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Lest We Forget the Realm of Armed Conflicts: A Guided Discussion on the Law of Armed Conflict/ International Humanitarian Law

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Abstract

The paper is a doctrinal and a dialectic endeavour to comment on LOAC/IHL from a bird's-eye view. It is the author's initial attempt to contribute to an ongoing discussion on the theory and practice of LOAC/IHL, reflecting on the key issues relevant to Nepal. The question-answer approach is based on the author's interactions with law students, colleagues, members from the police, military, victims, bureaucrats and politicians in the Nepali diaspora. The paper will benefit from the readers' critique.

Q1. What is the 'realm of armed conflicts'?

It is the theoretical premise of the paper. Prussian military strategist Carl von Clausewitz describes armed conflicts as 'realms of uncertainty', or realms of continuous 'fogs' and 'frictions'[1], where 'a fog' represents an ambiguity of knowledge that distorts the offence-defence consciousness during an armed conflict, and 'a friction' represents the slowing effect of unpredictable factors such as geographical conditions and enemy behaviour.[2] The author proposes that the realm is discernible in the present day legal regulation of armed conflicts. Since Clausewitz himself believed that armed conflicts are too uncertain to be legally regulated[3], a reader may suppose that a Clausewitzian legal interpretation of war would be paradoxical. In fact, Clausewitz's theory of war is so contentious that it is cited as being anywhere between highly relevant[4] and highly

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1 Carl von Clausewitz, *On War,* pp. 70, 72, 110, 153, 221, available at https://tinyurl.com/yyydkxba, accessed on 15 October 2020.

2 Ibid.

3 Clausewitz writes, "Paper laws… are self-imposed restrictions, almost imperceptible and hardly worth mentioning… one should be obeying no other but their own inner laws…and the law of probabilities". Ibid, pp. 43, 50, 56.

4 See generally Antulio J. Echevarria II, *Clausewitz and Contemporary War,* Oxford University Press, 2007; See generally Muhammad Alaraby, 'The Whispering Prussian: Clausewitz and Modern Wars', available at https://tinyurl.com/y2tmnj4l, accessed on 20 November 2020; See generally Colonel E.A. de Landmeter, 'The relevance of Clausewitz's "On War" to today's conflicts', available at https://tinyurl.com/ybf2dlek, accessed on 20 November 2020; See generally Olivia Garard, 'The Objective Value of Clausewitz', available at https://tinyurl.com/yxqvz8w5, accessed on 20 November 2020.

irrelevant[5] in explaining automated and asymmetrical 'new wars'. However, as Frederich Neitzche laments, "The worst readers are those who behave like plundering troops: they take away a few things they can use, dirty and confound the remainder, and revile the whole."[6] This paper borrows the pragmatic approach of Clausewitz's theory of war to "organize the contemporary ideas and clarify assumptions" [7] about LOAC/IHL, with following propositions:

a) It should be based on an 'objective knowledge'[8] of the rules and the practices;
b) Its contemporary realm of uncertainty includes fogs of interpretation and understanding, and forces of friction, which slow down or frustrate its compliance.
c) An interdisciplinary dialectic method[9] helps to identify such fogs and forces of frictions.

Q2. What is LOAC/IHL?

The Law of Armed Conflict (LOAC) or International Humanitarian Law (IHL) is a branch of public international law that regulates the extent of violence that parties to an armed conflict can resort to, and aims to minimize suffering[10] caused by the armed conflict. It stirs into motion when a situation can be classified as an armed conflict, and ceases to apply following the effective termination of an armed conflict[11].

The terms *jus in bello* (law of warfare), LOAC and IHL appear to refer to the same set of rules in public international law[12]. These rules were traditionally known as *jus in bello* and LOAC, while the term IHL was mainly endorsed by humanitarian organizations

5 See generally T. Lawrence, 'Evolution of a Revolt', in A. Lawrence (ed), *Oriental Assembly*, Williams and Norgate, 1940; See generally Mary Kaldor 'Inconclusive Wars: Is Clausewitz Still Relevant in these Global Times?' *Global Policy* p. 271, volume 1:3, 2010; See generally Wm. J. Olson, 'The Continuing Irrelevance of Clausewitz', available at https://tinyurl.com/y2vn9jw4, accessed on 20 November 2020.

6 Landmeter (n 4).

7 Jack L. Goldsmith and Eric A. Posner, *Limits of International Law*, Oxford University Press, 2005, p. 17 (emphasis added).

8 Echevarria II (n 4), p. 3.

9 Using dialectics to understand warfare, Clausewitz countered some of his best known propositions and refined them, which is where some of his paradoxical contradictions stem from. Clausewitz seemingly died before he had a chance to locate and revise the paradoxes. See Hew Strachan, *Clausewitz and the Dialectics of War*, Oxford University Press, 2007 (abstract), available at https://tinyurl.com/y5lpo823, accessed on 20 November 2020.

10 ICRC, 'What are *jus ad bellum* and *jus in bello*?', available at https://tinyurl.com/y87mvcz5, accessed on 20 November 2020.

11 This has a contextual meaning. For an international armed conflict, the standard of a 'general close of military operations and a general conclusion of peace' is applicable. *Gotovina Trial*, *Prosecutor v. Gotovina*, Trial, 15 April 2011, Case no. ICTY-06-90, para. 1694; However, Geneva Convention III and IV stipulate that they will remain in application until the protected persons are repatriated. Geneva Convention Relative to the Treatment of Prisoners of War (GC III), 12 August 1949, 75 UNTS 135, art. 5; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV), 12 August 1949, 75 UNTS 287, art. 6(4); In case of a non-international armed conflict, a peaceful settlement of dispute is required. *Tadic Interlocutory Appeals*, *Prosecutor v. Tadić*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, ICTY-94-1-AR72, para. 70.

12 Amanda Alexander, 'A Short History of International Humanitarian Law', available at https://tinyurl.com/yyslys45, accessed on 21 November 2020.

such as the International Committee of the Red Cross (ICRC) towards the end of the 20th century, in order to emphasize a humanitarian vision of armed conflicts. Armed forces demonstrate a proclivity towards the term LOAC.[13] For the purpose of initial comprehension, the objectives of LOAC/IHL can be summarized in six principles and three subject-matters.

The principles are: humanity (or the commonly agreed minimum considerations of humanity), distinction (between civilians and combatants, as well as civilian objects and military objectives), military necessity (the definition of legitimate military advantage), proportionality (prohibition on excessive collateral damage), precaution (measures to be taken before and during an attack to prevent excessive collateral damage), and non-discrimination (no adverse distinction on the ground of race, sex, colour, religion, political opinion, and other similar grounds).[14]

The subject-matters include: a) protection and care of the sick and wounded[15]; b) conduct of hostilities/combat, and limitations on means and methods of warfare[16]; c) protection and treatment of people under the power of a party to a conflict, such as during occupation, detention and internment.[17] LOAC/IHL also prescribes 'residual obligations'[18] following the termination of an armed conflict, such as: repatriation of conflict detainees [19], disclosure of information of missing persons[20], clearing landmines and explosive remnants of war[21], and returning grabbed/looted lands[22]. The reader would have to undertake a larger study to understand the intricacies of the law.

Q3. What is an 'armed conflict'?

Clausewitz defines a 'war' as a "clash between major interests with a will of their own, hostile feelings, intentions and emotions, which is resolved by bloodshed - the only way in which it differs from other conflicts."[23] The definition is transcendental, but contemporary wars may or may not contain bloodshed – especially those which include

[13] For example, the titles of military manuals indicate the preference. For example, Australia's LOAC Manual (2006), UK LOAC Manual (2004), Canada's LOAC Manual (2001), France's LOAC Manual (2001), South Africa's LOAC Teaching Manual (2008), Spain's LOAC Manual. In contrast, some states prefer LOAC/IHL, for example, Italy's LOAC/IHL Manual (1991), Peru's LOAC/IHL Manual (2004), Sweden's LOAC/IHL Manual (1991).

[14] See generally Marco Sassoli et al, *How Does Law Protect in War*, ICRC, 2011, 3rd edition, volume 1, chapter IV.

[15] See ICRC, 'Wounded, sick and shipwrecked protected under international humanitarian law', available at goo.gl/VNtM6B, accessed on 21 November 2020.

[16] Sassoli (n 14), pp. 249-294.

[17] Ibid, chapters 6 and 8.

[18] See Yugichha Sangroula and Ravi Prakash Vyas, 'Jus Post Bellum and Human Rights at Crossroads', *Researcher: a multidisciplinary journal,* 2017, volume 1:1.

[19] ICRC, 'Customary LOAC/IHL Database', rule 128 (release and return of persons deprived of their liberty), available at https://tinyurl.com/yckrjx9x, accessed on 22 November 2020.

[20] Ibid, rule 117 (accounting for missing persons).

[21] ICRC, 'Explosive Remnants of War', available at https://tinyurl.com/yajj73s2, accessed on 7 August 2018.

[22] Elena Cirkovic, 'Land Grabs and the Laws of War' available at https://academies.hypotheses.org/2324, accessed on 7 August 2018.

[23] Clausewitz (n 1), p. 83.

non-kinetic warfare. LOAC/IHL prefers the term 'armed conflict' over 'war', as the law strives to forego formal determination[24] in favour of factual determination of events. However, it would not be erroneous to say that the terms are interchangeable when used in a strict sense.

"States consider their relationship with non-state actors as being different from inter-state relationships"[25]. Therefore, instead of an all-encompassing definition of an armed conflict, LOAC/IHL provides a factual classification of hostilities, which can be either international armed conflicts (IACs) or non-international armed conflicts (NIACs)[26]. The definitions are relatively clear, and the sub-sets of 'law of IAC' and 'law of NIAC' are relatively distinct as well, contributing to a level of certainty in factually determining an otherwise uncertain realm of armed conflict.

An IAC is a "resort to armed force between two or more states"[27]. It can include one or more of these: cross-border hostilities triggered by a single-shot, invasion, total or partial occupation.[28] It can also include duly notified national liberation wars[29], although Nepal, India and China among a general populace of states do not recognize such wars as IAC.[30] A NIAC is broadly defined as "protracted (prolonged) armed violence between governmental authorities and organized armed group, or between such group" [31]. Its forms include low-intensity NIACs that meet the common 'lower threshold' of 'sufficient intensity' and 'organization of the involved organized armed group'[32], and high-intensity NIACs that contain an additional element of "control of an organized armed group over a part of the territory of a state" [33]. Isolated and sporadic acts of violence, such as riots, that do not meet the lower threshold are not considered NIACs[34], although as exemplified by the 1996-2006 armed conflict in Nepal, riots and violent demonstrations can occur during an armed conflict. At present, there are 18 active IACs, including those between India and China, and India and Pakistan, and 51 active NIACs, including those in India, Pakistan and Afghanistan[35].

Correct classification of an armed conflict is crucial for correct invocation of LOAC/

24 ICRC, *Commentary the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* Cambridge University Press, 2016, para. 193.

25 Thilo Marauhn, Zacharie F. Ntoubandi, 'Armed Conflict, Non-International', *Max Planck Encyclopedias of International Law* available at https://tinyurl.com/yx9gphba, accessed on 21 November 2020.

26 See generally Dapo Akande, 'Classification of Armed Conflict: Relevant Legal Concepts' in E Wilmurst (ed), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, chapter 3.

27 GC IV n (n 11), common art. 2.

28 ICRC Commentary to GC I (n 24), paras. 236, 301, 304.

29 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (AP I), 8 June 1977, 1125 UNTS 3, art. 1(4).

30 Nepal, India and China are not parties to AP I, and one of the reasons cited is the inclusion of national liberation movements in the taxonomy of law of IAC.

31 *Tadic Interlocutory Appeal* (n 11), para. 70.

32 *Tadic Trial, Prosecutor v Dusko Tadić,* Trial Judgement, 7 May 1997, ICTY-94-1, paras. 561-2.

33 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II), 8 June 1977, 1125 UNTS 609, art. 1(1).

34 Rome Statute of the International Criminal Court (ICC Statute), 17 July 1998, art. 8(2) (e).

35 RULAC, 'Conflicts', available at https://www.rulac.org/browse/conflicts, accessed on 21 November 2020.

IHL. It is certain that the whole of the rather vast Geneva Conventions[36] (GCs) applies to IACs, whereas only select provisions of the Geneva Convention[37], and the rather narrow Second Additional Protocol apply to a NIACs within a state-party's territory. Concepts such as grave breach of the GCs, prisoners of war (POW) and law of occupation do not apply to NIAC because of the aforementioned distinct sub-sets of law of IAC and law of NIAC. However, there are some overlapping rules, which include the rules on protection of civilians during military operations.

Having stated the above, it is acknowledged that there is no rule about the degree of armed required to constitute 'minimum intensity' to establish NIACs, or a level of "actual or effective authority over local administration" required to establish occupation.[38] Hence, national and international criminal tribunals perform such measurements on a case by case basis, referring to comparative indicants[39] identified in other armed conflicts. However, since every armed conflict is different, the relativity of such indicants does create a 'fog of fact' hindering the real-time application of LOAC/IHL as discussed in Q 10.

Q4. Who classifies an armed conflict? Is it required to be declared?

There is no centralized international authority[40], which has the final word on which situation constitutes an armed conflict. However, parties to an armed conflict have an obligation to "respect and ensure respect for the [Geneva] Conventions in all circumstances."[41] Hence, it follows that parties to an armed conflict are obliged to take legal guidance and set the law into motion, observing the facts on the ground. For example, if an organized armed group is engaged in sustained hostilities with another group or a government, and in that context either or both of them detain an adversary or a civilian, it becomes apparent that common article 3 to the GCs has been triggered. The Statute of the International Criminal Court (ICC) has inculcated a similar reasoning in its *Elements of Crime*.[42]

The idea that a political qualification by the parties to a conflict is not mandatory for the application of LOAC/IHL is as old as the 1949 Geneva Conventions, which

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36 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I), 12 August 1949, 75 UNTS 85; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II) 12 August 1949; Geneva Convention Relative to the Treatment of Prisoners of War (GC III), 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV), 12 August 1949, 75 UNTS 287.

37 As a matter of obligation, articles 1 and 3 common to the GCs would apply in a NIAC. Ibid.

38 Regulations Concerning the Laws and Customs of War on Land Annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex, 18 October 1907, art. 42.

39 *Prosecutor v. Lubanga,* Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, paras. 233-7.

40 ICRC Commentary to GC I (n 24), para. 392.

41 Four GCs (n 36), common article 1.

42 Every war crime defined in the *Elements of Crime* requires a proof of the perpetrator's knowledge of the factual circumstances establishing an armed conflict. See Elements of Crime to the ICC Statute, ICC-RC/11, 2010.

specify that the Conventions apply to "declared war or any other armed conflict"[43]. Therefore, although the parties to the conflict in Nepal did not officially recognize a situation of armed conflict until much later in March 2004[44], it can nevertheless be factually determined to have begun in 1996, not in 2004. Even when the parties to a conflict do not recognize an armed conflict, non-governmental organizations, scholars and courts[45] lend their prudence to the global community, classify the conflict and explain how LOAC/IHL applies. However, such non-recognition is a force of friction that slows down the the real-time application of LOAC/IHL as evidenced from the Nepali experience discussed in Q 10.

Q5. How can it be deduced that a NIAC occurred in Nepal[46]?

a. The intensity of the armed violence/hostilities

The hostilities between the CPN-M and the Government of Nepal transformed from an insurgency into an armed conflict in February 1996 following reported systematic counterattacks by the CPN-M on the police stations in Rolpa, Rukum and Sindhuli.[47] The intensity of the hostilities was gradually progressive as discussed below:

The first phase (February 1996 – 23 November 2001) reportedly included Maoists-extraction operations[48] and counteroffensives by CPN-M, including destruction or capture of police stations, administrative buildings, land grabbing and targeted killing of police personnel[49]. The Army had not been deployed at this point of time. Generally, deployment of the regular police force against insurgents alone does not indicate minimum intensity. However, in case of Nepal, the police force reportedly resorted to systematic violence against insurgents, which demonstrates a requisite minimum intensity.[50]

The second phase (24 November 2001 – January 2005) included a declaration of a state of emergency, and formation of the 'unified command of the Army' comprising of the police, armed police and the Army.[51]

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43 Four GCs (n 36), common article 2.

44 Supreme Commander of PLA, Pushpa Kamal Dahal, expressed commitment towards the Geneva Conventions. Human Rights Watch, *Between a Rock and a Hard Place: Civilians Struggle to Survive in Nepal's Civil War,* October 2004, p. 10; Former PM Surya Bahadur Thapa announced concrete steps to protect LOAC. 'Implementation of human rights and international humanitarian law', *South Asia Terrorism Portal*, 26 February 2004.

45 *Elements of Crimes* (n 42), p. 13.

46 The factual determination mainly relies on *prima facie* evidence for academic purpose, and except for the judgements of the Supreme Court, such reports have to be considered questionable at the moment.

47 Moeed W. Yusuf, *Insurgency and Counterinsurgency in South Asia,* Foundation Books, New Delhi, pp. 190-3.

48 Such as Operation Kilo Sierra II and Operation Cordon. Ibid, pp. 190-3.

49 Ibid.

50 Commentary to GC I (n 24), para. 431.

51 Human Rights Watch, *Nepal, Waiting for Justice, Unpunished Crimes from Nepal's Armed Conflict*, 2008, p. 16.

During the third phase (1 February 2005 to 21 November 2006)[52], the adversarial relationship between the political parties of Nepal and the CPN-M transformed to a congenial relationship, following the 12 point agreement among Seven Party Alliance (SPA)[53]. On the other hand, hostilities between the unified command of the Army and the CPN-M led People's Liberation Army (PLA) intensified as their conducts reportedly expanded to almost 75 districts, and both the parties reportedly resorted to more lethal warfare methods, for instance, mortar shelling of civilian areas.[54]

b. *The organization of the CPN-M*

When unorganized armed groups resort to intense violence, the situation may amount to internal disturbance or insurgency, provided that the violence is a rebellion against a government.[55] However, a NIAC strictly refers to intense violence perpetrated by an organized armed group, that is an armed group with a hierarchy and a real chain of command, and the ability to sustain military operations[56].

It can be concluded that the CPN-M constituted an organized armed group during the 1996-2006 armed conflict in Nepal, on the basis of the following indicants: a) a chain of command based on a tangible political leadership (they were the third largest political party in the 1991 elections[57]); b) existence of an ideological front entitled 'Prachanda Path'; c) formation of the PLA in 2001[58]; d) an armada of around 5000-7000 active combatants[59] that apparently used effective asymmetrical warfare tactics[60]; e) an armoury of rudimentary weapons, self-manufactured and imported guns and explosives[61], and semi-automatic SLRs and rocket launchers looted from the Army;[62] f) a degree of control in around 6 districts which were then dubbed as 'the red zone', including Rolpa and Rukum[63]; g) installation of a self-proclaimed 'people's court' (*Jana Adalat*)[64]. Apparently, the control did not effectively replace the government administration in the

[52] Yusuf (n 47), p. 190.

[53] '12-point understanding reached between the Seven Political Parties and Nepal Communist Party (Maoists)', available at goo.gl/U3cyUe, accessed on 5 November 2020.

[54] Sassoli, Antoine A Bouvier and Anne Quintin, *How Does Law Protection in War*?, vol III, 3rd edition, p. 2409.

[55] An active revolt or uprising. 'Insurgency', *Oxford Dictionary* available at https://en.oxforddictionaries.com/definition/insurgency, accessed on 23 November 2020.

[56] *Tadic Interlocutory Appeals* (n 11), para. 70.

[57] Bishnu Raj Upreti, *Armed Conflict and Peace Process in Nepal*, Adriot Publishers, Delhi, p. 22.

[58] Office of the High Commissioner of Human Rights (OHCHR), *Nepal Conflict Report*, 2012, p. 16.

[59] Ibid.

[60] Upreti (n 57), p. 33.

[61] *Nepal Conflict Report* (n 58).

[62] Human Rights Treaty Monitoring Coordination Committee (HRTMCC) Nepal, *Field Report on Maoists Trapped Civilian Bus in Landmine at Bandarmudhe Stream in Madi of Chitwan District*, 14 June, 2005, p. 2.

[63] Mercy Corps, *Western Nepal Conflict Assessment Report*, 2003, p. 76.

[64] 'Judged by the People: The Maoists Grow Stronger', *The Economist,* 5 October 2006.

red zone[65], when compared, for example, to the *de facto* governance of western Liberia by the Charles Taylor forces and western Colombia by the FARC forces.[66]

c. *An organization independent of foreign control*

A NIAC transforms into an IAC if a foreign government exercises overall control over an OAG. A 'foreign influences' may not meet the threshold of 'foreign control'.[67] The degree of India's influence over CPN-M apparently did not go beyond financial aid, irregular tactical trainings[68], supply of weapons[69], and shelter to the top echelon of CPN-M, who reportedly retained control throughout the conflict, even while operating from India.

It is evident from the above discussion that the situation was indeed a NIAC.

Q6. If the NIAC in Nepal effectively terminated in November 2006, why is a discuss about LOAC/IHL necessary at the present?

a. *The imperatives behind armed conflict preparedness*

The necessity of armed conflict preparedness is rifest when we least expect a conflict[70] because armed conflicts are realms of uncertainty. Armed conflict preparedness demands peacetime dissemination of LOAC/IHL[71], in particular due to the primarily discursive nature of LOAC/IHL, as elaborated in Q 14.

There are 69 active armed conflicts in the world, as of now, some of which are in Nepal's vicinity.[72] The Global Peace Index reports that "only a handful of nations are not engaged in intense political unrests"[73]. While a study based on over 2000 simulations has deduced that the probability of another armed conflict occurring in Nepal in the foreseeable future is low, same study demonstrates how difficult it is to predict armed conflicts even while relying on sound statistical models – it failed to predict the armed conflicts in Sri Lanka and Iraq.[74]

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65 Mercy Corps (n 63), pp. 76-8.

66 Ibid, p. 76.

67 See for detail the concept of 'overall control' a foreign state has to exert on an OAG. *Tadic Interlocutory Appeals* (n 31), para. 120.

68 Saubhagya Shah, 'A Himalayan Red Herring? Maoist Revolution in the Shadow of the Legal Raj', in Micheal Hutt (ed), *Himalayan People's War – Nepal's Maoist Rebellion*, Hurst and Company, London, 2004, pp. 192-224.

69 Ibid.

70 Franz-Stefan Gady, 'The Coming War in Asia: Why It Is Hard to Imagine the Unimaginable', *the Diplomat*, 3 August 2017.

71 ICRC, 'The Obligation to Disseminate LOAC/IHL' available at https://www.icrc.org/eng/assets/files/other/obligation_to_disseminate.pdf, accessed on 8 July 2018.

72 RULAC (n 35).

73 The overall position of Nepal and south Asia has slightly improved since 2017, however the global average has gone down. Institute for Economic Stability and Peace, *Global Peace Index 2018*, *Measuring Peace in a Complex World*, 2018, pp. 2,10,17.

74 See Havard Harge, 'Predicting Armed Conflict, 2010–2050', *ISA Annual Convention*, New York, 15–18 February 2009.

Studies indicate that lack of improvement in these factors increase the probability of armed conflicts: good governance (including government effectiveness and openness)[75], quality of life (including life expectancy, availability of health service and income levels)[76], and the record of ethnic inclusiveness and the degree of asymmetrical power dynamics between ethnic groups[77].

As elaborated in Q10, both Mao and Clausewitz, the progenitors of 'the theory of modern insurgencies' have observed that a war is a violent political weapon. In this vein, if we trace the chronology of the 1996-2006 NIAC of Nepal, the armed conflict was discernibly a violent tipping-point of the historical ethnic marginalization and the former regime's acquiescence towards deep socio-economic chasms in Nepal.[78] The seed of the 'people's war' was sown long back in 1949[79], in form of an assembly of Maoist ideologues who believed in a long-pending political transformation of feudalistic Nepal, who initially took it upon themselves to actualize the political transformation in form of an unarmed political movement, and later coalesced into a political party called Samyukta Janamorcha (United People's Front of Nepal), which emerged as the third largest party in the 1991 legislative elections in Nepal.[80] In 1994, a faction separated from the party with a motivation of launching an armed revolution against so-called 'feudal elements', including the King, major political parties and their supporters.[81] The former regime seems to have had information at its disposal to reasonably anticipate not only an insurgency, but a concerted hostility, for example, the armed faction which later formalized into CPN-M was known to have expressed ideological support towards the 'people's war' led by the Shining Path in Peru.[82] It appears that the government should have anticipated concerted attacks, whether or not they had specific intelligence about the six attacks on remotely located police stations in February 1996.[83]

However, for the general population, the unravelling of the conflict can be likened to the tale of a boiling frog, as the incoming chaos was not obvious

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75 Nepal does not do well on these variables according to the European Global Conflict Risk Index. European Union, 'European Global Conflict Risk Index' available at http://conflictrisk.jrc.ec.europa.eu/ accessed on 10 July 2018.

76 Md. Shahid Parwez, 'An Empirical Analysis of the Conflict in Nepal', *Nepal Resident Mission Working Paper Series no. 7*, Asian Development Bank, July 2006, pp. 2-5.

77 Nicholas James Hasty, 'On the determinants of internal armed conflict', Masters of Political Science Thesis, Iowa State University, 2015, p. 26.

78 See Robert Gersony, 'Western Nepal Conflict Assessment: History and Dynamics of the Maoist Revolt', Paper no 15, International Resource Group Discussion Forum; See also Krishna Hachhethu, 'Maoist Insurgency in Nepal: An Overview', available at http://www.uni-bielefeld.de/midea/pdf/harticle2.pdf, accessed on 10 July 2018;

79 'History of Maoist Insurgency' available at https://raonline.ch/pages/story/np_mao_sum01.html, accessed on 15 July 2018.

80 Upreti (n 57), p. 22.

81 Mahendra Lawoti and Anup K. Pahari, *The Maoist Insurgency in Nepal: Revolution in the twenty-first century*, Routledge, 2010, p. 332.

82 Mikesell Stephen, 'The Paradoxical Support of Nepal's left for Comrade Gonzalo', *Himal*, March/April 1993.

83 Chiran Jung Thapa, 'Nepal's Armed Conflict – A Narrative of Political Mismanagement' in V R Raghavan (ed), *Internal Conflicts – A four state analysis (India, Nepal, Sri Lanka, Myanmar),* Vij Books India, 2013, p. 169.

to them until it materialized overtly in February 1996.[84] The fog of knowledge among the general population was densified by a discernible denial policy of the regime, who rather described the situation as a matter of "simple law and order" [85]. The general population who usually do not speak a legal dialect, were unable to assert their rights under LOAC/IHL to be safeguarded from the general effects of the NIAC, due to a thick fog of legal and factual knowledge about a NIAC. Further, the regime itself appeared legally and practically unprepared to deal with the uncertain realm of a NIAC. Nepal police, tasked to restore 'law and order', appeared relatively inept in launching effective counteroffensive against guerrilla warfare[86], which to be fair did not fall within its *modus operandi*[87]. CPN-M grew from strength to strength as the King did not order the Army's deployment, further protracting the NIAC, and exposing the civilians to the violent effects of war, elaborated in Q9. Despite the accession to the Geneva Conventions in 1964, the government seemed to be walking through a fog of law, clearly evident in the submissions of the government before the Nepali judiciary[88]. It has to be noted that while such denial policies leading to a fog of law and facts are not exclusive to Nepal[89], the Nepali experience in retrospect suggests that the fog permeated every aspect of the Nepali society.

One would assume that following the conclusion of Comprehensive Peace Accord, abolition of monarchy and promulgation of a Constitution that describes Nepal as an 'inclusive democratic, socialism-oriented federal democratic republican state…whose foundations include the glorious history of historical peoples' movements and armed struggles time and again'[90], the aforementioned factors leading to an armed conflict have been significantly addressed. However, the Global Peace Index indicates that Nepal has undergone some, but not significant positive transformation in both qualitative and quantitative indicators of peace[91], although to be fair, conflict transformation is too complex to be only gauged statistically, especially given the additional uncertainties produced by the 2015 earthquakes and the 2020 pandemic. However, the persistent violent outbreaks,

[84] Here the author means that the general population could discern an insurgency in the sense that CPN-M supports were growing, and the rebellion was empirically visible, however the general population did not anticipate the insurgency to transform in to an intense and sustained armed violence.

[85] Sauvangya Shah, 'A Himalayan Red Herring', cited in Thapa (n 83), p. 179.

[86] The actual number of soldiers ready for deployment in combat was probably much lower. Deepak Thapa and Bandita Sijapati, *A Kingdom Under Siege*, Kathmandu, 2003, p. 137.

[87] In Nepal, Police were not trained not to use brute force and had no prior experience or formal training in combating insurgency and the APF was deployed only a month into its institutionalization. Shah (n 83), p. 179.

[88] The Government of Nepal as the defense replied that '[t]he Geneva Convention applies in the conditions of war and armed revolts. However, the current condition falls under the criminal justice system. As the legislations have been already enacted respecting the convention, the writ be voided.' *Raja Ram Dhakal et al v. His Majesty's Governmen*t et al, WN 2942, 2059 (2002) (unofficial translation).

[89] See Sandesh Shivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict', vol. 22, issue. 1, *European Journal of International Law* 219, 2011 available at https://tinyurl.com/yb9wkh92, accessed on 20 July 2018.

[90] Constitution of Nepal, 2075 (2015) (unofficial English translation), preamble, art. 4.

[91] 'Global Peace Index', 2020, available at https://tinyurl.com/yyknswgd, accessed on 29 November 2020.

notably in the Terai region of Nepal[92], and the sporadic yet recurrent violent conducts of Netra Bahadur Chand (Biplav) led armed group that proclaims itself to be a Communist Party, signal a continuation of 'structural fragility'[93] within the society. The Nepali experience in the retrospect evinces that armed conflict preparedness is a common necessity, as armed conflicts affect every person in the radius of the conflict in various degree, including the military, the organized armed groups, the government, politicians and the civilian population.[94]

b. Evolution of nature of armed conflicts = greater fog of facts

The armed conflict in Nepal was a classic NIAC or a civil war[95]. However, NIACs has several forms, some of which are referred as 'new warfare'. These conflicts are not as easily discernible as a civil war, and are difficult to be factually determined as armed conflicts. Some of the notable new warfare are discussed below:

i. A NIAC can occur between a government and organized criminal gangs, such as between the Mexican Government and the drug cartels Sinaloa and Jalisco[96]. From a pragmatist position, it is difficult to reasonably conclude that the existing armed groups of Nepal, engaged in trafficking of drugs, cultural and religious idols, endangered species and human beings[97] are incapable of, in an uncertain future, being sufficiently armed and organized to launch a NIAC with a sheer criminal policy against the government.

ii. A NIAC is possible between organized armed groups, but not involving any state armed[98], such as the NIAC between Libya Shield, ISIL and Ansar al-Sharia in Libya.[99]

iii. Transnational[100] armed conflicts in which a coalition of states conduct military operation in what they call fragile states, such as Afghanistan, in the name of humanitarian intervention[101] are rare, but real. While some states

[92] For example the armed violence in the Terai regions fueled by age-old ethnic tensions that manifested intensely during the promulgation of the Constitution of Nepal. See Julia Strasheim, 'No end of the peace process: federalism and ethnic violence in Nepal', available at https://tinyurl.com/ybm68wlw, accessed on 12 July 2018.

[93] European Commission, *Global Conflict Risk Assessment*, 2008, p. 84.

[94] Sassoli et al (n 14), p. 33.

[95] Ibid, (Case no. 272, Civil War in Nepal), p. 2410.

[96] Geneva Academy of International Humanitarian Law and Human Rights, *War Report Armed Conflicts in 2017*, March 2018, p. 16.

[97] Upreti (n 57), p. 270.

[98] *Tadic Interlocutory Appeals* (n 11), para. 70. 'Another case [of non-international armed conflict] is the crumbling of all government authority in the country, as a result of which various groups fight each other in the struggle for power'. ICRC, 'Opinion Paper on How is the Term Armed Conflict Defined in LOAC/IHL', p.4, available at https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf, accessed on 20 July 2018. Commentary to GC I (n 24), paras. 470, 477.

[99] Geneva Academy (n 96), p. 36.

[100] Transnational armed conflicts technically can be both international or non-international.

[101] See for example the 2015 UNSC meeting memos regarding Afghanistan in 'Global Community Must Protect War-Weary Afghanistan amid Threats to Stability, Self-Reliance, Top United Nations Official Tells Security Council', UNSC Press Release, 15 September 2015, available at https://www.un.org/press/en/2015/sc12050.doc.htm, accessed on 25 July 2018.

consent to the intervention, such as the US coalition actions against Al Qaeda in Afghanistan[102], or the Cameroon coalition actions against Boko Haram in Nigeria[103], it is contentious if the host states provide 'genuine consent'[104]. In other cases, humanitarian interventions take place without the consent of the host state, such as the US[105] and Turkey's intervention[106] in Syria.

c. *NIACs in neighbouring states can have a spillover effect in Nepal*

LOAC/IHL applies to territories of the parties to the conflict (in both NIAC and IAC), and thus has a particular geographical scope of application. [107] Yet, an armed conflict occasionally spills over the territory of a neighbouring state[108] triggering application of LOAC/IHL, even if in limited scope, in that state. For example, a combatant crossing the border into a neighbouring state theoretically carries along the combatant status across such border.[109] When Prachanda and other Maoist leaders reportedly took refuse in India and were directing the Maoist armada therefrom, the conflict of Nepal spilt over India[110]. Hence, factually the LOAC/IHL applied in India in two situations – a NIAC with the Naxalite armed groups[111], and as a spillover effect of the NIAC in Nepal. Inversely, the NIAC of India has been spilling over Nepal due to the transboundary movements of the OAG combatants and their supporters[112]. Nepal is already grappling with the refugee movement spillover of the NIAC in Myanmar[113], but it does not require an LOAC/IHL assessment because unlike Bangladesh, Nepal is not an immediate neighbour to Myanmar.

Although the concept of spillover effects applies to NIACs, existence of IAC(s) is territorially consequential to the bordering neighbours from a LOAC/IHL perspective. The concerning nuclear arms race between India and Pakistan[114], and the current IACs between India and China, and India and Pakistan[115] may

102 Geneva Academy (n 96), p. 26.

103 Ibid, p. 100.

104 C. A. J. Coady, 'The Ethics of Armed Humanitarian Intervention', available at https://tinyurl.com/ychjsynx, accessed on 15 September 2020.

105 Rule of Law in Armed Conflict (RULAC), 'International Armed Conflict in Syria', available at goo.gl/5QLKwD, accessed on 25 July 2018.

106 Ibid.

107 See for reference Emily Crawford, 'The Temporal and Geographical Reach of LOAC/IHL', *Research Paper no. 16/42*, University of Sydney, 26 August 2017.

108 See for reference Robin Geiss, 'Armed violence in fragile states: Low-intensity conflicts, spillover conflicts, and sporadic law enforcement operations by third parties', *International Review of the Red Cross* p. 127, 2009, volume 91: 873, pp. 127-142.

109 Marco Milanovic, 'On Whether LOAC/IHL Applies to Drone Strikes Outside 'Areas of Active Hostilities': A Response to Ryan Goodman', *EJILtalk*, 5 October 2017 available at goo.gl/zr4q2n, accessed on 25 July 2018.

110 Satarupa Bhattacharjya, 'Nepal's Maoist Chief Harps on Democracy', *IndiaToday,* 4 December 2006.

111 RULAC, 'Non-international armed conflict in India' available at http://www.rulac.org/browse/countries/india#collapse1accord, accessed on 25 July 2018.

112 Dipak Gupta, 'The Naxalites and the Maoist Movement in India: Birth, Demise, and Reincarnation', vol. 3, no.2, *Democracy and Security* 157, 2007, p. 158.

113 Maximillian Morch, 'Nepal and the Rohingya Refugees', *The Diplomat*, 5 December 2017.

114 Tom Hundley, 'India and Pakistan are quietly making nuclear war more likely', *Vox*, 4 April 2018,

115 Geneva Academy (n 45), p. 12.

have implications for Nepal from the perspective of the law of neutrality[116], and protection of aliens found in the territory of a state in an IAC[117].

d. *LOAC/IHL applies to Peacekeeping Missions*

At present, Nepal is the fifth largest troop contributing nation to the UN peace operations with over 5700 personnel serving in 11 missions, most of which are in countries undergoing an armed conflict.[118] Knowledge of LOAC/IHL is indispensable, and thus a part of troop training. How LOAC/IHL binds these troops depend on a factual determination of their impartiality in an armed conflict - LOAC/IHL applies to impartial troops whose conducts have a nexus with an armed conflict[119], or troop who *de facto* qualifies as a party to a conflict[120]. Troops are both right-holders and duty-bearers within LOAC/IHL. They can be a distinctly identifiable victims of illegitimate violence, including war crimes[121]. Their duties, while rather narrow in comparison to states and OAGs, are delineated in the 1999 UN Secretary General's Bulletin[122] and the respective troops' Operative Guidelines.[123] Nepali troop personnel are hence bound by LOAC/IHL. Without prejudice to merits of peacekeeping missions, it cannot be refuted that peacekeeping troops are frequently alleged of violations of LOAC/IHL, such as pillage, torture and sexual violence, including rape.[124] Should they be alleged of such violations, including war crimes, the UNSC bulletin specifies that the troop contributing nation has the authority to investigate and if necessary, prosecute the accused.[125] Documentation of such investigations are rather sparse[126], including those regarding Nepal.

Q7. What forms of violence are prohibited by LOAC/IHL?

The typology of prohibited 'violence' in an armed conflict is not limited to combat

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116 The law of neutrality in IHL provides the definition of a neutral state, that is, a state which does not participate in the armed conflict. It entails rights of inviolability of the territory of a neutral state, and certain protections to the nationals of a neutral state found in the territory of a belligerent state. It also entails a duty to maintain impartiality in international relations with the belligerents of the armed conflict. For detail, see Nicholas Tsagourias and Alasdair Morrison, *International Humanitarian Law, Cases, Materials and Commentary*, Cambridge University Press, 2018, chapter 8.

117 For the rules on protection of aliens in occupied territories, see GC IV (n 36), arts. 48, 70; For the rules on protection of aliens in the territory of a party to a conflict, see GC IV (n 36), art. 35- 46.

118 'United Nations Peacekeeping', available at https://peacekeeping.un.org/en/nepal, accessed on 5 December 2020.

119 Tristan Ferraro, 'The applicability and application of international humanitarian law to multinational forces', *International Review of the Red Cross* p. 561, 2014, volume 95: 891, p. 584.

120 Commentary to GC I (n 24), para. 411.

121 Customary IHL Database (n 19), rule 33 (personnel and objects involved in a peacekeeping mission).

122 See generally, UNSG, 'Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law,' (6 August 1999) UN Doc. ST/SGB/1999/13.

123 Surya Deuja, 'IHL and Peacekeeping', South Asia Teaching Session, Kathmandu, April 2018.

124 'UNSC, 'Special measures for protection from sexual exploitation and sexual abuse, Report of the Secretary General' (2004) UN Docs A/58/777.

125 1999 UNSC Bulletin (n 124), p. 2.

126 One of the few cases include that of Ronghi, a member of a peacekeeping force, who was found guilty of raping and murdering a ten-year-old girl in Kosovo. *United States v. Ronghi*, No. ARMY 20000635, (A. Ct. Crim. A. May 27, 2003*); United States v. Ronghi*, 60 M.J. 83, 86 (C.A.A.F. 2004).

situations, it also includes acts against a person or object under a party's control[127]. Not everyone is protected against every violence. LOAC/IHL contains a scheme of protected persons, protected objects, as well as general and special protections[128]. However, there are some sweeping protections in both IAC and NIAC: all civilians and civilian objects are protected against general effects of hostilities[129]; all *hors de combat* or people out of combat including members of adverse parties who have given up arms/are sick or wounded/are detained have to be treated with dignity and be afforded certain judicial guarantees[130], and everyone whether a civilian or a combatant is protected against unnecessary suffering and superfluous injury[131], and has a fundamental guarantees against any inhumane act, including sexual violence, torture, biological experimentation, slavery, enforced disappearance and collective punishment.[132]

A war crime is a serious violation of LOAC/IHL and is understood as a crime under a treaty or a custom[133]. It requires a proof of a nexus between the perpetrator's conduct and an armed conflict.[134] As such 'war crime', 'crime against humanity' and 'genocide' are separate crimes with their own cultural, etymological and legal history, whose discussion deserves a separate discussion, but the latter two can be both related or unrelated to an armed conflict.

If the *modus operandi* of a warring armed force includes large-scale violence on civilians, and in that context, it resorts to frequently injuring, killing, displacing, disappearing, sexually abusing, pillaging or torturing civilians, standalone or in combination, that would suffice both the definition of both a crime against humanity[135] and a war crime. It can be argued on the basis of *prima facie* documentation discussed in Q 9 that both occurred in the NIAC in Nepal, However, crimes against humanities can occur in violent situations falling short of an armed conflict such as the violent elections in Guinea[136], political turbulences in Venezuela[137], riots in Ukraine[138], and the violent rhetorical war on drugs in the Philippines[139], among others, are being examined/investigated by the ICC, and may incorporate conducts of multinational corporations[140] in the future.

Similarly, it is possible for a genocidal situation to occur outside an armed conflict; however, it is frequently used as a method of warfare or culminates into an armed conflict

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127 Marco Sassoli, Lecture on Non-International Armed Conflict, 8 March 2017, University of Geneva.

128 'Whom does LOAC/IHL protect?', available at https://tinyurl.com/y5yh3c99, accessed on 28 November 2020.

129 Customary IHL Database (n 19), rule 47.

130 Commentary to GC I (n 24), para. 585.

131 Customary IHL Database (n 19), rule 70.

132 Ibid, rules 87-105.

133 *Tadic Interlocutory Appeal* (n 11), para. 94.

134 *Lubanga Confirmations of Charges* (n 39), paras. 380-382.

135 See ICC Statute (n 34), art. 7.

136 ICC, 'Situation in Guinea' available at https://www.icc-cpi.int/guinea, accessed on 20 July 2018.

137 ICC, 'Situation in Venezuela' available at https://www.icc-cpi.int/venezuela, accessed on 20 July 2018.

138 ICC, 'Situation in Ukraine', available at https://www.icc-cpi.int/ukraine, accessed on 20 July 2018.

139 ICC, 'Situation in the Phillipines', available at https://www.icc-cpi.int/philippines, accessed on 20 July 2018.

140 'Is environmental destriction a crime against humanity', *TheWashingtonPost*, 16 September 2016.

as observed in Germany, former Yugoslavia, Rwanda and arguably in Myanmar[141]. In the actual understanding[142], violence in a genocidal situation are directed towards a particular national, racial, ethnic or religious group with an intention to destroy such group. No such genocidal situation existed in the NIAC in Nepal. While some ethnic groups were disproportionately affected by the conflict for mostly geographical and economic reasons[143], they were not specifically targeted. The so-called 'feudal elements' targeted by CPN-M were not a particular group, rather a loose concept[144]. Violence against political groups is not considered a genocide[145]. A war crime may not amount to genocide, but that does not undermine its severity and gravity.

Q8. What about human rights? Is LOAC/IHL a part of human rights?

A violation of LOAC/IHL is often also a violation of human rights as they share a common objective - to prohibit inhumane conditions during an armed conflict. Hence, human rights mechanisms are frequently activated to investigate violations of human right during armed conflicts[146]. UN special rapporteurs have also held 'country visits' in Nepal to follow-up on the situation of post-conflict transitional justice.[147]

However, LOAC/IHL and human rights are different sets of law, and are not always consistent with each other. In a response study to consolidate opinions about whether and to what extent the international law is fragmented, the International Law Commission (ILC) observed that two sets of law apply to armed conflicts – LOAC/IHL and human rights[148], which lends itself to the potential fog of law – how to determine which set applies to any given situation? To this, the ILC has proposed a pragmatic scheme:

- If the situation is ordinary or general, the general rule applies. If it is a 'hard case', whereby in an extraordinary or special situation there are diverging interpretations of what is lawful within applicable set of rules, whichever is

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141 See 'Genocide', *Encyclopedia Britannica,* 2020 available at https://www.britannica.com/topic/genocide, accessed on 24 November 2020.

142 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277 (Genocide Convention), art. 1.

143 See generally, Sebastian von Einsiedel and Cale Salih, *Conflict Prevention in Nepal*, World Bank Background Paper on Study on Conflict Prevention, April 2017.

144 Olivier Bangerter, Internal Control Codes of Conduct within Insurgent Armed Groups, *An Occasional Paper of the Small Arms Survey,* 2012, p. 45.

145 See Genocide Convention (n 143), art. 1; Also see ICC Statute (n 34), art. 6.

146 UNGA, 'International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011', 19 December 2016, UN Doc. A/71/L.48; OHCHR, 'Situation of human rights in Myanmar', 3 April 2017, UN Doc. A/HRC/RES/34/22; OHCHR, 'Special Procedures of the Human Rights Council' available at https://www.ohchr.org/en/hrbodies/sp/pages/welcomepage.aspx, accessed on 18 August 2018; UNHRC, 'President of Human Rights Council appoints Members of Commission of Inquiry on 2018 protests in Occupied Palestinian Territory', available at goo.gl/cf3APM, accessed on 18 August 2018.

147 The author finds the title of this report very imprudent for a report that wants to persuade a state to implement its finds and recommendations, and does not agree with some of its legal conclusions including those on universal jurisdiction, but see Human Rights Watch, *No Law, No Justice, No State For Victims,* 2020, available at https://tinyurl.com/y9dtll25, accessed on 9 December 2020.

148 ILC, *Fragmentation of International Law,* 13 April 2006, UN Doc. A/CN.4/L.682, p. 61.

the special rule (*lex specialis*) applies.[149]

- Both, LOAC/IHL and human rights, contain general and special rules.[150] A whole set of rule cannot be special rules. A rule is a special rule if it contains a special 'subject-matter (fact description)' or is special in regard to the 'number of actors' whose behavior it regulates. It must be expressed in the following format: "for every p, it is true that the rule q applies."[151]

This systematic approach borrows from the proposition of International Court of Justice (ICJ) that there are three possible interrelationships between LOAC/IHL and human rights – in some situations LOAC/IHL applies exclusively; in some situations human rights applies exclusively; and in many situations human rights and LOAC/IHL complement each other to enhance protection by law during an armed conflict.[152] Such complementary has been crucial in determining the legality of grounds of detention and detention conditions, as well as for providing standards of fair trial to the detainees in NIAC.[153] The complementarity is also reflected in the policy of the UN.[154] However, there are frictions against the complementarity, and one of the most impactful friction is the product of the asymmetrical warfare most akin to 'people's war' style of NIAC.

To elaborate, it is one of the oldest rule based on the principle of distinction within LOAC/IHL that civilians cannot be the targets of military operations, however they lose such protection if and so long as they directly participate in hostilities[155]. Since such loss of protection is reserved for special situations even within LOAC/IHL, and serves a pragmatic interest to be able to exceptionally treat a civilian like an adversary when they become hostile elements, hence the rule qualifies as *lex specialis* in its entirety.

However, the ICRC *Interpretative Guidelines* proposes a limitation on this rule – that parties should attempt to capture the civilian first, and this proposal is actually based on the concept of 'force continuum' under human rights.[156] Geoffrey S. Corn asserts that this is tantamount to 'mixing apples and hand grenades' as "during peacetime, the law does not tolerate employment of any force, let alone deadly force"[157], whereas armed conflict, as discussed earlier, tolerates certain deadly force with caution. Corn notes that ICRC's 'capture first' recommendation was helmed 'unlikely to be operable in classic

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149 Ibid.

150 Ibid.

151 Ibid.

152 *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory Advisory Opinion*, ICJ, 2004, para. 106

153 Geoffrey S. Corn, 'Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict', p. 31, available at https://tinyurl.com/create.php, accessed on 1 December 2020.

154 UN Human Rights Committee, General comment No. 36; UN Human Human Rights Committee, General comment No. 35, Article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35 (read only paras. 63-65); UN Working Group on Arbitrary Detention, UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, UN Doc. A/HRC/30/37, paras. 27-32, 94-6.

155 AP I (n 29), art. 51(3); AP II (n 33), art. 13(3).

156 See generally Corn (n 154).

157 Ibid, p. 31.

battlefield situations involving large scale confrontation [and that] even if equipped with sophisticated weaponry and means of observation, armed forces operating in situations of armed conflict may not always have the means or opportunity to capture rather than to kill."[158] In the cases of *Kale Tamang*[159] and *Buddhibahadur Praja*[160], which were *prima facie* related to conducts of hostilities, the Supreme Court of Nepal took cognizance of 'humanitarian law' without explicit reference to any treaty or customary rule or principle applicable to conduct of hostilities, while on the other hand, illustrated a distinguished understanding of human rights. Jens Ohlin opines that such situations are a pothole in complementarity.[161] The author agrees with Ohlin and adds that combat situations were Clausewitz's classical realm of uncertainty, which LOAC/IHL has organically developed to regulate as much as possible. Hence, this challenge in complementarity creates a fog of law, which can also be traced in the Nepali experience so far.

Q9. What war crimes occurred in the 1996-2006 NIAC in Nepal?

The author restresses that most of the sources below are secondary sources in law that have yet to undergo a judicial test.

a. War crimes explicitly or implicitly prohibited under the common article 3 to the GCs

i. Murder

The armed forces of Nepal reportedly murdered civilian CPN-M (Nepal) sympathizers[162], and allegedly fabricated evidence in some occasions to guise them as crossfires or encounters of members of the CPN-M (Nepal)[163]. In some cases, no attempt was allegedly made to verify the identity of the suspects in their power.[164] The forms of murder included infliction of physical violence not followed by immediate medical treatment to the effect of the civilian's death[165], death of civilians in their power under clandestine circumstances[166], and killing of *hors de combat* members of CPN-M (Nepal).[167] Similarly, CPN-M (Nepal) have been alleged of murdering civilians, including journalists[168] and

[158] Ibid, p. 34.

[159] *Kale Tamang et al v Government of Nepal* et al, WN 0238, cited in Govinda Bandi (ed.), *Transitional Justice and Right to a Remedy*, Nepal Bar Association, 2013, pp. 151-158.

[160] *Buddhibahadur Praja et al v Government of Nepal et al.* WN 2448 of 2063 (2006, cited in Ibid, pp.141-148.

[161] Kevin Von Heller, 'Another Round on IHL and IHRL', available at https://tinyurl.com/y8x2ydzq, accessed on 2 December 2020.

[162] Human Rights Watch (n 147), pp. 30-31.

[163] Ibid.

[164] Nepal Conflict Report (n 58), p. 82.

[165] See *Surya Prasad Sharma v. Nepal*, Human Rights Committee Communication 1469/2006, UN. Doc. CCPR/C/94/D/1469/2006; *Rabi Khatri Case Study*, in Nepal Conflict Report (n 98), p. 84.

[166] International Crisis Group, *Nepal: Peace and Justice*, *Asia Report no. 184*, 14 January 2010, p. 12-13.

[167] Nepal Conflict Report (n 58), p. 85.

[168] International Commission of Jurists (ICJ), *Achieving Justice for Gross Human Rights Violations in Nepal Baseline Study*, October 2017, p. 8.

teachers[169], and killing *hors de combat* members of the armed forces.[170]

ii. *Outrages on personal dignity*

Both parties to the conflict reportedly perpetrated torture, rape and other sexual abuse, and disrespectful treatment of dead bodies[171], including their indecent disposal or indecent cremation.[172]

iii. *Sexual violence*

A sexual violence may constitute multiple war crimes including physical and psychological violence, outrage on personal dignity and in certain cases, torture.[173] Over a 100 such case studies have been documented by NGOs.[174] As of 6 June 2019, the Truth and Reconciliation Commission Nepal (TRC Nepal) has received 322 cases of sexual violence against both the parties to the conflict[175], all of which are women and girls.[176] However, it is plausible that many remain unreported[177], including intra-group sexual abuses, especially of child soldiers and women combatants, as it is a fairly recently recognized war crime.[178]

iv. *Doramba 2013-a war crime of summary execution?*

A statement by the Nepal Army reads that on the morning of 17 August 2013 it killed members of the CPN-M in an ambush in Doramba.[179] If accurate, this would be a legitimate killing in a combat situation, not a summary execution under common article 3; the ICRC *Commentary* to common article 3 candidly states that common article 3 does not apply to conduct of hostilities.[180] However, the NHRC fact-finding team reported that they were taken as captives to a forest and killed at gun-point.[181] If accurate, the Army killed *hors de combat* in its power, and the conduct amounts to murder and summary execution (execution without affording judicial mechanism). The Army reportedly conducted an independent investigation and court-

169 *Sushil Pyakurel et al v Prime Minister Jhalanath Khanal* et al, WN 1094 cited in Govinda Bandi (ed.), *Transitional Justice and Right to a Remedy*, Nepal Bar Association, 2013, pp. 116-121.

170 International Crisis Group (n 166), p. 14.

171 Customary IHL Database (n 19), rule 113 (treatment of the dead).

172 Case Study of Ujjwal Kumar Shrestha in ICJ (n 169), p.9; *Maina Sunwar Case*, *Devi Sunwar v. District Police Office Kavre et al*, WN 0641, 2063 (2013).

173 Commentary to Common Article 3 (n 24), p. 698.

174 *Nepal Conflict Report* (n 58), p. 23.

175 Dewan Rai, 'TRC records 295 complaints on sexual assault', *The Kathmandu Post,* 2 December 2016.

176 See 'Conflict-era sexual violence victims yet to be identified', available at https://tinyurl.com/yb2nhya4, accessed on 12 December 2020.

177 See Human Rights Watch, *Silenced and Forgotten: Survivors of Nepal's Conflict-Era Sexual Violence,* 2014.

178 The ICC *Ntaganda* decision on the confirmation of charges qualifies rape and sexual slavery of child soldiers committed by members of same group as war crimes. Prosecutor v. *Bosco Ntaganda,* Confirmation of Charges, 2014, ICC-01/04-02/06-309, paras. 76-82.

179 Seira Tamang, 'Remembering Doramba', August 2004, NepaliTimes, available at https://tinyurl.com/y7a6avme, accessed on 29 November 2020.

180 Commentary to GC I (n 24), para. 389.

181 Ibid.

martialled a commander, but the details are unavailable.[182] Perhaps[183] the most conductive forum to verify the facts would be a special court agreed upon by the victims, the general population of Nepal, the parties to the conflict, and the government and which contains a locally thought-out *Rules of Evidence and Procedure*[184], because this case study is emblematic of a post-conflict justice riddled by these challenges: it is not clear what standard of proof was used in the martial court and the reports; b) fact-finding reports, NGO reports and news reports need to undergo the test of impartiality and reliability in the spirit of truth;[185] c) There are conflicting reports about whether those killed were Maoist cadres or Maoist suspects[186], whether two of them were civilians[187], and whether the members of the Army committed perfidy[188] by conducting hostility whilst dressed as civilians.[189]

v. Multiple war crimes in a single conduct

Both parties to the conflict reportedly perpetrated rape followed by murder[190]; unlawful detention followed by torture[191]; unlawful detention followed by murder, sometimes tripled with indecent disposal of the dead body[192]; unlawful detention followed by enforced disappearance[193], among others.

vi. Enforced Disappearance

"The very virtue of a person gone missing is a violation of LOAC"[194]. Enforced disappearance is a composite crime[195] because it is a likely combination of some or all of these war crimes - abduction, arbitrary detention, incommunicado and/or secret detention, physical or mental

182 Ibid.

183 The choice of the word reflects the necessity to first revisit the transitional justice mechanism in Nepal as discussed later, and that this issue requires a separate discussion.

184 The reader can refer to the ICC's own Rules of Evidence and Procedure to gain a fair idea of what thought-out rules look like.

185 *Prosecutor v. Thomas Lubanga Dyilo, Decision on the admissibility of four documents,* 13 June 2008, ICC-01/04-01/06, para. 31*; Prosecutor v. Aleksovski*, Decision on prosecutor's appeal on admissibility of evidence, 16 February 1999, ICTY-1995-14/1, para. 15.

186 See generally, Tika Prasad Bhatta, 'Out and about in Doramba', available at https://tinyurl.com/ycvx3a75, accessed on 10 December 2020.

187 See Human Rights Watch, 'Unlawful Killings and Summary Executions by Nepali Security Forces', https://tinyurl.com/ycms8akx, accessed on 11 December 2020.

188 Killing, injuring or capturing an adversary by resort to perfidy is prohibited. LOAC/IHL (n 19), rule 65.

189 Bhatta (n 186).

190 'Case study of Reena Rasaili', in Human Rights Watch and Advocacy Forum, *Adding Salt to Injury*, 2011, p. 17.

191 *Yubaraj Giri v. Nepal,* Human Rights Committee Communication No. 1761/2008, CCPR/C/101/D/1761/2008 (2008).

192 *Maina Sunwar* Case (n 172); 'Case study of Sahid Ullah Dewan', in Human Rights Watch and Advocacy Forum (n 190), p. 29.

193 *Mukunda Sedhai* v Nepal, Human Rights Committee Communication No. 1865/2009, UN Doc. CCPR/C/108/D/1865/2009 (2009).

194 Monique Crettol and Anne-Marie La Rosa, 'The missing and transitional justice: the right to know and the fight against impunity', *International Review of the Red Cross* p. 355, volume 88: 862, p. 356.

195 Customary IHL Database (19), rule 98 (on enforced disappearance)

violence, sexual violence, torture and murder. [196] NHRC Nepal has reported at least 1619 cases of conflict-related disappearances, 1234 of which is attributed to the armed forces, 331 to CPN-M (Nepal); 54 of them remain unidentified.[197] Rarely has a conflict-related missing person surfaced and revealed their voluntary disappearance.[198] When the government refuted these allegations[199], the Supreme Court took cognizance of *prima facie* reports and ordered to government to set up a separate commission to specifically investigate allegations of enforced disappearance.[200]

vii. Other possible war crimes under common article 3

These include hostage taking[201], pillaging or destroying medical units and transports providing medical care to the sick and wounded[202], obstructing operation of consented-to humanitarian organizations and their workers.[203]

b. Serious violations of customary rules applicable in a NIAC

i. Attack(s) on a civilian or a civilian population as a part of hostilities[204]

The armed forces allegedly attacked civilians, particularly the CPN-M sympathizers, during campaigns such as during Kilo Sierra II and Cordon[205]. The CPN-M allegedly perpetrated targeted killings of civilians, especially teachers[206], school children[207], journalists and human rights defenders.[208]

ii. Attack(s) on civilian objects

The armed forces allegedly extensively burnt the village at Khara, Rukum[209]. CPN-M allegedly destroyed 5138 civilian infrastructures in Nepal, including administration buildings, police posts, schools, roads and bridges, drinking water systems, electric powerhouses, telecom towers, radio stations, buses and food stores, among others. [210]

iii. Attack(s) on non-military objectives including religious or cultural objects[211]

For example, CPN-M (Nepal) reportedly desecrated the Tansen palace, a

196 Nepal Conflict Report (n 58), pp. 19, 20.
197 Human Rights Watch (n 147), p. 16.
198 'Armed Conflict victim returns home after 18 years', *The Himalayan Times*, 1 May 2017.
199 *Rajendra Dhakal v. HMG* et. al., 2007 cited in Bandi (n 159).
200 Ibid.
201 As expressed in the common article 3 to the GCs.
202 It derives from the obligation to care for the sick and the wounded. Commentary to GC I (n 24), para. 770.
203 Ibid.
204 Customary IHL Database (n 19), rule 6 (civilians' loss of protection of attack).
205 Thapa (n 83), p. 169.
206 International Crisis Group (n 166), p. 13.
207 See Human Rights Watch (n 147), p. 118
208 International Crisis Group (n 166), p. 12.
209 Ibid, p. 13.
210 Upreti (n 57), pp. 277-8.
211 Customary IHL Database (n 19), rule 38 (attacks against cultural properties).

UNESCO world heritage site[212] and the Malgalsen palace.[213]

iv. Civilian displacement[214]

Not all civilian displacement amount to war crime.[215] Those that occur as an effect of pillage of civilians' land, houses and other properties as described in (ix) amount to war crimes.

v. Excessive collateral damage to civilians lives and properties than justifiable by military necessity

The armed forces reportedly open-fired at Sharada Secondary School to kill members of CPN-M, which led to deaths of 4 students.[216] On the other side of the spectrum, the CPN-M (Nepal) reportedly open-fired at a school in Achham, that killed two minor[217]. Such events are a violation of LOAC/ IHL by the virtue of target non-verification[218] , which led to civilians being placed at a line of fire by the hostile party's omission. By this virtue, such attacks are also indiscriminate in effect.[219]

vi. Recruitment of children below the age of 15[220]

The armed forces reportedly used children as messengers, spies or informants, however such engagements are not deemed as recruitment of child soldiers[221], although it has to be emphatically acknowledged that such acts expose children to the general effects of war, which is a violation of special protection that has to be afforded to children by the parties to the conflict[222]. It is a verified fact that the CPN-M recruited child soldiers throughout the conflict[223], with at least 1996 documented cases of such recruitment, among which 475 were below the age of 15[224].

vii. Civilian reprisal[225]

The *Khara incident* is an emblematic case study of of civilian reprisal, if accurate, in which a young inspector allegedly ordered the execution of at least 17 local men, including a 15 year old boy, as a reprisal for the killing of

212 'The Medieval Town of Tansen', available at https://whc.unesco.org/en/tentativelists/5262/, accessed on 10 August 2018.

213 Kai Weise, 'Conflict and heritage destruction', *The Himalayan Times*, 8 July 2017.

214 Customary IHL Database (n 19), rule 129 (the act of displacement)

215 Mercy Corps (n 63), p. 75.

216 'Case no. 272, Civil War in Nepal' in Sassoli (n 14), p. 2411.

217 Nepal Conflict Report (n 58), p. 86.

218 Customary IHL Database (n 10), rule 16 (target verification).

219 Ibid, rule 12 (the definition of indiscriminate attack).

220 Ibid, rule 136 (recruitment of child soldiers).

221 See generally, UNSG, 'Report of the Secretary-General on children and armed conflict in Nepal,' UN Doc. S/2006/1007, 20 December 2006.

222 See the general construction of article 77 of AP I.

223 International Crisis Group (n 166), p. 13.

224 Ibid.

225 Customary IHL Database (n 19), rule 145 (reprisal upon civilian population).

his colleague. It is alleged that the police burnt down 25 houses, 35 animal sheds, and five grain warehouses and grinding mills. The killed people were later found to be civilians, who were supporters of Nepali Congress Party.[226]

viii. Use of weapons in a prohibited manner

The NIAC was rather fought using small arms and ammunitions whose acquisition and use for insurgent purposes is prohibited by the Arms Act of Nepal [227] and the Explosives Act of Nepal[228]. Small arms and ammunitions are not prohibited weapons under LOAC/IHL *per se,* however they cannot be used against civilians.[229]

Landmines and explosive remnants of war (ERWs) were used in the NIAC in Nepal. They are not prohibited weapons as a matter of treaty law in Nepal, as the state is not a party to the Anti-Personnel Landmines Convention and the Conventional Weapons Convention and its Protocols. However, it has been verified that they were installed hap hazardously at public place[230]. In such situations, the mines and ERWs were indiscriminate in effect. It can also be argued that since mines and ERWs cause superfluous injury and unnecessary suffering of the combatants, they are inherently against the principle of humanity under LOAC/IHL[231]. Traditional forms like those used in Nepal[232] evidently resulted in death and amputation of many civilians[233], including children.[234] Use of mines and ERWs when there is a reasonable probability of such effects would amount to a war crime.

ix. Pillage[235]

Nearly 40,000 people reportedly had their properties arbitrarily seized by the parties to the conflict[236]. The armed forces reportedly pillaged money and movable property during military operations[237]. The Supreme Court of Nepal has observed[238] that the CPN-M perpetrated widespread pillage of

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226 Mercy Corps (n 63), p. 90.

227 Arms and Ammunitions Act, Nepal, 2019 (1962).

228 The Explosives Act, Nepal, 2018 (1961).

229 OHCHR, 'Conflict-related Disappearances in Bardiya District' available at goo.gl/nyNV9K, accessed on 10 August 2018.

230 HRTMCC Nepal, 'Field Report in Maoists Trapped Civilian Bus in Landmine at Bandarmudhe Stream in Madi of Chitwan District', 14 June 2005.

231 Jean-Marie Henckaert, 'Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict', *International Review of the Red Cross* p.175, 2005, volume 87:857, p. 194.

232 Ibid.

233 Geneva International Center for Humanitarian Demining (GICHD), *Evaluation of the UN Mine Action Programme in Nepal*, Geneva, 2012, p. 9.

234 Ibid.

235 Customary IHL Database (n 19), rule 52 (pillage).

236 *Bhojraj Timilsina et al v. Nepal Congress Party et al*, WN 2063-WO-0920 (2006) in Bandi (n 159), p. 132.

237 See *Tej Bahadur Bhandari v Nepal*, Human Rights Committee Communication No. 2031/2011, UN Doc. CCPR/C/112/D/2031/2011.

238 *Liladhar Bhandari et al v Government of Nepal*, WN 0863 cited in Bandi (n 159), p. 172.

land.[239]

The above are neither an exhaustive list of crimes, nor of case studies and reports. Other probable war crimes worth investigating in the Nepali context include: attack on medical and religion personnel and objects[240], making non-defended localities and demilitarized zones the object of attack[241], seizing property of the adverse party not required by military necessity[242], denial of quarter[243], collective punishments[244] and attack on objects indispensable to survival.[245]

Q10. Why is the 1996-2006 NIAC in Nepal also called 'the people's war', 'political conflict' and the 'Maoist insurgency'? Which is the correct legal term?

The term 'armed conflict' is most appropriate for a real-time application of LOAC/IHL, however, the use of the above three terms in an academic discussion of LOAC/IHL is not only tolerable, but necessary. When a situation is factually determined as a NIAC, LOAC/IHL applies equally and objectively to the parties to the conflict, including the party claiming 'a people's war'[246]. The terms 'political conflict', 'people's war' and 'Maoist insurgency' dilute the objectivity of LOAC/IHL, and create frictions against the effective compliance of LOAC/IHL. The continuous reference to the NIAC as 'Maoist insurgency' during the NIAC in Nepal had two such effects.

First, it downplayed the gravity of violence, consequently fostering a narrative that the situation was an insurgency (falling short of a full-blown armed conflict), and was thus regulated by the domestic law of Nepal. Domestic law has its own utilities and limitations in regulating a NIAC. For instance, the domestic homicide law can be used to identify and detain anyone who kills a civilian in the context of a NIAC, and to provide the requisite interim relief to the victims, as evidenced in the case laws of *Jayakishor Labh*[247] and *Purnamaya Lama*[248], among others. However, a NIAC magnifies and exposes prevalent weaknesses in domestic criminal justice system, which in the Nepali experience reportedly included: a) discrimination and inconsistency in registration of FIR in conflict-related cases due to 'external pressure'[249]; b) frequent acrimonious non-cooperation by the accused member of CPN-M with the investigating

239 Francesca Romanin et. al., *Natural Resource Grabbing: An International Law Perspective*, Brill Publications, 2015, p. 414.

240 Customary IHL Database (n 19), rule 25 (medical personnel).

241 Ibid, rules 36-7 (open towns and non-defended localities).

242 Ibid, rule 50 (destruction and seizure of property of an adversary).

243 Ibid, rule 15 (precautions in attack).

244 Ibid, rule 103 (collective punishments).

245 Ibid, rule 54 (attacks against objects indispensable to the survival of the civilian population).

246 ICRC, '*jus ad bellum* and *jus in bello*', available at https://tinyurl.com/y3o3xcnn, accessed on 23 November 2020.

247 *Jayakishor Labh v District Police Office Dhanusha*, WN 063-WO-0681 in Bandi (n 159), p. 114.

248 *Purnamaya Lama v District Police Office Kavre et al*, WN 1231/2063, in Ibid, p. 100.

249 Human Rights Committee, 'Concluding observations on the second periodic report of Nepal', UN Doc. CCPR/C/NPL/CO/2 ,15 April 2014, p. 2.

police officers[250]; and c) non-compliance of the police (not a neutral third-party in the particular circumstance) with judicial orders and directions requiring them to cooperate.[251] Further, it is understood that a homicide is climatically different to killings associated with an armed conflict.[252] Hence, exclusive domestic law approach to a so-called 'Maoist insurgency' did not provide enough safeguards to the people of Nepal.

Second, use of the term in a legal capacity violates the sanctity of rule of law as it projects the CPN-M as the only unruly party[253] in a hostile situation that amounts to NIAC, whereas we discussed above in Q 9, both the parties to the NIAC are either alleged or been held guilty of committing war crimes. Hence, the term 'armed conflict' is the most conducive one for the real-time application of LOAC/IHL.

Regardless, the author would not dismiss[254] the significance of a political theory of war in an academic discussion about the correlation between the political history *vis a vis* causes of an armed conflict and the effective compliance of LOAC/IHL. According to Clausewitz, "war is a continuation of politics by other means"[255]. This theory is based on his experience as a commander of the Prussian insurgents who rebelled against France, based on the post-French Revolution model of mass-politics.[256] Mao drew inspiration from Clausewitz among other scholars and theorized that "war is not simply a continuation of politics, it is a rather genesis of politics, and a means of political transformation."[257] According to Mao, war as an instrument of political transformation requires a 'strategic defensive' established through political mobilization of 'the people', and organization of 'the people's force'[258]. The term 'Maoist insurgency' and 'people's war' are hence based on Mao-Clausewitizian political explanation of war.

That a 'people's war' model of armed conflict guides whether or not 'a people's force/ army' complies with LOAC/IHL has been illustrated in a study on the beliefs and conducts of Revolutionary United Front (RUF) of Sierra Leone, People's Liberation Movement (SPLM) of Sudan, National Resistance Army (NRA) of Uganda and the National Liberation Army (NLA) of Nepal, among others. It was found that:

> Most armed groups see their aim – the reason why they are fighting – as beneficial for their country, their ethnic group, and/or the population in general...the fact that IHL serves an objective in line with that of many armed groups is, for them, a most convincing

[250] ICJ, *Achieving Justice for Gross Human Rights Violations in Nepal Baseline Study*, October 2017, p. 16.

[251] Ibid.

[252] *Lubanga Confirmation of Charges* (n 39), paras. 287-288.

[253] See for example 'Deuba defends army, police mobilised during armed conflict', *The Himalayan Times*, 3 June 2016.

[254] The author has revised her previous opinion upon study of theories of war, specially Clausewitz and Mao.

[255] Clausewitz (n 1), p. 73.

[256] Hew Strachan, *The Direction of War: Contemporary Strategy in Historical Perspective,* Cambridge University Press, 2014, pp. 58-9.

[257] Francis Miyata and John Nicholson, 'Clausewitzian Principles of Maoist Insurgency' available at https://tinyurl.com/y29y954q, accessed on 22 November 2020.

[258] Mao Tse-Tung, *On Protracted War,* p. 229, available at http://www.marx2mao.com/Mao/PW38.html#s1, accessed on 23 November 2020.

> argument... [but] despite the prevalence of an IHL-related discourse among armed groups, one wonders to what extent the content of the law really is known… while others know that it is their duty not to kill enemies who surrender, they do not know that it is just as necessary to give them appropriate medical care after they have been taken captive. Fairly few groups have access to lawyers who are well versed in IHL; in most cases, their knowledge derives from hearsay and reading matter of varying quality.[259]

It appears that a 'people's war' and LOAC/IHL have a common objective to alleviate the suffering of 'the people'; however, the recruited members of a 'people's force' largely consists of a demographic unfamiliar with LOAC/IHL. Nepal imposed upon itself[260] the obligation to disseminate the GCs[261] in 1964 through treaty accession. While the obligation to disseminate the GCs is a so-called soft obligation, at the very least, a good faith practice of this obligation could have somewhat dispelled the fog of legal awareness among the civilians, some of whom got recruited by the 'people's war'. It is evident from the above discussion that terminologies such as 'political conflict', 'the people's war' and 'Maoist insurgency' have to be a staple in a contemporary academic discussion of LOAC/IHL, in order to analyse to what extent the fog of legal knowledge affects the beliefs and conducts of the parties to a conflict, in order to reduce such fogs in the future.

Apart from an academic discussion, it appears that these terms are also relevant to questions regarding post-conflict transitional justice. While the Supreme Court of Nepal has prescribed in the *Suman Adhikari case* that 'the word "political conflict" is not recognized by human rights and humanitarian law, and to rule otherwise would be denying remedy to the 'victims of the armed conflict'[262], and while this positions seems to be the majority position in Nepal, another approach suggests that post-conflict transitional justice is empirically a political process, as discussed in Q 15.

Q11. Is 'humanitarian law' a universal law?

The presupposition of universal humanity is based on these notion of humanitarianism – "all human beings should be treated humanely, that is with respect and dignity" and "human welfare supersedes every other purposes"[263]. In 1979, Jean Pictet called for a universal adoption of the Geneva Conventions based on a naturalist premise that humanity is transcendental, and its existence as an immutable human reason can be

[259] Olivier Bangerter, 'Reasons why armed groups choose to respect humanitarian law or not', *International Review of the Red Cross* p.353, 2011, volume 90:882, pp. 356, 369-70.

[260] 'List of multilateral treaties signed by Nepal', Ministry of Law, *Justice and Parliamentary Affairs*, Nepal, p. 13, available at https://tinyurl.com/ycrocygs, accessed on 27 November 2020.

[261] Customary IHL Database (n 19), rule 143 (states must encourage the teaching of international humanitarian law to the civilian population).

[262] *Suman Adhikari et al v Government of Nepal*, WN 0032, 2070 (2013) (unofficial translation).

[263] See Jean Pictet, 'Fundamental Principles of the Red Cross: Commentary', available at https://tinyurl.com/y87f47m5, accessed on 12 December 2020; Also see A. Schweitzer, *The Philosophy of Civilization,* Prometheus Books, 1987, preface and chapter II; Also see UNGA, 'Strengthening of the coordination of humanitarian emergency assistance of the United Nations', UNGA Resolution A/RES/46/182.

traced across continents and generations[264]. While humanity itself is immutable, this presupposition does not automatically justify the universality of LOAC/IHL, for two reasons.

First, there seems to be no uniform interpretation of 'respect', 'dignity' and 'welfare' in Dharmic, religious and moral doctrines. For instance, Chanakya in his *Arthashastra* advises that defeated states should be allowed to maintain their language, dress, customs and gods[265], whereas European colonialists advanced a particular reading of Christianity that it was not inhumane to be merciless towards savages, since it was exacted to 'civilize the savages' and to expand the European civilization.[266]

Second, the concept of humanity has grown more complex with the advent of time. For example, based on the unique geopolitics of its times, *Arthashastra* seems to green-signal biological warfare when the victory of a just king over an unjust king is at stake[267]. However, but it would be unfair to infer that Chanakya would prescribe biological warfare at the cost of mass destruction or extinction of humankind, given the relative simple technological capacities of those times.

Third, religious doctrines frequently rely on mythology to relay their lessons, which cannot be reviewed scientifically. For example, the *Bramhasthra* may or may not have been a weapon of mass destruction[268], hence its comparison to the contemporary ban on indiscriminate weapons becomes untenable. Fourth, ancient humanitarian messages tend to get lost in translation, as illustrated by the polarized interpretation of *Jihad*.[269]. This is not to say that religious and moral codes are not important, in fact armed actors appear to better comply with LOAC/IHL when they can draw parallels between their local culture, ethics and religion, and LOAC/IHL.[270] However, the local compliance paradigm does indicate that LOAC/IHL is not indeed normatively universal. Contextually, a school of post-colonialism holds that LOAC/IHL were responses to European challenges phrased as universal standards and indoctrinated into non-Western nations.[271] This critique clearly manifests in the discussion about amnesty for war crimes, elaborated in Q 15.[272]

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264 Pictet (n 263), See generally Manoj Kumar Sinha, 'Hinduism and International Humanitarian Law', *International Review of the Red Cross* p. 285, 2005, volume 87:858, pp. 285-294; Ahmed Al Dawoody, 'IHL and Islam: An Overview', available at https://tinyurl.com/ybsp8gjd, accessed on 23 November 2020.

265 Jaideep Prabhu, 'The Hindu Art of War', available at https://tinyurl.com/yc56fltw, accessed on 23 November 2020.

266 William Edward Hall, *A Treatise of International Law*, pp. 48–9, cited in Frederic Megret, 'From "savages" to "unlawful combatants": a postcolonial look at international law's "other", p. 14, available at https://tinyurl.com/yxz59x32, accessed on 27 November 2020.

267 Ibid.

268 For example, Sinha likens *Bhramhastra* to a nuclear weapon, both are intended to be used as a last resort under extreme events. Sinha (n 264).

269 For example, a scholar argues that the West is intentionally pushing an aggressive narrative about *Jihad,* whereas there are different schools of thoughts about *Jihad,* and some of them theorize a humanitarian interpretation of *Jihad.* See generally Faiz Bakhsh, 'Compatibility between International Humanitarian Law and Islamic Law or War (Jihad)' p. 75, *PETITA,* 2019, volume 4:1.

270 Juliane Garcia Ravel and Madalena Vasconcelos Rosa, 'IHL in action: seven patterns of respect', available at https://tinyurl.com/y9pr9kr3, accessed on 27 November 2020.

271 Megret (n 266), p. 33.

272 Amnesty for war crimes is rather a contentious topic within the political sphere. However, studies

The author's standpoint is that while LOAC/IHL has not entirely elevated to the position of a universal law, it retains an important position as public international law, since LOAC/IHL lays down obligations of states and people under their jurisdiction not on the basis of humanity that manifests in the informal moral doctrines[273], rather on the basis of humanity which are reasoned, debated and agreed upon by states as a set of rules in the international law-making process, primarily as treaties and customs[274]. Treaty and customary LOAC/IHL is not only more uniform and systematic[275] but also the most extensive and comprehensive model of legal regulation of armed conflict till date. For that matter, it seems at least the four Geneva Conventions which encompass a vast portion of LOAC/IHL are universally ratified or accepted[276]. Hence, at least the four Geneva Conventions are arguably universal by the virtue of international law-making process.[277] However, other treaty sources of LOAC/IHL have not been universally ratified/acceded, including the three additional protocols to the GCs, four Hague Conventions of 1899, 13 Hague Conventions and their annexed regulations of 1907, and the thematic treaties such as the 1954 Cultural Property Convention and the 1980 Conventional Weapons Convention, and their Protocols. While not universal, least 161 rules expressly or tacitly rooted in these treaties are customary international law.[278]

This suggests that if not entirely universal, LOAC/IHL is widely recognized and accepted among states. However, its gamut remains limited as states remain polarized on key rules including: a) recognition or otherwise of guerrilla combatants[279]; b) whether organized armed groups have the right to participate in hostilities against the territorial government in a non-international armed conflict (NIAC)[280]; c) whether a non-state combatant can be 'a farmer by day and fighter by night'[281]; d) whether equality of belligerence during NIAC is practicable[282]; e) whether national liberation wars should

demonstrate that amnesty combined with prosecution are more common than is assumed.

273 Gregory Shaffer, 'Legal Realism and International Law', available at https://tinyurl.com/y7pec99c, accessed on 25 November 2020.

274 There are several theories on the legitimacy of international law, nonetheless the majority opinion pins primacy on state consent. Rüdiger Wolfrum, 'Legitimacy in International Law', *Max Planck Encyclopedia of International Law,* available at https://tinyurl.com/y72jhq7a, accessed on 28 November 2020.

275 While common article 3 to the GCs provides the bare minimum rules for situations during a NIAC when a person may find themselves in the hands of a party to the conflict, the fundamental guarantees under article 75 of AP1 and article 4 of APII applies to everyone at all situations during IAC and NIAC including those of hostilities.

276 'Speakers Argue About Calls for Universal Ratification of Additional Protocols to Geneva Conventions, as Sixth Committee Takes Up Annual Report', UNGA Meetings Coverage, 4 November 2020, available at https://tinyurl.com/y8677knh, accessed on 26 November 2020.

277 But see post-colonialism critique of international law making process.

278 Jean-Marie Henckaert, 'Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict', *International Review of the Red Cross* p.175, 2005, 87:857, p. 212.

279 ICRC, *Commentary the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* Cambridge University Press, 2016, para. 1688.

280 Sassoli (n 14), p. 343.

281 Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities*, ICRC, p. 12.

282 Marco Sassoli, 'Introducing a sliding-scale of obligations to address the fundamental inequality between armed groups and states?', *International Review of the Red Cross* p.427, 2011, volume 93, p. 428.

be recognized as international armed conflicts(IAC)[283]; f) whether drones are altering the understanding of excessive collateral harm, and specially disfavour third-world countries[284]; and g) whether and to what extent LOAC/IHL governs 'new wars' such as cyberwarfare and automated warfare?[285] Notably, such fogs have dissuaded states including India and Nepal from becoming parties to the first two Additional Protocols to the GC.

Q12. Does LOAC/IHL legitimize war violence?

LOAC/IHL is generally not regarded as a war mongering legal instrument, barring a post-realist critique that it has proliferated European style inter-state violence in non-western countries.[286] From a positivist and legal realist explanation, LOAC/IHL is in fact designed to restrict war violence by detaching legality of war violence from legality of war *per se*, or the notion of 'just and unjust war'[287] or *jus ad bellum*. Simply for illustrative purposes, this detachment can be understood with reference to the Kaurava-Pandava war depicted in the Mahabharata. If the war had occurred in the modern timeplane[288], the Pandavas would arguably be liable for mutilating[289] and inflicting unnecessary suffering[290] on Dussasana, irrespective of their *DharmaYuddha*. By extension, not all war violence by the Kauravas would be illegal. For instance, outflanking an enemy combatant forming a Chakrabyu would not be a prohibited method of warfare, however subjecting Abhimanyu, an otherwise legitimate target to prolonged death within the Chakrabyu would amount to infliction of unnecessary suffering. Inversely, Ashwatthama would arguably not be liable for covertly killing *Upapandavas* at night, at least under customary LOAC/IHL.[291] This demonstrates that at present, *jus ad bellum* or the question 'when can X wage a war against Y?' is separate from *jus in bello*, or the question 'how can X wage a war against Y?' However such separation is prone to contemporary frictions[292] as discussed later.

283 AP I (n 29), art. 1(4); Commentary to AP I (n 24), para. 3619.

284 Frederic Megret, 'The Humanitarian Problem with Drones', available at https://tinyurl.com/yccsg9nk, accessed on 3 December 2020.

285 See ICRC, *International Humanitarian Law and the Challenges of New Armed Conflicts*, 2019, pp. 26-29.

286 Ibid, p. 31.

287 Marc Weller, *The Oxford Handbook of the Use of Force in International Law*, Oxford University Press, 2015, p. 465.

288 The author again stresses that the LOAC/IHL-like standards in religious scriptures cannot be compared to the normative field of LOAC. This exercise is for illustrative purpose. For a comprehensive LOAC/IHL 'value-based' assessment of Mahabharata, see Sinha (n 23), pp. 285-294.

289 Customary IHL Database (n 19), rule 92 (prohibition on mutilations unless required by the state of health of a person under generally accepted medical standards).

290 Ibid, rule 70 (prohibition on use of means of warfare which are of a nature to cause unnecessary suffering).

291 A combatant is targetable at all times, including at night. A sleeping combatant is not *hors de combat* and thus will remain 'in combat'. However, targeting combatants who are sleeping may be prohibited by military manuals and remains a moral question even without any ensuing legal consequence. Gary D Solis, *The Law of Armed Conflict, International Humanitarian Law in War,* Cambridge University Press, 2nd edition, p. 202.

292 It has been proposed that the distinction between *jus in bello* and *jus ad bellum* is blurring. Nevertheless, the the separation between two legal domains remains the majority opinion. See generally Geoffrey S. Corn, 'Self-defense Targeting: Blurring the Line between the Jus ad Bellum and the Jus in Bello', *International Law Studies* p. 58, 2011, volume 88.

A pragmatic rationale behind the separation can be traced back to several theories of war. In Clausewitz' proposition, "wars are social phenomena"[293]. The idea that war and peace are both products of the social nature of humanity and that wars are as innate to us as peace is also innately a Taoist 'yin and yang' position, which was also the central premise of Sun-Tsu's *Art of War*[294]. Under such rationale, permitting some violence and restricting others is a trade-off between offensive, defensive and protective aspects of humanity. Hence, it has been proposed that LOAC/IHL is not based on pacifism *per se*.[295]

We can imagine a utopia in which LOAC/IHL instructs its subjects to refrain from violence to an extent that military operations are no longer feasible, and while that might seem ideal, the above discussion suggests that such utopia has always been resisted by human nature. LOAC/IHL rather proposes 'do no more harm than is necessary and avoid excessive collateral damage' (the principles of military necessity, proportionality and precaution). These principles are based on custom rather than ideals. They are based on what states evidently believe can aid in preserving humanity to the maximum feasible extent, by looking back and learning from their past mistakes.[296] While the idea of 'a humanitarian law of violence' on the surface seems paradoxical[297] to some, it is a significant legal framework during an armed conflict, as discussed in Q 14.

Q13. Does LOAC/IHL legitimize the violence of terrorists by providing them certain protections?

If a person or an armed group is classified as a terrorist, in absence of an armed conflict, their treatment is governed by anti-terror laws and human rights. However, if the classification has a nexus with an armed conflict, their treatment also attracts the rules of LOAC/IHL, which does not, for a functional reason, classify a person as 'a terrorist', 'freedom fighter' or 'member of a people's force/army'.[298] LOAC/IHL presupposes that someone can either be a hostile or a non-hostile person in an armed conflict, and creates rights and duties on that basis. Hence, LOAC/IHL recognizes two broad categories of persons – civilians and combatants[299]. A terrorist suspect/accused/convict can be either of these, depending on whether the person is in or

[293] AP I (n 29), preamble.

[294] Tsu uses the metaphors of 'sun and earth'. Sun Tsu, *The Art of War,* ss. 1.13, 1.4, 1.7, available at https://suntzusaid.com/index/heaven, accessed on 10 December 2020.

[295] Also see Marco Sassoli, Antoine A Bouvier and Anne Quintin, *How Does Law Protection in War*?, vol I, 3rd edition, p. 93.

[296] See AP I (n 29), art. 51(5)(b); For a detailed explanation of how customs are formed in international law, particularly in LOAC/IHL, see Jean-Marie Henckaerts, 'History and Sources', in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law,* Oxford University Press, 2020, pp. 1-9.

[297] In the words of a Youtube commentator completely unaware about LOAC, "law of war was the 'stupidest s**t he'd ever heard". Thomas Foster, 'What has law got to do with armed conflict', *International Review of the Red Cross* p. 994, vol. 99:904, 2017, p. 994.

[298] Yasemin Unal, 'Terrorist or Freedom Fighter', available at https://tinyurl.com/y6cf9fgf, accessed on 21 November 2020.

[299] Customary IHL Database (n 19), rule 1 (the principle of distinction between civilians and combatants).

out of combat. When detained, the person is out of combat and in the power of the adverse party. In such situations, common article 3 to the GCs protects the person from ill-treatments on the "grounds of national security, including fighting terrorism".[300] In the context of Nepal, the CPN-M was listed as a 'terrorist group' under Terrorist and Disruptive Activities Ordinance (TADO), and later the Terrorist and Disruptive Activities Act (TADA).[301] The Supreme Court of Nepal has echoed that people listed as terrorists cannot be subjected to torture or arbitrary detention in the name of security imperative.[302]

It has to be mentioned however that there is a conduct-based prohibition on 'an act of terror' as a method of warfare, including acts of hostage-taking and indiscriminate bombardments, among others.[303] Rounding up terrorist suspects who could very well be civilians, and torturing them to extract confession of their membership, for example, fits the definition of 'an act of terror against a civilian population'[304]. Both states and armed groups are capable of such acts of terror against civilian population. Ultimately, LOAC/IHL prescribes a certain and basic standard of humane treatment towards any person labelled a terrorist in the context of an armed conflict.

Q14. Is LOAC/IHL effective?

a. Is LOAC/IHL at a vanishing point?

This question is based on a misconstrued interpretation of a popular aphorism. In Holland's opinion, international law at the vanishing point of jurisprudence, that is, international law is not the same as jurisprudence (the actual law) because from far, 'international law' and 'jurisprudence' appear to be on the same line, but from near, they are parallel lines[305]. Holland did not opine that international law is 'vanishing', on the contrary he acknowledged that it is visible from a distance.

However, the question whether LOAC/IHL is at a vanishing point of jurisprudence is valid. LOAC/IHL in particular can be critiqued for lacking a 'centralized executive and judiciary'.[306] However, as Posner and Goldsmith opine, any legal order should be "assessed fairly for its utilities and limitations"[307]. The nature of LOAC/IHL as a legal order is reflected in the following provisions of AP I:

(article 82) The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when

300 Commentary to GC I (n 24), para. 614.

301 Human Rights Watch, *Nepal, Waiting for Justice, Unpunished Crimes from Nepal's Armed Conflict*, p. 2.

302 *Jayakishor Labh case* (n 247).

303 AP I (n 29), art. 51; AP II (n 33), art. 13(2).

304 Customary IHL Database (n 19), rule 2.

305 See for example Aaron Fichtelberg, *Law at the Vanishing Point: A Philosophical Analysis of International Law,* Ashgate, 2008, pp. 1-202.

306 Goldsmith and Posner (n 7), p. 7.

307 Ibid, pp. 13, 84-5.

necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

> (article 83) Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.
>
> (article 87) 1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol. 2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol[308].

It can be deduced that the enforcement of LOAC/IHL is largely based on a dual good faith approach: a presumption that responsible commanders and their legal advisors will ensure a real-time application of LOAC/IHL, and that the states will facilitate a positive engagement about LOAC/IHL in relative peace-time. In this vein, armed groups are required to demonstrate that they have a 'responsible command'[309] before they can invoke principles of distinction and military necessity to justify their military operations. Similarly, states are directed to take 'all necessary measures' to enforce the Conventions and the Protocols.[310] By and large, 'all necessary measures' seems to have an open-ended interpretation, which encourages states to carry out *suo moto* dissemination[311], translation[312], and domestication of the Geneva Conventions. Whereby the only explicit hard obligation includes the obligation to penalize the grave breaches of the Conventions (in an IAC)[313], and to punish misuse of the distinctive emblem[314].

Due to the primary emphasis on real-time prevention and repression of misconducts, it has been proposed that LOAC/IHL is not designed for judicial settlement, and is rather discursive[315]. Trials for war crime are not as frequent and pervasive as the common word of mouth surrounding the issue[316]. It also

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308 AP I (n 29), art. 80.

309 AP II (n 33), art. 1(1).

310 AP I (n 29), art. 80.

311 As stipulated in articles 47, 48, 127 and 144 respectively of the four Geneva Conventions.

312 GC IV (n 36), art. 145.

313 GCs (n 36), arts. 50, 51, 130, 147 (respectively); AP I (n 29), art. 85.

314 GC I (n 36), art. 54; GC II (n 36), art. 55.

315 Anton Petrov, 'Lawfare? We need the states to interpret international humanitarian law', p. 7, https://tinyurl.com/yxztfumz, accessed on 19 December 2020.

316 Center for International Policy Studies, 'The Effects of Transitional Justice Mechanisms: A Summary of

seems that so far states have not effectively expressed an intention to transform LOAC/IHL into an adjudicatory law, since there is no adjudicatory body under any treaty or custom in its realm. The International Humanitarian Fact-Finding Commission (IHFFC) has been mandated to conduct inquiries into serious violations of the Geneva Conventions and AP I during an IAC[317] (and during NIAC by the consent of the parties to a conflict)[318], however the IHFFC is barely used and does not have an adjudicatory power.[319] Further, there is no central authority to interpret LOAC/IHL, hence parties to the conflict with the help of their legal advisors, as well as supranational and international organizations, scholars and courts are needed to interpret them for their working purpose.[320]

For argument's sake, international criminal law and human rights, including the ICC and principles of transitional justice have already modified the more discursive, less-adjudicatory approach of LOAC/IHL. However, such proposition is contentious. While it is certain that the ICC has a material jurisdiction to investigate and prosecute war crimes, but also genocide and crimes against humanity climatic to armed conflicts[321], ICC was not intended by states to be an end all be all post-conflict justice mechanism, and it only tries a select few so-called big fishes such as heads of states and commanders of an OAG, or a person *de facto* equivalent in decision-making. Even when such big fishes are tried, the porosity of the ICC is extremely low due to the gravity test, admissibility test, and a rigorous standard of proof. [322] Most importantly, ICC is meant to be positively complementary[323] to national jurisdiction, meaning it only activates following the exhaustion of national criminal justice mechanisms of the territorial state, and even then, a case for adjudicatory LOAC/IHL on the basis of ICC is an extremely difficult one given the myriad of substantive and political challenges the system faces, which the author believes deserves a discussion of its own. Turning to complementary human rights systems, human rights courts under regional mechanism and transitional justice human rights trials have adjudicatory power, however they are rather concerned with violation of human rights, rather than LOAC/IHL, which are meant to be complementary but separate rules under international law. Similarly, while human rights inquiries and fact-finding missions provide a momentum to fact-finding or truth-seeking[324], which is a common goal

Empirical Research Findings and Implications for Analysts and Practitioners', available at https://tinyurl.com/yxbvnwle, accessed on 19 December 2020.

317 AP I (n 29), art. 90 (c) (i).

318 Ibid, art. 90 (c) (iii).

319 'Case Study on International Humanitarian Fact Finding Commission', in Sassoli (n 14).

320 Petrov (n 315), p. 4.

321 ICC Statute (n 34), arts. 5, 6, 7, 8.

322 ICC, 'About ICC', available at https://www.icc-cpi.int/about, accessed on 20 August 2018.

323 Otto Triffterer, The Rome Statute of the International Criminal Court – A Commentary, 2016, p. 20.

324 E.g. UNGA, 'International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011', 19 December 2016, UN Doc. A/71/L.48; E.g. OHCHR, 'Situation of human rights in Myanmar', 3 April 2017, UN Doc. A/HRC/RES/34/22; E.g. OHCHR, 'Special Procedures of the Human Rights Council', available at https://www.ohchr.org/en/hrbodies/sp/pages/welcomepage.aspx, accessed on 18 August 2018; E.g. UNHRC, 'President of Human Rights

of human rights and LOAC/IHL, they have no adjudicatory power. Similarly, truth and reconciliation mechanisms are local mechanisms that provide the states complete latitude in deciding if and to what extend war trials are conducive to the notion of 'positive peace', as elaborated in Q 15. To sum up, the nature of LOAC/IHL as international law is discursive, rather than adjudicatory, as it stands.

Another issue pertinent to the nature of LOAC/IHL as an international law is whether it is self-executing, or in other words, whether they have the status of primary law in a state without the requirement to introduce a domestic legislation.[325] At least in the case of Nepal, the Treaty Act is explicit that treaties ratified/acceded by Nepal have the status of primary law[326], hence it can be concluded that, in law, Geneva Conventions (but not the Additional Protocols) and other thematic LOAC/IHL treaties ratified/acceded to by Nepal are self-executing treaties for Nepal. As such they can be directly invoked at domestic courts[327] in Nepal. This approach is essentially trans-nationalist[328], and was acknowledged by both the government and the judges in the *Raja Ram Dhakal Case*.[329] However, the author has observed that the trans-nationalist approach is not corroborated by practices. In the same case, the Supreme Court directed the government to introduce a *Geneva Conventions Act*[330], which apparently includes a retrospective application clause.[331] Further, the Office of the Attorney General has no record of charging an accused for a violation of LOAC/IHL, and the Supreme Court has no record of directly enforcing the Geneva Conventions in conflict-related cases.[332]

As regards customary LOAC/IHL, it is generally perceived that they are not automatically incorporated into national law and require a national implementing legislation[333]. For example, in the *Rajendra Dhakal case*, Nepali judiciary has directly invoked an international custom (on prohibition of enforced disappearance), but entrusted its execution to a national commission based on a domestic legislation.[334] The Treaty Act of Nepal has understandably not created a primary law status for customary international law. Hence, it can be deduced that Nepal has a nationalist approach towards LOAC/IHL in practice.

Council appoints Members of Commission of Inquiry on 2018 protests in Occupied Palestinian Territory', available at goo.gl/cf3APM, accessed on 18 August 2018.

325 David Sloss, 'Schizophrenic Treaty Law', *Texas International Law Journal* p. 15, 2007, volume 43, p. 17.

326 Treaty Act, Nepal, 1990, art. 9(2).

327 *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 478–80 (the US, D.D.C. 2005); *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 165 (the US, D.D.C. 2004).

328 Derek Jinks and David Sloss, 'Is the (US) President Bound by the Geneva Conventions?', *Cornell Law Review*, 2004, volume 90, p. 1025.

329 *Raja Ram Dhakal Case*, *Raja Ram Dhakal et al v. His Majesty's Governmen*t et al, WN 2942, 2059 (2002) (unofficial translation), defense written response.

330 Ibid.

331 Draft Geneva Conventions Bill, Nepal, 2019.

332 E.g. *Buddhibahadur Praja et al v Government of Nepal* et al. WN 2448 of 2063 (2006) in Bandi (n 159), p.141-148; E.g. *Kale Tamang et al v Government of Nepal et al*, WN 0238 in Bandi (n 159), p. 151-158.

333 *R v Jones (Margeret)* 2007 1 AC 136 (the UK); *Nulyarimma v Thompson (2000, Australia)*

334 *Rajendra Dhakal Case* (n 199).

It should also be noted that debates about the nature of LOAC/IHL generally aim to improve its compliance, rather than question its legitimacy. As in any field, commentaries on the reality of LOAC are clashes among highly read scholars, as reflected in the *Is IHL a Sham* dialectic between Eyal Benvenisti - Doreen Lustig and Jochen von Bernstorff.[335] Scholars from other fields including psychology[336] have also contributed to the LOAC/IHL compliance dialectic. The author also recalls and sides with Michael Bothe's opinion that "challenges to compliance are intrinsic to any legal order…including domestic legal order".[337] Hence, that LOAC/IHL is violated, or implicitly, that it is subject to fogs and frictions *per se* does not mean it has no legitimacy as a law.

b. States and organized armed groups generally want to respect LOAC/IHL

Although the customary IHL database needs to be minutely studied from local context to wane out likely evidentiary discrepancies, the 161 customary rules documented by it, on issues ranging from combat limitations to detainee repatriation, at the very least illustrate that states generally recognize and want to respect LOAC/IHL. In the author's study, a customary international law is a (testable) evidence that states generally believe in a rule's overarching utility, and by that virtue also believe that it is necessary 'to be bound by it (*opinio juris*)' and behave accordingly (state practice).[338] Furthermore, lack of a manifest opposition to a custom is a strong evidence that a state believes in the overarching utility of the custom, if we rely on the following observation by the ICTY in *Furundzija Trial*[339]

> state officials frequently resort to torture, as long as they show no manifest opposition to the prohibition on torture in the Geneva Conventions, or claim that it was authorised to practice torture in an armed conflict, the state will be bound by the prohibition as a custom… *opinio juris* in favour of a rule overcomes the fact that violations are frequent.[340]

One of such customs is the non-reciprocity rule[341]. For example, party A is still obligated to provide medical treatment to wounded members of party B

335 See Eyal Benvenisti and Doreen Lustig, 'Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874', *European Journal of International Law* p. 127, 2020, volume 31:1; Jochen Von Bernstorff, 'Is IHL a Sham? A Reply to "Monopolizing War" by Eyal Benvenisti and Doreen Lustig', European Journal of International Law p. 709, 2020, volume 31:2; Benvenisti and Lustig, 'Beyond the 'Sham' Critique and the Narrative of Humanitarianism: A Rejoinder to Jochen von Bernstorff', *European Journal of International Law* p. 721, 2020, volume 31:2.

336 See for example Ezequiel Morsella, John A. Bargh and Peter M. Gollwitzer, *Oxford Handbook of Human Actio*n, Oxford University Press, 2008.

337 Michael Bothe, 'Compliance', *Max Planck Encyclopedia of Public International Law*, available at https://tinyurl.com/y6mo79um, accessed on 24 November 2020.

338 Tullio Treves, 'Customary International Law', *Max Planck Encyclopedia of International Law,* available at https://tinyurl.com/yyxot5hc, accessed on 24 November 2020.

339 *Prosecutor v. Anto Furundzija*, ICTY-95-17/1-T, 10 December 1998, para. 138.

340 Ibid.

341 Customary IHL database (n 19), rule 140.

in A's power, even when party B may not reciprocate. While there are plausible frictions against the rule's compliance[342], that states seem to agree on something so consequential to their short and long-term war-time military interests, also forward a proposition that states want to respect LOAC/IHL.

With regard to organized armed groups, they seem to express their intention to respect LOAC/IHL utilizing both formal (LOAC/IHL based) values and informal (internal code of conducts, religious and local moral doctrines) values, including:

i. binding voluntary agreements under the common article 3 to the GCs, including special agreements between OAGs of Indonesia and Sudan with their respective government, and between OAGs in Somalia and El Salvador[343]; ceasefire and peace agreements[344] such as the Comprehensive Peace Accord in Nepal;

ii. 20 action plans between OAGs and the UN to prevent recruitment of child soldiers, including that concluded by CPN-M (Nepal) in 2009 complied by 2011;[345]

iii. Codes of conducts integrating LOAC/IHL into internal regulations among more than 30 OAGS including PLA/UCPN-M of Nepal;[346] For example, the "Eight Points for Attention" issued by CPN-M that advised its members as follows:

   "1. Speak politely; 2. Pay fairly for what you buy; 3. Return everything you borrow; 4. Pay for anything you damage; 5. Do not hit or swear at people; 6. Do not damage crops; 7. Do not take liberties with women; 8. Do not ill-treat captives."[347]

iv. 48 deeds of commitment between OAGs and Geneva Call regarding avoidance of the use of anti-personnel landmines, monitored by Geneva Call;[348]

c. LOAC/IHL is both frequently violated and complied with

Helen Durham has observed that popular news "leave out the part that IHL has prevented more causalities and destructions than it has conceded"[349]. While it is

342 Bothe (n 337).

343 Ezequiel Heffes and Marcos D. Kotlik, 'Special agreements as a means of enhancing compliance with IHL in non-international armed conflicts: An inquiry into the governing legal regime', *International Review of the Red Cross* p. 1195, volume 96, p. 1199.

344 Ibid.

345 Office of the Special Representative of the UN Secretary General on Children and Armed Conflict, 'Action Plans', available at https://tinyurl.com/y25nwuaz, 25 November 2020.

346 Olivier Bangerter, *Internal Control Codes of Conduct within Insurgent Armed Groups,* Graduate Institute of International and Development Studies, 2012, p. 11.

347 But see the discussion in Q6 on the definition of 'the People'.

348 Helen Durham, 'Why the Mine Ban Convention was worth fighting for and still is' available at https://tinyurl.com/y4d23guk, accessed on 27 November 2020.

349 Helen Durham, 'Atrocities in conflict mean we need the Geneva conventions more than ever', *The*

not possible to precisely verify her statement, the underlying theme of selective news reporting has credence. Clausewitz explicates that "uncertainty, danger, fear, courage, change and friction are integral to the nature of war".[350] To be preoccupied with only the danger and fear aspects of an armed conflict paints a monolithic picture of the situation on ground. Psychologists opine that such preoccupation is a product of 'negativity bias', which in turn has been empirically proven to be a product of humans' evolutionary nature to react quickly to potential threat.[351] When this impulse is constantly fed negative news, it can lead to delusionary threat-perception as indicated by a 2016 survey regarding threats posed by non-state militants in Syria and Iraq to the US[352]. Such negativity is a force of friction against LOAC/IHL.

Initiatives to mitigate the negativity bias include the UN Action Plan and Geneva Calls mentioned in Q 9, and the recently launched *IHL in Action* Database[353], which contribute to a positivity discourse through documentation of good practices, for example:

- Canada aborted airstrikes in Libya in March 2011 after they determined the collateral damage to be excessive to the military advantage anticipated.[354] The NATO forces complied with the list of cultural sites "that were not to be targeted by the armed forces".[355]
- Netherlands repatriated 4 cultural properties to Cyprus looted during past armed conflicts.[356]
- 20 years ago, around 20,000 individuals, mainly civilians, were maimed or killed due to anti-personnel landmines, every year. At present, the number is around 3,500.[357]
- The Government of Nepal released hundreds of members of CPN-M to resuscitate peace talks during the NIAC in Nepal.[358] CPN-M reported to the UN that it had expelled its members responsible for a bus bombing in Madi that killed 40 civilians[359].

Guardian, 5 April 2016, available at goo.gl/Ee881r, accessed on 5 July 2018; Helen Durham has been the Director of International Law and Policy at the ICRC since 2014. She has over 20 years' experience in the Red Cross and Red Crescent Movement, 'Law and Policy Contributor', https://blogs.icrc.org/law-and-policy/contributor/helen-durham/, accessed on 24 November 2020.

350 Strachan (n 256), p. 48.

351 Tom Stafford, 'Psychology: Why bad news dominates the headline' https://tinyurl.com/y46vk2m3, accessed on 26 November 2020.

352 Steven Pinker, 'The media exaggerates negative news. This distortion has consequences' available at https://tinyurl.com/y7pe5jkt, accessed on 26 November 2020.

353 ICRC, 'IHL in Action' available at https://ihl-in-action.icrc.org/, accessed on 26 November 2020.

354 Ibid.

355 Ibid.

356 Ibid.

357 Durham (n 349).

358 IHL in Action (n 353).

359 Bangerter (n 144), p. 48.

Therefore, the author reiterates that LOAC/IHL is both frequently violated and complied with, which ensues the question 'why?'. It is critical to acknowledge that frictions against LOAC/IHl can be both external and internal. It has been observed that norms, both formal and informal, constitute 1/4th of conflict transformation[360]. Informal norms, particularly, 'group culture' including an armed force's values, assumptions and beliefs is empirically proven to influence and restrain soldiers' behaviours.[361] For example, it is observed that 'people's wars' make a distinction between 'the people' and 'the oppressors' which is not necessarily the same as the distinction between civilians and combatants. In case of CPN-M, 'the people' apparently excluded 'feudal elements', that is, "supporters of the monarchy, large landowners, elites who oppressed the people…and government informers"[362.] The classification is an informal norm, and tends to violate the principle of non-discrimination within LOAC/IHL and human rights. This suggests that informal norms can be in friction with LOAC/IHL when their values diverge, analogical to the friction between LOAC/IHL and human rights when they diverge. The friction within the broader normative framework of armed conflict, among other factors is a reason why LOAC/IHL tends to be violated.

A concept rooted in Clausewitz's theory of war, called 'lawfare', also explains the LOAC/IHL compliance paradigm. It basically stands for the use of law as a weapon/use of law to further one's interest.[363] It has been proposed that law as a weapon can be used to persuade the armed forces[364] that protecting cultural heritages, fairly treating the *hors de combat*, respecting the prisoners of war and using less lethal forces has 'fewer costs' and thus is an overall strategic win[365]. However, law can also be abused by exploiting its fogs, in case of LOAC/IHL to escape accountability for abuse of autonomous weapons and cyber operations, and mistreatment of people as unlawful combatants[366] among others.

Empirical studies including Nepal suggest that parties may comply with LOAC/IHL for these reasons – the group's objective and the need to maintain good public relation to achieve it[367]; because while violation of LOAC/IHL may serve a short-

[360] Conflict transformation has four elements: 1) actor transformation: internal change within the parties to the conflict; 2) issue transformation: alternation of the political agenda of the conflict; 3) rule transformation: norm involved in the conflict and limits within which the parties conduct their relations; structural transformation: involves change in the whole structure of inter-party relations. Raimo Vayrynen, cited in Upreti (n 57), p. 229.

[361] Altea Rossi, 'Training Armed Forces in IHL: Just a Matter of Law?' available at https://tinyurl.com/y5yw8z9f, accessed on 27 November 2020.

[362] Bangerter (n 144), p. 46.

[363] Charles Dunlap, "Lawfare 101: Primer" available at https://tinyurl.com/yy2kyg6a, accessed on 27 November 2020.

[364] Tanisha Fazal and Margarita Konaev, 'Can International Humanitarian Law Restrain Armed Groups? Lessons from NGO Work on Anti-Personnel Landmines', available at https://tinyurl.com/y9y5v42n, accessed on 27 November 2020.

[365] Dunlap (n 363).

[366] Petrov (n 315).

[367] Bangerter (n 259), p. 357.

term interest, but compliance serves a long-term interest[368]; because LOAC/IHL is an embodiment of humanity and without it there is no war worth fighting.[369] Quite astoundingly, the primary reasons behind the violation of LOAC/IHL are the same - the group's objectives, the military advantage and what LOAC/IHL represents to the group.[370] While such behaviour seems paradoxical, it has been suggested that while the rules of LOAC/IHL are discussed within armed groups' leadership, the decisions to respect or neglect them are "sometimes weighed up with great care and sometimes hastily."[371] The paradoxical compliance seems to corroborate the cognitive psychology critique of rational choice theory[372], specifically of the common presumption that the parties to a conflict always rationally pursue their self-interest, which the cognitive psychologists opine is not always possible, since a proper rational choice assumes that a decision-maker has "full knowledge of their situation, their action alternative, payoff functions, fully ordered and consistent preferences, which are stable over time and space."[373]

In the view of Clausewitz, cognitive psychology and the above facts, it cannot be presumed that parties to a conflict always take a rational approach towards LOAC/IHL, corroborating Clausewitz' theory that an armed conflict remains a realm of uncertainty, to an uncertain extent. Quite intriguingly, the Geneva Conventions demonstrate an awareness of the irrational impulses of parties to the conflict by emphatically recommending its state parties, in 1949, to facilitate local dialectic of LOAC/IHL by widely disseminating and translating the Geneva Conventions into local languages. As discussed earlier, a LOAC/IHL discourse did not take place in Nepal. It is impossible to ascertain that a LOAC/IHL discourse would have facilitated a more rational pro-LOAC/IHL decision-making atmosphere during the NIAC in Nepal, however it can be reasonably proposed that critical discussions about the utilities and limitations of LOAC/IHL would have influenced the analysis of 'action alternatives' within party leaderships. Regardless, looking into the uncertain future, it seems prudent to conclude that a critical, but positive discourse about LOAC/IHL is necessary.

Q15. Should Nepal investigate and prosecute the violations of LOAC/IHL that took place in the NIAC in Nepal?

368 Violation of IHL may be a direct military advantage but seldom an overall military advantage as actors lose trust of people. *Ibid*, p. 361; Experiences of the 36 years (19960-1996) of Guatemalan armed conflict as well as Columbian conflict show that without respecting the basic human rights of people, violent conflict cannot be transformed. Nepalese conflicts' geographical radius and intensity increased due to radical tactics used by first the Nepal police and Armed Police Force. Upreti (n 57).

369 Bangerter (n 259), p. 367.

370 Ibid, p. 353.

371 Ibid, p. 354.

372 Tom Burns and Ewa Roszkowska, 'Rational Choice Theory: Toward a Psychological, Social, and Material Contextualization of Human Choice Behavior', available at https://tinyurl.com/y2a94hom, accessed on 27 November 2020.

373 Ibid.

This question marks the edge of LOAC/IHL that perhaps a purist would not cross, since it was concluded in Q 14 that LOAC/IHL focuses on its real-time application rather than post-conflict prosecutions. However, the author believes that a dive into this question rather brings to the surface the limits of international law, *vis a vis* LOAC/IHL and its companions, human rights and international criminal law. Towards the end of this question, it will be apparent to the reader that from a Clausewitzian empirical position, 'an obligation' to prosecute (all) war crimes does not always translate into 'a necessity to prosecute (all) war crimes, and it will also be apparent to the reader why the pragmatism driven LOAC/IHL historically evolved to depend more on real-time application and peace-time dissemination, over post-conflict prosecutions.

a) There is a residual obligation to investigate the violations of LOAC/IHL

It is clear and fairly simple to infer that it is a residual obligation (described in Q 2) of the parties of a conflict to clean up their mess, whether caused by legal or illegal conducts, which requires them to investigate and find particular truths, including locating and neutralizing mines and ERWs, releasing and repatriating the war detainees, returning displaced persons, accounting for the dead people, accounting for the missing people, returning properties seized or captured not justified under LOAC/IHL, among others.[374] In the author's opinion, residual obligations should be interpreted as a real-time application of LOAC/IHL on the basis of fact continuity. It can be observed that the nature of violations of LOAC/IHL described in Q 9 is such that it is important to investigate them in order to fulfil many of the residual obligations contained in customary LOAC/IHL. Since the contemporary Nepali governance practically comprises of the parties to the NIAC in Nepal, it can be fairly proposed that the government has a residual obligation to investigate the violations of common article 3 and customary LOAC/IHL that took place in the NIAC in Nepal, being guided by a due process of law. Whether the two instant truth commissions of Nepal and Nepali judiciary are effectively carrying out such investigations is a discussion that deserves a separate discussion.

b) There is an obligation to prosecute (all) violations of LOAC/IHL that amount to crimes under International Law

i. war crimes and (a misconstrued legal justification for amnesty)

Under the Geneva Conventions, the state parties are required to investigate and prosecute the grave breaches of the Conventions during an IAC[375], whereas under customary international law, it appears that the obligation to prosecute all war crimes committed by their nationals or armed forces is incumbent upon the states.[376]

In order to facilitate a peaceful settlement of dispute necessary for an

[374] See generally, Customary IHL Database (n 19).

[375] AP I (n 29), arts. 32-3; Customary IHL Database (n 19), rule 117 (amnesty).

[376] Customary IHL Database (n 19), rule 158.

effective termination of NIAC, LOAC/IHL recommends a "broadest possible amnesty to persons who have participated in a NIAC".[377] This provision recommended a *de facto* combatant status to members of an OAG in a NIAC, who unlike the enemy combatants in IAC, are not provided combatant immunity, that is immunity for taking up arms against one's enemy.[378] The provision does not serve a legal justification for amnesty for war crimes. Despite this, an analogous provision of amnesty within the CPA[379] was used to justify withdrawal of conflict-related cases.[380] The petitioner in a case before the Supreme Court of Nepal challenged the invocation of amnesty for 'political crimes'.[381] In the author's opinion, a political crime is a misnomer, however, it would not be legally inappropriate to conclude that a domestic crime[382] that does not amount to war crime *prima facie* qualifies for broadest possible amnesty. Since Nepal has a nationalist approach towards LOAC/IHL as concluded in Q14, the CPA can be interpreted as an agreed justification for amnesty for conducts of CPN-M not amounting to war crimes. A reader may ponder – what about amnesty for war crimes? In the author's position, there is no legal justification for amnesty for any war crime under LOAC/IHL, however there may be an empirical and conditional justification as explained in part (c) of this question.

ii. Torture and enforced disappearance

Convention on Protection of Persons from All Forms of Enforced Disappearance (CED) and Convention against Torture (CAT) obliges the states parties to criminalize and 'prosecute or extradite'[383] crimes amounting to enforced disappearance and torture, respectively. It follows that a criminal investigation shall take place either in Nepal or another territory where the accused is extradited by Nepal. CAT directly applies to Nepal as a treaty law. While Nepal has not ratified CED, the obligation to prosecute enforced disappearances is a customary LOAC/IHL[384], and Nepal's acceptance of the custom is evidenced in the Supreme Court's

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377 AP II (n 33), art. 6.2; Customary IHL Database (n 19), rule 159.

378 Ibid.

379 Comprehensive Peace Accord, Nepal Government and the Communist Party of Nepal (Maoist), 22 November 2006, available at https://www.refworld.org/docid/5b3f7a104.html, accessed on 27 November 2020.

380 Office of the Attorney General of Nepal, *Annual Report*, Kathmandu, 2008.

381 Raju Prasad Chapagain, 'Withdrawal of criminal charges and other forms of amnesty in Nepal: Reflections on the relevant national and international legal framework', *Nepal Judicial Academy Journal* p.186, 2010, vol. IV, p. 186.

382 For example, see article 53 of the Muluki Criminal Code of Nepal which stipulates that it is a crime to wage war against Nepal.

383 International Convention for the Protection of All Persons from Enforced Disappearance, adopted on 20 December 2006 (Enforced Disappearance Convention), arts. 4, 11; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984 (Convention against Torture/CAT), arts. 4, 7.

384 Customary IHL Database (n 98), art. 98.

directives in the *Rajendra Dhakal* case[385] and the subsequent criminalization of enforced disappearance in Muluki Criminal Code.[386]

iii. Crimes against humanity (CAH)

As discussed earlier, some *conducts* of both the parties exemplified above *prima facie* amount to CAH. Acts other than torture and enforced disappearances that may also amount to CAH and could be investigated as such are: murder, forcible transfer of population, imprisonment or other severe deprivation of physical liberty, rape or any other sexual violence, persecution on political grounds, apartheid and other inhuman acts causing great suffering or serious injury to health.[387] The draft UN CAH Convention also imbibes the obligations to criminalize and prosecute or extradite[388]. However, the draft Convention is not treaty law, the customary status of the obligation to investigate conducts as CAH is contentious[389]and the *Muluki Criminal Code* has not criminalized CAH as such, far let retrospectively. Unless the government creates an obligation upon itself under domestic law, the government has no obligation as such to investigate potential CAH of the NIAC in Nepal specifically as CAH.

iv. The contentious obligation to establish universal jurisdiction

The author recalls the *Kumar Lama trials* in the UK[390], which makes the discussion on universal jurisdiction proverbially hit close to home. While it seems that the very initiation of the case in a foreign jurisdiction at that point of time provided a momentum to the transitional justice process in Nepal[391], it would be a stretch make a valid case for universal jurisdiction for war crimes and crimes against humanity on the basis of a few cases, that is not how international law works. At present, at best the concept of universal jurisdiction is an evolving international law, legitimized locally through domestic legislations, and whose utilities and limitations have to be carefully approached.

It could be argued that there are two forms of universal jurisdiction – absolute and conditional. When the Spain indicted Hu Jintao for alleged genocide against people of Tibet, it exercised absolute universal jurisdiction[392] as the accused

[385] *Rajendra Dhakal case* (n 159).

[386] See chapter 16 of the Muluki Country Code of Nepal.

[387] International Law Commission, *Draft articles on Prevention and Punishment of Crimes Against Humanity*, 2019, art. 1.

[388] Ibid, arts. 6, 7, 8.

[389] Antonio Coco, 'The Universal Duty to Establish Jurisdiction over and Investigate Crimes against Humanity: Preliminary Remarks on draft Articles 7, 8, 9 and 11 by the International Law Commission', p. 11, available at https://tinyurl.com/y6gryxc6, accessed on 19 December 2020.

[390] *Kumar Lama v R* [2014] EWCA Crim 1729 (Court of Appeal) (Unreported).

[391] See Sneha Shrestha, 'The Curious Case of Colonel Kumar Lama: Its origins and impact in Nepal and the United Kingdom, and its contribution to the discourse on Universal Jurisdiction', pp. 41-3 available at https://tinyurl.com/y6lqu3mc, accessed on 30 November 2020.

[392] 'Parliament approves proposal to curb universal jurisdiction powers' JURIST, 12 February 2014 available

had no territorial link to Spain. Spain not only revoked the case but amended its domestic law to allow prosecutions against war crime and CAH 'committed abroad if the suspect is a Spanish citizen, a foreigner residing in Spain or a foreigner whose extradition has been denied by Spain." [393]

It is reported that 166 states have national legislations on universal jurisdiction on one or more among war crimes, crimes against humanity, torture and genocide[394]. 117 states have provided their courts universal jurisdiction on war crimes.[395] It is also observed that "many of these definitions do not align with the requirement of international law, which may create a gap of impunity."[396] Regarding their actual use, while the rate of overall prosecution is incremental in trend, they seem to be limited to 15 countries[397] due to realpolitik and the limited yet legally recognized concept of foreign sovereign immunity and diplomatic immunity.[398] The author has observed that some of the reported cases conflate universal jurisdiction with the active and passive personality forms of criminal jurisdiction[399]. It was also observed that cases in Senegal and Ghana were limited to African nationals, that no country in Asia has exercised this jurisdiction, and that overwhelming number of them were against nationals of Africa and Asia.[400] Only Spain has, at the cost of political whiplash, endeavoured to indict the US nationals for their conducts in Guantanamo Bay and Israel for its conducts in Gaza.[401]

It is evident that there is no general agreement among states regarding the interpretation and application of universal jurisdiction as suggested by the statements of South Africa, Qatar, Peru, Singapore, Sudan, Gabon, Paraguay, Cuba, Egypt, Mauritius, Rwanda, China, India, Libya, Bulgaria, Burkina Faso, the US, to name a few, to the Sixth Committee of UNGA in 2018.[402] International criminal tribunals seem to have found that universal jurisdiction for international crimes under their material jurisdiction is not a customary international law.[403]

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at https://tinyurl.com/yxtrk5y6, accessed on 30 November 2020.

393 Ibid.

394 *Kumar Lama v R* [2014] EWCA Crim 1729 (Court of Appeal) (Unreported).

395 Delegate from Mexico, UNGA Sixth Committee, 10 October 2018 available at https://tinyurl.com/yy39uhn5, accessed on 29 November 2020.

396 Amnesty International, Universal Jurisdiction: A Preliminary Survey of Legislation Around the World – 2012 Update (2012).

397 Trial International, Universal Jurisdiction Annual Report 2019, p.11 available at https://tinyurl.com/y68jzqay, accessed on 29 November 2020.

398 Xavier Phillippe, 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?', *International Review of the Red Cross* p.375, 2006, volume 88: 862, p. 376.

399 Ibid.

400 Ibid.

401 JURIST (n 392).

402 UNGA Sixth Committee, 10 October 2018 available at https://tinyurl.com/yy39uhn5, accessed on 29 November 2020.

403 *Tadic Interlocutory Appeals* (n 11), para. 62; *Prosecutor v. Furundžija*, Trial Judgement, 10 December 1998, ICTY-95-17/1, para. 156; *Democrutic Republic of the Congo v. Belgium*, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, Arrest Warrant of 11 April 2000, para. 51; *Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 ILR 298; *Demjanjuk v Petrovsky*, 1985, 603 F.Supp.1468; 776 F.2d 571.

The ILC in the *Commentary to (CAH) Draft Articles* has documented a *jus cogens* prohibition on CAH, including torture, however it clearly states that the Convention does not "seek to address the consequence of the prohibition on such status" implicitly ruling out an obligation of universal jurisdiction.[404] Similarly, scholars hold that the obligation to prosecute or extradite contained in CAT, CED the *CAH Draft Articles*, are obligation *inter partes* and do not address the entire world community[405], although notably the EU has a diverging interpretation.[406]

Similarly, the word of mouth that ICC has a universal jurisdiction is rather inaccurate. ICC does not have a universal jurisdiction, rather an aspiration to gain universal jurisdiction in the future by being universally ratified[407], which may or may not materialize, and thus it did not exercise universal jurisdiction in the *Al Bashir* case, again as word of mouth has some believe; rather it exercised an exceptional power provided to it by the UNSC[408].

To sum up, states exercise conditional universal jurisdiction through domestic mechanisms, however the practice is infrequent, selective, and not based on any uniform standard prescribed by international law.

c) Should the conducts temporal to the NIAC in Nepal that amount to war crime and crime against humanity be prosecuted?

Foremost, the author has concluded in (a) that it would be theoretically and practically amenable to investigate such conducts. As discussed throughout the paper, some criminal cases have already been adjudicated at the general courts. However, these cases were adjudicated under domestic criminal charges. The author restates that a review of the two truth commissions in Nepal deserves a separate discussion, however a precursory question, which the author believes did not receive a proper attention in the immediate aftermath of what we have discussed in the paper was a NIAC riddled with fogs and frictions, are: should war crimes and crime against humanity temporal to the NIAC in Nepal be prosecuted? Should the prosecutions be sweeping (against all) or selective (against some)?

To begin, we must reflect on the justice versus peace debate underlining these questions. Classical naturalism asks – what is justice – following the law? Seeking what is most conducive to peace? Is it justice if pursuing prosecution disrupts peace? Is *Fiat Justitia et Pereat Mundus* (let justice be done and let the world perish) just?

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404 Draft Articles on CAH (n 387).

405 ILC, Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries, 2019, UN Doc. A/74/10, p.24-5, available at https://tinyurl.com/y4ezoe4m, accessed on 20 December 2020.

406 James Crawford, *Brownlie's Principles of Public International Law*, 8th edition, 2012, p. 456.

407 ICC Statute (n 34), art. 13(b).

408 S.M.H. Nouwen and W. G. Werner. 'Doing Justice To The Political: The International Criminal Court In Uganda And Sudan: A Rejoinder To Bas Schotel', *European Journal of International Law*, 2011, pp. 1161-1164.

The justice versus peace dichotomy emanates from an enduring tension between classical naturalism (pure reason and solidarity) and classical positivism (autonomous and self-validating legal order).[409] The classical positivism would posit that violations of LOAC/IHL amounting to crimes should be prosecuted without exception, as rule of law has to be upheld at all times and not only when states find it convenient to do so.[410] It concludes that once a state sets 'auto-limitation'[411] upon itself to prevent, repress and punish war crimes, they are bound to honour the auto-limitation without fail.

One response is as Marlti Koskenniemi concludes – that naturalism v positivism dichotomy is quite an exaggeration[412], since LOAC/IHL is naturalist-positivist. While the justification to be bound by LOAC/IHL is a positivist one, its primal source is the naturalist proposition of humanity. Using this premise, it has been proposed that the justice versus peace dichotomy is a false dichotomy[413].

The 'false dichotomy' school proposes that prosecution promotes a 'positive peace'[414], and exemplifies Argentina and Chile to implore that whenever war criminals are not held accountable through prosecution, peace becomes a mouthpiece, and thus fragile and unsustainable[415]. Sierra Leone and Sudan are taken as examples to argue that amnesties in the fear of disrupting peace actually embolden impunity as war criminal get the sense that they can get away with just about anything. It is also proposed that trials will deter future conflicts and violation of human rights.[416] Therefore, the UN regards prosecution of war-related crimes a 'central element of integral transitional justice strategy[417], and maintains that not punishing such crimes begets impunity.[418]

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[409] Jochen Von Bernstroff, *The Public International Law Theory of Hans Kelsen, Believing in Universal Law*, Cambridge University Press, 2010, p. 48.

[410] Jiaming Shen, 'The Basis of International Law: Why Nations Observe', *Penn State International Law Review*, 1999, volume 17, p. 31.

[411] Ibid, p. 37.

[412] Marlti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge University Press, p. 308.

[413] Katerina Mansour and Laura Riches, 'Peace v Justice: A False Dichotomy', *Contemporary Issues in Conflict Resolution,* Paris School of International Affairs, 2017, p. 4.

[414] Patrick Wegner, 'ICC Complementarity, Positive Peace and Comprehensive Approaches in Transitional Justice' available at goo.gl/BZv1vv, accessed on 15 August 2018.

[415] Katerina Mansour and Laura Riches, 'Peace v Justice: A False Dichotomy', *Contemporary Issues in Conflict Resolution,* Paris School of International Affairs, 2017, p. 4.

[416] J. Malamud-Goti, 'Transitional Governments in the Breach: Why Punish State Criminals', *Human Rights Quarterly,* 1990, volume 12:1, p. 1; Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities', *American Journal of International Law,* 2001, volume 95(1), pp. 7-31; For critical discussion regarding the flaws in the 'prosecution of international crime creates deterrence' argument, see Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals,* Princeton University Press, 2000, pp. 190-191; Laurel E. Fletcher and Harvey M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', *Human Rights Quarterly* p. 573, 2002, pp. 591-2; David. Wippman, 'Atrocities, Deterrence, and the Limits of International Justice', Fordham International Law Journal p. 473, 1999, pp. 473-488.

[417] United Nations Security Council, 'The rule of law and transitional justice in conflict and post-conflict societies', Report of the Secretary-General, 23 August 2004, para. 23.

[418] UN, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, UN Doc E/CN.4/2005/102/Add.1, 2005, principle 19.

Nepal seems to have formally adopted this strategy, on the basis of which it seems to be widely believed that: a) the TRC legislations have been subpar to the international TJ standards and unreasonably delayed; b) withdrawal of conflict cases is an act of amnesty that promotes impunity and is antidemocratic[419]; c) the Supreme Court has denounced such withdrawals[420]; and d) a critique on a-c disparages[421] the Court and the rule of law since the victims, scholars and the judiciary have proposedly spoken in unison that 'reconciliation is not to be conceived as a substitute for justice'[422]. As a rejoinder, the NHRC Nepal published the names of 286 people from both the parties to the conflict reiterating scant prosecution of conflict-cases in Nepal.[423]

Another response to the peace versus justice debate emanates from empiricist critique of classical positivist perception of justice. It is critiqued that transitional justice is an overburdened and under-conceptualized idea.[424] This response opines that some form of transitional justice is critical for peace and democratization, but also holds that a 'templatization' of transitional justice[425] through 'evidentiary cherry picking' based on a handful of well-documented cases in the Americas, Eastern Europe, and South Africa[426] is not a good approach of transitional justice. The Center for International Policy Studies reports that

Most studies find that existing empirical knowledge about the impacts of transitional justice is still very limited, and does not support strong claims about the positive or negative effects of TJ across cases. Research on this subject is still nascent, and many of its early findings are questionable and contradictory. Further, we note that scholars in other fields have long identified problems of "publication bias," in which positive evaluations of well-meaning interventions are more likely to be published than studies finding null or negative results.[427]

A study finds that even among the well-documented countries, the experiences are significantly diverse. The study found a clear link across the board between forward-looking institutional reform within the police, military and judiciary, and democratization, but no clear link between backward-looking truth and justice mechanisms, and functioning of democracy, based on dissimilar experiences in Portugal, El Salvador, Guatemala, Argentina, South Africa, and the Czech

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419 'Parties in agreement on criminal case withdrawals', *The Repúblic*a, 6 March 2012.

420 The court has held withdrawals incompatible with human rights and humanitarian law obligations. The court also held that armed conflict case withdrawals cannot annul punishment and reparation for war offences. *Government of Nepal v. Gagan Rai Yadav et al*, WN 3302 in Bandi (n 159), pp. 207-214.

421 Dhiraj Pokhrel, *Nuances of De Facto Amnesty: A Case of Nepal,* MA Human Rights Thesis, Central European University, pp. 26-27.

422 Ram Kumar Bhandari, 'Transitional Justice in Nepal: Perspective of Victims', available at goo.gl/1nxgjg, accessed on 20 August 2018.

423 'Nepal: Stalling on Justice for Conflict-Era Crimes', TelegraphNepal, available at https://tinyurl.com/yykzkzrs, accessed on 22 December 2020.

424 Paul Gready and Simon Robins, 'Transitional Justice and Theories of Change: Towards evaluation as understanding', *International Journal of Transitional Justice* p.280, 2020, p.280.

425 Center for International Policy Studies (n 316), p. 17

426 Ibid, p. 43.

427 Ibid, p. 31

Republic.[428] The study finds that the data on impact of the broader idea of democratization on positive peace is more robust than specific impact of trials on the same.[429] A larger if not all-encompassing comparative study by Center for International Policy suggests that quantitative studies on trials tend to see more positive impact on peace whereas qualitative studies are more sceptical and find a better record for amnesties[430]. This corroborates David Wippman's critique of deterrent effect of prosecution that when a group believes they are acting for the greater good, typical to 'people's war', and the group's survival is at stake, previous history of prosecution has little deterrent effect.[431]

A separate critique emanates from the third-world approach to international law (TWAIL). The templatization of transitional justice based on selective evidence is explained as financial, political and symbolic investment of the Western governments and NGOs to the point that a narrative became a vector of globalization.[432] This is called "irresponsible because foreign experts are not themselves accountable to affected population…potential costs of TJ-related miscalculations are high, but they will be borne exclusively by local population, not Northern experts." [433] A scholar from Burundi points out that local understanding of transitional justice in Burundi is demonstrated different from the proposed universal model.[434] Some view the UN's push to speed up the TJ in Afganisthan as potentially undermining the country's 'fragile stability'[435]. In her book, *Transitional Justice in Nepal,* Yvetter Selim concludes that transitional justice has been both a producer and a product of politics, noting every actor in the TJ paradigm has acted to further its own interest, and that strict division between victims and perpetrators does not reflect everyday realities in Nepal.[436]

In the author's conclusion, the dichotomy between peace and justice is real from an empirical perspective. Interestingly, although such obligation is a part of customary international law, suggesting that Nepal believes in the overarching utility of prosecuting war crimes and conflict-related crimes against humanity, it has to be seriously re-examined whether Nepal's belief in the custom is 'fact-based' and what factors guided Nepal's expression of belief towards the

[428] Barahona de Brito, Alexandra, Carmen González-Enríquez and Paloma Aguilar (eds), *The Politics of Memory: Transitional Justice in Democratizing Societies,* Oxford University Press, 2001, pp. 30, 312.

[429] Center for International Policy Studies (n 316), p. 36.

[430] Center for International Policy Studies, 'Impact of Transitional Justice', available at https://tinyurl.com/yxaunkmr, accessed on 20 December 2020.

[431] David Wippman (n 416) (emphasis added).

[432] Pierre Hazan, 'Measuring the impact of punishment and forgiveness: a framework for evaluating transitional justice', *International Review of the Red Cross* p.19, 2006, volume 88:861, p. 46.

[433] Center for International Policy Studies (n 316), 19.

[434] Sandra Rubli, 'Rethinking the Social World: The Politics of Transitional Justice in Burundi', *Africa Spectrum*, 2013, volume 48:1, p. 4.

[435] 'Afghanistan: Revitalize transitional Justice System – UN Human Rights Commissioner', available at https://tinyurl.com/y65u2sr2, accessed on 28 December 2020.

[436] Yvette Selim, *Transitional Justice in Nepal: Interests, Victims and Agency,* Routledge/Asian Studies Association of Australia (ASAA), 2018, p. 175

custom.[437]

It may be asked – what are the implications of the justice versus peace dichotomy for the future TJ remit in Nepal? TJ is a *sui generis* process[438]. As pled by the government in the *Suman Adhikari* case, 'that the principles, methods and processes adopted in one country have to be replicated entirely in another country is neither in tune with the time, nor relevant.'[439] The UN acknowledges that justice has to be attempted at a societal level.[440] On the ground, TJ is a political process and rarely neutral.[441] However, as experts suggest, a *sui generis* approach does not equate to 'license for inaction'[442]. Therefore, studies recommend that TJ processes require rigorous planning, acknowledgement of the pitfalls and should 'listen to the people'.[443] It has been noted that, in the recent years, amnesties used in "circumscribed, conditional and democratically supported manner" are viewed charitably by a few TJ scholars.[444] Trials in Africa are often combined with amnesties.[445] In Timor-Leste, the Reception, Truth and Reconciliation partnered with indigenous communities to "reintegrate low-level perpetrators who wanted to return to their homes and make amends with those they offended".[446] It is worth reviewing in the days to come to what extent a bottom-up realism based has been adopted in Nepal? A TWAIL critique would ask – whom is Nepal primarily accountable towards – the people of Nepal, or the international community?

The author proposes that at the very least the domestic legislative framework of TJ in Nepal should go back to the drawing board and should adopt an empirical approach.[447] A multidisciplinary bottom-up rigorous planning is non-negotiable for the *sui generis* TJ in Nepal, with following proposed agenda for discussion: a) Is a democratically supported model of amnesty necessary and possible in Nepal?; b) if yes, what due process is conducive to draw limits onto amnesties? c) whether the collective recommendation in the draft of a TJ mechanism requires listening to the general population of Nepal, or to identified victims? d) is the general judicial system enough for such trials? e) what other trial models would be conducive to positive peace?

The author deems it fitting to round up this discussion by reflecting upon the implication a selective trial or curated amnesty would have in explaining the

437 Center for International Policy Studies (n 316), p. 5.

438 Shen (n 410), p. 42.

439 Suman Adhikari Case (n 262), p. 25.

440 United Nations Security Council (n 417).

441 See generally Center for International Policy Studies (n 316).

442 Center for International Policy Studies (n 316), p. 43.

443 Ibid, p. 6-7.

444 Ibid, p. 25.

445 Naomi Roht-Arriaza & Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice,* Cambridge University Press, p. 430.

446 ICTJ, *Truth Seeking*, 2013, p. 24.

447 But see contrary opinion in Cherif Bassiouni, 'Editorial', *International Journal of Transitional Justice* p. 325, 2014, volume 8:3, pp. 325-338.

nature of LOAC/IHL. It appears to be against a classical positivist understanding of rule of law. Amnesty for conflict-related crimes risk being labelled a negative lawfare, as an Israeli colonel puts, 'the whole of international law is now based on the notion that an act that is forbidden today becomes permissible if executed by enough countries.'[448] Contextually, a statement that appeared in the Jerusalem Post might be worth reading:

> International law is the *lingua franca* of international organizations. So you have to play the game if you want to be a member of the world community. And the game works like this. As long as you claim you are working within international law and you come up with a reasonable argument as to why what you are doing is within the context of international law, you're fine. That's how it goes. This is a very cynical view of how the world works. So, even if you're being inventive, or even if you're being a bit radical, as long as you can explain it in that context, most countries will not say you're a war criminal.[449]

The above statement seems to suggest that it would be clever of someone accused of war crime or crime against humanity to exploit the fogs and frictions of a legal realm of armed conflict. However, from a naturalist perspective of reason-driven organic rule of law, any rule that appears detached from the reality, here the apparent diverse realities produced by the application of 'obligation to prosecute' conflict-related international crimes has produced in Latin America, Africa and Asia, cannot be deemed rule of law (and justice) to begin with. Under naturalism, the notion of democratically supported and *sui generis* and due process driven adjudicatory model of transitional justice would not only fit, but expand the notion of rule of law and justice in the Nepali society.

Which approach is the most suitable for Nepal? It is impossible to answer at the moment. However, even from the perspective of a Kelsenian pure theory of law, when there are choices among several legally permissible interpretations, extra-legal considerations should guide the choices.[450] Such extra-legal considerations in the context of Nepal primarily include resource prioritization and long-term political stability.

In the author's view, the best approach to reach to a conclusion on the 'justice versus peace' debate temporal to the war crimes and crimes against humanity which occurred in the 1996-2006 NIAC in Nepal requires a clean slate *sui generis* approach, with a new draft of Truth and Reconciliation Act, not based on any specific template of transitional justice, including the one endorsed by the United Nations, and whose drafting process should be local-driven, interdisciplinary and

[448] With caution, see Jeff Halper, 'How Israel undermines International Law through lawfare', available at https://tinyurl.com/yygp4zgk, accessed on 29 December 2020.

[449] Ibid.

[450] Petrov (n 315), p. 4.

bottom-up. The proposal for a clean slate approach would not be contrary to the primary nature of LOAC/IHL as a discursive law. It is emphatically restressed that there is no 'one size fits all' or an auto-interpretation approach to justice for violation of LOAC/IHL since there is no central authority to impose the rules of LOAC/IHL, hence it is up to the states to interpret them.[451]

Conclusions

So as not to venture too far from the realm of LOAC/IHL, the author has not discussed three issues frequently discussed in association with the NIAC in Nepal. These issues would require a much broader critique of human rights and international and comparative criminal law, and deserve a separate and thorough discussion altogether. They are: a) whether Nepal should institutionalize a special court to prosecute conflict-related cases not *sub judice* at or settled by the general court system of Nepal; b) are trials, akin to the Kumar Lama case, before a foreign court conducive to the transitional justice in Nepal?; c) can and will ICC exercise its jurisdiction over the violations discussed in Q9?

The author believes a legal analysis of the 1996-2006 NIAC in Nepal should necessarily begin with a critique of the rules and practices of LOAC/IHL, and an examination of the fogs and frictions therein, as was attempted in the paper. The conclusions of the discussion are as follows:

1. LOAC or IHL aims to minimize suffering during an armed conflict. It does not apply to every violent situation, rather to those that can factually be determined as an armed conflict.
2. An armed conflict is an armed violence whose classification depends on the nature of interrelationship among the parties involved. If it involves states, it is an international armed conflict (IAC). If it involves a state and an organized armed group, or takes place exclusively between organized armed groups, it is a non-international armed conflict (NIAC). Since IAC and NIAC govern different forms of violent relationships, the sets of rules applicable to them also vary.
3. LOAC/IHL applies to both declared and undeclared armed conflicts, as long as legal conditional to constitute IAC and NIAC are met. It is incumbent upon states, parties to a conflict, courts and scholars to classify such situations for their own working purpose.
4. A NIAC occurred in Nepal between February 1996 and November 2006. It demonstrates the minimum intensity and involvement of an organized armed group required to constitute a NIAC.
5. Although Nepal is not temporally in an armed conflict at the present, armed conflict preparedness is imperative, and knowledge of LOAC/IHL is an essential aspect of conflict preparedness, as demonstrated by the experiences of the 1996-2006 NIAC. Conflict preparedness is also necessitated by the challenges

[451] Ibid.

introduced by evolving norms of warfare.

6. LOAC/IHL protects both civilians and combatants from certain forms of violence, and protects everyone from inhumane acts. However, LOAC/IHL as a whole differentiates between legitimate and illegitimate violence, which are rule-based determination. A war crime is a serious violation of LOAC/IHL. Crime against humanity and genocide can related or unrelated to an armed conflict.

7. Human right is not the same as LOAC/IHL. They are meant to be complementary, most notably in the area of detentions and occupation. However, the use of human rights in combat situations remains contentious.

8. War crimes including murder, sexual violence, enforced disappearance, pillage, recruitment of child soldiers, among others, prohibited by common article 3 and customary LOAC/IHL have been reported and in some cases ascertained to have occurred during the NIAC in Nepal. Both the parties to the conflict have been alleged of violating LOAC/IHL.

9. The armed conflict of Nepal was a NIAC for the purpose of LOAC/IHL, and such situations should be referred as a NIAC by law for effective real-time application of LOAC/IHL in the future. However, an etymological appreciation of words such as 'Maoist insurgency', 'people's war' and 'political conflict' from an academic point of view is not detrimental, in fact, may be useful for enhancing the compliance of LOAC/IHL.

10. LOAC/IHL is not a universal law. However, it is a widely agreed international law.

11. LOAC/IHL as such does not recognize the classification of a person as a 'terrorist'. However, if a person is suspected, accused or convicted as terrorist, LOAC/IHL prohibits certain inhuman acts against such persons. Within LOAC/IHL, both state and non-state actors are capable of 'acts of terror' which is a conduct-based prohibition.

12. LOAC/IHL is a discursive law that focuses on real-time application, and peace-time dissemination. It relies on its state parties in a good faith to implement its provisions. This does not make LOAC/IHL a weak or ineffective law. Facts indicate that parties to a conflict both violate and comply with LOAC for reasons not limited to the law. Understanding the factors that make parties to a conflict show mercy to the civilians and their adversaries requires an interdisciplinary approach towards understanding the factors that guide their behavior.

13. While the obligation to investigate and prosecute war crime and other war-related crimes including different forms of crimes against humanity seem to be reflected in treaties or customary international law, or both, empirical studies indicate that transitional justice mechanisms that rely on war trials in addition to truth seeking have had mixed outcomes towards fostering positive peace and a broader justice in a post-conflict society. In the light of such studies, discussions about war trials and amnesties at a national-level still seem germane and amenable.