until such time as it is transferred to Australia.

G. The Parties agree that arrangements:

1. Relating to the management of risks associated with the Nuclear Risks to be indemnified pursuant to paragraph E of this Article, including measures to provide appropriate visibility of activities; or
2. Relating to the allocation of other risks that are not Nuclear Risks arising out of or connected with the design, manufacture, assembly, transfer, or utilization of any Material or Equipment, including Naval Nuclear Propulsion Plants, component parts or spare parts thereof, transferred or to be transferred pursuant to this Article,

may be mutually entered into by the applicable Parties on terms and conditions pursuant to paragraph A of this Article or other bilateral or trilateral international agreements or arrangements between the applicable Parties connected with the transfer or prospective transfer of Material or Equipment pursuant to this Article.

H. Australia may make payments of appropriated funds to the other Parties for the purpose of implementing this Agreement.

ARTICLE V

Responsibility for Use of Information, Material, and Equipment

The application or use of any information (including design drawings and specifications), Material, or Equipment communicated, exchanged, or transferred pursuant to this Agreement shall be the responsibility of the Recipient Party, and the other Parties do not provide any

indemnity, do not warrant the accuracy or completeness of such information, and do not warrant the suitability or completeness of such information, Material, or Equipment for any particular use or application.

ARTICLE VI
Conditions and Guarantees

- A. Cooperation under this Agreement shall be carried out by each Party in accordance with that Party's applicable laws and regulations.
- B. All conditions, limitations, and guarantees contained in this Agreement that relate to the communication or exchange of information shall also apply to information that is contained in Material or Equipment transferred pursuant to this Agreement, is contained in Special Nuclear Material used in or produced through the use of any Material or Equipment transferred pursuant to this Agreement, or that results from or is derived from such information, Material, or Equipment.
- C. Information, Material, and Equipment communicated, exchanged, or transferred pursuant to this Agreement shall not be used for any nuclear explosive device, or for research on or development of any nuclear explosive device.
- D. Unless otherwise mutually decided in writing by the Parties, Australia shall use only Special Nuclear Material transferred pursuant to this Agreement for naval nuclear propulsion and shall not use Special Nuclear Material from any other source for naval nuclear propulsion. Australia shall not enrich uranium, produce nuclear fuel, or reprocess spent nuclear fuel for naval nuclear propulsion.
- E. Australia shall not enrich or reprocess Material transferred pursuant to this Agreement or Special Nuclear Material used in or produced through the use of any Material or Equipment transferred pursuant to this Agreement. Australia shall not otherwise alter in form or content Material transferred pursuant to this Agreement without the prior written consent of the United States and the United Kingdom.
- F. Information (including information incorporated in a production or utilization facility or important component part thereof) that is important to the design, construction, fabrication, operation, or maintenance of a uranium enrichment or nuclear fuel reprocessing facility or a facility for the production of heavy water shall not be communicated or exchanged pursuant to this Agreement.
- G. Except as may otherwise be mutually agreed in writing by the Parties, the Recipient Party agrees not to use information, Material, or Equipment communicated, exchanged, or

transferred pursuant to this Agreement other than for purposes provided for in this Agreement.

- H. The United States and the United Kingdom shall have the right to cease further cooperation under this Agreement, including suspension or termination of transfers of Material and Equipment, and to require the return of any Material or Equipment transferred pursuant to this Agreement, and any Special Nuclear Material produced through the use of any Material or Equipment transferred pursuant to this Agreement, if Australia: materially breaches its obligations under the NPT, the Australia-IAEA Safeguards Agreements, or the Article 14 Arrangement; terminates, abrogates, or otherwise withdraws from any of the foregoing agreements or arrangements; or detonates a nuclear weapon or other nuclear explosive device.
- I. Australia shall establish and maintain a system of accounting for, and control of all Material transferred pursuant to, this Agreement and any Special Nuclear Material used in or produced through the use of any Material or Equipment transferred pursuant to this Agreement. The Parties shall consult with each other regarding methods and technology for providing such accounting and control.
- J. No Special Nuclear Material transferred pursuant to this Agreement, produced through the use of any Material transferred pursuant to this Agreement, or recovered from any Material used in any Equipment transferred pursuant to this Agreement shall be stored in any facility that has not been mutually decided in writing in advance by the Parties.
- K. All Australian nuclear-powered submarines shall be conventionally armed.

ARTICLE VII

Cooperation Related to the Application of the Australia-IAEA Safeguards Agreements

- A. Cooperation under this Agreement shall require the application of the Australia-IAEA Safeguards Agreements and, as applicable, the Article 14 Arrangement with respect to all nuclear activities within the territory of Australia, under its jurisdiction or carried out under its control anywhere, in accordance with the provisions of those instruments. Special Nuclear Material and Source Material transferred to Australia pursuant to this Agreement, and Special Nuclear Material used in or produced through the use of Material or Equipment transferred pursuant to this Agreement, shall be subject to the Australia-IAEA Safeguards Agreements and, as applicable, the Article 14 Arrangement.

- B. Australia shall have in place the Article 14 Arrangement, including any necessary implementing mechanisms, prior to the United States or the United Kingdom transferring any Material to Australia pursuant to this Agreement. With respect to the Article 14 Arrangement:
1. Australia shall consult with the United States and the United Kingdom during its negotiations with the IAEA in relation to the Article 14 Arrangement to ensure the proposed Article 14 Arrangement: protects information in accordance with paragraph F of this Article; avoids unduly hampering, delaying, or interfering with the Recipient Party's use of Material and Equipment pursuant to paragraph H of this Article; fulfills the Parties' commitment to the highest nonproliferation standard; and is consistent with the Parties' obligations under this Agreement; and
 2. Prior to Australia concluding the Article 14 Arrangement with the IAEA or any amendment or modification thereto, Australia shall ensure, through consultation with the United States and United Kingdom, that the Parties have a shared view that the proposed Article 14 Arrangement meets the requirements in subparagraph B.1 above.
- C. Australia shall ensure, through consultation with the United States and United Kingdom, that the Parties have a shared view that any proposed amendment to the Australia-IAEA Safeguards Agreements that would relate to Material or Equipment transferred pursuant to this Agreement: protects information in accordance with paragraph F of this Article; avoids unduly hampering, delaying, or interfering with the Recipient Party's use of Material and Equipment pursuant to paragraph H of this Article; fulfills the Parties' commitment to the highest nonproliferation standard; and is consistent with the Parties' obligations under this Agreement.
- D. Australia shall collaborate with the other Parties on measures to be developed with the IAEA to support the IAEA's ability to effectively implement the Australia-IAEA Safeguards Agreements and the Article 14 Arrangement to meet the IAEA's objectives with respect to Material and Equipment transferred pursuant to this Agreement.
- E. If any of the Parties becomes aware of circumstances which demonstrate that the IAEA for any reason is not or will not be applying the Australia-IAEA Safeguards Agreements or the Article 14 Arrangement, the Parties shall immediately enter into arrangements which conform with IAEA principles and procedures and the Australia-IAEA Safeguards Agreements and, as applicable, the Article 14 Arrangement, and which provide assurance equivalent to that intended to be secured by those instruments.

- F. The Parties agree to protect NNPI and related Classified Information from disclosure to the IAEA. The Parties shall ensure that Australia can provide the IAEA with other information and access necessary to fulfill its obligations to the IAEA under the Australia-IAEA Safeguards Agreements and the Article 14 Arrangement. The Parties shall mutually consult and, prior to the provision of information to the IAEA, develop written mechanisms to implement this paragraph.
- G. Upon the request of the United States or the United Kingdom, Australia shall report or permit the IAEA to report to the United States and the United Kingdom on the safeguards status of all inventories of Source Material and Special Nuclear Material transferred pursuant to this Agreement.
- H. This Article shall be implemented in such a manner as to avoid unduly hampering, delaying, or interfering in the Recipient Party's use of Material and Equipment transferred pursuant to this Agreement to the extent such use is consistent with this Agreement.

ARTICLE VIII

Security of Information, Material, and Equipment

- A. The Parties shall accord full security protection to information, Material, and Equipment communicated, exchanged, or transferred pursuant to this Agreement in accordance with this Agreement and in accordance with applicable laws, regulations, and policies of the Parties. In no case shall any Party maintain security standards for protecting information, Material, or Equipment communicated, exchanged, or transferred pursuant to this Agreement that are less restrictive than those set forth in this Agreement.
- B. Any information communicated or exchanged pursuant to this Agreement shall be accorded at least the same level of protection by the Recipient Party as that accorded to such information by the Originating Party. The Parties shall consult with each other regarding the appropriate protection for such information.
- C. Any information, Material, or Equipment communicated, exchanged, or transferred pursuant to this Agreement shall only be made available through channels existing or hereafter established for the communication, exchange, or transfer of such information, Material, or Equipment among the Parties.
- D. The Recipient Party shall maintain adequate physical security with respect to any information, Material, and Equipment communicated, exchanged, or transferred pursuant to this Agreement and with respect to any Special Nuclear Material used in or produced through the use of any Material or Equipment so transferred.

1. Such physical security shall be maintained in accordance with any applicable international agreements and is expected to be maintained consistent with any applicable arrangements.
2. Such physical security shall protect against theft, espionage, sabotage, unauthorized access, or any other hostile activity.
3. The adequacy of physical security measures maintained by the Recipient Party pursuant to this paragraph with respect to Material and Equipment transferred pursuant to this Agreement and with respect to any Special Nuclear Material used in or produced through the use of any Material or Equipment so transferred shall be subject to review and consultation by the Parties periodically and whenever an Originating Party is of the view that revised measures may be required to maintain adequate physical security.
4. Each Party shall identify those agencies or authorities responsible for ensuring that levels of physical security are adequately met.

This paragraph shall be implemented in such a manner as to avoid unduly hampering, delaying, or interfering in the Recipient Party's use of Material and Equipment transferred pursuant to this Agreement to the extent such use is consistent with this Agreement.

ARTICLE IX

Dissemination of Information, Material, and Equipment

- A. The government agencies that may authorize Persons for the purposes of Articles III.B, IV.A, IX.B, and Annex A of this Agreement shall be the United States Department of Energy, United Kingdom Ministry of Defence, the Australian Submarine Agency, or any legal successor of those agencies.
- B. Information, Material, and Equipment communicated, exchanged, or transferred pursuant to this Agreement, and any Special Nuclear Material used in or produced through the use of any Material or Equipment transferred pursuant to this Agreement, shall not be communicated, exchanged, or transferred by the Recipient Party or Persons under its jurisdiction to any unauthorized Persons or, except as provided in paragraph C of this Article, beyond the jurisdiction or control of the Parties. Each Party may stipulate the degree to which any of the information, Material, or Equipment communicated, exchanged, or transferred by it or authorized Persons under its jurisdiction pursuant to this Agreement may be disseminated or distributed; may specify the categories of Persons who may have access to such information; and may impose such other restrictions on the dissemination or distribution of such information as it deems necessary.

- C. Nothing in this Agreement shall be interpreted, or shall operate, as a bar or restriction to consultation or cooperation by any Party with other nations or international organizations. No Party, however, shall communicate, exchange, or transfer information, Material, or Equipment communicated, exchanged, or transferred pursuant to this Agreement or any Special Nuclear Material used in or produced through the use of any Material or Equipment transferred pursuant to this Agreement, to any other nations, foreign or international entities, or individuals who are not nationals of the Parties unless mutually agreed in writing by the Parties. Notwithstanding the foregoing, information communicated or exchanged pursuant to this Agreement may be provided to the IAEA to the extent permitted by, and in accordance with, Article VII.F of this Agreement.
- D. No Party shall communicate, exchange, or transfer information, Material, or Equipment made available by another Party pursuant to this Agreement to an individual who is not its national and who is a national of another Party without the written consent of that other Party.
- E. Nothing in this Agreement shall preclude the communication, exchange, or transfer of information, Material, or Equipment that may be transmitted under other applicable agreements or arrangements between any of the Parties.

ARTICLE X **Information Security Policies**

- A. Information security policies mutually decided in writing shall be maintained with respect to all information, Material, and Equipment communicated, exchanged, or transferred pursuant to this Agreement. The Parties shall consult with each other on these matters.
- B. In the event that any Party updates its national information security terminology referred to in Article II of this Agreement, it shall notify the other Parties in writing and, upon mutual written determination, any relevant definition shall be read using the updated terminology for the purposes of this Agreement.

ARTICLE XI **Intellectual Property**

- A. The Parties shall ensure adequate and effective protection of intellectual property created or furnished under this Agreement and relevant implementing instruments. Rights to such intellectual property shall be addressed as provided in this Article.

- B. With respect to any invention employing or derived from information, Material, or Equipment that has been communicated, exchanged, or transferred by the Originating Party pursuant to this Agreement and made or conceived by the Recipient Party, or any agency or corporation owned or controlled by that Party, or any of their agents or contractors, or any employee of any of the foregoing, after the date of such communication, exchange, or transfer:
1. The Recipient Party shall obtain, by appropriate means, sufficient right, title, and interest in and to such invention, including any patent application or patent thereon, in order to fulfill its obligations under subparagraph B.2;
 2. The Recipient Party shall transfer and assign to the Originating Party all right, title, and interest worldwide in and to the invention, including any patent application or patent thereon, subject to the retention of a royalty-free, non-exclusive, irrevocable, perpetual, worldwide license, with the right to grant sublicenses to authorized Persons, for the governmental purposes of the Recipient Party and for the purposes of the Parties' mutual defense and security; and
 3. The Originating Party shall then grant to the third Party to this Agreement a royalty-free, non-exclusive, irrevocable, perpetual, worldwide license, with the right to grant sublicenses to authorized Persons, for the governmental purposes of that third Party and for purposes of the Parties' mutual defense and security.
- C. Each Party shall, to the extent owned by it, or any agency or corporation owned or controlled by that Party, grant to the other Parties a non-exclusive, irrevocable license, with the right to grant sublicenses to authorized Persons, to use the subject matter covered by any intellectual property rights and incorporated in any Material or Equipment transferred pursuant to this Agreement for use by the other Parties for the purposes provided for in this Agreement.
- D. Neither the United States nor the United Kingdom warrants or represents that any information, Material, or Equipment communicated, exchanged, or transferred pursuant to this Agreement does not infringe any patent owned or controlled by other Persons and assumes no liability or obligation with respect thereto, and Australia agrees to indemnify the United States and the United Kingdom and their employees, for any and all liability arising out of any infringement of any such patent.
- E. With respect to any invention, including any patent application or patent thereon, or license or sublicense thereto covered by paragraph B or C of this Article, each Party hereby waives any and all of its legal claims against the other Parties for compensation, royalty, or award.

- F. The Parties may conclude legally binding instruments for the purpose of allocating intellectual property rights arising under this Agreement other than those allocated in paragraphs B and C of this Article.
- G. Notwithstanding anything to the contrary in this Article or in any instrument concluded pursuant to paragraph F of this Article:
1. No patent application with respect to any invention employing or derived from information, Material, or Equipment communicated, exchanged, or transferred pursuant to this Agreement that includes Classified Information, Controlled Unclassified Information, or technical data or technology subject to export control requirements may be filed:
 - (a) By any Party or any Person in the country of any Party, except in accordance with conditions and procedures mutually decided in writing by the Parties; or
 - (b) In any jurisdiction not a Party to this Agreement, except as may be mutually agreed in writing by the Parties and subject to Articles VI and IX of this Agreement.
 2. Appropriate secrecy or prohibition orders shall be issued for the purpose of giving effect to paragraph G.1 of this Article.
 3. Any intended publication of information employing or derived from information communicated or exchanged pursuant to this Agreement or related to Material or Equipment transferred pursuant to this Agreement shall be subject to the Parties' respective review processes for: Classified Information, Controlled Unclassified Information, and technical data or technology subject to export control requirements. Classified Information, Controlled Unclassified Information, or technical data or technology subject to export control requirements employing or derived from information communicated or exchanged pursuant to this Agreement may not be published except in accordance with the applicable laws and regulations of the Parties and only following such review by the Parties.
- H. As between the United States and the United Kingdom, intellectual property rights related to information, Material, or Equipment originally communicated, exchanged, or transferred between those Parties pursuant to the U.S.-UK MDA shall be allocated and governed by that agreement.

ARTICLE XII
Other Agreements

- A. Upon entry into force, this Agreement supersedes the ENNPJA, which shall terminate at that time, and the cooperation between the Parties being carried out under or envisaged by the ENNPJA shall be carried out in accordance with this Agreement. Notwithstanding Article X.C of the ENNPJA, information originally communicated or exchanged pursuant to the ENNPJA shall be treated in accordance with this Agreement.
- B. Except as provided in paragraph A of this Article, this Agreement does not affect the Parties' rights and obligations under any other agreement in force at the time of entry into force of this Agreement. If any Party identifies an inconsistency between this Agreement and such other agreement, the relevant Parties shall consult upon request.

ARTICLE XIII
Final Provisions

- A. This Agreement shall enter into force for all Parties on the date of the last note in an exchange of diplomatic notes among the Parties providing notification that each Party has completed all domestic requirements for the entry into force of this Agreement. This Agreement shall remain in force until 31 December 2075.
- B. Any Party may, by giving at least one year's written notice to the other Parties, terminate this Agreement.
- C. The Parties shall resolve any disagreements arising in the implementation or interpretation of this Agreement through mutual consultations without recourse to any other dispute settlement mechanisms.
- D. If any Party, at any time following the entry into force of this Agreement, materially breaches or terminates this Agreement, each other Party shall have the right to require the return or destruction of any information, Material, and Equipment that it communicated, exchanged, or transferred pursuant to this Agreement. A Party considering a determination of material breach or a decision to give a written notice to terminate this Agreement is expected to consult with the other Parties prior to finalizing such a determination or decision.
- E. Notwithstanding the termination or expiration of this Agreement, information, Material, or Equipment communicated, exchanged, or transferred pursuant to this Agreement prior to the expiration or effective date of termination shall continue to be treated in accordance with Articles IV.D-H, V, VI.B-E, G-K, VII, VIII.A-B, and D.1, 2, IX.A-D, X,

and XI of this Agreement, as well as Annex A. Additionally, termination of this Agreement shall not affect rights or obligations under Article XI.

- F. Amendments to this Agreement may be made as mutually agreed in writing by the Parties and shall enter into force on the date of the last note in an exchange of diplomatic notes among the Parties providing notification that each Party has completed all domestic requirements for the entry into force of the agreement to amend.
- G. The Parties may enter into instruments or develop other mechanisms to implement this Agreement, including those provided for in Articles IV.A, IV.G, VII.F, and XI.F. For the avoidance of doubt, all such instruments or mechanisms, as well as implementation of this Agreement, shall be consistent with the terms of this Agreement, and this Agreement shall prevail to the extent of any inconsistency.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

DONE at *Washington*, this *5th* day of *August* 2024, in three originals, in the English language.

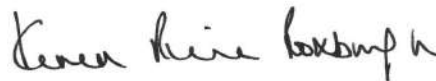
FOR THE GOVERNMENT OF THE
UNITED STATES OF AMERICA:



FOR THE GOVERNMENT OF
AUSTRALIA:



FOR THE GOVERNMENT OF THE
UNITED KINGDOM OF
GREAT BRITAIN AND NORTHERN
IRELAND:



ANNEX A: ANNEX RELATED TO INFORMATION, PHYSICAL, AND PERSONNEL SECURITY

This Annex related to information, physical, and personnel security is agreed among the Parties in connection with the Agreement Among the Government of the United States of America, the Government of Australia, and the Government of the United Kingdom of Great Britain and Northern Ireland for Cooperation Related to Naval Nuclear Propulsion ("Agreement"), of which this Annex is an integral part:

SECTION I – INFORMATION SECURITY: GENERAL PROVISIONS

- A. Naval Nuclear Propulsion Information (NNPI) communicated or exchanged between or among the Parties shall have the appropriate information protection markings. In order to protect the Parties' NNPI, the Recipient Party shall maintain the markings of the Originating Party and may apply a suitable handling instruction identifying a corresponding security classification of the Recipient Party and shall protect the received NNPI according to the requirements set forth in this Agreement, including this Annex.
- B. For purposes of this Annex, a "Responsible Authority" means the agencies identified in Article IX.A of this Agreement.
- C. Consistent with Article VI.B of this Agreement, all conditions, limitations, and guarantees contained in this Annex that relate to the communication or exchange of information shall also apply to information that is contained in Material or Equipment transferred pursuant to this Agreement, is contained in Special Nuclear Material used in or produced through the use of any Material or Equipment transferred pursuant to this Agreement, or that results from or is derived from such information, Material, or Equipment.

SECTION II – CLASSIFIED INFORMATION SECURITY: CONTROL OF NNPI THAT CONSTITUTES CLASSIFIED INFORMATION

- A. Control programs shall be maintained to protect NNPI that constitutes Classified Information, which shall have for their basic purposes:
 - 1. Classification in strict accord with the potential harm associated with compromise of Classified Information;
 - 2. Control of access;
 - 3. Ready accountability commensurate with the degree of potential harm; and
 - 4. Destruction when no longer needed.

- B. Each Party shall classify NNPI strictly in accordance with that Party's applicable security classification policies. To promote uniformity, the following special rules shall be observed:
1. Documents shall be classified according to content and not necessarily according to relationship to other documents;
 2. Classification of a file or group of documents physically connected shall be at least as high as that of the most highly classified document therein;
 3. The overall classification of a document shall be at least as high as the highest classified portion of the document, even though separate pages, paragraphs, sections, or components thereof may bear different classifications;
 4. Documents and physical items shall be conspicuously marked so that current classifications are clearly visible and readily understandable. For NNPI that constitutes Classified Information that is orally communicated, the communicating Party shall clearly state the applicable classification level before it is communicated; and
 5. When a document is reproduced, all original security markings thereon shall also be reproduced or shown on each reproduction.
- C. Each Party shall identify locations where it may use NNPI that constitutes Classified Information, in accordance with its relevant security controls. Security controls for such identified locations shall be at least as restrictive as those authorized by the Originating Party. Except during the periods when such NNPI is in use by authorized individuals, it shall be stored in repositories of approved design and construction, as determined by each Party. NNPI that constitutes Classified Information that is stored or processed in information technology systems shall be protected against unauthorized access, destruction, and illegal modification. The nature and extent of the protection given shall be commensurate with the assessed threat to and vulnerability of the systems involved. Threats, vulnerabilities, and resultant risks shall be assessed by each Party's Responsible Authority. All information technology systems processing NNPI that constitutes Classified Information must meet the requirements of the United States Naval Nuclear Propulsion Program ("U.S. NNPP"). In addition, security controls shall be implemented to ensure that individuals who are not authorized for access to NNPI that constitutes Classified Information, albeit security cleared for other Classified Information, cannot gain access to such information. The nature and quality of such controls shall be endorsed by each Party's Responsible Authority.
- D. Requirements for intra-Party transmission of NNPI that constitutes Classified Information made available by another Party shall be mutually determined in writing by the Parties.

- E. Accountability procedures shall be mutually determined in writing by the Parties to control dissemination of NNPI that constitutes TOP SECRET NNPI.
- F. Documents containing NNPI that constitutes Classified Information, when no longer needed, shall be destroyed completely, to prevent anyone from reconstructing such information. Approved destruction methods shall include any method authorized by the policies of the Party in possession of the NNPI that constitutes Classified Information at the time of destruction for the equivalent classification level of the document.
- G. Storage media and similar items containing NNPI that constitutes Classified Information shall be protected and, when no longer needed, destroyed by physical destruction of components or media in the manner prescribed for documents of the same classification.

**SECTION III – INFORMATION SECURITY: NNPI THAT CONSTITUTES
CONTROLLED UNCLASSIFIED INFORMATION**

- A. Naval Nuclear Propulsion Information that constitutes Controlled Unclassified Information shall be encrypted when it is transmitted by electronic means on an unclassified network, and the method of encryption shall be determined by each Party in accordance with domestic policy. All information technology systems processing NNPI that constitutes Controlled Unclassified Information must meet the requirements of the U.S. NNPP.
- B. Documents containing NNPI that constitutes Controlled Unclassified Information, when no longer needed, shall be destroyed completely to prevent anyone from reconstructing the information. Approved destruction methods shall include any method authorized by the policies of the Party in possession of the NNPI that constitutes Controlled Unclassified Information at the time of destruction.
- C. Storage media and similar items containing NNPI that constitutes Controlled Unclassified Information shall be protected and, when no longer needed, destroyed by physical destruction of components or media. Approved destruction methods shall include any method authorized by the policies of the Party in possession of the NNPI that constitutes Controlled Unclassified Information at the time of destruction.
- D. Each Party shall identify locations where it may use NNPI that constitutes Controlled Unclassified Information, in accordance with its relevant security controls. Security controls for such identified locations shall be at least as restrictive as those authorized by the Originating Party. Except during the periods when such NNPI is in use by authorized individuals, it shall be stored in repositories of approved design and construction, as determined by each Party. NNPI that constitutes Controlled Unclassified Information stored or processed in information technology systems shall be protected against unauthorized access, destruction, and illegal modification. The nature and extent of the protection given shall be commensurate with the assessed threat to and vulnerability of the systems involved.

Threats, vulnerabilities, and resultant risks shall be assessed by each Party's Responsible Authority. In addition, security controls shall be implemented to ensure that individuals who are not authorized for access to NNPI that constitutes Controlled Unclassified Information cannot gain access to such information. The nature and quality of such controls shall be endorsed by each Party's Responsible Authority.

SECTION IV – PERSONNEL SECURITY

- A. Consistent with Article IX.A-B of this Agreement, prior to affording access to NNPI communicated or exchanged pursuant to this Agreement, a determination for each individual to be afforded such access shall be made by a Responsible Authority of the Recipient Party.
- B. Access to NNPI communicated or exchanged pursuant to this Agreement shall be afforded only to those individuals whose official duties require such access. No individual shall be granted access unless it is affirmatively determined by the Responsible Authority of the Party providing access that such access will not endanger the national security of that Party or pose an undue risk to the common defense and security of the Parties.
- C. Access to NNPI that constitutes Classified Information:
 - 1. The Responsible Authority of a Party may only grant an individual access to NNPI that constitutes Classified Information if facts and circumstances indicate that the granting of the access is consistent with national security interests of the Party. Such a determination shall be based on all relevant information. Prior to this determination, an investigation shall be conducted by the Responsible Authority of the Party making the determination, and the information thus developed shall be reviewed and adjudicated using criteria developed by the Responsible Authority of the Party making the determination. The criteria may be revised by each Party. Each Party shall make available to the other Parties the established criteria used in making access determinations and shall notify the other Parties if significant changes occur to the criteria. The Responsible Authority of the Party granting individuals access to NNPI that constitutes Classified Information shall conduct periodic reviews to ensure that each individual with access to NNPI that constitutes Classified Information conforms with the current standards applicable to the individual's employment and shall be re-examined as a matter of priority when new information is received which indicates that continued employment involving access to NNPI that constitutes Classified Information may no longer be consistent with the interests of security.
 - 2. The minimum scope and extent of such an investigation shall be related to the nature and significance of the access to be afforded to the individual in accordance with the criteria developed by the Party conducting the investigation.

3. Within each Party, effective liaison shall be maintained among the national agencies responsible for national security and the agencies responsible for the access determination and program execution to assure prompt notification of information with derogatory implications developed subsequently to the granting of access to NNPI that constitutes Classified Information.
 4. Access to NNPI shall be approved separately from the adjudication of a security clearance for access to other Classified Information conducted under each Party's applicable procedures for security clearances. For the avoidance of doubt, access to NNPI that constitutes Classified Information requires both a security clearance and a separate determination related to access to NNPI pursuant to this Section.
- D. Each Party shall require any non-governmental facility handling NNPI to maintain an appropriate record of the status of individuals authorized to have access to such information at that facility.

SECTION V – PHYSICAL SECURITY

- A. Consistent with Article VIII.D of this Agreement, each Party shall establish programs for physical security of NNPI communicated or exchanged and for Material and Equipment transferred pursuant to this Agreement and for any Special Nuclear Material used in or produced through the use of any Material or Equipment transferred so as to assure:
1. Proper protection during use, in storage, and in transit;
 2. The establishment of security areas, with controlled access, when deemed necessary by reason of the sensitivity, character, volume, and use of the NNPI, Material, or Equipment involved, and the character and location of the building or buildings involved. Perimeter barriers (natural or structural) shall be established when considered necessary to prevent or impede unauthorized access because of the particular sensitivity or revealing characteristics of the NNPI, Material, or Equipment involved;
 3. A system of controlled access which shall embody procedures for authorization by a Party's Responsible Authority, accurate methods of personnel identification, and accountability for identification media, and a means of enforcing limitations on movement and access to security areas; and
 4. The exchange of views regarding security system technologies, and information relating to their application to Material and Equipment transferred pursuant to this Agreement and Special Nuclear Material used in or produced through the use of Material or Equipment so transferred.

- B. Facility Index. Each Party shall maintain appropriate records of its approved non-government facilities where NNPI communicated or exchanged, and Material and Equipment transferred under this Agreement or Special Nuclear Material used in or produced through the use of Material or Equipment so transferred may be used and stored.

SECTION VI - ADDITIONAL REQUIREMENTS

- A. Visits. It is recognized that cooperation pursuant to this Agreement, including this Annex, may require individuals sponsored by one Party to visit another Party. In furtherance of this visit, the Responsible Authority of the sponsoring Party shall furnish (in advance) to the Responsible Authority of the Party to be visited, an assurance in writing that the individual is eligible for access to particular categories of NNPI communicated or exchanged under Article III of this Agreement in the country of the sponsoring Party.
- B. Security of Contracts. Every contract, sub-contract, consultant agreement, or other arrangement entered into by any Party or government agency or government corporation of any Party, and relating to NNPI communicated or exchanged pursuant to this Agreement, shall contain appropriate clauses imposing obligations to abide by the security arrangements in this Agreement, including this Annex.
- C. Loss or Compromise. In the event of loss or possible compromise of NNPI communicated or exchanged pursuant to this Agreement, any individual having knowledge of such loss or possible compromise shall be required to promptly report such loss or compromise to the Responsible Authority of the Party that granted the individual access. The Responsible Authority of the Party in whose jurisdiction the loss or possible compromise occurred shall undertake an immediate investigation into the circumstances surrounding the incident. The Recipient Party shall promptly notify the other Parties of the loss or compromise and the findings of the investigation.
- D. Reports. The Recipient Party shall from time to time submit such reports as are requested by the Originating Party concerning NNPI communicated or exchanged pursuant to this Agreement and the dissemination of NNPI on which particular restrictions have been placed by the Originating Party.
- E. Continuing Review of Security System. The Parties recognize that the effective and prompt implementation of their respective security policies can be materially advanced through reciprocal visits of security personnel. Accordingly, the Parties agree to continue thorough exchanges of views on security policies, standards, and procedures, and to permit their respective security working groups to examine and view at first hand the implementing procedures of the agencies responsible for the administration of the Parties' naval nuclear propulsion programs, for the purpose of achieving an understanding of adequacy and reasonable comparability of the respective systems.

**ANNEX B: ANNEX RELATED TO SPECIAL NUCLEAR MATERIAL AND
EQUIPMENT**

This Annex details Special Nuclear Material and Equipment that may be transferred to Australia by the United States and the United Kingdom pursuant to Article IV of the Agreement Among the Government of the United States of America, the Government of Australia, and the Government of the United Kingdom of Great Britain and Northern Ireland for Cooperation Related to Naval Nuclear Propulsion ("Agreement") of which this Annex is an integral part:

SECTION I – SPECIAL NUCLEAR MATERIAL

With respect to any Special Nuclear Material to be transferred only in complete, welded Power Units pursuant to Article IV.B of this Agreement:

- A. Such Power Units shall contain highly enriched uranium and, only with respect to irradiated fuel, may contain plutonium.
- B. The United States or the United Kingdom shall provide conversion, enrichment, fabrication, and other services related to the Special Nuclear Material to Australia, under such terms and conditions, and at such times, as mutually decided in writing by the applicable Parties. Consistent with Article VI.E-F of this Agreement, such services shall not include the communication or exchange of information related to enrichment or reprocessing to Australia.
- C. The total amount of such Special Nuclear Material that may be transferred shall not exceed the total amount needed for the number of conventionally armed, nuclear-powered submarines to be provided or constructed under the AUKUS trilateral security partnership.

SECTION II – EQUIPMENT

Equipment that may be transferred in accordance with Article IV.A of this Agreement may include:

- A. Equipment needed for the research, development, or design, of Naval Nuclear Propulsion Plants, including their manufacture, operation, maintenance, regulation, and disposal. Such Equipment would further include any Equipment necessary for

the acquisition, specification, inspection, installation, certification, testing, overhaul, refueling, and operating practices and procedures of such Naval Nuclear Propulsion Plants and security and supply support for such Naval Nuclear Propulsion Plants, as well as any special maintenance and service facilities related thereto;

- B. Training and services associated with such Equipment; and
- C. Program support associated with such Equipment in areas such as safety, security, nuclear safeguards, transportation, public information, procurement, logistics, and fiscal management.

**UNDERSTANDING AMONG
THE GOVERNMENT OF THE UNITED STATES OF AMERICA,
THE GOVERNMENT OF AUSTRALIA, AND
THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND
NORTHERN IRELAND**

During the negotiation of the Agreement Among the Government of the United States of America, the Government of Australia, and the Government of the United Kingdom of Great Britain and Northern Ireland for Cooperation Related to Naval Nuclear Propulsion ("Agreement"), the Government of the United States of America ("United States"), the Government of Australia ("Australia"), and the Government of the United Kingdom of Great Britain and Northern Ireland ("United Kingdom") (collectively, "Governments") discussed their intended approach to certain Articles of the Agreement. The Governments desired to memorialize those discussions in this Understanding, which guides implementation, but which does not alter or form an integral part of the Agreement:

1. The Governments intend to jointly cooperate to facilitate Australia's effective integration into, and use by, its naval nuclear propulsion program of any information communicated or exchanged pursuant to Article III of the Agreement.
2. The United States and the United Kingdom should make best efforts to transfer Material and Equipment to Australia, as may be agreed pursuant to Article IV and in accordance with their respective export control requirements.
3. The Governments intend to do all things practicable to obtain the necessary national authorizations and approvals under Article IX.B of the Agreement, including use of export exemptions where available under the Governments' applicable export control laws and export permits, to enable appropriate dissemination and distribution of information, Material, and Equipment within the Governments' jurisdictions.

4. Australia may directly, or may authorize Persons to, transfer and retransfer to the United States or the United Kingdom, in accordance with the Governments' applicable laws, Material and Equipment related to Naval Nuclear Propulsion Plants, including component parts or spare parts thereof, of conventionally armed, nuclear-powered submarines, including for manufacture, operation, maintenance, regulation, and disposal.
5. The Governments reaffirm their commitment to setting the highest nonproliferation standard in connection with their cooperation pursuant to the Agreement, including in relation to Article VII of the Agreement and the Article 14 Arrangement. In this regard, the Governments affirm their objective of enabling the International Atomic Energy Agency to continue to verify that there is no diversion of nuclear material for the production of nuclear weapons or other nuclear explosive devices, no misuse of nuclear facilities, and no undeclared nuclear material or activities in Australia throughout the lifecycle of Australia's conventionally armed, nuclear-powered submarine program.
6. The United States and the United Kingdom should not unreasonably withhold information, Material, or Equipment from Australia, and the Governments are expected to take all reasonable steps to facilitate in a timely manner any communication or exchange of information or transfer of Equipment and Material that may be authorized pursuant to the Agreement. The Governments affirm that cooperation under the Agreement is to be carried out in such a manner as to not adversely affect the ability of the United States and the United Kingdom to meet their respective military requirements and to not degrade their respective naval nuclear propulsion programs.
7. Without limiting or altering the legal rights or obligations provided for in Articles IV.E-F and V of the Agreement, the United States and the United Kingdom intend to apply their respective standards and quality control processes that they would apply for similar Material and Equipment for their own governmental uses to Material and Equipment to be transferred to Australia pursuant to the Agreement.
8. This Understanding becomes operative upon the date of the last signature below or the date on which the Agreement enters into force, whichever is later.

9. This Understanding may be modified as mutually decided in writing by the Governments.

10. This Understanding ceases to be operative on the same date that the Agreement expires or is terminated. A Government may discontinue its participation in this Understanding earlier and, in such case, should provide one year's written notice to the other Governments of its intent to do so.

Signed, in triplicate, at *Washington* on this *5th* day of *August*
2024, in the English language.

FOR THE GOVERNMENT OF THE
UNITED STATES OF AMERICA:



FOR THE GOVERNMENT OF
AUSTRALIA:



FOR THE GOVERNMENT OF THE
UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND:



United Nations

S/2025/271

**Security Council**Distr.: General
15 May 2025

Original: English

Protection of civilians in armed conflict**Report of the Secretary-General****I. Introduction**

1. The present report is submitted pursuant to the request in the statement by the President of the Security Council of 21 September 2018 ([S/PRST/2018/18](#)). It also responds to the Council's requests for reporting on specific themes in resolutions [2286 \(2016\)](#), [2417 \(2018\)](#), [2474 \(2019\)](#), [2475 \(2019\)](#), [2573 \(2021\)](#) and [2730 \(2024\)](#).

2. In 2024, civilians, including women and children, continued to bear the brunt of armed conflict, suffering death, injury, forced displacement, enforced disappearance, torture, sexual violence and other losses. The destruction of civilian infrastructure caused disruptions to electricity, healthcare, water and sanitation services, education and livelihoods, depriving many persons of the essential services needed to survive. The number of people who were forcibly displaced reached new highs. Medical personnel were harmed and facilities were damaged, leaving patients without care. Humanitarian workers and United Nations personnel faced violence, access impediments and shortages of essential supplies. In many countries, including Cameroon, Mozambique, Nigeria and South Sudan, other situations of violence, such as civil unrest, intercommunal clashes over land and water and criminal activity also caused death, injury and destruction. The state of the protection of civilians in 2024 is reviewed in section II of the present report.

3. More than 120 armed conflicts endured and the use of new technologies proliferated while blatant violations and permissive interpretations of international humanitarian law took an immense human toll. Inconsistent standards, assertions of exceptional circumstances and hollow calls for compliance undermined respect for international humanitarian law. Such conduct strikes at the very heart of international humanitarian law, which seeks to limit human suffering precisely when there is armed conflict. It defies the very agreement concluded by States stipulating that the requirements of humanity must set limits on conduct in war, including the use of certain tactics and weapons that cause unacceptable harm. These principles remain true today and must be upheld. In section III of the present report, the dangers posed by new technologies used in warfare and worrisome trends in compliance with and attitudes towards international humanitarian law are examined. The full protection of civilians called for in the previous report of the Secretary-General ([S/2024/385](#)) is also elaborated on in that section.

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S/2025/271

II. Global state of the protection of civilians

A. Widespread harm to civilians and civilian infrastructure

4. In Afghanistan, Colombia, the Democratic Republic of the Congo, Ethiopia, Lebanon, Myanmar, Somalia, South Sudan, the Sudan, the Syrian Arab Republic, Ukraine, the Occupied Palestinian Territory which encompasses the West Bank, East Jerusalem and the Gaza Strip, and elsewhere, civilian death and injury were prominent, including in urban areas where heavy explosive weapons were used and as a result of unexploded ordnance and improvised explosive devices. In the Sudan, frequent artillery shelling and air strikes in densely populated areas, attacks directed against civilians and sexual violence were reported. Civilians were killed and injured from the use of explosive weapons in Lebanon, Myanmar, Sudan, Syrian Arab Republic, Ukraine, Gaza and elsewhere.¹ The United Nations recorded more than 36,000 civilian deaths in 14 armed conflicts in 2024.

5. Landmines and explosive remnants of war continued to endanger civilians and impede their movement and livelihoods, as well as the returns of displaced persons in Afghanistan, the Central African Republic, Colombia, the Democratic Republic of the Congo, Iraq, Lebanon, Libya, Nigeria, Somalia, South Sudan, the Sudan, the Syrian Arab Republic, Ukraine, Yemen, the Occupied Palestinian Territory and elsewhere. In South Sudan, explosive ordnance contaminated over 22 million m² of land. In Nigeria, civilian casualties from explosive ordnance rose by 8 per cent compared with 2023. The use of cluster munitions was reported in Lebanon, Myanmar and Ukraine.

6. An increase in the use of larger bombs with a high explosive yield in densely populated areas contributed to a rise in civilian casualties in several conflicts. In the Pact for the Future, adopted in September 2024, Member States committed themselves to restrict or refrain from, as appropriate, the use of explosive weapons in populated areas when their use may be expected to cause harm to civilians or civilian objects, including essential civilian infrastructure, schools, medical facilities and places of worship, in accordance with international law. This is an important alignment with the 2022 Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas. In October 2024, the International Red Cross and Red Crescent Movement adopted its Movement Action Plan to Prevent and Respond to the Humanitarian Impacts of War in Cities, for the period 2022–2027, reflecting a shared recognition of the human cost of urban warfare and a commitment to improving the protection of civilians.

7. In Afghanistan, the Central African Republic, Colombia, the Democratic Republic of the Congo, Mali, the Niger, the Occupied Palestinian Territory and elsewhere, there were reports of torture, extrajudicial killings, arbitrary arrest and detention, hostage-taking, enforced disappearance, sexual violence and forced displacement. People detained in Myanmar, the Syrian Arab Republic and the Occupied Palestinian Territory were reported to have died from extrajudicial executions, torture or inadequate healthcare. Conditions of detention were described as deplorable – overcrowded and squalid, with poor ventilation, spoiled food and unsafe drinking water leading to waterborne disease. In Gaza, 98 persons taken hostage from Israel in October 2023 were still being held hostage at the end of the year, amid reports of ill-treatment, including deprivation of food, water and sanitation, and reasonable grounds to believe that hostages may be subjected to ongoing sexual violence, as well as psychological abuse and killings in captivity. Thousands of Palestinians were deprived of their liberty, most without charges or

¹ Action on Armed Violence, “Explosive Violence Monitor 2024: Initial Data”, 14 January 2025.

trial, with reports of ill-treatment, torture, sexual violence and inadequate medical care.

8. Armed conflict has also led to enduring trauma. Bereaved survivors faced a higher risk of depression, anxiety and stress disorders, suicidal ideation, substance abuse and disease. Gender discrimination and exclusion has hampered girls' education and women's livelihoods and participation in civic life.

9. In Colombia, the Democratic Republic of the Congo, Ethiopia, Israel, Lebanon, Mali, Mozambique, Myanmar, the Sudan, the Syrian Arab Republic, Ukraine, Yemen, the Occupied Palestinian Territory and elsewhere, there was significant damage to civilian objects and critical civilian infrastructure, such as shelters, health facilities, energy infrastructure, fuel storage sites, water sources and infrastructure, crops, telecommunications towers, schools, universities, homes, markets, food storage facilities, granaries, farmlands and religious sites. This damage disrupted life-saving services, disrupted livelihoods, increased risks of disease outbreaks, deepened humanitarian needs and eroded community resilience. In Gaza, nearly 70 per cent of all structures had been damaged or destroyed by the end of 2024.

10. In Ukraine, there were more than 300 reported attacks on electricity infrastructure, causing nationwide power outages and heating and water supply disruptions, and putting millions of persons at risk during the colder months. In Yemen, strikes on power stations led to electricity outages, while the capacity of vital port facilities was also impaired, jeopardizing the humanitarian and commercial imports on which the country depended. In the north-east of the Syrian Arab Republic, hostilities led to the prolonged shutdown of the Tishrin Dam, depriving over 413,000 persons of electricity and water for weeks. The electricity blackout in Gaza continued throughout 2024.

B. Aggravated suffering

Forced displacement

11. By mid-2024, approximately 122.6 million people worldwide remained forcibly displaced due to conflict, persecution, violence and human rights violations. This was an increase of 5 per cent, or 5.3 million people, compared with the end of 2023.²

12. The highest number of new forcible displacements in the first half of 2024 occurred in Colombia, the Democratic Republic of the Congo, Mozambique, Myanmar, the Sudan, Ukraine and the Occupied Palestinian Territory. The estimated number of people internally displaced within Gaza reached 1.9 million – approximately 90 per cent of the population. Most had been forced to flee multiple times since October 2023, with nowhere safe to go, and lived in cramped, unsanitary shelters, tents and bombed-out buildings, or on the street. Over 1.6 million people were newly displaced within the Sudan, bringing the total number of internally displaced persons to 10.5 million. This was the largest internal displacement ever recorded.³ In Myanmar, close to 1 million people were newly displaced within the country in the first half of 2024. Conflict in the Democratic Republic of the Congo, Lebanon, the Philippines, the Syrian Arab Republic and Ukraine also triggered new displacements.

13. Displaced persons lacked adequate shelter, food, health services, employment, civil documentation and education. They were especially vulnerable to risks of

² Office of the United Nations High Commissioner for Refugees, *Mid-Year Trends 2024* (Geneva, 2024).

³ *Ibid.*

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eviction, gender-based violence and trafficking in persons. In several instances, displaced persons were harmed or killed in displacement sites, including in Lebanon, the Democratic Republic of the Congo and Gaza. Ongoing conflict made displacement more protracted and hindered voluntary and dignified returns, posing an obstacle to durable solutions.

Food insecurity and water scarcity

14. In 2024, more than 280 million people faced high levels of acute food insecurity (Integrated Food Security Phase Classification phase 3 and above) in 59 countries and territories, many of them in armed conflict. Throughout 2024, food insecurity persisted in Cameroon, the Central African Republic, Colombia, the Democratic Republic of the Congo, Mali, Mozambique, Myanmar, the Niger, Nigeria, Somalia, the Sudan, the Syrian Arab Republic, Yemen, the Occupied Palestinian Territory and elsewhere, often alongside water scarcity. The causes of food insecurity ranged from violence in markets to the killing of farmers and vendors, looting of supplies and destruction of infrastructure. In many places, conflict-related hunger was exacerbated by harsh climatic conditions and weather phenomena, such as dry spells and flooding, resulting in the loss of food, seed, animals and assets, disrupting food production and livelihoods and driving up food prices.

15. In the Sudan, more than half the population – about 25 million people – faced acute food insecurity, with 755,300 of them facing catastrophic conditions. Famine was identified in displacement camps in North Darfur and projected to spread.⁴ Hostilities and intercommunal land disputes impaired food production and access to agricultural land and drove massive displacement, affecting small-holder farmers, pastoralists and fishers. The destruction of water treatment plants and distribution networks left millions without reliable access to safe drinking water and exposed civilians to waterborne disease. Attacks damaged the Marawi Dam, disrupting the electricity supply necessary to operate water stations and wells and leaving at least 2.5 million people in Khartoum struggling to gain access to safe water.

16. In Gaza, up to 86 per cent of the population faced crisis or worse levels of food insecurity (Integrated Food Security Phase Classification phase 3 and above).⁵ Heavy vehicle tracks, razing, shelling and other conduct significantly damaged agricultural infrastructure, including wells, farms and warehouses. Food prices soared due to severe supply restrictions, lack of regulatory oversight and looting incidents. In December 2024, water production was about a quarter of pre-October 2023 levels. In Lebanon, fighting disrupted farming activities across 130,000 hectares, or nearly a quarter of cultivable land. The burning of tens of thousands of olive trees, fruit crops and agricultural land, coupled with restrictions preventing farmers from having access to their land, impaired the country's agricultural sector and caused a 40 per cent drop in cereal production. At least 45 water facilities were destroyed and 14 utility staff were killed while maintaining water systems.

17. In the Democratic Republic of the Congo, fighting destroyed farmlands, contaminated them with explosive remnants of war and drove people to abandon them. Combined with the killing and kidnapping of farmers, pastoralists and fishers, the looting of livestock and crops, attacks on markets, land disputes, route closures and the heavy taxation of agricultural goods, this disrupted food availability and drove up prices. In Mali, looting, the destruction of granaries and markets, blocked routes and the contamination of land with explosive remnants of war, all compromised food availability. In Cabo Delgado, Mozambique, violence disrupted agriculture and

⁴ See https://www.ipcinfo.org/fileadmin/user_upload/ipcinfo/docs/IPC_Famine_Review_Committee_Report_Sudan_July2024.pdf.

⁵ See <https://www.ipcinfo.org/ipc-country-analysis/details-map/en/c/1157985/>.

forced farmers to abandon their land, contributing to a decline in food availability and increasing the cost of food. In the north-east of the Syrian Arab Republic, the destruction of agricultural infrastructure, the contamination of land with explosive remnants of war, the destruction of irrigation systems, supply chain disruptions and rising food prices all exacerbated food insecurity, while the destruction of key water stations and limited fuel supplies for water pumping stations aggravated water scarcity. In the Central African Republic, a rise in sexual violence led women and girls to abandon working in the fields, leading to food shortages and rising food prices. In Nigeria, women were more likely than men to face severe hunger and have poor food consumption patterns.

18. Pursuant to its resolution 2417 (2018), the Security Council was alerted to the risk of conflict-induced famine and widespread food insecurity in the Sudan and Gaza. In the Democratic Republic of the Congo, the Nduma défense du Congo-Rénové signed the Geneva Call Deed of Commitment on the Prevention of Starvation and Addressing Conflict-Related Food Insecurity. A coalition of Member States and organizations launched the Global Alliance to Spare Water from Armed Conflicts to strengthen the protection of fresh water and related infrastructure.

Medical care

19. In 2024, violence against medical personnel and facilities caused the destruction of vital health infrastructure and the disruption of medical care, leaving thousands without access to necessary treatment. In 20 conflict-affected countries, more than 870 healthcare workers were killed, more than 770 were injured, more than 100 were kidnapped, and around 300 were threatened or assaulted.⁶ The highest numbers of medical workers killed and injured were in Lebanon, the Occupied Palestinian Territory, followed by Ukraine and Sudan. Kidnappings of medical personnel were most prevalent in the Democratic Republic of Congo, Mali, Myanmar and Nigeria, while Ethiopia reported the largest number of health workers displaced by violence. Attacks on medical personnel were also reported in Mozambique, Niger, the Syrian Arab Republic, Yemen and elsewhere, exacerbating the challenges faced by healthcare workers and patients.

20. Health facilities were frequently struck and at times misused for military purposes, exposing patients and medical staff to harm. This conduct resulted in death and injury and severely weakened healthcare systems, leaving hospitals inoperable and populations without medical services. More than 900 healthcare facilities were damaged or destroyed in the same 20 countries,⁷ with the World Health Organization documenting incidents affecting patients, transport and medical supplies. In Gaza, the World Health Organization reported more than 300 reported attacks that damaged or destroyed health facilities, with 19 of 36 hospitals and 86 healthcare centres out of service in December 2024. Destruction or damage to health facilities was also observed in Ethiopia, Myanmar, the Sudan, the Syrian Arab Republic and Ukraine. In the Central African Republic, mobile clinics and primary healthcare centres came under attack and, in the Democratic Republic of the Congo, the bombing of hospitals resulted in the death of patients, including children. In parts of Myanmar, humanitarian organizations had to suspend medical activities due to hostilities and severe restrictions on their access, leaving communities without healthcare. In Lebanon, dozens of health workers and patients were killed and health facilities damaged. Attacks on healthcare personnel of facilities also affected populations in Burkina Faso, Cameroon, Mozambique and elsewhere. Ambulances and other means of medical transport were damaged in Lebanon, Ukraine, the Occupied Palestinian

⁶ Figures provided by Insecurity Insight (<https://insecurityinsight.org/>).

⁷ Ibid.

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Territory and elsewhere. In Colombia and Ethiopia, parties to conflict used ambulances as a cover, exposing them to attack.

21. The destruction of healthcare facilities and violence also exacerbated medical shortages. In Ethiopia, insecurity and movement restrictions hampered the delivery of medical supplies. In the Democratic Republic of the Congo, hospitals faced severe shortages of medicine. In Mozambique, widespread misinformation on cholera further disrupted critical health services and left people in need without essential healthcare. In a positive development, the Collectif des mouvements pour le changement-Force de défense du peuple, an armed group in the Democratic Republic of the Congo, signed the Geneva Call Deed of Commitment for the Protection of Health Care in Armed Conflict.

The natural environment and climate change

22. Armed conflict continued to degrade the environment in the Central African Republic, Colombia, Iraq, Israel, Lebanon, the Syrian Arab Republic, Yemen, the Occupied Palestinian Territory and elsewhere, with severe impacts on ecosystems, agriculture, local communities and livelihoods. In the Red Sea, off the coast of Yemen, strikes on tankers and cargo vessels caused oil spills over hundreds of kilometres, endangering marine life and the environment. In the Syrian Arab Republic, attacks on industrial sites, oil refineries and fuel storage facilities caused widespread pollution and oil spills, contaminating land, air and water sources, impairing agricultural production and generating health risks.

23. In Gaza, bombing has left millions of tons of debris and hazardous material containing human remains and harmful substances. In addition, hundreds of thousands of tons of solid waste were piled up. In the West Bank, over 25,000 trees were damaged or destroyed, including from cutting, burning, uprooting and the spillage of sewage. In some cases, land was rendered uninhabitable for plants and wildlife.

24. Climate change exacerbated conflict-related vulnerabilities and needs. Recurrent climate shocks, such as floods and droughts, severely affected Cameroon, Chad, Myanmar, Nigeria, Somalia, the Syrian Arab Republic and elsewhere. In Somalia, floods across 13 districts led to the loss of livestock and cropland and damaged infrastructure, such as roads, schools and shelters, exacerbating the effects of ongoing conflict. In Cameroon, the worst floods in four years affected nearly 450,000 people and strained limited resources. In the Syrian Arab Republic, floods and extreme heatwaves damaged shelters and strained water systems, compounding humanitarian needs. Prolonged droughts reduced agricultural yields and exacerbated food and water shortages.

25. The crime of ecocide was incorporated into the updated Environmental Crimes Directive of the European Union and introduced into national legislation in a number of countries, serving as a reminder of the need to establish a crime of ecocide at the international level.

C. Persons at specific risk

Persons with disabilities

26. In Colombia, the Democratic Republic of the Congo, Ethiopia, Myanmar, the Niger, the Sudan, Yemen and elsewhere, persons with disabilities faced barriers to healthcare, water, sanitation, food, education and employment. These barriers included physical obstacles, lack of information or understanding of the conflict and risks, lack of access to specialized care, assistive devices and rehabilitation services,

financial challenges and safety concerns. Women and girls with disabilities faced heightened risks of harassment, gender-based violence and exploitation.

27. In Gaza, the absence of evacuation warnings in accessible formats, coupled with the destruction of communication networks, the vast destruction of housing and civilian infrastructure and the resultant rubble, curtailed the movement of persons with disabilities, including persons with hearing impairments, and exposed them further to death and injury. One assessment showed that 83 per cent of persons with disabilities had lost their assistive devices. Children with disabilities lost assistive devices and struggled without adequate access to healthcare, sanitation and education.

28. In Somalia, over 72 per cent of surveyed persons with disabilities had no access to humanitarian assistance due to a lack of information, physical inaccessibility and the fear of physical or verbal attacks. In Cameroon, about 40 per cent of the persons with disabilities surveyed reported that they did not have access to water sources due to physical barriers, such as long distances, road conditions and a lack of infrastructure that would allow them to pump water independently. In the north-west of the Syrian Arab Republic, displacement camps and transitional shelters remained largely inaccessible to persons with disabilities. Assessments determined that 59 per cent of persons with disabilities reported difficulties with mobility, while 48 per cent faced challenges with self-care.

Children

29. In Afghanistan, Burkina Faso, the Central African Republic, the Democratic Republic of the Congo, Lebanon, Myanmar, Somalia, the Sudan, the Syrian Arab Republic, Ukraine, the Occupied Palestinian Territory and elsewhere, children were killed and injured, notably as a result of the use of explosive weapons in populated areas. The recruitment and use of children in hostilities continued, as did child abductions. In Ukraine, children were separated from their parents and legal guardians, forcibly transferred or deported and left unable to return. Schools were used for military purposes, including in Colombia, Ethiopia and Gaza. Attacks on schools increased, notably in Ethiopia, Myanmar, the Sudan, Ukraine and Gaza, depriving children of education and compounding their vulnerability. Damage to and the destruction of educational facilities in Ukraine rose by 96 per cent. In Gaza, 12,035 schoolchildren and 492 teachers were killed, more than 19,300 students and 2,600 teachers were injured, according to the Ministry of Education, and at least 88 per cent of school buildings were damaged. All schoolchildren in Gaza (more than 650,000 students) lost an academic year, while 65 per cent of children in Lebanon were out of school during the hostilities. One million children were out of school in the north-west of the Syrian Arab Republic. Overall, more than 52 million children in countries affected by conflict were estimated to be out of school. In Iraq, Libya, Myanmar, Somalia, the Syrian Arab Republic and elsewhere, children were detained on the basis of their or their relatives' alleged ties to parties to the conflict and some were reportedly ill-treated.

Victims of sexual violence

30. Conflict-related sexual violence persisted, including in the Central African Republic, Colombia, the Democratic Republic of the Congo, Ethiopia, Mali, Mozambique, Myanmar, Nigeria, Somalia, South Sudan, the Sudan, the Syrian Arab Republic, Ukraine and the Occupied Palestinian Territory. In 2024, the United Nations-verified some 4,500 cases of sexual violence. Women and girls represented 93 per cent of victims. In the Democratic Republic of the Congo, Nigeria and Somalia, the United Nations verified a significant increase in sexual violence against children. Sexual violence in detention centres was reported in Myanmar, the Sudan, Ukraine,

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the Occupied Palestinian Territory and elsewhere. Survivors continued to face significant barriers to healthcare, psychosocial, legal services and access to justice, including because of limited availability, mandatory reporting requirements, fear of retaliation and social stigma. Some communities faced image-based abuse, doxing and other sexualized cyber threats.

31. As part of a new initiative by the United Nations Mission in South Sudan, patrols were established to strengthen the prevention and deterrence of conflict-related sexual violence. The United Nations and the Federal Government of Somalia established one-stop survivor centres to enhance access to critical services. Ukraine adopted legislation to provide reparations to survivors of sexual violence. In the Democratic Republic of the Congo, the non-State armed group Nduma défense du Congo-Rénové Guidon faction signed the Geneva Call Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination.

Journalists

32. In 2024, 53 of the 82 killings of journalists recorded by the United Nations Educational, Scientific and Cultural Organization occurred in countries affected by armed conflict, a sharp increase from previous years (35 of 71 killings of journalists recorded in 2023; 25 of 87 journalist killings recorded in 2022; and 20 of 55 journalist killings recorded in 2021). International journalists were prevented from entering Gaza, where 20 journalists were killed – the highest number in any war in decades – followed by the Sudan, where 8 journalists were killed. Journalists covering armed conflicts also experienced harassment, assaults, arbitrary detention, disappearances and threats.

Missing persons

33. Cases of missing persons remained a critical concern. The International Committee of the Red Cross (ICRC) registered 56,559 new missing persons cases and followed more than 254,000 cases. The number was greater than in 2023 (when the ICRC had registered 40,000 new missing persons cases) and high in a number of armed conflicts, in particular the Democratic Republic of the Congo, Iraq, Israel, the Sudan, the Syrian Arab Republic, the Russian Federation, Ukraine and the Occupied Palestinian Territory. According to the Palestinian Civil Defence, at least 10,000 people were missing under the rubble and presumed dead. The United Nations estimated that 1,000 Palestinian workers and patients from Gaza who were in Israel on 7 October 2023 remained missing. In the Syrian Arab Republic, tens of thousands of people were unlawfully detained or held incommunicado. In most cases, their fate and whereabouts remained unknown. In Colombia, 4,862 cases of missing persons were recorded. The Unit for the Search for Persons Deemed Missing in the context of and due to the armed conflict found 141 missing persons alive. In the Democratic Republic of the Congo, 2,880 cases of enforced disappearances were reported. The Sudan also saw a significant increase in enforced disappearances.

D. Humanitarian action and peace operations

Humanitarian action

34. Wherever there was human suffering, humanitarian personnel did their utmost to respond and alleviate it. But in the Democratic Republic of the Congo, Myanmar, the Sudan, the Syrian Arab Republic, Ukraine, the Occupied Palestinian Territory and elsewhere, humanitarian organizations faced immense challenges due to violence, bureaucratic and administrative impediments, and/or shortages of essential supplies,

including food, medicine and fuel. Political considerations often interfered with humanitarian operations. Counter-terrorism measures and other political decisions also undermined principled humanitarian action.

35. Aid workers, mostly staff serving their own communities, persevered despite brutal violence. 2024 was the deadliest year on record for humanitarian personnel. More than 360 humanitarians were killed in 20 countries.⁸ This number includes at least 200 humanitarian personnel killed in Gaza, some in their homes and others at work. In the Sudan, 54 humanitarian personnel were killed, all recruited locally. Ethiopia had its deadliest year, with 23 humanitarian personnel killed and many more injured. In Lebanon, 15 humanitarian personnel were killed. National and local aid workers remained the most vulnerable. Arrests and detention of humanitarian personnel remained a major concern.

36. In the Democratic Republic of the Congo, the Sudan and elsewhere, attacks harming humanitarian convoys and compounds forced agencies to suspend operations. In the Democratic Republic of the Congo, attacks on and the looting of humanitarian warehouses disrupted humanitarian operations. In Gaza, access denials, hostilities, road destruction, unexploded ordnance and looting impeded humanitarian aid. In Somalia, looting of food aid led to the suspension of a United Nations-led operation, affecting 52,000 people. In the Sudan, multiple attacks harming humanitarian facilities resulted in \$20 million in losses. In Myanmar, World Food Programme supplies were looted and its warehouse storing emergency food to sustain 64,000 people for one month was burned. In Colombia, the Democratic Republic of the Congo, Mali, Ukraine and elsewhere, improvised explosive devices and explosive remnants of war disrupted aid delivery.

37. Bureaucratic and administrative measures also impeded humanitarian operations. In the Sudan, over 60 per cent of surveyed humanitarian organizations faced delays. Checkpoints blocked food supplies for over three weeks in June, affecting 850,000 people. In the Central African Republic, a new law regulating non-governmental organizations imposed recruitment limits, operating authorizations and taxation. In Lebanon, authorities imposed increased scrutiny on humanitarian activities, delaying programmes and restricting certain populations from receiving assistance. In the Niger, a ministerial decree mandated armed escorts in areas of military operations, severely impairing humanitarian activities; continued advocacy led to lifting this requirement for humanitarian staff travelling in official vehicles in designated areas. Israel adopted legislation that, if implemented, could prevent the United Nations Relief and Works Agency for Palestine Refugees in the Near East from continuing its essential work in the Occupied Palestinian Territory.

38. Disinformation campaigns spread lies that cost lives. The spread of harmful information further eroded trust in humanitarian actors, reducing operational effectiveness and placing humanitarian personnel at risk. Widespread misinformation and disinformation campaigns targeting humanitarian organizations were reported in Burkina Faso, the Democratic Republic of the Congo, Ethiopia, the Occupied Palestinian Territory and elsewhere. In Ethiopia, humanitarian actors engaged with social media to successfully remove threatening online posts targeting aid workers.

39. Sanctions and counter-terrorism measures have inadvertently added to humanitarians' hurdles. States' counter-terrorism and anti-money-laundering

⁸ Afghanistan, Burkina Faso, Central African Republic, Cameroon (far north), Colombia, the Democratic Republic of the Congo, Ethiopia, Lebanon, Mali, Mozambique, Myanmar, the Niger, Nigeria, the Philippines, Somalia, the Sudan, the Syrian Arab Republic, Ukraine, Yemen and the Occupied Palestinian Territory, Source: Humanitarian Outcomes, "2024", Aid Worker Security Database, available at www.aidworkersecurity.org/.

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legislation exposed humanitarian organisations and personnel, their suppliers, banks and service providers to obligations and legal risks, leading to private sector de-risking, with an adverse impact on humanitarian operations. For instance, export and sectoral restrictions affected humanitarian supply chains in the Syrian Arab Republic. In the Sahel and elsewhere, States imposed measures curtailing resource transfers to areas where non-State armed groups operate.

40. The Security Council's decision in resolution [2761 \(2024\)](#) to maintain the humanitarian exemption established in resolution [2664 \(2022\)](#) regarding the Al-Qaeda/ISIL (Da'esh) sanctions regime and additional humanitarian exemptions in European Union sanctions is welcomed.

41. The adoption of Security Council resolution [2730 \(2024\)](#) underscored the commitment by Member States to strengthening the protection of humanitarian personnel and United Nations and associated personnel, including national and locally recruited personnel, and their premises and assets. The Secretary-General presented concrete recommendations to the Security Council to enhance the security of humanitarian and United Nations personnel ([S/2024/852](#)).

Peace operations

42. Peacekeepers continued to protect hundreds of thousands of civilians despite rising instability and increasing threats to United Nations personnel. By maintaining its positions in southern Lebanon amid escalating hostilities, the United Nations Interim Force in Lebanon provided protection through its presence, monitored and reported on the conduct of hostilities, continued its critical liaison functions with the parties to the conflict, facilitated humanitarian access and coordinated with humanitarian actors on the evacuation of civilians. In the Democratic Republic of the Congo, the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) continued to protect hundreds of thousands of internally displaced persons in North Kivu and Ituri, and to support State authorities in holding accountable perpetrators of serious violations. In the Central African Republic, the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic undertook regular integrated and joint visits with local authorities in Bria to engage communities on their protection concerns and build trust in State authorities, enhancing the Government's capacity to protect civilians. Regional dynamics and conflict affected all peacekeeping operations with mandates to protect civilians.

43. Special political missions contributed to the protection of civilians through the implementation of their mandates on human rights, child protection and children in armed conflict and sexual violence in several countries, including Afghanistan, Libya, Iraq and Somalia.

44. The United Nations accelerated its work with the African Union to enhance operational readiness to implement Security Council resolution [2719 \(2023\)](#), including provisions on prioritizing the protection of civilians and ensuring African Union-led peace support operations accessing United Nations assessed contributions are planned and conducted in compliance with international law. The United Nations and the African Union jointly reviewed and strengthened their policy, guidance, training and practice for protection. United Nations peacekeeping operations enhanced their own civilian harm mitigation measures and practices, particularly with respect to indirect fire as such capabilities were introduced in MONUSCO.

III. New technologies, trends in compliance and working towards the full protection of civilians

A. New technologies

45. New technologies have shown the potential to bring both great benefits and risks. Artificial intelligence has developed at breakneck speed, helping to identify food insecurity, predict displacement and detect landmines, and offering the potential to gather and analyse information to anticipate and avoid civilian harm. At the same time, artificial intelligence has reportedly been used in armed conflict to select targets and make life-or-death decisions at high speed and in high numbers, generating greater risks for civilians in armed conflict. The use of artificial intelligence in warfare raises serious concerns about compliance with international law and human oversight in decision-making because of the difficulty in predicting its output, automation bias and other factors. Humans must always retain control over decision-making functions and be guided by international law, including international humanitarian law, human rights and ethical principles.

46. The Pact for the Future highlighted the need to continue to assess the existing and potential risks associated with the military applications of artificial intelligence and the possible opportunities throughout their life cycle. The Secretary-General's High-level Advisory Body on Artificial Intelligence has developed a blueprint for addressing the risks and opportunities that artificial intelligence presents to humanity. The Global Digital Compact adopted at the Summit for the Future translates this into action. Member States have committed to swiftly establish an Independent International Scientific Panel on Artificial Intelligence and initiate the Global Dialogue on Artificial Intelligence Governance within the United Nations.

47. In this connection, it is vital to reiterate the 2023 appeal by the Secretary-General and the International Committee of the Red Cross to negotiate a legally binding instrument to establish clear prohibitions and restrictions on autonomous weapons systems by 2026.

48. The way in which information and communications technology (ICT) is being used in armed conflict also continues to raise concerns about compliance with international humanitarian law and the protection of civilians. For instance, ICT activities can disrupt or damage essential infrastructure and services and delete vital data even without causing physical damage to civilian objects, while its scale, speed and reach can amplify civilian harm. The use of ICT can also more readily invite a role for civilians and civilian platforms to play in armed conflict, thus exposing them to direct or incidental harm. While civilian involvement in war is not new, the ICT environment can facilitate and multiply it. There is growing recognition that ICT activities during armed conflict are governed by international humanitarian law. It is now equally critical to arrive at a common understanding of how it applies, as is ensuring an understanding of the risks that civilian involvement can entail.

49. The use of ICT also greatly magnifies the scale, speed and reach of the spread of harmful information, adding to the dangers civilians face in conflict. It can be used to polarize attitudes, fuel violence, distort facts on which people rely to make decisions for their safety, and undermine trust in and acceptance of humanitarian activities. In the Sudan, for instance, harmful information on social media has reportedly exacerbated divisions and fuelled violence and the killing of dozens of people.

B. Compliance with international humanitarian law

50. Increasing disregard for civilian life and for the rules of war developed over more than 150 years has been observed throughout many conflicts and constitutes a troubling pattern. And yet it is precisely for situations of war that international humanitarian law was designed to ensure a minimum of humanity. This is what underpins our contemporary international humanitarian law framework and must continue to serve as a compass for parties' conduct in war.

51. Despite legal commitments and the lessons of history, parties to conflict have blatantly violated the rules of war, whether by directing attacks against civilians and civilian objects, launching indiscriminate attacks with inaccurate or heavy weapons, using human shields, or by carrying out torture, sexual violence and hostage-taking. The production, use or transfer of long-stigmatized and widely prohibited weapons such as chemical weapons, cluster munitions and antipersonnel mines and the first-ever withdrawal from a humanitarian disarmament treaty raised serious humanitarian concerns, pushed beyond legal boundaries, set dangerous precedents, and propagated the dangerous and outdated idea that exceptional threats and military necessity could outweigh international humanitarian law.

52. Parties have also distorted the rules of war to the point of justifying immense civilian harm instead of minimizing it. With permissive interpretations or weak assessments of who is a lawful target, what is a military objective, what is proportional incidental civilian harm, what are feasible precautions, or who poses a threat for detention purposes, parties to conflict have undercut the humanity principle at the heart of international humanitarian law. This conduct risks lowering standards well below the balance between military necessity and humanity, thoughtfully achieved through decades of international humanitarian law development.

53. This conduct has also been accompanied by inconsistent standards and influenced by political interests. States and other actors assert which attacks are lawful or unlawful not on the basis of detailed evidence or formal legal judgements but on the basis of whether the party in question was an adversary or not.

54. All States are responsible for ensuring respect for international humanitarian law, whether or not they are involved in a given conflict. This entails political dialogue, training and dissemination, influence through joint operational planning, and conditioning arms exports on compliance with international law. Some States have reviewed their arms transfer decisions and suspended arms exports due to the risk of the arms being used to commit international humanitarian law violations. In the proceedings related to *Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, the International Court of Justice reminded all States of their international obligations relating to the transfer of arms to parties to an armed conflict, in order to avoid the risk that such arms might be used to violate the 1949 Geneva Conventions and the Genocide Convention.

55. Investigating and prosecuting international crimes is also critical to ensuring compliance with and trust in international law. While allegations of international crimes still outpace their investigation and prosecution, the pursuit of accountability has continued in the Central African Republic, Colombia, Liberia, Uganda, Ukraine and elsewhere. In the Central African Republic, a judicial investigation commission was established to investigate violations of international humanitarian law and bring perpetrators to justice. In Uganda, a former commander of the Lord's Resistance Army was tried and found guilty of 44 charges, including murder, rape, kidnapping and pillaging, and sentenced to 40 years in prison. In Liberia, the President issued an

executive order establishing the office of a war crimes court to investigate and try crimes committed during the civil wars in Liberia between 1989 and 2003.

56. Courts in France, Germany, Portugal, Sweden, Switzerland, the United States of America and elsewhere exercised jurisdiction to prosecute international crimes committed abroad. German, Swedish and Swiss courts instituted proceedings against former officials of the Syrian Arab Republic. A French court tried three former officials of the Syrian Arab Republic in absentia for complicity in war crimes and crimes against humanity. A French court also validated an arrest warrant against the former President of the Syrian Arab Republic, Bashar Al-Assad, for complicity in crimes against humanity. In Portugal, a former member of ISIL (Da'esh) was convicted of war crimes committed in Iraq.

57. The International Criminal Court convicted Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud of war crimes and crimes against humanity committed in Mali. The Court also issued new arrest warrants in connection with the situations in Ukraine and in the State of Palestine. As the President of the International Criminal Court noted, the past year has been marked by an unparalleled increase in demand for the Court's work, along with unprecedented levels of threats, pressures and coercive measures which pose a serious threat to administering justice. The Court must be protected from external interference and pressure.

58. Angola became the first African Union member State to ratify the statute of the African Court of Justice and Human Rights, which, once established, will play an important role in the pursuit of accountability for international crimes on the African continent. Meanwhile, the International Residual Mechanism for Criminal Tribunals accounted for all of the 253 people indicted for international crimes committed in Rwanda and the former Yugoslavia, exemplifying determination in securing justice for atrocity crimes.

59. The International Court of Justice indicated provisional measures in the proceedings concerning the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*. The International Court of Justice also issued an advisory opinion on the legal consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, determining the unlawfulness of the presence of Israel in the Occupied Palestinian Territory, as well as its policies and practices therein, and that Israel must put an end to them.

60. The General Assembly adopted resolution [79/122](#) to elaborate and conclude a legally binding instrument on the prevention and punishment of crimes against humanity.

C. Towards the full protection of civilians

61. The patterns and types of civilian harm seen in contemporary conflicts cannot always be attributed to violations of international law. In his 2024 report, the Secretary-General called for reflection on what it means to protect civilians in contemporary armed conflicts and called for a more comprehensive approach to protection that has meaning for all civilians affected by conflict, even when parties are acting in compliance with the law. In practical terms, working towards the full protection of civilians encompasses the actions listed below.

62. First, it means constantly working to reduce harm by developing and adopting policy and operational measures to strengthen civilian protection. Connected to this, it means recognizing that there is substantial space for Member States and parties to conflict to develop and adopt policies and practices that both apply international

humanitarian law obligations and go beyond them. These include policies and operational plans developed under the African Union Compliance and Accountability Framework, military tactical directives or rules of engagement within specific conflicts, such as those adopted by the International Security Assistance Force in Afghanistan and the indirect fire policy of the African Union Mission in Somalia, and, at the international level, the Safe Schools Declaration, the Paris Commitments on Children Associated with Armed Forces or Armed Groups, and the Political Declaration on the Use of Explosive Weapons in Populated Areas. Reference can also be made to initiatives that engage non-State armed groups to strengthen the protection of civilians, such as the Geneva Call Deeds of Commitment.

63. Second, it means understanding and responding to civilian harm from conflict in its widest sense, including by considering varying patterns of life and patterns of harm inflicted over time. This could be achieved by considering harm beyond immediate death and injury and adopting a broader public health perspective that considers the impact of conflict on physical and mental health, the disruption of health systems, the spread of disease, and environmental contamination, for example. In turn, this can inform policy responses. This requires broad and disaggregated data across all aspects of public health, including on different vulnerabilities within the civilian population and how different impacts based on age, gender and disability correlate with particular means or methods of warfare.

64. Third, working towards the full protection of civilians means invoking and relying on norms and standards that value civilians. Consideration should also be given to the role of international human rights law in armed conflict. It is equally important to view the protection of civilians in armed conflict through a human rights lens, including reflecting on how contemporary conflict impacts the enjoyment of rights, such as the right to an adequate standard of living, the right to the highest attainable standard of health, the right to education, the right to a clean, healthy and sustainable environment, and the rights to equality and non-discrimination, and to seek strengthened implementation of applicable human rights law in these areas.

65. Fourth, working towards the full protection of civilians should be a collaborative endeavour. In his 2024 report on the protection of civilians in armed conflict, the Secretary-General recommended that States, parties to conflict, United Nations actors and international and civil society organizations reflect on the full protection of civilians approach and how they could contribute to its further development and implementation. This recommendation still stands and could be usefully pursued through such a collaborative approach. The different processes to develop the Political Declaration on the Use of Explosive Weapons in Populated Areas or the Global Alliance to Spare Water from Armed Conflicts could be instructive in this regard. These processes demonstrate the importance and utility of states prepared to take issues forward and a space for regular discussion allowing all interested stakeholders to contribute.

IV. Recommendations

66. The state of protection of civilians is grim and the trends are alarming. At the same time, the measures required to protect civilians are longstanding and time-tested. Protecting civilians requires strict adherence to international humanitarian law and international human rights law and the adoption of good-faith policies and practices to enhance protection. In the Pact for the Future, adopted in September 2024, Member States renewed their commitment to strengthen tools to address armed conflict, including by enabling humanitarian access, protecting humanitarian personnel and United Nations and associated personnel, ending impunity for

violations of international law, and exercising control over the international transfer of conventional arms. In this regard, the Secretary-General welcomes the global initiative to galvanize political commitment to international humanitarian law, launched by Brazil, China, France, Jordan, Kazakhstan, South Africa and the International Committee of the Red Cross.

67. States and non-State armed groups, as appropriate, should promptly:

(a) Ratify or accede to relevant treaties and incorporate their international humanitarian law and international human rights law obligations into national laws, military manuals, codes of conduct, rules of engagement and training;

(b) Develop and review national protection policies establishing institutional authorities and responsibilities for the protection of civilians and civilian objects (see [S/2018/462](#)) and endorse and implement the political declaration on the use of explosive weapons in populated areas without delay;

(c) Develop and improve understanding of the patterns and types of civilian harm in contemporary conflicts, including how it affects different groups, to identify effective legal, policy and operational responses to civilian harm;

(d) Prohibit autonomous weapons that function in such a way that their effects cannot be predicted, as well as those with the power and discretion to take lives without human involvement. States must also impose clear restrictions for all other autonomous weapons to ensure compliance with international law and ethical acceptability;

(e) Shield principled humanitarian operations from the political dynamics of conflict, support humanitarian engagement with all parties to conflict, take active steps to facilitate impartial humanitarian activities, fight misinformation and disinformation that harms civilians, including humanitarian personnel, generalize humanitarian exemptions to all sanctions and counterterrorism measures and promote risk tolerance regarding principled humanitarian action where such measures apply;

(f) Ensure respect for international humanitarian law and international human rights law, including through public statements, political dialogue, training and dissemination, influence through joint operational planning, and conditioning arms exports on compliance with international humanitarian law and international human rights law;

(g) Consistently investigate alleged serious violations of international law, including war crimes, crimes against humanity and crimes of genocide, prosecute perpetrators, ensure reparations for victims and guarantees of non-repetition, strengthen States' capacities and resources to investigate and prosecute, and, as appropriate, become a party to the Rome Statute of the International Criminal Court and cooperate fully with it and other investigative and judicial mechanisms.

V. Conclusion

68. If, as the Saint Petersburg Declaration stated in 1868, the progress of civilization should have the effect of alleviating as much as possible the calamities of war, then it is imperative that States and all parties to conflict adhere to the long-standing, fundamental rules that have been established for this purpose. They must muster the political will and exert all their influence to reach this goal. The Pact for the Future has renewed Member States' commitment to protect all civilians in armed conflict. They must be put into action without delay.

United Nations

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**General Assembly**Distr.: Limited
11 March 2025

Original: English

Seventy-ninth session

Agenda item 31

The role of diamonds in fuelling conflict

Armenia, Austria, Belgium, Botswana, Bulgaria, Côte d'Ivoire, Democratic Republic of the Congo, Germany, Greece, Guyana, Kazakhstan, Portugal, South Africa, United Arab Emirates and Zimbabwe: * draft resolution

The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts

The General Assembly,

Recognizing that the trade in conflict diamonds continues to be a matter of serious international concern, which can be directly linked to the fuelling of armed conflict, the activities of rebel movements aimed at undermining or overthrowing legitimate Governments and the illicit traffic in and proliferation of armaments, especially small arms and light weapons,

Recognizing also the devastating impact of conflicts fuelled by the trade in conflict diamonds on peace and the safety and security of people in affected countries, and the systematic and gross human rights violations that have been perpetrated in such conflicts,

Expressing deep concern regarding the unprecedented challenges faced by the Kimberley Process arising from ongoing geopolitical tensions and conflicts,

Noting the negative impact of such conflicts on regional stability and the obligations placed upon States by the Charter of the United Nations regarding the maintenance of international peace and security, and recognizing that continued action to curb the trade in conflict diamonds is imperative,

Noting also that the Kimberley Process remains a unique tripartite initiative that brings together stakeholders in Government, industry and civil society in its quest to prevent conflict diamonds from entering the diamond trade and has had a valuable development impact in improving the lives of people in some diamond-mining communities and contributing to the achievement of the 2030 Agenda for Sustainable Development¹ and the Sustainable Development Goals,

* Any changes to the list of sponsors will be reflected in the official record of the meeting.

¹ Resolution 70/1.



Noting with appreciation that the Kimberley Process, as an international initiative led by participants, has pursued its deliberations on an inclusive basis involving concerned stakeholders, including producing, exporting and importing States, the diamond industry and civil society, as well as applicant States and international organizations,

Recalling that conflict prevention and the elimination of conflict diamonds from legitimate trade is the primary objective of the Kimberley Process, and stressing the need to continue its activities in order to achieve this objective,

Welcoming the important contribution of the Kimberley Process, which was initiated by African diamond-producing countries and supported by other Kimberley Process participants, and calling for the consistent implementation of commitments made by Kimberley Process participants and the diamond industry and civil society organizations, as observers,

Acknowledging the role that the Kimberley Process has played, in the past 22 years, in stemming the flow of conflict diamonds and the significant development impact it has had in improving the lives of many people dependent on the trade in diamonds, and noting that the plenary meeting of the Kimberley Process, in looking towards the future, committed to continue to ensure that the Kimberley Process remains relevant as a credible tool in curbing the flow of conflict diamonds, capturing the evolving nature of conflicts and realities on the ground,

Acknowledging also that the diamond sector is an important catalyst for promoting economic and social development, which are necessary for poverty reduction and achieving the Sustainable Development Goals in many producing countries, particularly in developing countries,

Bearing in mind the positive benefits of the legitimate diamond trade to producing countries, workers and their communities, and underlining the need for continued regional and international action to prevent the problem of conflict diamonds from negatively affecting the trade in legitimate diamonds, which makes a critical contribution to the economies of producing, exporting and importing States,

Noting that the total elimination of conflict diamonds from the diamond market continues to be the primary objective of the Kimberley Process, and stressing the need for the Kimberley Process to continue evolving to meet the social and environmental challenges in line with the 2030 Agenda and the Sustainable Development Goals,

Recognizing that the Kimberley Process promotes legitimate rough diamond trade, and recalling the positive benefits of legitimate diamond trade to producing countries, including its transparency and accountability throughout the diamond industry, and the contribution it has made to the economies of producing, exporting and importing States, and therefore underlining the need for continued international action with regard to the ethical exploitation, sale and trade of rough diamonds,

Expressing appreciation for the continuous efforts made by Botswana in supporting the operationalization of the Kimberley Process secretariat in Gaborone,

Welcoming the efforts to enhance regional cooperation on Kimberley Process matters, including among artisanal and alluvial diamond-producing countries in Central Africa and the Mano River Union, and encouraging the sharing of lessons and increased capacity-building for the Certification Scheme,

Recalling the Charter and all the relevant resolutions of the General Assembly and of the Security Council related to conflict diamonds, and determined to contribute to and support the implementation of the measures provided for in those resolutions,

Recalling also General Assembly resolution [55/56](#) of 1 December 2001 and Security Council resolution [1459 \(2003\)](#) of 28 January 2003, in which the Assembly and the Council strongly supported the Kimberley Process Certification Scheme as a valuable contribution in breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts,

Noting that the implementation of the Kimberley Process Certification Scheme continues to have a positive impact in reducing the opportunity for conflict diamonds to play a role in fuelling armed conflict and helps to protect legitimate trade and ensure the effective implementation of the relevant resolutions on trade in conflict diamonds,

Acknowledging that lessons learned from the Peacebuilding Commission may be useful for some Kimberley Process participants and that some Kimberley Process participants may also have experiences to share with respect to peacebuilding, as appropriate,

Recognizing that the ongoing and regular review and reform of the Kimberley Process is necessary to keep pace with and aim to address the ongoing threat of instability, conflict and contemporary challenges in the diamond trade in order for the Kimberley Process to continue to fulfil its mandate in the regulation of the trade of rough diamonds and the prevention of conflicts,

Welcoming the decision of the 60 Kimberley Process participants, representing 86 countries, including the 27 States members of the European Union represented by the European Commission, to address the problem of conflict diamonds by participating in the Kimberley Process and implementing the Kimberley Process Certification Scheme,

Welcoming also Uzbekistan as the sixtieth Kimberley Process participant,

Welcoming further the decision to lift all restrictions on the export of rough diamonds from the Central African Republic, subject to enhanced vigilance, in 2025, and recognizing the progress made by the Central African Republic in ensuring compliance with Kimberley Process minimum requirements,

Recognizing that State sovereignty should be fully respected and that the principles of equality, mutual benefits and consensus should be adhered to, and welcoming the implementation of the Kimberley Process Certification Scheme in such a way as not to impede the legitimate trade in diamonds or impose an undue burden on Governments or industry, particularly smaller producers, and not to hinder the development of the diamond industry,

Recognizing also that the Kimberley Process Certification Scheme, which came into effect on 1 January 2003, will be credible only if all participants have the requisite national legislation coupled with effective and credible internal systems of control designed to eliminate the presence of conflict diamonds in the chain of producing, exporting and importing rough diamonds within their own territories and across their borders, while taking into account that differences in production methods and trading practices, as well as differences in the institutional controls thereof, may require different approaches to meeting minimum standards, and encouraging all participants to work towards overall compliance with the Kimberley Process standards,

Welcoming the voluntary system of industry self-regulation through the System of Warranties, in accordance with the Kimberley Process Certification Scheme core document, that supports the effectiveness of the Certification Scheme,

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Noting that the Kimberley Process established the Ad Hoc Committee on Review and Reform of the Kimberley Process, as articulated under paragraph 20 of the Kimberley Process Certification Scheme core document,

Expressing appreciation to the United Arab Emirates, as the 2024 Chair of the Kimberley Process, for its efforts in promoting the continuation of work, and for hosting the twentieth plenary meeting of the Kimberley Process in Dubai, from 12 to 15 November 2024, in a hybrid format,

Noting with regret that the 2024 Kimberley Process plenary meeting ended without consensus on a communiqué,

1. *Recognizes* that the Kimberley Process Certification Scheme helps to ensure the effective implementation of relevant resolutions of the Security Council containing sanctions on the trade in conflict diamonds and contributes to the prevention of conflicts fuelled by diamonds, and calls for the full implementation of existing Council measures targeting the illicit trade in rough diamonds, particularly diamonds which play a role in fuelling conflicts;

2. *Also recognizes* the important contributions that the international efforts to address the problem of conflict diamonds, including the Kimberley Process, have made and can make to the settlement of conflicts and the consolidation of peace;

3. *Notes* that the annual reporting process on Kimberley Process Certification Scheme implementation is the main comprehensive and regular source of information on the implementation of the Kimberley Process provided by participants, and calls upon participants to submit consistent and substantive annual reports in order to conform to this requirement;

4. *Recalls* the adoption of the administrative decision on the Ad Hoc Committee on Review and Reform, in particular its paragraph 4.1, whereby the Kimberley Process entrusted the Committee:

(a) To review and propose, for the plenary's adoption, a definition of "conflict diamonds" which captures the evolving nature of conflicts and the realities on the ground;

(b) To strengthen Kimberley Process Certification Scheme implementation with regard to technical assistance between participants in rough diamond mining and trading;

(c) To consider conducting a structural review of the Kimberley Process with a view to addressing challenges facing communities impacted by diamond mining activities, through corporate social responsibility and support for artisanal and small-scale mining communities;

(d) To clarify the Kimberley Process position on total country compliance or partial compliance zoning in producing countries;

(e) To consider strengthening Kimberley Process governance;

5. *Encourages* the tripartite framework of the Kimberley Process to continue working on the important dialogue within the Ad Hoc Committee on Review and Reform, including to achieve consensus on the definition of conflict diamonds;

6. *Takes note* of the administrative decisions of the 2024 plenary meeting of the Kimberley Process, held from 12 to 15 November 2024, as well as the special session, held on 17 May 2024, both hosted by the United Arab Emirates in Dubai;

7. *Reaffirms* the commitment of the Kimberley Process to continue its cooperation with the World Customs Organization and the intention to work on

reviewing the explanatory notes of the harmonized system code to further engage with the World Customs Organization on processes and technologies now used in diamond cutting and polishing;

8. *Welcomes* the establishment of the Kimberley Process secretariat in Gaborone pursuant to the decision by the 2022 plenary meeting of the Kimberley Process;

9. *Stresses* the decision by the plenary that, while financial contributions to the Kimberley Process secretariat are not mandatory for Kimberley Process members, such contributions are critical to the proper functioning of the Kimberley Process secretariat, and therefore encourages Member States to also voluntarily support the operationalization of the secretariat;

10. *Recalls* its resolution 77/277 of 29 March 2023, in which it noted the plenary's views of the Kimberley Process as an effective multilateral tool for conflict prevention in stemming the flow of conflict diamonds, and its valuable development impact in improving the lives of people in some diamond-producing countries and its contribution to the 2030 Agenda for Sustainable Development and the Sustainable Development Goals;

11. *Reaffirms* the importance of the tripartite nature of the Kimberley Process, stresses that the widest possible participation in the Kimberley Process Certification Scheme is essential, and therefore encourages participants to contribute to the work of the Kimberley Process by participating actively in the Certification Scheme and ensuring compliance with its undertakings and the effective implementation of its measures, underscores the importance of the Civil Society Coalition and its members to the Kimberley Process, and acknowledges the importance of supporting additional applications for membership by civil society organizations;

12. *Recalls* the central place of mining communities in the Kimberley Process and the need to devote particular attention to engaging Kimberley Process stakeholders and communities, especially artisanal miners, in governance structures, developing best practices, and promoting the rule of law;

13. *Reaffirms* the importance of enhancing cooperation with and assistance to participants in Kimberley Process matters, including with a regional dimension, focusing on the implementation of best practices, capacity-building and compliance with Kimberley Process standards, rules and procedures;

14. *Encourages* the continued implementation of the Declaration on Supporting Principles for Responsible Diamond Sourcing as Best Practices for the benefit of the global diamond industry and communities;

15. *Recognizes* the value of engaging with relevant external organizations to support the work of the Kimberley Process and its working bodies;

16. *Encourages* further strengthening of the Kimberley Process to enhance its effectiveness in addressing challenges posed to the diamond industry and related communities, including from instability and conflict, and to ensure that the Kimberley Process remains relevant for the future and continues to contribute to international peace and security and the achievement of the 2030 Agenda and the Sustainable Development Goals, and looks forward to further exploring and advancing the ways in which the Kimberley Process contributes to peacebuilding and sustaining peace;

17. *Acknowledges with great appreciation* the important contribution that the United Arab Emirates, as Chair of the Kimberley Process in 2024, made to the efforts to curb the trade in conflict diamonds, and welcomes the continuation of the United Arab Emirates as the Custodian Chair for 2025;

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18. *Requests* the Chair of the Kimberley Process to submit to the General Assembly at its eightieth session a report on the implementation of the Kimberley Process;

19. *Decides* to include in the provisional agenda of its eightieth session the item entitled "The role of diamonds in fuelling conflict".



International Agreements for the Transfer of Refugees and Asylum-seekers

Introduction

1. This guidance provides globally relevant advice and considerations to inform cooperative arrangements among States on asylum and ensure their consistency with international refugee and human rights law. In particular, it aims to inform the development and implementation of arrangements for State cooperation in relation to the transfer of refugees and asylum-seekers to a third country, when States are considering such arrangements. This guidance outlines the legal basis for such arrangements as well as their scope and content and should be read together with UNHCR's existing positions and guidance on related issues, on which it is based.¹ It also underscores the importance of responsibility-sharing and international cooperation as essential elements for the legality and practical viability of these arrangements. This guidance further describes the potential role of UNHCR in the development, conclusion, implementation and monitoring of transfer agreements pursuant to its mandate for the international protection of refugees and its supervisory responsibility for the application of refugee law instruments.

2. UNHCR has long aimed to support effective responses to the challenges of onward movements,² including by issuing legal and policy guidance as well as implementing practical and rights-based operational approaches that ensure international protection is accessible and effective.³ While maintaining its position that asylum-seekers should ordinarily be processed in the territory of the State where they arrive, UNHCR considers that it is essential to provide specific guidance to ensure the lawful and rights-based implementation of transfer arrangements, should States consider such measures as part of broader responses to the challenges posed by the onward movements of refugees and asylum-seekers. Such

¹ See particularly UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, www.refworld.org/policy/legalguidance/unhcr/2013/en/16943. UNHCR, *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, April 2018, www.refworld.org/policy/legalguidance/unhcr/2018/en/120729. UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, September 2019, www.refworld.org/policy/legalguidance/unhcr/2019/en/123059. These positions remain valid and should be read together with the present guidance.

² 'Onward movement' refers to movement of refugees and asylum-seekers from one country where they enjoyed international protection, or could have sought and received such international protection, to another country where they may request it. See UNHCR Guidance Note on irregular onward movement, note 1 above, discussing the transfer of refugees and others granted international protection (including subsidiary or other complementary forms of international protection), who move onward and seek protection in another State, as well as asylum-seekers requesting international protection in a current State who have, or could have, sought protection in a previous State. Regarding the definition of persons seeking or in need of international protection, see UNHCR, *Persons in need of international protection*, June 2017, www.refworld.org/policy/legalguidance/unhcr/2017/en/121440. For the purposes of the present Guidance, the term 'current State' or 'current host State/country' refers to the State in which an asylum-seeker or refugee is physically present and/or where they have most recently applied for international protection. 'Transferring state' refers to a current State or current host State that is seeking to transfer refugees and asylum-seekers to another State. 'Third country/State' refers to a State where refugees and asylum-seekers had found, could have found, or can find international protection, and to where they are being transferred.

³ Executive Committee of the High Commissioner's Programme, *Conclusion No. 58 (XL): Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection*, 13 October 1989, <https://www.refworld.org/policy/exconc/excom/1989/en/114502>. UNHCR, *The 10-Point Plan in Action, 2016 Update, Chapter 8: Addressing Onward Movements*, December 2016, www.refworld.org/policy/strategy/unhcr/2016/en/114091. See also UNHCR's guidance outlined in note 1 above.



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arrangements need to enshrine the safeguards and guarantees provided in this guidance, including in relation to responsibility-sharing.

3. People seeking asylum in a State may lawfully be transferred by that State to a third country that is considered safe for them and where they can find international protection that is accessible and effective.⁴ This includes asylum-seekers who have been in the third country, including those who transited through that third country and had not applied for international protection, as well as asylum-seekers who had applied for asylum but whose asylum claims were not previously assessed by the third country. It also includes asylum-seekers who have not been in the third country, and who have no meaningful link or connection to that country, but who following their transfer, can find international protection there. Finally, it includes refugees and others already granted international protection by the third country (the first country of asylum), provided that such protection continues to be accessible and effective and their stay in the third country is lawful.⁵ Lawful transfers should not include transfers of people who have been formally recognized as refugees, or have otherwise been granted international protection, by the current host State. Such persons should not be transferred to a third country and should have legal residence in the current host country.⁶

The legal basis for transfers of refugees and asylum-seekers

4. An arrangement between States for the transfer of refugees and asylum-seekers is best governed by a legally binding international – bilateral or multilateral – agreement, challengeable and enforceable in a court of law, including by the affected refugees and asylum-seekers.⁷ International agreements between States regulating the transfer of refugees and asylum-seekers provide a clear and binding legal framework, setting out relevant standards, enabling such transfers to occur in accordance with international law. The agreements should outline the conditions under which transfers may occur, the specific responsibilities of the participating States and the criteria and safeguards necessary to ensure the rights and safety of the individuals concerned. Such agreements, when correctly developed and implemented, can advance the effective management of onward movements, reduce risks associated with dangerous journeys, enhance responsibility-sharing and strengthen inter-State cooperation, while upholding the rights of refugees and asylum-seekers.

⁴ The 2018 Legal Considerations, note 1 above, summarize UNHCR's position on the requirements for assessing the safety of the third country and access to protection for refugees and asylum-seekers being transferred, whereas the 2013 Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, note 1 above, sets out key principles which are applicable when arrangements to transfer asylum-seekers are being made between States. As noted above, these positions remain valid and should be read together with the present guidance.

⁵ The 'first country of asylum' concept is generally applied in cases where a person has already, in a previous State, found international protection that continues to be accessible and effective. See: 2018 Legal Considerations, note 1 above, para. 3. As to the lawfulness of stay in the country, see paragraph 8, footnote 11 of this guidance. See also Guidance on irregular onward movement, note 1 above, para. 33, as to the ongoing obligations of the first country of asylum vis-à-vis the refugee, including the obligation to readmit the refugee.

⁶ The transfer of refugees recognized by the current host state is subject to strict rules concerning the expulsion of refugees under Article 32, *Convention relating to the Status of Refugees* (28 July 1951) 189 UNTS 137, www.refworld.org/docid/3be01b964.html.

⁷ See 2013 Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, note 1 above, para. 3(v). As such, an 'international agreement' concluded between States in written form, irrespective of the description, title or form in which the agreement is written, would be desirable. Such an agreement would be governed by international law and will be binding for the participating States. See *Vienna Convention on the Law of Treaties* (23 May 1969) 1155 UNTS 331.



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5. International transfer agreements should be publicly available and incorporated in the domestic legal system of the participating States, to ensure accountability among the participating States and provide clarity for affected refugees and asylum-seekers as to their rights guaranteed by law. Such agreements then offer legal certainty for participating States and affected individuals, thereby enhancing the effectiveness, fairness and durability of the arrangement.

The scope and content of transfer agreements

6. International transfer agreements should establish objective and legally enforceable standards applicable in the third country to ensure that transferred refugees and asylum-seekers have effective access to protection, assistance and solutions, both under the third country's domestic laws and policies and in practice. Such agreements should also define clear and enforceable responsibilities of the transferring State.

7. International transfer agreements should include obligations on the part of the third country to admit transferred individuals to its territory and ensure that they are afforded standards of treatment commensurate with the 1951 Convention, its 1967 Protocol and international human rights law.⁸ This includes the guarantee of certain core rights, most notably the obligation to protect against refoulement, among others.⁹

8. For asylum-seekers transferred to a safe third country, the agreement should also outline clear obligations to ensure admission to the country¹⁰ and access to a fair and efficient State-led asylum procedure in the third country, ensuring an assessment on the merits of the asylum claim and guaranteeing lawful presence¹¹ in the third country. Such State-led asylum procedures could include a variety of case processing modalities, such as simplified, group or prima facie procedures.¹² When a transferred asylum-seeker is recognized as a refugee or otherwise being in need of international protection, the agreement should also guarantee the

⁸ Guidance Note on irregular onward movement, note 1 above, para. 20.

⁹ Under the 1951 Convention, note 6 above, other core rights include: non-discrimination between refugees (Article 3); personal and civil status recognition (Article 12); free access to courts of law (Article 16(1)); administrative assistance (Article 25); identity documentation (Article 27); travel documentation, particularly for lawfully staying refugees (Article 28); transferring assets (Article 30); non-expulsion of refugees lawfully in the territory (Article 32); and non-refoulement (Article 33). For the remaining rights included in the Convention, the standards of treatment afforded to refugees is relative to the treatment of other legally residing non-nationals or nationals. International human rights instruments require States to ensure core standards of treatment. See: UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, www.refworld.org/docid/4672bc122.html. In addition, international human rights law provides scope for progressive realization of certain socio-economic rights, taking into account the concerned country's available resources, levels of international assistance and cooperation, stage of economic development and the general welfare of society. See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, E/1991/23, 14 December 1990, <https://www.refworld.org/legal/general/cescr/1990/en/5613>.

¹⁰ The 2018 Legal Considerations, note 1 above, para. 4. Guidance Note on irregular onward movement, note 1 above, para. 18(a).

¹¹ The term "lawfully in", a legal term used in the 1951 Convention, refers to refugees, including asylum-seekers, who are in the territory in an authorized manner, even if they are authorized to remain only on a temporary basis, for example for the duration of their asylum procedure. See UNHCR, "Lawfully Staying" - A Note on Interpretation, 3 May 1988, <https://www.refworld.org/policy/legalguidance/unhcr/1988/en/27335>.

¹² See UNHCR, *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status*, HCR/GIP/15/11, 24 June 2015, www.refworld.org/policy/legalguidance/unhcr/2015/en/105663. Where UNHCR carries out status determination under its mandate, this cannot be considered equivalent to an asylum procedure conducted by a State, see Guidance Note on irregular onward movement, note 1 above, para. 19.



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granting of lawful stay in the third country.¹³ In cases involving previously recognized refugees, or beneficiaries of other forms of international protection, being transferred to their first country of asylum, the agreement should ensure that these persons are readmitted, granted lawful stay and can re-avail themselves of the rights previously granted or enjoyed in that country, in accordance with international law.¹⁴

9. International transfer agreements should also set out the obligations of the transferring State, before and after transfer, including measures to enforce the agreement and implement transfers, and mechanisms to monitor all parties' (including the third country's) compliance with the agreement and its implementation.

10. The existence of an international transfer agreement does not absolve the transferring State of its ongoing responsibility to assess whether conditions in the third State meet the standards contained in the agreement, both in law and in practice. This obligation is engaged upon the agreement's conclusion and must be upheld throughout its implementation.¹⁵ To this end, the transferring State must undertake regular monitoring to ensure that the agreed standards are consistently met in practice. The agreement should also include a clause requiring its suspension or termination in case reliable information, including from UNHCR, indicates that the standards are not upheld.

11. Whether an individual can lawfully be transferred can be assessed, for example, through an admissibility procedure or other expedited procedure regulated by law. In any event, individuals must, prior to their transfer, have a meaningful opportunity to assert that the third country is not safe in their particular circumstances, or otherwise that their transfer is unlawful, and have access to an effective remedy to challenge the proposed transfer.¹⁶ For some individuals with specific profiles, vulnerabilities or belonging to particular groups, the third country may not be safe. This includes individuals at risk of human rights violations as well as those who may otherwise face significant barriers to enjoying their rights or accessing basic services in the third country. Equally, when asylum-seekers are not admitted to the territory of the third country, or have no access to fair and efficient asylum procedures, they must not be transferred and must be able to seek and enjoy asylum in the current host State. Also, the transfer would not be lawful when, for example, it breaches the right to family life that the transferred individual is enjoying in the current host State. These individuals must not be transferred. In all cases in which the transfer of children is being considered, the best interests of the child must be a primary consideration.

¹³ The term "lawful stay" also refers to refugees who are authorized to stay in the host country, including after recognition. See UNHCR, "*Lawfully Staying*" - A Note on Interpretation, note 11 above.

¹⁴ The 2018 Legal Considerations, note 1 above, para. 3. Guidance Note on Irregular Onward Movement, note 1 above, paras. 18 and 33. When a refugee has moved onward from a State which has granted international protection, that State bears ongoing obligations towards the individual, unless their status has ceased.

¹⁵ This obligation is based on the principle of non-refoulement, which requires the transferring State to ensure that the individual being transferred is not at a real risk of persecution or other serious human rights violations in the receiving country.

¹⁶ International law recognizes States' obligation to ensure that any person whose rights or freedoms are infringed upon shall have an effective remedy by a competent authority, see, for example, Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) and Article 13 of the European Convention on Human Rights (ECHR). Further, transfers without the possibility of an individual assessment may also amount to a violation of the prohibition of collective expulsion under, among others, Article 13 of the ICCPR, Article 4 of Protocol 4 of the ECHR, Article 12(5) of the African Charter on Human and Peoples' Rights and Article 22(9) of the American Convention on Human Rights.



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**Transfer of asylum-seekers to safe countries with which they have no link
or connection**

12. Transfers need to be sustainable and reasonable.¹⁷ A meaningful link or connection between an asylum-seeker and a third State is not mandatory under international law to permit transfers,¹⁸ although it can enhance their sustainability and reasonableness. In the absence of a meaningful link or connection to the receiving country, measures are needed to ensure sustainability of the transfer, the dignity of the asylum-seekers in the receiving country, including to support prospects for self-reliance and inclusion, and enhancement of responsibility-sharing.

13. The standards applicable to the safety of the third country and other safeguards and guarantees for transfer agreements to a country where the asylum-seeker does have a link – as set out in paras 4 to 11 above – equally apply in relation to transfers to a country where the asylum-seeker does not have a link. In summary, there would need to be guarantees of access to a fair and efficient asylum procedure, of treatment in line with international standards, and of international protection for those who are found to be in need of such protection. The third country must be one that is considered safe for the transferred asylum-seeker and where they can find international protection that is accessible and effective.

Enhancing responsibility-sharing and international cooperation

14. International transfer agreements should serve to effectively share responsibilities for international refugee protection obligations. Furthermore, they should contribute to the effective management of refugee movements and help expand the overall protection space, both in the transferring State and the receiving State, as well as across the broader regions in which these concerned States are situated. Engagement with relevant regional intergovernmental organizations might further facilitate regional cooperation and responses, by leveraging existing mobility frameworks to regulate transfers. Such organizations and frameworks could enable dialogue and joined-up approaches on comprehensive responses to transfers of refugees and asylum-seekers and advance regional harmonization of standards and inclusive State systems, expanding the overall protection space in the region.

15. To ensure the lawfulness and effectiveness of international transfer agreements and encourage constructive engagement with partner States, such agreements should be grounded in the principles of responsibility-sharing and international cooperation, as articulated in the 1951 Convention and the Global Compact on Refugees.¹⁹ Transfer agreements should also uphold the right to seek and enjoy asylum.²⁰ These objectives can be achieved through provisions in the transfer agreement that incorporate the following elements:

¹⁷ Executive Committee Conclusion No. 15(XXX) of 1979, *Refugees Without an Asylum Country*, para (h)(iv). See also 2018 Legal considerations, note 1 above, para. 6 and Guidance Note on Irregular Onward Movement, note 1 above, paras. 14, 15 and 23.

¹⁸ UNHCR 2018 Legal Considerations, note 1 above, para. 6. Guidance Note on Irregular Onward Movement, note 1 above, para. 23.

¹⁹ 1951 Convention, note 6 above, preambular para. 4. UN General Assembly, *Global Compact on Refugees*, 2018, para. 14, www.refworld.org/legal/agreements/unqa/2018/en/124198.

²⁰ *Universal Declaration on Human Rights* (1948), Article 14.



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- Timely, predictable, adequate and sustainable financial and material support to the third country,²¹ to enable it to ensure that refugees and asylum-seekers, alongside members of host communities, have access to adequate standards of treatment and basic services.
- A fair distribution of refugees among participating States,²² having regard to the fact that low- and middle-income States host the majority of the world's refugees. For example, participating States with fewer refugees are encouraged to take on the responsibility for refugees through resettlement and complementary pathways.²³
- Support for the further development of State asylum systems in third countries to ensure fair and efficient procedures as well as the development of inclusive State systems in areas such as education, health, housing, employment and social protection as part of efforts to support sustainable responses.²⁴

16. Transferring States must still uphold the right to seek and enjoy asylum and cannot relinquish responsibility for all asylum-seekers who seek protection at their borders or in their territory. International transfer agreements are not lawful where they are, in whole or in part, an attempt by a State to divest itself of its international legal obligations, for example with regard to "sur place" refugees, referring to persons who were not refugees when they left their country of origin, but become refugees at a later date.²⁵ A practice by a State fully divesting itself of its international legal obligations would amount to externalization of refugee law obligations contrary to international law.²⁶ UNHCR has cautioned that this may be the case when transfer agreements lack adequate safeguards to ensure effective access to international protection including as provided in this guidance, unfairly shift the burden for identifying or addressing international protection needs to another State or leave transferred persons' international protection needs unmet.

UNHCR engagement in relation to international transfer agreements

17. In line with UNHCR's mandate, particularly its competence to promote the conclusion of international conventions for the protection of refugees and to advocate the admission of

²¹ *Ibid.*, paras. 14 and 32. This is particularly important where the receiving country is one of the low- and middle income countries which host 73% of the world's refugees, see: UNHCR, *Global Trends Report 2024*, <https://www.unhcr.org/global-trends-report-2024>.

²² 1951 Convention, note 6 above, preambular paragraph 4, recognizing that "the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation".

²³ Global Compact on Refugees, note 19 above, paras. 18, 21, 23, 90-96.

²⁴ Sustainable responses are nationally-led strategies that promote self-reliance and support durable solutions from the outset, while advancing responsibility-sharing across the international community. They help advance the objectives of the Global Compact on Refugees – easing pressure on host countries, enhancing self-reliance, expanding access to third-country solutions, and supporting conditions in countries of origin for safe and dignified return. See Executive Committee of the High Commissioner's Programme, *Sustainable responses*, EC/76/SC/CRP.17, 11 June 2025, <https://www.unhcr.org/media/sustainable-responses-93rd-meeting-standing-committee>.

²⁵ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 4, April 2019, paras. 94-96, www.refworld.org/policy/legalguidance/unhcr/2019/en/123881.

²⁶ 'Externalization' refers to measures taken by States – unilaterally or in cooperation with other States – which involve inadequate safeguards to guarantee international protection as well as shifting responsibility for identifying or meeting international protection needs to another State or leaving such needs unmet, making such measures unlawful. See UNHCR, *UNHCR Note on the "Externalization" of International Protection*, 28 May 2021, www.refworld.org/policy/legalguidance/unhcr/2021/en/121534.



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refugees to the territories of States,²⁷ UNHCR can play an important role in supporting the conclusion and implementation of international transfer agreements of refugees and asylum-seekers. Through constructive engagement with States and other stakeholders, UNHCR can foster international cooperation, enhance the effectiveness and sustainability of transfer agreements, improve refugees' self-reliance and resilience, and advance the rights-based and effective management of refugee movements.

18. Specifically, UNHCR's role in fostering adherence by States with international protection principles and standards in the conclusion and implementation of transfer agreements may include:

- advising States and regional organizations on the development of international transfer agreements;
- providing guidance to States on the scope and terms of transfer agreements to ensure compliance with international legal standards, as well as with the principles of responsibility-sharing and international cooperation;
- advising States on reforms required to domestic legal frameworks to enable effective implementation and enforcement of transfer agreements;²⁸
- facilitating and/or participating in negotiations of transfer agreements between States;
- monitoring the implementation of transfer agreements and advising participating States accordingly, including, when relevant, on the suspension or termination of agreements;
- providing legal and practical advice, including through partners, to refugees and asylum-seekers subject to transfer agreements, notably through effective approaches for communication with communities;
- following formal agreement by the third country to admit them to the territory,²⁹ supporting refugees in re-acquiring lawful status previously held in the third country, including the renewal of expired, withdrawn or lost residency permits.
- noting that the third country is required to facilitate access to documentation, rights and basic services, including meeting immediate needs and ensuring adequate reception conditions, UNHCR may provide support as relevant;
- supporting the development of asylum capacity in the participating States to ensure access to fair and efficient asylum determination procedures;
- supporting the development of inclusive State systems to ensure access to education, employment, housing, health care, and social protection, among other areas, while

²⁷ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), www.refworld.org/docid/3ae6b3628.html, paras. 8(a) and 8(d).

²⁸ Relevant in this regard is UNHCR's supervisory responsibility under paragraph 8(a) of its Statute, note 27 above, as well as the 1951 Convention and 1967 Protocol Contracting States' obligation to cooperate with UNHCR and facilitate its supervisory responsibility, particularly in relation to the States' laws, regulations and decrees. See Article 35 of the 1951 Convention, note 6 above, and Article II of the *Protocol relating to the Status of Refugees* (31 January 1967) 606 UNTS 267, www.refworld.org/docid/3ae6b3ae4.html.

²⁹ It is noted that admission to the territory is a precondition for the lawfulness of a transfer arrangement (see paras 7-10).



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coordinating with partners efforts to address the welfare of refugees and asylum-seekers;³⁰

- facilitating access to solutions for refugees, including through resettlement and complementary pathways; and
- administering funds to support the implementation of transfer agreements.³¹

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³⁰ UNHCR Statute, note 27 above, para. 8(i).

³¹ *Ibid.*, para. 10.



सत्यमेव जयते

The Immigration and Foreigners Act, 2025

(ACT NO. 13 OF 2025)

[As on the 10th September, 2025]

LIST OF ABBREVIATIONS USED

G.S.R.	.	.	.	.	.	<i>for</i>	General Statutory Rules.
S.O.	.	.	.	.	.	„	Statutory Order.
Notifn.	.	.	.	.	.	„	Notification.

THE IMMIGRATION AND FOREIGNERS ACT, 2025

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THE IMMIGRATION AND FOREIGNERS ACT, 2025

ACT NO. 13 OF 2025

[4th April, 2025.]

An Act to confer upon the Central Government certain powers to provide for requirement of passports or other travel documents in respect of persons entering into and exiting from India and for regulating matters related to foreigners including requirement of visa and registration and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Seventy-sixth Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title and commencement.—(1) This Act may be called the Immigration and Foreigners Act, 2025.

(2) It shall come into force on such date¹ as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions.—In this Act, unless the context otherwise requires,—

(a) “accommodation” means a temporary or permanent premises of any nature, where a foreigner is accommodated;

(b) “carrier” means a person or entity, including any association of persons or company, whether incorporated or not, who is engaged in the business of transporting passengers or cargo by air, water or land by aircraft or ship or any other mode of transport;

(c) “civil authority” means such authority as may be appointed by the Central Government in this behalf for such area as it thinks fit;

(d) “entry” means entry by air, water or land;

(e) “exit” means exit by air, water or land;

(f) “foreigner” means a person who is not a citizen of India;

(g) “immigration function” means any one of the functions relating to—

(i) the visa issuance and regulation of entry into;

(ii) transit through;

(iii) stay in; or

(iv) movement within and exit from,

India, under the provisions of this Act or rules or orders or directions made thereunder;

(h) “Immigration Officer” means any officer authorised by the Central Government to carry out immigration functions or such other functions as may be prescribed and includes the Chief Immigration Officer;

(i) “immigration post” means the point of entry into and exit from India for the purpose of immigration functions as may be notified by the Central Government;

(j) “keeper of accommodation” means the person in charge of the management of an accommodation and includes any person authorised by him to perform the duties of the keeper of the accommodation;

1. 1st day of September, 2025, *vide* notification No. S.O. 3981 (E), dated 31st August, 2025, *see* Gazette of India, Extraordinary, Part II, sec. 3 (ii).

(k) “notification” means a notification published in the Official Gazette and the expressions “notify” and “notified” shall be construed accordingly;

(l) “order” means the instructions issued under any of the provisions of this Act or the rules made thereunder;

(m) “other travel document” means the Emergency Certificate or Certificate of Identity or such other travel document which has been issued by or under the authority of the Central Government or Government of a foreign country or any other organisation as may be recognised for this purpose by the Central Government, subject to such conditions as may be prescribed;

(n) “passport” means a passport issued or deemed to have been issued under the provisions of the Passport Act, 1967 (15 of 1967) and includes a passport which have been issued by or under the authority of the Government of a foreign country subject to such conditions as may be prescribed;

(o) “prescribed” means prescribed by rules made under this Act;

(p) “Prohibited place” means any place as the Central Government may, by order, specify in this behalf;

(q) “Protected area” means any area contiguous with India’s international border or any other area, as the Central Government may, by order, specify in this behalf;

(r) “Registration Officer” means a Registration Officer authorised by the Central Government in this behalf for such area as it thinks fit and includes such officer authorised by him with the approval of the Central Government to perform the duties of the Registration Officer on his behalf;

(s) “Restricted area” means any area within India and outside the protected area, as the Central Government may, by order, specify in this behalf;

(t) “visa” means an authorisation by such authority as may be prescribed in this behalf, permitting a foreigner to enter into or transit through or stay in or exit from the territory of India.

CHAPTER II

MATTERS RELATED TO IMMIGRATION

3. Requirement of passport or other travel document and visa.—(1) No person proceeding from any place outside India shall enter, or attempt to enter, India by air, water or land unless he is in possession of a valid passport or other travel document, and in case of a foreigner, also a valid visa, and any foreigner while present in India shall also be required to possess valid passport or other valid travel document and valid visa, unless exempted under section 33 or through intergovernmental agreements:

Provided that notwithstanding anything contained in this sub-section, no foreigner shall be allowed to enter into or stay in India, if he is found inadmissible to do so on account of threat to national security, sovereignty and integrity of India, relations with a foreign State or public health or on such other grounds as the Central Government may, specify in this behalf:

Provided further that the decision of the Immigration Officer in this regard shall be final and binding.

(2) Notwithstanding anything contained in section 3 of the Passports Act, 1967 (15 of 1967), no person shall depart or attempt to depart from India by air, water or land unless he is in possession of a valid passport or other travel document and in case of a foreigner, also a valid visa:

Provided that notwithstanding anything contained in this sub-section, no person shall be allowed to depart or exit from India, if his presence is required in India by any authorised agency or on such grounds as the Central Government may, by order, specify in this behalf:

Provided further that the decision of the Immigration Officer in this regard shall be final and binding.

(3) The Immigration Officer may examine the passport or other travel document and visa of a foreigner during his entry into, transit through, stay in, movement within India and also require him to furnish such information as may be necessary and appropriate.

(4) The Immigration Officer may seize a passport or other travel document of any person which has been declared as lost or stolen or considered as damaged or forged or fraudulently obtained or on the direction of the passport issuing authority or courts.

(5) The overall supervision, direction and control on visa and related matters shall vest in and be exercised by the Central Government.

4. Immigration posts for entry or exit.—(1) The Central Government may notify the designated immigration posts for entry into or exit from India at such places as may be specified.

(2) A designated immigration post for entry into or exit from India shall be manned by an Immigration Officer or such other officers as may be specified by the Bureau of Immigration constituted under section 5.

5. Bureau of Immigration.—(1) There shall be constituted a Bureau called the Bureau of Immigration for performing the immigration functions and such other functions as may be prescribed.

(2) The Bureau of Immigration referred to in sub-section (1) shall consist of such number of officers appointed by the Central Government in such manner as may be prescribed.

(3) The general supervision, directions and control of the Bureau of Immigration, shall vest in and be exercised by the Central Government and the overall supervision of the immigration functions and such other functions as may be prescribed, shall vest in the officer appointed by the Central Government as Commissioner of Bureau of Immigration.

(4) The Commissioner, Bureau of Immigration shall, in discharge of his duties under this Act, be assisted by the Foreigners Regional Registration Officers, Foreigners Registration Officers, Chief Immigration Officers and such Immigration Officers as may be authorised by the Central Government in this behalf.

CHAPTER III

MATTERS RELATED TO FOREIGNERS

6. Registration of foreigners.—The foreigners on arrival in India shall be required to register with the Registration Officer concerned, subject to such conditions and in such manner as may be prescribed.

7. Power to issue orders, directions or instructions.—(1) The Central Government may, by an order or direction or instruction, make provisions, either generally or with respect to all foreigners or with respect to any particular foreigner or any specified class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or, their departure therefrom or their presence or continued presence therein.

(2) In particular, and without prejudice to the generality of the foregoing power, the orders or directions or instructions issued under this section may provide that the foreigner—

(a) shall not enter India, or shall enter India only at such times and by such route and at such port or place and subject to the observance of such conditions on arrival as may be specified;

(b) shall not depart from India, or shall depart only at such times and by such route and from such port or place and subject to the observance of such conditions on departure as may be specified;

(c) shall not remain in India or in any specified area therein;

(d) shall, if he has been required by order or direction or instruction under this section not to remain in India, meet from any resources at his disposal the cost of his removal from India and of his maintenance therein pending such removal;

(e) shall remove himself to, and remain in, such area in India as may be specified;

(f) shall comply with such conditions as may be specified—

(i) requiring him to present himself for examination, for such information in such manner, at such time, as may be required;

- (ii) requiring him to reside in a particular place;
- (iii) imposing any restrictions on his movements;
- (iv) requiring him to furnish such proof of his identity and to report such particulars to such authority in such manner and at such time and place as may be specified;
- (v) requiring him to allow his photograph and biometric information, as may be specified, to be taken and to furnish specimens of his handwriting and signature to such authority and at such time and place as may be specified;
- (vi) requiring him to submit himself to such medical examination by such authority and at such time and place as may be specified;
- (vii) prohibiting him from association with persons of a specified description;
- (viii) prohibiting him from engaging in activities of a specified description;
- (ix) prohibiting him from using or possessing specified articles;
- (x) regulating his conduct in any such particular as may be specified.

(3) In addition to the foregoing, the Central Government may make provision for any matter which is to be or may be specified and for such incidental and supplementary matters as may be expedient or necessary for giving effect to this Act.

(4) Any authority specified in this behalf may, with respect to any particular foreigner, issue order or direction or instruction under clause (f) of sub-section (2).

8. Obligation of keeper of accommodation and others to furnish particulars.—(1) It shall be the duty of the keeper of accommodation to submit to the Registration Officer such information in respect of foreigners accommodated in such accommodation and in such manner as may be prescribed:

Provided that subject to provisions of sub-section (3), provisions of this of this sub-section shall not be applicable to residential premises of non-commercial nature.

(2) Every foreigner accommodated in such accommodation shall furnish to the keeper of accommodation thereof such particulars as may be required by him.

(3) If in any area as may be specified in this behalf, the civil authority so directs, it shall be the duty of every person occupying or having under his control any residential premises to submit to the Registration Officer in such manner such information in respect of foreigner accommodated in such premises as may be specified.

9. Obligation of Universities and Educational Institutions.—Every University and Educational Institution or any other institution admitting any foreigner shall furnish information to the Registration Officer in respect of such foreigner in such manner as may be prescribed.

10. Obligation of hospital, nursing home or any other medical institution.—Every hospital, nursing home or any other such medical institution providing medical, lodging or sleeping facility in their premises shall furnish information in respect of any foreigner taking indoor medical treatment or their attendant for whom such lodging or sleeping facility has been provided to the Registration Officer in such manner as may be prescribed.

11. Visit to Protected or Restricted area or Prohibited places.—No foreigner shall enter or stay in Protected area or Restricted area or Prohibited place without a special permit or permission granted by such authority as may be specified by an order published in the Official Gazette in this behalf and subject to such conditions as specified therein.

12. Change of name of foreigner in India.—(1) No foreigner who was in India on the date on which this Act came into force shall, while in India after that date, assume or use or purport to assume or use for any purpose, any name other than that by which he was ordinarily known immediately before the said date, except where a specific permission for change of name has been granted by such authority in such manner as may be prescribed.

(2) No foreigner who has entered into India after the date on which this Act came into force shall, while in India after the date of his entry, assume or use or purport to assume or use for any purpose, any name other than that by which he was ordinarily known immediately before the said date of entry, except where a specific permission for change of name has been granted by such authority as may be prescribed.

(3) For the purpose of this section—

(a) the expression “name” includes a surname; and

(b) a name shall be deemed to be changed if the spelling thereof is altered.

(4) Nothing contained in this section shall apply to the assumption or use by any married woman, of her husband’s name.

13. Foreigners whose movements are restricted.—(1) Any foreigner in respect of whom there is in force an order under clause (f) of sub-section (2) of section 7 requiring him to reside at a place set apart for the residence under supervision, for a number of foreigners, shall, while residing therein, be subject to such conditions as to maintenance, discipline and the punishment of offences and breaches of discipline as the Central Government may from time to time by order determine.

(2) No person shall—

(a) knowingly assist such a foreigner to escape from custody or the place set apart for his residence, or knowingly harbour any such foreigner; or

(b) give such a foreigner any assistance with intent thereby to prevent, hinder or interfere with the apprehension of such a foreigner.

(3) The Central Government may, by order, provide for regulating access to, and the conduct of persons in, places in India where such a foreigner whose movements are restricted is lodged, and for prohibiting or regulating the dispatch or conveyance from outside such places to or for such a foreigner therein of such articles as may be prescribed.

14. Power to control places frequented by foreigners.—(1) The civil authority may, subject to such conditions as may be prescribed, direct the owner or keeper having control of any premises frequented by any foreigner—

(a) to close such premises either entirely or during specified periods;

(b) to use or permit the use of such premises only under such conditions as may be specified; or

(c) to refuse admission to such premises either to all foreigners or to any specified foreigner or class of foreigners.

(2) A person to whom any direction has been given under sub-section (1) shall not, while such direction remains in force, use or permit to be used any other premises for any of the aforesaid purposes, except with the previous permission in writing of the civil authority and in accordance with any conditions which that authority may think fit to impose.

(3) Any person to whom any direction has been given under sub-section (1) and who is aggrieved thereby may, within thirty days from the date of such direction, appeal to the Central Government, and the decision of the Central Government in the matter shall be final.

15. Foreigner who is national of more than one foreign country.—When a foreigner, while in India with a valid passport or other travel document and valid visa, is recognised as a national by the law of more than one foreign country, the civil authority or Immigration Officer may, after due verification of all available documents and inquiry, treat that foreigner as the national of the country on whose passport or travel document he had entered into India or with which he appears to be most closely connected for the time being and the decision of civil authority or Immigration Officer in this regard shall be final:

Provided that the Central Government, either of its own motion or on an application by the foreigner concerned, may revise any such decision.

16. Burden of proof.—If in any case, not falling under section 15, any question arise with reference to this Act or any rule or order made or direction given thereunder, whether any person is or is not a foreigner of a particular class or description, the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, notwithstanding anything contained in the Bharatiya Sakshya Adhiniyam, 2023 (47 of 2023), lie upon such person.

CHAPTER IV

LIABILITY OF CARRIERS

17. Obligation of carriers and like.—(1) The carrier landing or embarking at a port or place in India shall furnish to a civil authority or Immigration Officer—

(i) the passenger and crew manifest;

(ii) the advance passenger information data of passengers and crew on board of such aircraft, vessel or other mode of transport, as the case may be; and

(iii) the passenger name record information of passengers arriving or departing,

in such form, containing such particulars, in such manner and within such time, as may be prescribed.

(2) For the purposes of sub-section (1), the expression “passenger name record information” means the records prepared by an operator of any aircraft or vessel or other mode of transport or his authorised agent for each journey booked by or on behalf of any passenger.

(3) Where the information referred to in sub-section (1) is not furnished to civil authority or Immigration Officer within the prescribed time and manner or false information is furnished and if civil authority or Immigration Officer is satisfied that there was no sufficient cause for such delay in furnishing the information or in the manner prescribed, the carrier shall be liable to such penalty specified in section 18 for each such information:

Provided that no penalty shall be imposed without giving the carrier an opportunity of being heard in the matter.

(4) Any person aggrieved by the penalty imposed under sub-section (3), may prefer an appeal to such authority in such form, manner and accompanied by such fee as may be prescribed.

(5) Every such appeal shall be preferred within a period of thirty days from the date of the order appealed against:

Provided that the appellate authority may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of thirty days, permit the appellant to prefer the appeal within a further period not exceeding thirty days.

(6) On receipt of any such appeal, the appellate authority shall, after giving the parties an opportunity of being heard and after making such inquiry as it deems proper, make such order, as it may think fit, confirming, modifying or reversing the order appealed against.

(7) Any District Magistrate or any Commissioner of Police or, where there is no Commissioner of Police, any Superintendent of Police or the civil authority or Immigration Officer may, for any purpose connected with the enforcement of this Act or any rule or any order made thereunder, require the carrier to furnish such information as may be prescribed in respect of passengers or members of the crew on such aircraft, vessel or other mode of transport, as the case may be.

(8) Any passenger on such carrier and any member of the crew of such carrier shall furnish to the carrier, any information required by him for the purpose of furnishing the information referred to in sub-section (1) or for furnishing the information required under sub-section (7).

(9) If any foreigner whose entry has been refused, such foreigner shall be handed over to the carrier by the Immigration Officer and it shall be the responsibility of that carrier to ensure his removal from India without delay.

(10) If any foreigner enters into India in contravention of any provisions of this Act or any rule or order made thereunder, the civil authority or Immigration Officer may, within two months from the date of such entry, direct the carrier on which such entry was effected to provide accommodation, otherwise than at the expense of Central Government, on such aircraft or a vessel or any other mode of transport for the purpose of removing the said foreigner from India.

(11) The carrier which is about to carry passengers from a port or place in India to any destination outside India, if so directed by the Central Government and on tender of payment therefor at the current rates, shall provide on the aircraft or vessel or any other mode of transport, accommodation to such port or place outside India, being a port or place at which the aircraft or vessel or any other mode of transport is due to call, as the Central Government may specify, for any foreigner ordered under section 7 not to remain in India and for his dependents, if any, travelling with him.

(12) The carrier shall not cause or permit the aircraft or vessel or any other mode of transport to depart from a port or place in India until a clearance has been obtained from the Immigration Officer on submission of general declaration in such form, manner and with such particulars, as may be prescribed.

(13) For the purposes of this section,—

(a) “carrier” shall also include pilot of aircraft, master of vessel, or company representative or station manager or operator of such aircraft or vessel or any other mode of transport or any person authorised by such carrier to discharge on his behalf any of the duties imposed on him by this section;

(b) “passenger” means any person not being a *bona fide* member of the crew, travelling or seeking to travel on an aircraft or a vessel or any other mode of transport.

CHAPTER V

OFFENCES, PENALTIES AND APPEAL

18. Liability of carrier to pay penalty.—The carrier, for contravention of the provisions of section 17, shall be liable to a penalty which may extend to fifty thousand rupees.

19. Liability of carriers for passengers brought into India.—(1) Where the civil authority or Immigration Officer is of the opinion that any carrier has brought a person, in contravention of the provisions of section 3 and rules or orders made thereunder, into India, he may, by order impose a penalty which shall not be less than two lakh rupees, but may extend to five lakh rupees, on such carrier:

Provided that no order shall be passed without giving the carrier an opportunity of being heard in the matter.

(2) Any person aggrieved by an order made under sub-section (1), may prefer an appeal to such authority in such form, manner and accompanied by such fee as may be prescribed.

(3) Every such appeal shall be preferred within a period of thirty days from the date of the order appealed against:

Provided that the appellate authority may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of thirty days, permit the appellant to prefer the appeal within a further period of thirty days.

(4) On receipt of any such appeal, the appellate authority shall, after giving the parties a reasonable opportunity of being heard and after making such inquiry as it deems proper, make such order, as it may think fit, confirming, modifying or reversing the order appealed against.

(5) Where any penalty imposed under this section is not paid, the civil authority or Immigration Officer may recover the penalty so payable by—

(a) seizing or detaining the aircraft or the ship or any other mode of transport of the carrier;

- (b) seizing, detaining or selling any goods or properties belonging to the carrier; or
- (c) such other means as may be notified.

20. Contravention or attempts to contravene provisions of Act.—(1) Any person who contravenes or attempts to contravene, or abets or attempts to abet, or does any act preparatory to a contravention of, any of the provisions of this Act or of any rule or order made or direction given thereunder, or fails to comply with any direction given in pursuance of any such order, shall be deemed to have contravened the provisions of this Act.

(2) Any person who, knowing or having reasonable cause to believe that any other person has contravened the provisions of this Act or of any rule or order made or direction given thereunder, gives that other person any assistance with intent thereby to prevent, hinder or otherwise interfere with his arrest, trial or punishment for the said contravention shall be deemed to have abetted that contravention.

(3) The carrier, by means of which any foreigner enters or leaves India in contravention of this Act or any rule or order made thereunder, or direction given in pursuance of section 7 shall, unless he proves that he exercised all due diligence to prevent the said contravention, be deemed to have contravened this Act.

21. Penalty for entry without valid passport or other travel document.— Any foreigner who enters into any area in India without a valid passport or other travel document, including visa required for such entry in contravention of provisions of section 3 of this Act or of any rule or order made thereunder or any direction given in pursuance thereof, shall be punishable with an imprisonment for a term which may extend to five years or with fine which may extend to five lakh rupees or with both.

22. Penalty for using or supplying forged or fraudulently obtained passport or other travel document and visa.—Whoever knowingly uses or supplies a forged or fraudulently obtained passport or other travel document or visa for entering into India or staying in or exiting from India, shall be punishable with an imprisonment for a term which shall not be less than two years, but may extend to seven years and shall also be liable to fine which shall not be less than one lakh rupees, but may extend to ten lakh rupees:

Provided that any attempt for above mentioned use of forged or fraudulently obtained passport or any other travel document or visa found for such entry or exit from India shall also be treated as an offence under this section.

23. Penalty for contraventions of other provisions of this Act.—Whoever,—

(a) being a foreigner, remains in any area in India for a period exceeding the period for which the visa was issued to him or stays in India without a valid passport or other valid travel document in contravention of provisions of section 3 or does any act in violation of the conditions of the valid visa issued to him for his entry and stay in India or any part thereunder;

(b) contravenes any other provisions of this Act, other than sections 17 and 19, or of any rule or order made thereunder or any direction or instruction given in pursuance of this Act or such order or direction or instruction for which, no specific punishment is provided under this Act,

shall be punishable with an imprisonment for a term which may extend to three years or with a fine which may extend to three lakh rupees or with both.

24. Penalty for abetment. — (1) Whoever abets any offence punishable under sections 21 or 22 or 23 shall, if the act abetted is committed in consequence of the abetment, be punishable with the same punishment as provided for those offences.

(2) For the purposes of this section,—

(i) an act or offence is said to be committed in consequence of the abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the offence;

(ii) the expression “abetment” shall have the same meaning as assigned to it under section 45 of the Bharatiya Nyaya Sanhita, 2023 (45 of 2023).

25. Compounding of certain offences.—(1) Notwithstanding anything contained in the Bharatiya Nagarik Suraksha Sanhita, 2023 (46 of 2023), any offence punishable under sections 21, 23 or section 24 whether committed by an individual or a company or an organisation or any officer or employee or a representative thereof, may, either before the institution of prosecution or during trial, be compounded by such officers or authorities and for such sums as the Central Government may, by notification, specify in this behalf:

Provided that the sum so specified shall not, in any case, exceed the maximum amount of the fine which may be imposed under sections 21 or 23 for the offence so compounded.

(2) Nothing contained in sub-section (1) shall apply to an offence committed, by an individual or a company or an organisation or any officer or employee or representative thereof within a period of three years from the date on which a similar offence committed by it or him was compounded under this section.

(3) Every officer or authority referred to in sub-section (1) shall exercise the powers to compound an offence, subject to the directions, control and supervision of the Central Government.

(4) Where any offence is compounded before the institution of any prosecution or before commencement of trial, no prosecution shall be instituted in relation to such offence, against the offender in relation to whom the offence is so compounded.

(5) Where the compounding of an offence is made after the institution of prosecution or during trial, such compounding shall be brought by the authority specified for such compounding in writing, to the notice of the court in which the prosecution or trial is pending and on such notice of the compounding of offences being given, the individual or the company or the organisation or any officer or employee in relation to whom the offence is so compounded shall be discharged.

(6) For the purposes of this section, any second or subsequent offence committed after the expiry of a period of three years from the date on which the offence was previously compounded, shall be deemed to be a first offence.

26. Power to arrest.—Any officer of police, not below the rank of a Head Constable may arrest without warrant any person who has contravened or against whom a reasonable suspicion exists that he has contravened section 3 or any rule or order made thereof and the provisions of section 58 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (46 of 2023) shall, so far as may be, apply in the case of any such arrest.

CHAPTER VI

MISCELLANEOUS

27. Power to give effect to orders, directions, and like.—(1) Any authority empowered by or under or in pursuance of the provisions of this Act or rule or order made thereunder to give any direction or to exercise any other power may, in addition to any other action expressly provided for in this Act, take or cause to be taken such steps and use, or cause to be used, such force as may, in its opinion, be reasonably necessary for securing compliance with such direction or for preventing or rectifying any breach thereof, or for the effective exercise of such power, as the case may be.

(2) Any police officer, not below the rank of Head Constable, may take such steps and use such force as may, in his opinion, be reasonably necessary for securing compliance with any rule or order made or direction given under or in pursuance of the provisions of this Act or for preventing or rectifying any breach of such rule or order or direction.

(3) The power conferred by this section shall be deemed to confer upon any person acting in exercise thereof a right of access to any land or other property whatsoever.

28. Power to delegate authority.—The Central Government may, by notification, direct that any power or functions which may be exercised or performed by it under this Act or by any rule or order made thereunder, subject to such conditions, if any, as it may specify in such notification, be exercised or performed—

(a) by such officer or authority subordinate to the Central Government;

(b) by any State Government or by any officer or authority subordinate to such Government or any officer or authority authorised by such Government.

29. Power of removal.—The Central Government may, by general or special order, direct the removal of a foreigner from India for contravention of any of the provisions of this Act or any rule or order made thereunder or an adverse security report, and thereupon any officer of the Government shall have all reasonable powers necessary to enforce such directions.

30. Power to make rules.—(1) The Central Government may, by notification, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) such other functions to be carried out by Immigration Officer under clause (h) of section 2;

(b) the conditions subject to which the other travel document issued under clause (m) of section 2;

(c) the conditions subject to which the passport issued under clause (n) of section 2;

(d) the authority authorised to grant visa under clause (t) of section 2;

(e) such other functions to be performed by the Bureau of Immigration under sub-section (1) of section 5;

(f) the manner of appointment of officers of the Bureau of Immigration under sub-section (2) of section 5;

(g) the other functions which shall vest in the officers appointed by the Central Government as Commissioners of the Bureau of Immigration under sub-section (3) of section 5;

(h) the conditions and the manner subject to which the foreigners on arrival in India shall be required to register with the Registration Officer under section 6;

(i) the manner of submission of the information of foreigners to the Registration Officer by the keeper of accommodation under section 8;

(j) the manner of submission of the information of foreigners to the Registration Officer by the Universities and Educational Institutions under section 9;

(k) the manner of submission of the information of foreigners to the Registration Officer by the hospitals, nursing homes and other medical institutions under section 10;

(l) the authority and the manner for change of name of a foreigner subject to a specific permission under sub-sections (1) and (2) of section 12;

(m) the restriction of the dispatch of such articles to or for a foreigner under sub-section (3) of section 13;

(n) the conditions subject to which the civil authority may exercise the power to control places frequented by foreigners under section 14;

(o) the form, particulars, the manner and the time within which the information to be furnished by carrier to the civil authority or Immigration Officer under sub-section (1) of section 17;

(p) the appellate authority, form, manner and the fee to be accompanied for filing an appeal under sub-section (4) of section 17;

(q) the information to be required by District Magistrate or any Commissioner of Police from the carrier under sub-section (7) of section 17;

(r) the form, manner and such particulars to be submitted by the carrier to the Immigration Officer under sub-section (12) of section 17;

(s) the appellate authority, form, manner and the fee to be accompanied for filing an appeal under sub-section (2) of section 19;

(t) any matter which is to be or may be prescribed or in respect of which provision is to be made by rules.

31. Rules to be laid before Parliament.—Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

32. Protection of action taken in good faith.—No suit or any other proceeding shall lie against any person for anything done, or intended to be done in good faith under this Act or any rule or order made thereunder.

33. Power to exempt in certain cases.—(1) The Central Government may, by order published in the Official Gazette, declare that all or any of the provisions of this Act or of any rule or order made thereunder shall not apply, or shall apply only in such circumstances or with such exceptions or modifications or subject to such conditions as may be specified in such order, to or in relation to—

(a) the citizens or class of citizens of any such country as may be so specified; or

(b) any other individual foreigner or class or description of foreigner.

(2) The Central Government may, if it is of the opinion that it is necessary or expedient so to do in the public interest or to fulfil the international obligation, by order published in the Official Gazette and subject to such conditions as may be specified therein, exempt any carrier or class of carriers from the operations of all or any of the provisions of this Act and may, as often as may be necessary, revoke or modify such order.

(3) A copy of every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

34. Application of other laws not barred.—The provisions of this Act shall be in addition to, and not in derogation of the provisions of any other law for the time being in force.

35. Power to remove difficulties.—(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall be made under this section after the expiry of a period of three years from the date of commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

36. Repeal and saving.—(1) The Passport (Entry into India) Act, 1920 (34 of 1920), the Registration of Foreigners Act, 1939 (16 of 1939), the Foreigners Act, 1946 (31 of 1946) and the Immigration (Carriers' Liability) Act, 2000 (52 of 2000) (hereinafter referred to as repealed Acts) are hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken or purported to have been done or taken, including any rules, orders, directions, instructions, regulations or any proceedings made or issued or taken or given or any penalty or fine imposed under the repealed Acts shall, in so far as it is not inconsistent with the provision of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

(3) The mention of the particular matters referred to in sub-section (2) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeal.

STATEMENT OF OBJECTS AND REASONS

The matters relating to foreigners and immigration are presently administered through the Foreigners Act, 1946 (31 of 1946) and the Immigration (Carriers' Liability) Act, 2000 (52 of 2000). The Foreigners Act, 1946 was enacted to confer upon the Central Government certain powers in respect of foreigners. The Immigration (Carriers' Liability) Act, 2000 was enacted to make the carriers liable in respect of passengers brought by them into India in contravention of the provisions of the Passport (Entry into India) Act, 1920 (34 of 1920) and the rules made thereunder and matters connected therewith. The other relevant Acts relating to foreigners and immigration are the Passport (Entry into India) Act, 1920 and the Registration of Foreigners Act, 1939 (16 of 1939). These two Acts were enacted with a view to take power to require passports of persons entering into India; and to provide for the registration of foreigners in India.

2. The Acts, namely the Passport (Entry into India) Act, 1920, the Registration of Foreigners Act, 1939 and the Foreigners Act, 1946 are not only of pre-Constitution period, but also, they were brought into extraordinary times of first and second world wars. While there is an underlying continuity and commonality of objectives among the four Acts, there are some overlapping provisions among the said Acts.

3. In view of the reasons mentioned in the preceding paragraphs, there is a necessity to repeal all the aforesaid four Acts and to enact a new comprehensive legislation, namely the Immigration and Foreigners Bill, 2025. The proposed legislation is to be enacted with a view to confer upon the Central Government certain powers to provide for requirement of passports or other travel documents in respect of persons entering into and exiting from India and for regulating matters related to foreigners including requirement of visa and registration and for matters connected therewith or incidental thereto. The proposed legislation is being enacted to avoid multiplicity and overlapping of laws on the same or related subject and to comply with the Government of India's policy of simplification of laws.

4. The Immigration and Foreigners Bill, 2025, inter alia, provides for the following, namely:—

- (i) the matters relating to immigration, namely the functions of Immigration Officer, the requirement of passport and visa and other matters;
- (ii) the matters relating to foreigners and their registration;
- (iii) the provisions relating to obligation of universities and educational institutions admitting any foreigner;
- (iv) the obligation of hospital, nursing home or any other medical institution admitting the foreigners;
- (v) the provisions relating to foreigners whose movements are restricted;
- (vi) the power of civil authority to control places frequented by foreigners;
- (vii) the provisions relating to liability of carriers and its obligations;
- (viii) the offences and punishment for contravention of certain provisions of the proposed legislation and composition of offences;
- (ix) the power of Central Government to issue orders for removal of foreigners, to delegate and exempt; and
- (x) to repeal the existing four Acts relating to foreigners and immigration.

5. The Notes on clauses explain in detail the various provisions contained in the Bill.

6. The Bill seeks to achieve the above objectives.

AMIT SHAH.

NEW DELHI;
The 4th February, 2025.

**THE DOHA FRAMEWORK FOR A COMPREHENSIVE PEACE AGREEMENT
BETWEEN THE GOVERNMENT OF THE DEMOCRATIC REPUBLIC OF THE
CONGO AND THE ALLIANCE FLEUVE CONGO/MARCH 23RD MOVEMENT
(AFC/M23)**

PREAMBLE

The Government of the Democratic Republic of the Congo (the “Government”), on the one hand, and the Alliance Fleuve Congo/March 23 Movement (“AFC/M23”), on the other hand (the “Parties”);

REAFFIRMING their commitment to national sovereignty and territorial integrity;

REFERRING to the fundamental principles of the Constitution of the Democratic Republic of the Congo (the “DRC”), the rule of law, the Constitutive Act of the African Union (the “AU”), the Charter of the United Nations and all relevant UN Security Council Resolutions that recommend peaceful means to resolve the current armed conflict in the DRC, as well as applicable international law;

REAFFIRMING the commitments and objectives set out in the Declaration of Principles of 19 July 2025 (“Declaration of Principles”) in favour of a pathway towards a Comprehensive Peace Agreement;

REITERATING the will to implement the Prisoner Release Mechanism, signed on 14 September 2025, as well as the Ceasefire Monitoring and Verification Mechanism, signed on 14 October 2025;

RECOGNIZING that durable peace cannot be achieved by military means, but through the acknowledgement and resolution of the root causes of the conflict;

REITERATING that lasting peace constitutes the essential foundation for building a united, prosperous, and secure nation for the people of the DRC;

PRIORITIZING dialogue and negotiation as the means for resolving any dispute between the Parties and their irreversible mutual engagement for peace, in accordance with the joint East African Community–Southern African Development Community (EAC–SADC) framework as endorsed by the AU;

COMMITTING to promote social cohesion by combating impunity for crimes and to promote respect for human rights and non-discrimination;

REITERATING that the Framework Agreement aligns with the provisions of the Peace Agreement between the DRC and the Republic of Rwanda signed in Washington on 27 June 2025, as per the Declaration of Principles signed in Doha on 19 July 2025;



FULLY AND IN GOOD FAITH COMMITTED to comprehensive peace and conflict resolution through the implementation of this Framework Agreement in accordance with its defined Protocols, phases, and timelines, in a spirit of cooperation and mutual trust; and

EXPRESSING their gratitude to the State of Qatar, the United States of America, the AU, and the AU Mediator H.E. Faure GNASSINGBÉ President of the Council of Ministers of the Togolese Republic for their constant support and facilitation role in this peace process;

Hereby agree to the following:

I. INTRODUCTION

a. Purpose and scope

This Framework Agreement sets forth guiding principles, core commitments, and mechanisms aimed at strengthening the effective implementation of the said ceasefire, as well as the will to achieve a permanent cessation of hostilities, stabilization, the resolution of root causes of conflicts, the restoration of State authority, national participatory governance, and national reconciliation and building confidence within the community.

The Comprehensive Peace Agreement will be composed of this Framework Agreement and eight (8) Protocols, two (2) of them having already been signed, and 6 (six) to be negotiated. between the Parties beginning no later than two (2) weeks after the signature of the present Framework Agreement.

The Comprehensive Peace Agreement will be composed of the signed Protocols and any other potential related documents which may be agreed up on by the parties. Each of these Protocols will define detailed measures, timetables, and technical modalities, which will form an integral part of this Agreement, and together form the Comprehensive Peace Agreement.

The Protocols shall determine their implementation, timeline, and sequencing. These Protocols are the following:

- The Mechanism for the Liberation of Detainees signed on 14 September 2025;
- The Ceasefire Oversight and Verification Mechanism signed on 14 October 2025;
- Humanitarian Access and Judicial Protection;
- The Restoration of State Authority, reforms and National Participatory Governance Arrangements;
- Interim Security Arrangements, Disarmament, Demobilization, Reintegration (DDR) of Local Armed Groups and the Neutralization of Foreign Armed Groups;

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- Identity and Citizenship, Return and Reinstallation of Internally Displaced Persons, and Refugees;
- Economic and Social Recovery;
- Justice, Truth, and Reconciliation.

b. Guiding Principles

The Parties commit to the following principles in the adoption and implementation of this Framework Agreement and Protocols:

Good faith implementation; respect for the sovereignty and territorial integrity of the DRC; non-discrimination; protection of civilians and human rights; accountability for crimes; gender and youth participation; respect for customary entities; and cooperation with agreed regional and international partners; as well as respect for international humanitarian law.

The Parties confirm their commitment to the permanent ceasefire and the release of prisoners under the Declaration of Principles and hereby agree to a permanent cessation of hostilities between the Parties. They also reiterate their agreement to implement the Mechanism for the Liberation of Detainees signed on 14 September 2025 and the Ceasefire Oversight and Verification Mechanism, signed in Doha on 14 October 2025.

II. THE PROTOCOLS

1. Humanitarian Access and Judicial Protection

The Parties commit to unimpeded, safe, and sustained humanitarian access; protection of humanitarian personnel; and the facilitation of essential services within the territories impacted by the conflict.

The Parties affirm their respect for international law, including international humanitarian law and international human rights law, when applicable, including regarding the protection of civilians and other persons affected by armed conflict, the protection of missing persons and prisoners of war, the respect for deceased persons, and the protection of family links.

The Government commits to declaring a state of humanitarian emergency in the disaster zone in regions long impacted by armed conflict, accompanied by a special pacification and reconstruction program, whose operations will be defined in the Protocols.

2. Restoration of State Authority, Reforms, And National Participatory Governance Arrangements;

a. Restoration of State Authority



In line with the Declaration of Principles signed in Doha on 19 July 2025, the Parties agree that the full restoration of State authority over the entire national territory, the institutions, and services, constitutes a fundamental pillar of this Peace Agreement. The Protocols will define the actors, in accordance with the Constitution and the national law, modalities, stages, and timetable for the restoration process; local and customary authorities will be associated on matters under their jurisdiction.

b. Reforms

In a country as vast and diverse as the Democratic Republic of Congo, achieving lasting stability and development requires the strengthening of national unity and efficient governance.

The Parties agree that the Government shall undertake the reforms agreed upon in the Protocols in order to ensure the country's political, security, and institutional stability, in the interest of the population, and aimed at strengthening the performance of State institutions, as well as promoting transparent, accountable, and national participatory governance, in accordance with the Constitution and national legislation.

c. National Participatory Governance Arrangements

Establishing a governance mechanism in accordance with the Constitution and the national law, is an important step toward achieving lasting peace and stability in the Democratic Republic of Congo.

The Parties undertake to coordinate the reinstallation of the apolitical public administration, the freedom of movement of persons and goods, access to civil status and other documents needed by the population, and the reopening of essential services (banks, customs, infrastructure); and organize, if conditions permit, free, fair and credible legislative and local elections in the concerned territories.

3. Interim Security Arrangements, Disarmament, Demobilization, Reintegration (DDR) of Local Armed Groups and the Neutralization of Foreign Armed Groups

The Parties shall not harbor or support any armed group. However, pathways for integration or demobilization are to be consistent with arrangements between the Parties, in line with the Constitution, DDR international standards. The Protocol will define the criteria of DDR screening based on best practice in this field.

In the interest of reconciliation and peacebuilding, the Government undertakes to promote an environment of inclusivity and mutual confidence, in a manner consistent with the objectives of this Agreement.

The Parties agree to establish transitional security arrangements, in the areas affected by the conflict, in order to ensure public order and the protection of civilians, for a period of five (5) months, with the possibility of extension by the Parties, in consultation with the Facilitators, and



in the context of progress in implementing the timeline for the restoration of State authority. The composition, command, and mandate shall be defined in the Protocols.

DDR for eligible members of local armed groups and the neutralization of foreign armed groups will be coordinated in accordance with national and international standards and will be included in the Protocols.

4. Identity and Citizenship, Return and Reinstallation of Internally Displaced Persons and Refugees

Addressing the issue of national identity is vital for the return and reinstallation of displaced persons and refugees. For this to happen, the government shall safeguard against persecution, hate speech, denationalization, forced exile, etc.

The Parties commit to facilitating the safe, voluntary, and dignified return of refugees to their areas or countries of origin, in accordance with tripartite mechanisms related to the refugees, the DRC – Country of exile – UNHCR. This process will be conducted in compliance with the international humanitarian law.

The issue of internally displaced persons will be dealt with in the Protocol.

The issue related to identity and citizenship shall be addressed in accordance with the Constitution and national legislation.

The implementation will be defined in the Protocols, in conformity with international standards.

5. Economic Recovery and Social Services

The Parties agree that the Government will take all the necessary measures to restore basic public services, with the support of international partners.

A recovery program for critical infrastructure, livelihoods, education, health, environmental protection, and support of local small and medium enterprises (SMEs) to revive the local economy, prioritizing reintegration of demobilized persons and support to vulnerable groups, will be put in place with international support.

The implementation will be defined under the Protocols.

6. Justice, Truth, and Reconciliation

The Parties agree on the establishment by the Government of an independent national commission to promote truth, reconciliation, and accountability for crimes, and to recommend appropriate reparations through a transitional justice process, whose organization and functioning will be consistent with the Constitution and the applicable international law.

The implementation will be defined under the Protocols.



III. IMPLEMENTATION, MONITORING AND DISPUTE RESOLUTION

The Parties shall adopt the Protocols specifying timelines, areas, sequencing, security parameters, legal measures, and resource arrangements necessary to implement this Framework Agreement.

The Parties undertake to implement this agreement and Protocols in good faith with the accompaniment and support of the international community.

The State of Qatar, the United States of America, and the AU, including the President of the Council of Ministers of the Togolese Republic as the designated Mediator for the AU in the context of protracted insecurity in the Eastern part of DRC, may serve as Observers in this implementation.

Disputes arising from this Framework Agreement, or its Protocols shall be addressed in the first instance amicably by the Parties. Any unresolved matters will be referred to the facilitators.

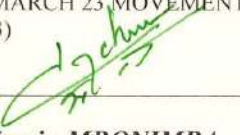
IV. FINAL PROVISIONS

Amendments require the written consent of both Parties.

The Parties agree that the Protocols described in the Purpose and Scope section above and adopted pursuant to this Framework Agreement will constitute a Comprehensive Peace Agreement which shall be implemented in accordance with its spirit and objectives.

The Government commits to adopt the necessary regulatory and legislative measures, including working with the Parliament in accordance with the Constitution of the DRC, for the implementation of the provisions of this Agreement.

This Framework Agreement enters into force upon signature by duly authorized representatives. and remains in effect until replaced by a comprehensive peace settlement or jointly terminated.

<p>FOR THE GOVERNMENT OF THE DEMOCRATIC REPUBLIC OF THE CONGO</p> <p>Signature: </p> <p>Mr. Sumbu Sita MAMBU</p> <p>Date: 15 Novembre 2025.</p>	<p>FOR THE ALLIANCE FLEUVE CONGO/MARCH 23 MOVEMENT (AFC/M23)</p> <p>Signature: </p> <p>Mr. Benjamin MBONIMPA</p> <p>Date: 15 novembre 2025</p>
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Migration and Refugees

Agreement Between the Government of the United States of America and the Government of the Republic of Cabo Verde on the Transfer of Third-Country Nationals

Signed at Praia November 19, 2025.

Entered into Force November 19, 2025.



NOTE BY THE DEPARTMENT OF STATE

Pursuant to Public Law 89—497, approved July 8, 1966
(80 Stat. 271; 1 U.S.C. 113)—

“ . . . the Treaties and Other International Acts Series issued under the authority of the Secretary of State shall be competent evidence . . . of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and international agreements other than treaties, as the case may be, therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof.

**AGREEMENT
BETWEEN
THE GOVERNMENT OF THE REPUBLIC
OF CABO VERDE
AND
THE GOVERNMENT OF THE UNITED STATES
OF AMERICA
ON THE TRANSFER
OF THIRD-COUNTRY NATIONALS**

The Government of the Republic of Cabo Verde and the Government of the United States of America, hereinafter collectively referred to as "the Parties" and individually as the "Party,"

Desiring to promote, deepen, and diversify traditional relations of cooperation and partnership;

Reaffirming that this partnership is based on the greatest respect for the sovereignty of each Party;

Determined to assist one another to ensure the dignified, safe, and timely transfer from the United States of America to Cabo Verde of individuals from third countries who have, by the time of their transfer, sought protection against return to their home country or country of former habitual residence;

Recognizing that it is the prerogative of the Government of the Republic of Cabo Verde to establish the criteria under which Cabo Verde accepts such

transfers, in line with its constitutional principles and international commitments, and based on which it expresses its total or partial agreement with proposed transfers, in light of, namely, the limitations established by the Government of the Republic of Cabo Verde;

Considering Cabo Verde's geographic isolation, the circumstances it faces as a Small Island Developing State and the low population density of its local communities, and aware of the need to preserve social stability; and

Considering the need to build a robust framework which defines clearly and in advance of any transfers the conditions, scope, shared responsibilities, duties, and obligations of the Parties in implementing this partnership and cooperation;

Hereby agree to the following:

ARTICLE I

Aim and Scope

This Agreement establishes a partnership and cooperation framework for the conditions, scope, responsibility, duties, and obligations of the Parties in the processes aimed at the identification, transfer, reception, and integration in Cabo Verde of third-country nationals who were present in the territory of the United States of America seeking protection from return to their country of origin or former habitual residence.

ARTICLE II

Preconditions

1. The Government of the United States of America shall propose, in its sole discretion, to the Government of the Republic of Cabo Verde, through the usual diplomatic channels, the transfer of third-country nationals who have, by the time of their transfer, sought protection against return to their country of origin or former habitual residence;
2. The Government of the Republic of Cabo Verde shall in its complete discretion consider accepting or denying in whole or in part a proposal made by the Government of the United States of America in accordance with paragraph 1, and based on the criteria established in operating procedures developed pursuant to Article IV;
3. For each third-country national proposed for transfer, the Government of the United States of America shall provide documentation, including but not limited to identity documentation and biographic data, to the extent such documentation exists and is in the possession of the Government of the United States of America and to the extent permitted by law, consistent with the operating procedures developed pursuant to Article IV;
4. For each third-country national proposed for transfer, the Government of the United States of America shall provide documentation, including but not limited to identity documentation, biographic data, criminal records (if applicable), and other relevant documents in its possession, to the extent such documentation exists and is in the possession of the United States of America, and to the extent permitted by law, consistent with the operating procedures developed pursuant to Article IV;
5. The Government of the United States of America shall not propose to the Government of the Republic of Cabo Verde the transfer of third-country

nationals with a serious criminal history, gang affiliation, or those who have been imprisoned for or convicted of terrorist activity, to the extent such information is known to the Government of the United States of America, as these limitations are implemented in the operating procedures developed pursuant to Article IV;

6. The Government of the United States of America shall not transfer unaccompanied minors pursuant to this Agreement; and

7. The Government of the United States of America shall make proposals to the Government of the Republic of Cabo Verde by submitting, in advance of any transfers, a provisional list of individuals proposed for transfer, on a timeline and in a manner consistent with the operating procedures developed pursuant to Article IV, for the Government of the Republic of Cabo Verde's review and decision.

ARTICLE III

Duties and Obligations of the Parties

1. Both Parties' actions under this Agreement shall be in accordance with their obligations stemming from international conventions, including the Protocol Relating to the Status of Refugees, done at New York on January 31, 1967; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on December 10, 1984; and any other applicable international obligations, as well as their respective national constitutions, laws, regulations, and immigration and visa policies, including the consideration by the Government of the Republic of Cabo Verde of the petitions of those third-country nationals for asylum, refugee protection, or other equivalent forms of temporary protection;

2. The Government of the United States of America agrees to provide the Government of the Republic of Cabo Verde with lists of proposed third-country nationals for transfer under this Agreement, in the manner outlined

in operating procedures developed pursuant to Article IV, and subject to the number of third-country national transfers outlined in operating procedures developed pursuant to Article IV, and the Government of the Republic of Cabo Verde agrees to make a decision regarding the Government of the United States of America's proposed transfers on the timeline identified in operating procedures developed pursuant to Article IV;

3. The Government of the Republic of Cabo Verde shall create the humane conditions necessary for receiving and facilitating the process of social integration, pursuant to its international obligations, national legislation, social policies, and the terms of this Agreement;

4. The Government of the Republic of Cabo Verde agrees not to send any individual transferred from the United States of America pursuant to this Agreement to his or her country of origin or nationality or former habitual residence, except in cases in which a final decision has been made relating to any pending claims for protection;

5. The Government of the Republic of Cabo Verde shall establish procedures, consistent with the terms of this Agreement and its international obligations and national legislation, to resolve the status of individuals who fail to seek protection or withdraw pending claims or petitions for protection in Cabo Verde; and

6. The Government of the United States of America, upon request, shall endeavor, in accordance with applicable law and regulations, to provide financial and technical assistance to strengthen the institutional capacities of the Government of the Republic of Cabo Verde for the reception and integration of the individuals transferred under this Agreement.

ARTICLE IV**Operating Procedures**

The Parties shall develop operating procedures to assist with the implementation of this Agreement. Such operating procedures are intended to establish pre-transfer procedures, in particular the number and profile of individuals to be transferred, the types of documentation to be provided by the Government of the United States of America, the process by which the Government of the Republic of Cabo Verde shall provide authorization in advance of any transfer, and any other criteria concerning eligibility for transfer.

ARTICLE V**Settlement of Disputes**

In the event of a conflict of interpretation or implementation, the Parties commit to resolve such matters through dialogue or diplomatic channels, always preferring diplomatic channels, that is, through the Embassies of Cabo Verde in Washington, D.C., and of the United States of America in the City of Praia, which shall coordinate with the Ministry of Foreign Relations, Cooperation, and Communities of Cabo Verde and with the U.S. Department of State, respectively.

ARTICLE VI**Entry into Force and Duration**

1. This Agreement shall enter into force upon signature.

2. This Agreement may be amended by written agreement between the Parties, and such amendments shall constitute an integral part of this Agreement, consistent with any applicable legal requirements.

3. Either Party may terminate or suspend this Agreement by notifying the other Party in writing.

4. Nothing in this Agreement shall be interpreted in a manner that obligates the Parties to disburse or commit funds. The implementation of this Agreement shall be subject to the availability of funds and technical capabilities of each Party.

IN WITNESS WHEREOF, the undersigned, who are duly authorized thereto by their respective governments, have signed this Agreement.

DONE at Praia, Cabo Verde, on this 19th day of November, 20 25, in duplicate, in the Portuguese and English languages, both texts being equally authentic.


**FOR THE GOVERNMENT
OF THE REPUBLIC OF
CABO VERDE**


**FOR THE GOVERNMENT
OF THE UNITED STATES
OF AMERICA**

ACORDO ENTRE
O GOVERNO DOS ESTADOS UNIDOS DA AMÉRICA
E
O GOVERNO DA REPÚBLICA DE CABO VERDE
SOBRE A
TRANSFERÊNCIA DE NACIONAIS
DE PAÍSES TERCEIROS

O Governo dos Estados Unidos da América e o Governo da República de Cabo Verde, doravante referidos coletivamente como “as Partes” e individualmente como a “Parte”,

Desejando promover, aprofundar e diversificar as tradicionais relações de cooperação e parceria;

Reafirmando que esta parceria é baseada no maior respeito pela soberania de cada Parte;

Determinados em ajudar-se mutuamente para assegurar a transferência digna, segura e oportuna, dos Estados Unidos da América para Cabo Verde, de indivíduos de países terceiros que possam procurar proteção contra o retorno aos seus países de origem ou ao país da sua anterior residência habitual;

Reconhecendo que cabe ao Governo da República de Cabo Verde a prerrogativa de estabelecer o critério que define se Cabo Verde aceita ou não tais transferências, respeitando os princípios constitucionais de Cabo Verde e compromissos internacionais assumidos e com base no qual o Governo emitirá o seu total ou parcial acordo com as transferências propostas, à luz, nomeadamente, das limitações estabelecidas pelo Governo da República de Cabo Verde;

Considerando o isolamento geográfico da República de Cabo Verde e a baixa densidade populacional das suas comunidades locais, e cientes da necessidade de preservar a estabilidade social;

Considerando a necessidade de se criar um quadro regulatório sólido e funcional que defina, de forma clara e antecipada a quaisquer transferências, as condições, alcance, responsabilidades partilhadas, deveres e obrigações das Partes na implementação desta parceria e cooperação;

Acordaram o seguinte:

ARTIGO I

Âmbito e Finalidade

Este acordo estabelece um quadro de parceria e cooperação, que regulará as condições, alcance, responsabilidades, deveres e obrigações das Partes, nos procedimentos visando a identificação, transferência, acolhimento e integração em Cabo Verde, de nacionais de países terceiros, que estavam presentes no território dos Estados Unidos da América procurando proteção referente ao retorno aos seus países de origem, ou de residência habitual anterior.

ARTIGO II

Condições Prévias

1. O Governo dos Estados Unidos da América proporá, a seu exclusivo critério, ao Governo da República de Cabo Verde, através dos canais diplomáticos habituais, a transferência de nacionais de países terceiros que possam procurar proteção contra o retorno aos seus países de origem, ou de residência habitual anterior;
2. O Governo da República de Cabo Verde poderá, a seu exclusivo critério, aceitar ou recusar, total ou parcialmente, uma proposta apresentada pelo Governo dos Estados Unidos da América, em conformidade com o parágrafo 1, e com base nos critérios estabelecidos nos procedimentos operacionais desenvolvidos nos termos do n.º 1 do Artigo IV;
3. Para cada nacional de país terceiro proposto para transferência, o Governo dos Estados Unidos da América deverá fornecer documentação, incluindo, entre outros, documentação de identidade e dados biográficos, na medida em que tal documentação exista e esteja na posse do Governo dos Estados Unidos da América e na medida permitida por lei, consistente com os procedimentos operacionais desenvolvidos de acordo com os termos do n.º 1 do Artigo IV;

4. Para cada nacional de país terceiro proposto para transferência, o Governo dos Estados Unidos fornecerá documentação, incluindo, mas não se limitando a, documentos de identidade e dados biográficos (se aplicável), e outros documentos relevantes em sua posse, na medida em que tal documentação exista e esteja na posse do Governo dos Estados Unidos da América e na medida permitida por lei, em conformidade com os procedimentos operacionais definidos nos termos do n.º 1 do Artigo IV;
5. O Governo dos Estados Unidos não proporá ao Governo da República de Cabo Verde a transferência de nacionais de países terceiros com antecedentes criminais graves, filiação em gangues criminosas ou que tenham sido presos ou condenados por atividade terrorista, na medida em que tal informação seja do conhecimento do Governo dos Estados Unidos da América, tal como estas limitações estão implementadas nos procedimentos operacionais definidos nos termos do n.º 1 do Artigo IV; e
6. O Governo dos Estados Unidos da América não transferirá menores não acompanhados nos termos do presente Acordo;
7. O Governo dos Estados Unidos da América apresentará propostas ao Governo da República de Cabo Verde, enviando, antes de qualquer transferência, uma lista provisória das pessoas propostas para transferência, num prazo e de uma forma compatíveis com os procedimentos operacionais desenvolvidos nos termos do n.º 1 do Artigo IV, para análise e decisão do Governo da República de Cabo Verde.

ARTIGO III

Deveres e Obrigações das Partes

1. As ações de ambas as Partes no âmbito do presente Acordo deverão respeitar as obrigações decorrentes de convenções internacionais, incluindo o Protocolo Relativo ao Estatuto dos Refugiados, celebrado em Nova Iorque a 31 de janeiro de 1967; a Convenção Contra a Tortura e Outras Penas ou Tratamentos Cruéis, Desumanos ou Degradantes, adotada em Nova Iorque a 10 de dezembro de 1984; bem como quaisquer outras obrigações internacionais aplicáveis, e ainda as respetivas constituições nacionais, leis, regulamentos e políticas de imigração e de vistos, incluindo a consideração pelo Governo da República de Cabo Verde dos pedidos de

asilo, proteção de refugiados ou outras formas equivalentes de proteção temporária apresentados por nacionais de países terceiros;

2. O Governo dos Estados Unidos da América concorda em prover ao Governo da República de Cabo Verde listas de nacionais de países terceiros propostos, para transferência ao abrigo do presente Acordo, listas estas que serão apresentadas na forma delineada nos procedimentos operacionais estipulados nos termos do n.º 1 do Artigo IV, e sujeitas a limites máximos de transferências de nacionais de países terceiros igualmente estabelecidos nesses procedimentos operacionais. O Governo da República de Cabo Verde compromete-se a tomar uma decisão relativamente às transferências propostas pelo Governo dos Estados Unidos da América no prazo definido nos referidos procedimentos operacionais previstos no n.º 1 do Artigo IV;
3. O Governo da República de Cabo Verde criará as necessárias condições humanas para acolher e facilitar o processo de integração social, em conformidade com a sua legislação nacional, políticas sociais e termos do presente Acordo;
4. O Governo da República de Cabo Verde concorda em não enviar qualquer indivíduo, transferido dos Estados Unidos ao abrigo do presente Acordo, para o seu país de origem ou nacionalidade, exceto nos casos em que tenha sido tomada uma decisão final relativamente a quaisquer pedidos pendentes de proteção; e
5. O Governo da República de Cabo Verde estabelecerá procedimentos, coerentes com os termos do presente Acordo e a sua legislação nacional, para resolver o estatuto de indivíduos que não tenham requerido proteção ou retirem requerimentos pendentes para proteção em Cabo Verde; e
6. O Governo dos Estados Unidos da América, mediante solicitação, envidará esforços, em conformidade com a legislação e os regulamentos aplicáveis, para prestar assistência financeira e técnica com vista a reforçar as capacidades institucionais do Governo da República de Cabo Verde para o acolhimento e integração das pessoas transferidas ao abrigo do presente Acordo.

ARTIGO IV**Procedimentos Operacionais**

As Partes definirão procedimentos operacionais para facilitar a implementação do presente Acordo. Tais procedimentos operacionais deverão abordar os trâmites anteriores à transferência, em particular o número e o perfil das pessoas a serem transferidas, o tipo de documentação a ser provida pelo Governo dos Estados Unidos da América e o processo por meio do qual o Governo da República de Cabo Verde emitirá a sua autorização, antecipadamente a qualquer transferência, assim como quaisquer critérios pertinentes à elegibilidade para transferência.

ARTIGO V**Resolução de Diferendos**

No caso de eventuais diferendos na interpretação ou na implementação, as Partes resolverão tais questões por meio do diálogo ou de canais diplomáticos, favorecendo sempre os canais diplomáticos, nomeadamente através da Embaixada de Cabo Verde em Washington, D.C., e a dos Estados Unidos da América na Cidade da Praia, que coordenarão com, respetivamente, o Ministério de Negócios Estrangeiros, Cooperação e Integração Regional de Cabo Verde e o Departamento de Estado dos EUA.

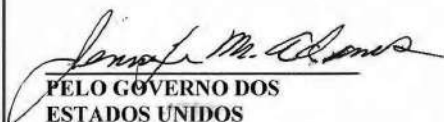
ARTIGO VI**Entrada em Vigor e Duração**

1. A entrada em vigor do presente Acordo ocorre na data da respetiva assinatura.
2. Este Acordo pode ser alterado por acordo escrito entre as Partes, e tais alterações constituirão parte integrante deste Acordo, em conformidade com quaisquer requisitos legais aplicáveis.
3. Qualquer uma das Partes poderá denunciar ou suspender o presente Acordo por meio de notificação, por escrito, à outra Parte.

4. Nada no presente Acordo será interpretado de modo a obrigar as Partes a desembolsar ou comprometer fundos. A implementação do presente Acordo ficará sujeita à disponibilidade de fundos e de capacidades técnicas de cada Parte.

EM FÉ DO QUE, os abaixo-assinados, devidamente autorizados pelos seus respetivos governos, assinaram o presente Acordo.

CELEBRADO em PRAIA, CABO VERDE, em duplicado, no dia 19 do mês de NOVEMBRO de 2025, nas línguas inglesa e portuguesa, fazendo ambos os textos igualmente fé.


PELO GOVERNO DOS
ESTADOS UNIDOS
DA AMÉRICA


PELO GOVERNO DA
REPÚBLICA DE CABO VERDE

United Nations

A/RES/80/188

**General Assembly**Distr.: General
19 December 2025**Eightieth session**

Agenda item 61

**Report of the United Nations High Commissioner for
Refugees, questions relating to refugees, returnees and
displaced persons and humanitarian questions****Resolution adopted by the General Assembly
on 15 December 2025***[on the report of the Third Committee (A/80/545, para. 5)]***80/188. Assistance to refugees, returnees and displaced persons in Africa***The General Assembly,**Recalling* the Organization of African Unity Convention governing the specific aspects of refugee problems in Africa of 1969¹ and the African Charter on Human and Peoples' Rights,²*Reaffirming* that the 1951 Convention relating to the Status of Refugees,³ together with the 1967 Protocol thereto,⁴ as complemented by the Organization of African Unity Convention of 1969, remains the foundation of the international refugee protection regime in Africa,*Welcoming* the entry into force on 6 December 2012 and the ongoing process of ratification of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa,⁵ which marks a significant step towards strengthening the national and regional normative frameworks for the protection of and assistance to internally displaced persons,*Recalling* the decision of the African Union to declare 2019 as the African Year of Refugees, Returnees and Internally Displaced Persons: Towards Durable Solutions to Forced Displacement in Africa,*Recognizing* the particular vulnerability of women and children, as well as older persons and persons with disabilities, among refugees and displaced persons,¹ United Nations, *Treaty Series*, vol. 1001, No. 14691.² *Ibid.*, vol. 1520, No. 26363.³ *Ibid.*, vol. 189, No. 2545.⁴ *Ibid.*, vol. 606, No. 8791.⁵ *Ibid.*, vol. 3014, No. 52375.

including exposure to discrimination, sexual exploitation and abuse, physical abuse, violence and exploitation and the recruitment and use of children by parties to armed conflict in violation of applicable international law, and in this regard acknowledging the importance of preventing, responding to and addressing sexual and gender-based violence as well as violations and abuses committed against refugee, returnee and displaced children,

Expressing gravest concerns about the humanitarian impact of and risks posed by the short- and long-term impacts of the coronavirus disease (COVID-19) pandemic, including on the already significant levels of humanitarian and development needs and suffering of affected people and communities, recognizing the disproportionate impact of the pandemic on women, children and people in vulnerable situations, and profoundly concerned by rising humanitarian assistance and protection needs including due to the increase in violence, including sexual and gender-based violence and violence against children, and the significant impact on education, especially for girls, as well as high levels of food insecurity and malnutrition and rising risks of famine, loss of livelihoods, and all the negative impacts on health, including mental health, which are also exacerbated by weakened health systems, and the impacts and risks for displacement; and recognizing the compounded risks and impacts due to armed conflict, poverty, natural disasters, violence, the adverse effects of climate change, and other environmental challenges; and further recognizing the efforts and measures proposed by the Secretary-General concerning the response to the impact of the COVID-19 pandemic,

Gravely concerned about the continued rising number of refugees and displaced persons in various parts of the continent,

Acknowledging the efforts of Member States, the United Nations High Commissioner for Refugees and other stakeholders in improving the situation of refugees and their host communities,

Expressing grave concern about funding gaps in the budgets of the Office of the United Nations High Commissioner for Refugees and the World Food Programme, which are among the most underfunded, in responding to various refugee situations in different parts of Africa, which are a major factor leading to the deterioration in living conditions in many refugee camps in Africa,

Emphasizing the need to develop a holistic approach in addressing large movements of population that takes into account the underlying causes of displacement,

Recognizing that refugees, internally displaced persons and, in particular, women and children are at an increased risk of exposure to HIV and AIDS, malaria and other diseases,

Recalling the high-level segment on the theme “Enhancing international cooperation, solidarity, local capacities and humanitarian action for refugees in Africa” of the sixty-fifth session of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees, held in Geneva from 29 September to 3 October 2014, and the statement adopted on 30 September 2014 by States members of the Executive Committee,⁶ and expressing deep concern that this particular event has not mobilized the necessary support for refugees and their hosting countries and communities,

⁶ Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 12A (A/69/12/Add.1), annex I.

Welcoming progress made in the implementation of the Nairobi Declaration on Durable Solutions for Somali Refugees and the Reintegration of Returnees in Somalia, welcoming also the nomination of the Special Envoy of the United Nations High Commissioner for Refugees for the Horn of Africa, the adoption of the Djibouti declaration on refugee education in December 2017 and the Kampala Declaration on Jobs, Livelihoods and Self-Reliance for Refugees, Returnees and Host Communities in the Intergovernmental Authority on Development Region, adopted on 28 March 2019, and welcoming further the reaffirmation by Member States of the commitment to promote inclusive policies towards refugees, as noted in the communiqué of the second interministerial stocktaking meeting on the Nairobi Declaration and Action Plan,

Recalling the Pact on Security, Stability and Development in the Great Lakes Region, adopted by the International Conference on the Great Lakes Region in 2006, and its instruments, in particular two of the protocols to the Pact that are relevant to the protection of displaced persons, namely, the Protocol on the Protection of and Assistance to Internally Displaced Persons and the Protocol on the Property Rights of Returning Persons,

Acknowledging with appreciation the generosity, hospitality and spirit of solidarity of African States, including host communities, that, despite their limited resources, continue to host a large number of refugees, owing to humanitarian crises and protracted refugee situations, and in this regard expressing particular appreciation for the commitment and efforts of neighbouring countries in the recent humanitarian crises on the continent,

Welcoming efforts by African States that endeavour to facilitate the voluntary repatriation, local integration, resettlement and rehabilitation of refugees and to promote conditions conducive to the voluntary return and sustainable reintegration of refugees in their country of origin, acknowledging with appreciation the coordination of humanitarian assistance by the United Nations as well as the continuing efforts of donors, the United Nations system, including the Office of the High Commissioner, regional organizations, international agencies, non-governmental organizations and other partners,

Welcoming also efforts made with regard to durable solutions for addressing the plight of refugees during emergencies, and recalling that those solutions include voluntary repatriation and, where appropriate and feasible, local integration and resettlement in a third country, while reaffirming that voluntary repatriation, supported, as necessary, by rehabilitation and development assistance to facilitate sustainable reintegration, remains the preferred solution,

Recognizing that host States have the primary responsibility for the protection of and assistance to refugees on their territory, recognizing also the need to redouble efforts to develop and implement comprehensive durable solution strategies, in appropriate cooperation with the international community and with regard to burden- and responsibility-sharing, and recognizing further the efforts of all States in this regard,

Emphasizing that States have the primary responsibility to provide protection and assistance to internally displaced persons within their jurisdiction, as well as to address the root causes of the displacement problem, in appropriate cooperation with the international community,

Expressing concern regarding the decreasing trend in resettlement opportunities, and recognizing the need to expand resettlement opportunities,

Recognizing the need to encourage increased efforts to facilitate and assist voluntary return and local integration,

Welcoming the ongoing implementation of pledges made by States at the intergovernmental ministerial event held in 2011 to mark the sixtieth anniversary of the 1951 Convention relating to the Status of Refugees and the fiftieth anniversary of the 1961 Convention on the Reduction of Statelessness,⁷

Acknowledging the efforts made by States and regional groups since the launch of the #IBelong campaign to eradicate statelessness and to afford protection to stateless people, as well as the commitments made during the high-level segment on statelessness convened by the Office of the High Commissioner, as well as the outcomes of the fifth Conference of African Ministers Responsible for Civil Registration, both held in October 2019,

Reaffirming its resolution 69/313 of 27 July 2015 on the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, which is an integral part of the 2030 Agenda for Sustainable Development,⁸ supports and complements it, helps to contextualize its means of implementation targets with concrete policies and actions, and reaffirms the strong political commitment to address the challenges of financing and creating an enabling environment at all levels for sustainable development in the spirit of global partnership and solidarity,

Taking note of the World Humanitarian Summit, held in Istanbul, Turkey, on 23 and 24 May 2016, while recognizing that it did not have an intergovernmentally agreed outcome, and welcoming the commitment of the African Heads of State and Government, adopted by the African Union, on the theme “One Africa, One Voice, One Message at the World Humanitarian Summit”,

1. *Takes note* of the reports of the Secretary-General⁹ and the United Nations High Commissioner for Refugees;¹⁰

2. *Calls upon* African States that have not yet signed or ratified the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa to consider doing so as early as possible in order to ensure its wider implementation;

3. *Notes* the need for African States, with the support and collaboration of the international community, to resolutely address the root causes of all forms of forced displacement in Africa and to foster peace, stability and prosperity throughout the African continent;

4. *Recalls* the Global Compact on Refugees as set out in the High Commissioner’s annual report (part II) of 2018,¹¹ affirmed on 17 December 2018,¹² and calls upon the international community as a whole, including States and other relevant stakeholders, to implement the Compact in order to achieve its four objectives on an equal footing based on the principle of burden- and responsibility-sharing, and in accordance with the guiding principles and paragraph 4 of the Global Compact on Refugees, through concrete actions, pledges and contributions, including at the first Global Refugee Forum in December 2019, and requests the High Commissioner to report regularly on the progress being made;

⁷ United Nations, *Treaty Series*, vol. 989, No. 14458.

⁸ Resolution 70/1.

⁹ A/79/326.

¹⁰ *Official Records of the General Assembly, Eightieth Session, Supplement No. 12 (A/80/12)*.

¹¹ See A/73/12 (Part II).

¹² See resolution 73/151.

5. *Welcomes* the important outcomes of the six continental consultative meetings that were organized under the 2019 theme of the African Union, “Year of refugees, returnees and internally displaced persons: towards durable solutions to forced displacement in Africa”, with regard to global responsibility-sharing, the role of parliamentarians in preventing and resolving forced displacement, statelessness, the mixed movements of refugees and migrants, and the ratification and implementation of the Organization of African Unity Convention governing the specific aspects of refugee problems in Africa of 1969 and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) of 2009;

6. *Reaffirms* the central role played by the Heads of State and Government of the Intergovernmental Authority on Development towards the successful negotiations in Khartoum and the eventual signing of the final Revitalized Agreement on the Resolution of the Conflict in South Sudan between the Government and the opposition movements during the thirty-third extraordinary summit, held in Addis Ababa on 12 September 2018, and encourages ongoing efforts to fully implement this agreement in order to achieve a sustainable and lasting peace;

7. *Commends* the continued efforts and commitment by the regional Governments towards resolving conflicts in the region, including the ongoing mediation by the Sudan between the parties to the conflict in the Central African Republic under the umbrella of the African Initiative for Peace and Reconciliation in the Central African Republic;

8. *Welcomes* the outcome of the second regional protection dialogue on the Lake Chad basin, held in Nigeria in January 2019, as well as the signing of the Abuja Action Statement by the Governments of Cameroon, Chad, the Niger and Nigeria, with a view to enhancing the response to the urgent needs of refugees, internally displaced persons, returnees and host communities;

9. *Also welcomes* the regional dialogue on protection and solutions related to the situation of forced displacement in the Sahel, held in Bamako on 11 and 12 September 2019, hosted by the Government of Mali, with the participation of government officials from Burkina Faso, Chad, Mauritania and the Niger, and further welcomes the outcome of the dialogue, namely, the Bamako conclusions and ministerial declaration adopted in Geneva on 9 October 2019;

10. *Notes with great concern* that, despite all the efforts made so far by the United Nations, the African Union and others, the situation of refugees and displaced persons in Africa remains precarious and the number of refugees and internally displaced persons has dramatically increased, and calls upon States and other parties to armed conflict to observe scrupulously the letter and spirit of, and respect and ensure respect for, international humanitarian law, bearing in mind that armed conflict is one of the principal causes of forced displacement in Africa;

11. *Welcomes* decision Assembly/AU/Decl. 8 (XXXII), adopted by the Assembly of Heads of State and Government of the African Union at its thirty-second ordinary session, held in Addis Ababa on 10 and 11 February 2019, in which the 2019 theme of the African Union was declared to be the “Year of refugees, returnees and internally displaced persons: towards durable solutions to forced displacement in Africa”;

12. *Expresses its appreciation* for the leadership shown by the Office of the United Nations High Commissioner for Refugees, and commends the Office for its ongoing efforts, with the support of the international community, to assist African States hosting large numbers of refugees, including by providing support to vulnerable local host communities, and to respond to the protection and assistance needs of refugees, returnees and displaced persons in Africa;

13. *Notes* the call of the Secretary-General of the United Nations for a generalized and collective mobilization of the international community to mitigate the short- and long-term effects of the COVID-19 pandemic, and calls for a strengthening of international cooperation in order to ensure equitable and timely access to safe, effective and quality vaccines, diagnostics and therapeutics;

14. *Recognizes* that the COVID-19 pandemic requires a global response to ensure that all States, in particular developing States, including refugee-hosting countries as well as the countries of origin, have universal, timely, effective, quality and equitable access to safe and effective diagnostics, therapeutics, medicines, vaccines and medical supplies and equipment, and calls upon States and other partners to urgently support funding and further explore innovative financing mechanisms aimed at ensuring access to the COVID-19 vaccines for all, including persons of concern to the Office of the High Commissioner and their host communities, bearing in mind that extensive immunization against COVID-19 is a global public good for health in preventing, containing and stopping transmission and bringing the pandemic to an end, and to ensure that refugees can access correct information to avoid the negative impact of disinformation and misinformation;

15. *Notes with appreciation* the ongoing initiatives taken by the African Union, the Subcommittee on Refugees, Returnees and Internally Displaced Persons of its Permanent Representatives Committee and the African Commission on Human and Peoples' Rights, in particular the role of its Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons in Africa, to ensure the protection of and assistance to refugees, returnees and displaced persons in Africa;

16. *Underlines* the need to provide an efficient humanitarian response to internally displaced persons, and recognizes in this regard the importance of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa;

17. *Acknowledges* the important contribution of age, gender and diversity mainstreaming in identifying, through the full participation of women, children, older persons and persons with disabilities, the protection risks faced by the different members of the refugee communities, in particular the non-discriminatory treatment and protection of women, children, older persons and persons with disabilities;

18. *Affirms* that children, because of their age, social status and physical and mental development, are often more vulnerable than adults in situations of forced displacement, recognizes that forced displacement, return to post-conflict situations, integration into new societies, protracted situations of displacement and statelessness can increase child protection risks, taking into account the particular vulnerability of displaced children to forcible exposure to the risks of physical and psychological injury, exploitation and death in connection with armed conflict, as well as the recruitment and use of children by parties to armed conflict in violation of applicable international law, and acknowledges that wider environmental factors and individual risk factors, particularly when combined, may generate different protection needs;

19. *Recognizes* that no solution to forced displacement can be durable unless it is sustainable, and therefore encourages the Office of the High Commissioner to support the sustainability of durable solutions, and recalls that those solutions include voluntary repatriation and, where appropriate and feasible, local integration and resettlement in a third country, while reaffirming that voluntary repatriation, supported, as necessary, by rehabilitation and development assistance to facilitate sustainable reintegration, remains the preferred solution;

20. *Reaffirms* the conclusion on civil registration adopted by the Executive Committee of the Programme of the United Nations High Commissioner for Refugees

at its sixty-fourth session, held in Geneva from 30 September to 4 October 2013,¹³ and recognizes the importance of early registration and effective registration systems and censuses as a tool of protection and as a means to the quantification and assessment of needs for the provision and distribution of humanitarian assistance and to implement appropriate durable solutions;

21. *Also reaffirms* the conclusion on registration of refugees and asylum-seekers adopted by the Executive Committee of the Programme of the High Commissioner at its fifty-second session,¹⁴ notes the many forms of harassment faced by refugees and asylum-seekers who remain without any form of documentation attesting to their status, recalls the responsibility of States to register refugees on their territories and, as appropriate, the responsibility of the Office of the High Commissioner or mandated international bodies to do so, reiterates in this context the central role that early and effective registration and documentation can play, guided by protection considerations, in enhancing protection and supporting efforts to find durable solutions, and calls upon the Office, as appropriate, to help States to conduct this procedure should they be unable to register refugees on their territory;

22. *Appreciates* the ongoing efforts undertaken by Member States to implement the conclusion on machine-readable travel documents for refugees and stateless persons adopted by the Executive Committee at its sixty-eighth session;¹⁵

23. *Calls upon* the international community, including States and the Office of the High Commissioner and other relevant United Nations organizations, within their respective mandates, to take concrete action to meet the protection and assistance needs of refugees, returnees and displaced persons and to contribute generously to projects and programmes aimed at alleviating their plight, facilitating durable solutions and supporting vulnerable local host communities;

24. *Acknowledges* the efforts made by the African countries applying the comprehensive refugee response framework, and underscores the importance for the international community of ensuring adequate, timely and predictable support;

25. *Reaffirms* the importance of timely and adequate assistance and protection for refugees, returnees and displaced persons, also reaffirms that assistance and protection are mutually reinforcing and that inadequate material assistance and food shortages undermine protection, notes the importance of a rights- and community-based approach in engaging constructively with individual refugees, returnees and displaced persons and their communities so as to achieve fair and equitable access to food and other forms of material assistance, and expresses concern with regard to situations in which minimum standards of assistance are not met, including those in which adequate needs assessments have yet to be undertaken;

26. *Also reaffirms* that respect by States for their protection responsibilities towards refugees is strengthened by international solidarity involving all members of the international community and that the refugee protection regime is enhanced through committed international cooperation in a spirit of solidarity and burden- and responsibility-sharing among all States;

27. *Further reaffirms* that host States have the primary responsibility to ensure the civilian and humanitarian character of asylum, calls upon States, in cooperation with international organizations, within their mandates, to take all measures necessary to ensure respect for the principles of refugee protection and, in particular, to ensure

¹³ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 12A (A/68/12/Add.1)*, chap. III, sect. A.

¹⁴ *Ibid.*, *Fifty-sixth Session, Supplement No. 12A (A/56/12/Add.1)*, chap. III, sect. B.

¹⁵ *Ibid.*, *Seventy-second Session, Supplement No. 12A (A/72/12/Add.1)*, chap. III, sect. A.

that the civilian and humanitarian nature of refugee camps is not compromised by the presence or the activities of armed elements or used for purposes that are incompatible with their civilian character, and encourages the High Commissioner to continue efforts, in consultation with States and other relevant actors, to ensure the civilian and humanitarian character of camps;

28. *Condemns* all acts that pose a threat to the personal security and well-being of refugees and asylum-seekers, such as refolement, unlawful expulsion and physical attacks, calls upon States of refuge, in cooperation with international organizations, where appropriate, to take all measures necessary to ensure respect for the principles of refugee protection, including the humane treatment of asylum-seekers, notes with interest that the High Commissioner has continued to take steps to encourage the development of measures to better ensure the civilian and humanitarian character of asylum, and encourages the High Commissioner to continue those efforts, in consultation with States and other relevant actors;

29. *Deplores* the continuing violence and insecurity, which constitute an ongoing threat to the safety and security of staff members of the Office of the High Commissioner and other humanitarian organizations and an obstacle to the effective fulfilment of the mandate of the Office and the ability of its implementing partners and other humanitarian personnel to discharge their respective humanitarian functions, urges States, parties to conflict and all other relevant actors to take all measures necessary to protect activities related to humanitarian assistance, prevent attacks on and kidnapping of national and international humanitarian workers and ensure the safety and security of the personnel and property of the Office and that of all humanitarian organizations discharging functions mandated by the Office, and calls upon States to investigate fully any crime committed against humanitarian personnel and bring to justice the persons responsible for such crimes;

30. *Calls upon* the Office of the High Commissioner, the African Union, subregional organizations and all African States, in conjunction with agencies of the United Nations system, intergovernmental and non-governmental organizations and the international community, to strengthen and revitalize existing partnerships and forge new ones in support of the protection system for refugees, asylum-seekers and internally displaced persons, and encourages African States that have not yet done so to consider ratifying and enforcing the Convention on the Safety of United Nations and Associated Personnel;¹⁶

31. *Calls upon* the Office of the High Commissioner, the international community, donors and other entities concerned to continue and, where appropriate, to intensify their support to African Governments through appropriate capacity-building activities, including training of relevant officers, disseminating information about refugee instruments and principles, providing financial, technical, legal and advisory services to accelerate the enactment or amendment and implementation of legislation relating to refugees, strengthening emergency response and enhancing capacities for the coordination of humanitarian activities, in particular to those Governments that have received large numbers of refugees and asylum-seekers;

32. *Reaffirms* the right of return, in accordance with international law, and the principle of voluntary repatriation, appeals to countries of origin and countries of asylum to create conditions that are conducive to voluntary repatriation, and recognizes that, while voluntary repatriation remains the pre-eminent solution, local integration and third-country resettlement, where appropriate and feasible, are also viable options for dealing with the situation of African refugees who, owing to prevailing circumstances in their respective countries of origin, are unable to return home;

¹⁶ United Nations, *Treaty Series*, vol. 2051, No. 35457.

33. *Also reaffirms* that voluntary repatriation should not necessarily be conditioned on the accomplishment of political solutions in the country of origin in order not to impede the exercise of the refugees' right to return, recognizes that the voluntary repatriation and reintegration process is normally guided by the conditions in the country of origin, in particular that voluntary repatriation can be accomplished in conditions of safety and dignity, urges the High Commissioner to promote sustainable return through the development of durable and lasting solutions, particularly in protracted refugee situations, and encourages States and other relevant actors to continue to support these efforts through, inter alia, the allocation of funds;

34. *Calls upon* the international donor community to provide financial and material assistance which allows for the implementation of community-based development programmes that benefit both refugees and host communities, as appropriate, in agreement with host countries and consistent with humanitarian objectives;

35. *Recognizes* the increase in the number and scale of disasters, including those related to the adverse effects of climate change, which in certain circumstances may contribute to displacement and additional pressure on host communities, encourages the United Nations and all relevant actors to strengthen the efforts aimed at addressing the needs of persons displaced within the context of such disasters, and notes in this regard the importance of sharing best practices to prevent and prepare for such displacements;

36. *Appeals* to the international community to respond positively, in the spirit of solidarity and burden- and responsibility-sharing, to the third-country resettlement needs of African refugees, notes in this regard the importance of using resettlement strategically, as part of situation-specific comprehensive responses to refugee situations, and to this end encourages States, the Office of the High Commissioner and other relevant partners to make full use of the Multilateral Framework of Understandings on Resettlement, where appropriate and feasible;

37. *Expresses serious concern* about the chronic underfunding for humanitarian assistance to refugees and internally displaced persons in Africa;

38. *Calls upon* the international donor community to provide assistance for material, financial and technical support intended for the rehabilitation of the environment and infrastructure affected by refugees in countries of asylum as well as internally displaced persons, where appropriate, and notes with concern the environmental degradation in these areas;

39. *Urges* the international community, in line with the principles of international solidarity and burden-sharing, to continue to fund generously the refugee programmes of the Office of the High Commissioner and other relevant humanitarian organizations and, taking into account the substantially increased needs of programmes in Africa, inter alia, as a result of repatriation possibilities, to ensure that Africa receives a fair and equitable share of the resources designated for refugees, and recognizes the importance of increased, flexible, predictable and multi-year funding;

40. *Encourages* the Office of the High Commissioner and interested States to identify protracted refugee situations which might lend themselves to resolution through the development of specific, multilateral, comprehensive and practical approaches to resolving such refugee situations, including the improvement of international burden- and responsibility-sharing and the realization of durable solutions, within a multilateral context, and recalls that those solutions include voluntary repatriation and, where appropriate and feasible, local integration and resettlement in a third country, while reaffirming that voluntary repatriation,

supported, as necessary, by rehabilitation and development assistance to facilitate sustainable reintegration, remains the preferred solution;

41. *Recalls* the need to reflect on effective strategies to ensure adequate protection and assistance for internally displaced persons and to prevent and reduce such displacement, and in this regard encourages the Secretary-General to work with Member States and the United Nations system to explore ways to better address the long-term needs of internally displaced persons, support communities that host them and improve the lives of the many millions of internally displaced persons;

42. *Expresses grave concern* about the plight of internally displaced persons in Africa, welcomes the efforts of African States in strengthening the regional mechanisms for the protection of and assistance to internally displaced persons, calls upon States to take concrete action to pre-empt internal displacement and to meet the protection and assistance needs of internally displaced persons, recalls in that regard the Guiding Principles on Internal Displacement,¹⁷ notes the current activities of the Office of the High Commissioner related to the protection of and assistance to internally displaced persons, including in the context of inter-agency arrangements in this field, emphasizes that such activities should be consistent with relevant General Assembly resolutions and should not undermine the refugee mandate of the Office and the institution of asylum, and encourages the High Commissioner to continue his dialogue with States on the role of his Office in this regard;

43. *Welcomes* the efforts by the High Commissioner to improve coordination with Member States and other United Nations agencies;

44. *Also welcomes* the efforts by the High Commissioner towards regionalization and decentralization, including to ensure that decision-making is closer to the point of delivery, and towards efficiency gains as efforts continue to advance refugee protection and solutions;

45. *Encourages* African States, together with development and humanitarian actors, to work closely on multi-year strategies for refugees and internally displaced persons, factoring in the subregional dimension of many forced displacement crises;

46. *Invites* the Special Rapporteur of the Human Rights Council on the human rights of internally displaced persons to continue the ongoing dialogue with Member States and the intergovernmental and non-governmental organizations concerned, in accordance with the Council's mandate, and to include information thereon in all reports to the Council and the General Assembly;

47. *Requests* the Secretary-General to submit a comprehensive report on assistance to refugees, returnees and displaced persons in Africa to the General Assembly at its eighty-first session, taking fully into account, inter alia, the situation of their host communities, refugee camps and the efforts expended by countries of asylum and those aimed at bridging funding gaps, under the item entitled "Report of the United Nations High Commissioner for Refugees, questions relating to refugees, returnees and displaced persons and humanitarian questions".

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15 December 2025*

¹⁷ E/CN.4/1998/53/Add.2, annex.

BOOK REVIEWS

Caroline Funke; Dennis Dijkzeul, *Disability Inclusion in Humanitarian Crises: Robust Human Rights Norms?* Carolin Funke & Dennis Dijkzeul, (Palgrave Macmillan, 2025).

Persons with disabilities are disproportionately affected during armed conflicts and natural disasters and disability inclusion in humanitarian action remains one of the most fragile commitments. Undoubtedly, the Convention on Rights of Persons with Disabilities, 2006 (the CRPD), the Humanitarian Disability Charter, the Inter-Agency Standing Committee (IASC) Guidelines and the United Nations Disability Inclusion Strategy have strengthened its normative basis. Identifying the disjuncture between normative aspirations and operational realities, this book urges attention to processes ‘below’ the international level. The authors of the book aptly point out that the institutionalisation of a norm at international level speaks considerably less about its effect than its translation and implementation at other levels of governance. In other words, the book examines whether disability norm cluster¹ maintains, strengthens or loses its robustness as it fares through the process of institutionalisation, translation and implementation. Distinguishing them as distinct stages² gives the book its analytical structure to trace the tearing down of disability inclusion norm cluster downstream.

The authors acknowledge the CRPD’s role in the transition from charity and medical model of disability to the human rights model (persons with disabilities are not passive recipients of aid but as partners who can exercise their rights on par with others). They also identify four ‘must-do’ component norms (stemming from the CRPD and the IASC Guidelines). They include ensuring meaningful participation, removal of barriers, capacity-building and collection of disaggregated data for monitoring inclusion. This very identification and contemplation of

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- 1 ‘Norm cluster’ is drawn from Winston’s conception of norms as a nexus between a problem, a value and a behaviour (pp 16–18). In the case of disability inclusion, the problem is the neglect of persons with disabilities in humanitarian crises; the value is their inclusion as rights holders; and the expected behaviour is expressed through several component norms.
 - 2 Institutionalisation concerns formal acceptance at the international level; translation concerns the incorporation of norms into governmental or organisational policies; implementation concerns what occurs “on the ground”.

component norms within the overarching norms allows for the examination of how each different part of disability inclusion is acted upon (without reducing it as a technical add-on or a mere checklist). While much of the literature is more focused on the emergence, acceptance and contestation of international norms, the authors argue that ratification, accession or formal acceptance, on their own, cannot adequately establish norm robustness. Their multi-level Sociology of Law lens dissects institutionalisation at the international level, translation into governmental and organisational policies and implementation at the field/local level. For instance, a state may have ratified the CRPD but still a donor may not have a specific disability strategy, a humanitarian organisation may lack the resources or expertise to implement its own commitments and persons with disabilities may still encounter neglect and marginalisation.

At the outset, the book tracks down the evolution of the human rights model of disability through the work of organisations of persons with disabilities and advocates as well as the development of international standards culminating in the CRPD. This has led to the understanding that persons with disabilities as rights-holders entitled to dignity, participation, equality and inclusion, among others on par with others. The authors point out that Article 11 of the CRPD specifically and expressly applies to situations of risk, including armed conflict, humanitarian emergencies and natural disasters.³ The subsequent development of the Humanitarian Disability Charter, the 2016 World Humanitarian Summit process, the IASC Guidelines and the UN Disability Inclusion Strategy, 2019, though significant, is illustrative of slower translation of the Convention into the humanitarian system.

In the next chapter, the authors examine the policies of major humanitarian donors (including the United States, Germany, the European Union, the United Kingdom and Japan), before focusing on interorganisational and organisational practice. Through this

3 Article 11 of the UNCRPD reads as, “*States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.*”

comparison, they highlight a considerable variation among them. While the United Kingdom had developed a relatively detailed strategy with concrete deliverables, many other donor policies still remain dispersed among general disability, development or humanitarian documents. Through this analysis, the authors highlight that disability inclusion is necessarily translated by funding arrangements, organisational requirements, guidance and monitoring alongside treaty commitments.

Further, the analysis of humanitarian organisations is intriguing as the authors diagnose a considerable variation in organisational practice even though the IASC Guidelines have provided a common framework towards the 'must-do' components. Even within the United Nations system, where a Disability Inclusion Strategy and reporting mechanisms exist, performance remains uneven. As the authors note, for instance, that consultation with persons with disabilities has not always been systematic, inclusive or fully accessible, while only a minority of UN entities had established accessibility policies or ensured accessible procurement. These findings nuancedly locate the problems, identifying the distinction between translation of a norm into organisational policy and implementation of the same in organisational practice.

The authors have made a judicious choice of comparative fieldwork analysis of the Cox's Bazar case (geographically concentrated, donor-heavy refugee crisis under a state that limits refugees' rights) and the South Sudan humanitarian crisis (a sprawling fragmented civil-war context). In Bangladesh (one of the pioneers to sign the CRPD), as the authors connect the position of the Rohingya refugees (the state does not permit them to form organisations including Organisations of Persons with Disabilities) and argue that competing policy priorities constrain the ability of the humanitarian organisations to fully translate the disability inclusion norm cluster. In South Sudan, the state institutions' limited capacity, the consequences of civil war and internal political instability and weak implementation of existing commitments impede the practical realisation of disability inclusion. Despite their very different political and humanitarian crises situations, humanitarian organisations in both settings are stubbornly slow in implementing improving accessibility, supporting organisations of persons with disabilities and building staff capacity. These case observations clearly

correspond to the conceptual framework without running the risk of over-generalisation and demonstrate the explanatory value of the 'norm cluster' approach.

With 'norm evasion' as another conceptual move, the authors observe that the insufficient implementation cannot be reduced to reasons of contestation, deliberate violation or intended non-compliance. For instance, the book notes that the humanitarian organisations themselves lack among others, the skills, confidence, resources and institutional arrangements necessary to act upon it. These 'errors of omission' can be, according to the authors, be captured within the concept of norm evasion. This conceptual move prevents reading every failure of implementation as an explicit rejection of the underlying norm. However, 'evasion' in an ordinary sense could mean an element of avoidance. The authors use it to describe both lack of priority and lack of capacity through their case studies. The book would have benefitted from articulating the differences between these forms of implementation, clearly and more sharply.

The relationship between the meaning of inclusion and the four 'must-do' actions identified in the book could have been still more well-defined. The existence of mechanisms (participation, accessibility, data and capacity building) does not necessarily establish that persons with disabilities exercise influence over decisions that affect them. The authors are cognizant that consultation does not always occur in a systematic or accessible manner and also that local organisations of persons with disabilities are mostly confined to project implementation or event organisation. The book identifies the question of what authority follows from participation, even if it occurs. However, it does not develop this nuanced argument as fully as it might have. As far as the treatment of the political economy of humanitarian action is concerned, the authors recognise the significance of donor funding and the dependence of local organisations of persons with disabilities on larger ones. But the question of norm robustness overshadows the implications of such dependence. Whether disability inclusion can become a stable institutional priority when its actualisation is contingent upon funding structures by actors whose priorities are also subject to change becomes an important concern.

The authors are apprehensive of the limitations of the book's theoretical framework, in the sense that norm robustness is too general a concept

to appropriately and adequately account for the different speeds and forms of institutionalisation, translation and implementation. A norm may appear well-established internationally while remaining weak in translation and implementation. They consequently insist disaggregating levels and actors instead of considering 'the state' or 'the humanitarian system' as a single addressee. Based on the evidence assembled in the preceding chapters, the authors conclude that the study of norms must attend to actors below the international level. To an extent, their call is justified by their qualitative mixed methods study and empirical research, including semi-structured interviews, focus-group discussions and field study. It explains why the book is able to throw light on the movement of norms between institutions and practice as distinct yet interacting process that a purely doctrinal study may miss out.

Finally, the book returns to its argument on the distance between recognition and practice. Through a sober account of organisational pathologies, it nails the bureaucracy of comfort. At the same time, it acknowledges that information about the practices of individual humanitarian organisations remains limited. That in turn limits the extent to which its findings can establish how organisational commitments translate in practice as sustained changes. At times, norms also mutate creatively through vernacularisation, when adapted by local actors into new practices (sometimes, emancipatory in unexpected ways). An ethnographical treatment that brings to forefront the voices of persons with disabilities themselves, everyday resistance and local practices of mutual aid would make it richer. In conclusion, this book is a compact, theoretically supple and empirically grounded study, useful for both practitioners and scholars alike. It opens up a conversation that it does not (and cannot) resolve, as an inevitable consequence of the field itself. It is a read on open-access with all its hard-nosed pragmatism and subtle insistence that disability rights matter (precisely because they make demands that run against organisational convenience). This insistence, carefully exercised with academic rigour and human responsibility for the community makes for the book's lasting merit.

*Swarna Latha R**

* Doctoral Research Scholar, Faculty of Legal Studies, South Asian University, New Delhi.

BOOK REVIEWS

Dr Parineet Kaur and Dr Kanika Sharma (eds.), *Modern Warfare and International Humanitarian Law: Evolving Challenges and Normative Developments* (Vij Books, 2025), Pp - 338.

International humanitarian law (IHL) took shape in a world of uniformed armies, identifiable battlefields and weapons whose effects could be traced to a single act. Contemporary conflict increasingly departs from that picture. Cyber operations reach civilian infrastructure from distant servers, information campaigns target the morale of populations rather than their territory, and armed drones and loitering munitions bring observation and strike together. Private companies supply capabilities once reserved for the state, and dual-use satellites have made outer space part of the operational environment. This raises a pressing question about how a body of law drafted largely in 1949 and 1977 can continue to guide conduct in such changing terrain. *Modern Warfare and International Humanitarian Law*, answers this question across fifteen chapters. Its guiding insight is that the foundational principles of IHL, namely distinction, proportionality, military necessity and precaution, remain the right compass even as the circumstances of their application evolve. The contributors are mostly South Asian legal scholars, and they bring Indian and regional perspectives into conversations often shaped by Euro-American voices, which gives the collection a distinctive character. The book is organised in three parts, moving from where and how war is waged, to what instruments are used, and finally to those who bear its consequences.

The first part opens with chapter on cyber warfare, which examines how cyber operations challenge the understanding of sovereignty as confined to physical territory. The authors assess whether due diligence and non-intervention remain relevant in the digital sphere, and whether a cyber operation may amount to a “use of force” under Article 2(4) of the UN Charter, with consequences for self-defence under Article 51. The chapter handles these unsettled questions clearly and opens a structured discussion on issues that states themselves have been cautious to address. From attacks on networks, the volume moves to attacks on narratives, with fake news and information warfare explored in Chapters 2 and 3. Chapter 2 draws on a rich range of examples, from narratives circulated in the recent India-Pakistan context to the contested

claims about weapons of mass destruction that preceded the Iraq war. The historical perspective is particularly engaging, that traces deception and rumour back to the Mahabharata and the Indian Rebellion of 1857, before considering disinformation within hybrid warfare and its intersection with human rights protections. Building on this foundation, the authors in Chapter 3 study fake news in the Russia-Ukraine war, where their examination of social media bots illustrates the scale of modern influence operations. Both chapters ask whether misinformation can constitute an “attack” under IHL, and their framing is of clear value to policymakers. The theme of contested legitimacy then leads naturally into chapter 4 on lawfare, which describes the purposeful use of law and legal institutions against opponents to achieve military objectives. Drawing on examples involving China, the United States, Ukraine, Russia, Israel and NATO, it shows how states and non-state actors alike use legal processes to challenge an adversary’s legitimacy or influence international opinion. The argument is nuanced, suggesting that lawfare may expose violations and strengthen compliance, even as it shapes the politics of accountability. Law is used by states and non-state actors, but it must also be observed by a third group of participants, and the part therefore ends with corporate conduct in conflict zones. Chapter 5 examines the difficulty of attributing liability to corporations across IHL, international criminal law and business and human rights regimes. Using corporate liability in relation to Israel’s actions in Gaza as an illustration, the chapter advocates stronger mechanisms for bringing private contractors, technology firms and extractive industries within the compliance framework.

The second part turns from the arenas of conflict to its instruments, beginning with the study of unmanned aerial vehicles. The author’s account in Chapter 6 titled Dawn of Drones in War Fighting is thoughtful and balanced, acknowledging that drones may enhance compliance with distinction and proportionality in principle while examining transparency, civilian harm and the geographic spread of hostilities. The attention paid to covert and extraterritorial operations and their implications for legal oversight is a notable strength. Loitering munitions, which combine surveillance, target selection and strike capability in a single platform, are the logical next step, and chapter 7 on loitering munitions and its implications under IHL considers whether existing weapons-review mechanisms suit their distinctive features. By tracing their development from early concepts such as the Kettering

Bug to present-day applications, the chapter places a contemporary technology within the longer history of warfare. Its conclusion is sensible and constructive, since technological advances can move faster than legal frameworks, and this calls for sustained dialogue and clearer regulation. Where these chapters raise questions about newer technologies, the next confronts the oldest of the modern dilemmas. Chapter 8 on Use of Nuclear Weapons in Armed Conflict: Legal and Humanitarian Dimensions tackles nuclear weapons, a subject marked by a persistent tension between national security, strategic deterrence and humanitarian protection. The survey of the NPT, the CTBT, nuclear-weapon-free zones, the TPNW and the ICJ Advisory Opinion shows both the evolution and the limits of the international legal regime, and it demonstrates effectively that strategic justifications cannot be separated from humanitarian and legal implications. Two chapters on outer space then offer a coherent and complementary treatment of a domain of rapidly growing strategic importance. Chapter 9 traces the evolution of space militarisation and carefully distinguishes it from weaponisation, while Chapter 10 shows how the dual-use character of space technology has changed the scale and nature of warfare. The attention to environmental consequences is particularly welcome, as is their discussion of what international space law and IHL can and cannot presently accomplish. The part closes by returning from orbit to the skies above the battlefield, with the chapter 11 on Evolving Air Power in Modern Conflicts, which follows doctrinal shifts in aerial bombardment and the rise of precision-guided munitions to show how air campaigns continue to test the boundaries of proportionality and precaution.

After examining the instruments of war, the third part restores the humanitarian core of IHL. Chapter 12 opens with the protection of journalists, tracing protection from the Lieber Code of 1863 through the Hague Conventions and the 1929 Geneva Convention, and explaining the position of war correspondents and embedded journalists. Its central message is clear, namely that journalists are civilians under IHL and are entitled to protection unless and for such time as they directly participate in hostilities. The chapter's reference to the International Federation of Journalists' call for a dedicated convention offers a constructive path forward. The next chapter 13 extends this concern to another group of civilians whose work places them in harm's way. It addresses attacks on medical personnel and facilities, asking

whether current legal frameworks are sufficient, where normative and structural weaknesses lie, and how accountability can be imposed in a fragmented international order. The case studies cover Ukraine, Syria, Yemen, Afghanistan and Palestine, and they close with a well-organised set of recommendations, including stronger monitoring, domestic implementation and the use of technology for documentation. The emphasis on safeguarding the “protectors” resonates strongly with contemporary realities. Protection then extends beyond people to what communities leave behind, as Chapter 14 considers cultural property during armed conflict. Beginning with destruction from Nalanda to the Bamiyan Buddhas, the Mosul museum and the Russia-Ukraine war, the chapter surveys the role of UNESCO, the 1954 Hague Convention and its Protocols, and the Al Mahdi case before the ICC, presenting heritage destruction not merely as collateral damage but as a strategy of cultural erasure. The volume concludes with the question that underlies every preceding chapter, namely who can be held to account. Chapter 15 analyzes the territorial jurisdiction of the International Criminal Court over nationals of non-party states, tracing the theoretical shift from the delegated theory to the conferral theory before turning to the Pre-Trial Chamber’s 2024 reasoning in the situation in Palestine, which introduced functionalism as a revision of the conferral theory. The careful doctrinal exposition contributes meaningfully to debates on universality, consent and the reach of international adjudication, and it brings the book to a fitting close.

Taken as a whole, the book’s principal strength is its thematic coherence. Each chapter addresses a distinct challenge, yet all are anchored in the foundational principles of IHL, and the editors have assembled contributions that combine descriptive analysis with normative reflection. This makes the volume valuable to scholars, practitioners and policymakers alike, while the rigorous but accessible legal analysis and the comprehensive bibliography enhances its usefulness as a research resource. The book also avoids alarmism. Rather than declaring IHL obsolete, the contributors affirm its resilience while recognising where interpretive clarification and enforcement are needed. The implicit message is one of cautious optimism, namely that humanitarian law retains its relevance and, with proactive clarification and political will, can be applied effectively in new domains. By engaging systematically with cyber operations, information warfare, emerging technologies, and

the enduring imperative to protect civilians and cultural heritage, the volume captures the many dimensions of modern conflict. It is a significant addition to contemporary IHL scholarship and a welcome resource for students, researchers and practitioners.

*Shabnam Khan**

* The Author is a Doctoral Researcher at Faculty of Law, University of Delhi, New Delhi, India.

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