

CHAPTER IV

VIOLATIONS OF INTERNATIONAL LAW AND INTERNATIONAL HUMANITARIAN LAW DURING THE LOW INTENSITY CONFLICT AND CONTRA WAR IN NICARAGUA: 1981-1990

International community from times immemorial has grappled with the issues of war and peace. The brutalization of human race, states using weapons of mass destruction, wars of aggression have led to the suffering of humanity. In today's independent and interdependent world, wars, armed conflict or undeclared wars, power struggles, both inter-state and intra-state, have resulted in multiple complex problems in the social, economic, political, legal and humanitarian spheres. The impact of wars and other armed conflicts are of such magnitude that governments, organizations, and individuals have called for effective and timely response from the international community to meet the humanitarian challenges of the time.

The nature of modern weapons of mass destruction have compelled the international community to reconsider the role of international law for ensuring peace and favorable conditions towards nation-building by the nation states. The weapons of mass destruction and frequent resort to force by states to resolve their problems made the international community realize that questions of peace and security can not be resolved by military means. It is by concerted and sustained political action on the part of the nation-states and their leadership in the international community can such issues be resolved. Realization has also dawned on the world community that issues of peace and security and the future of mankind cannot be solved by relying on the doctrines of containment or communism or deterrence.

However it is the practice that every nation-state pursues its national interests and every nation has the right to shape its destiny as it sees it best, as it pursues its national interests. All nations, however, must learn to work together and apply certain universally recognized principles of democracy and international laws whose basic objective would be peace and co-existence of nation-states with different and differing social, economic and political systems. The trend today is towards the maximum humanization of international relations, based on ensuring basic human rights and freedoms through international treaties and agreements. All these endeavors are a part

of the international cooperation in the humanitarian field. Vital issues on which the survival of mankind and the future of the nation-states are war and peace, human rights, reducing the weapons of mass destruction, problems of protection of refugees, ecological and environmental issues, protection and conservation of the cultural heritage of the nations and the people. Added are the issues are the problem of combating international terrorism and cross-border terrorism which not only target but also affect lives of innocent people. Terrorism has also played an important role in the destabilization of the internal political and economic life of nation-states but also has a spill over effect on to the international arena, destabilizing the international relations among nation-states.

It has become clear to the international community that the humanitarian problems of such magnitude can be resolved only on the basis of universally accepted binding principles and rules of contemporary international law to resolve the issues of war and peace and to address the humanitarian crises facing the world. The international community has evolved a set of principles and rules of inter-state cooperation, which envisage favourable conditions to each and every individual to enjoy fundamental rights and freedoms, both in peacetime and in situations of armed conflicts. These principles and standards of contemporary international law stems from the utopian idea and the desire of the people to outlaw war or to deter those nation-states attempting to resolve the disputes through force. In the event of the war being the inevitable outcome of the failure of nation states or groups within the civil society to resolve their problems and contentious issues, through pacific settlement of disputes, the objective of the international community was to render such conflicts, both international as well as internal armed conflicts, as humane as possible, whenever and wherever they occur.

Treaty standards of international law emerged in the mid-nineteenth and the early twentieth century. It picked up steam in the inter-war period (1919-1939) and achieved its fullest expression in the post-Second World War period. This period was crucial in the sense as the world correlation of forces

tipped in favor of peace, democracy and socialism. The experiences of Fascism and Nazism led to the development of a set of principles and standards in the field of human rights, both in peacetime and war. Internal armed struggle by armed insurgents against oppressive incumbent governments, or among various factions engaged in a fratricidal civil conflict as also wars of aggression by the superpowers for hegemony and world domination has been the ground reality. In such situations systematic violations of human rights and fundamental freedoms occur on a mass scale, no matter what the nature of the conflict. The international community evolved a set of principles and standards all the while respecting the state sovereignty, the principle of self-determination, and non-interference in the internal affairs of independent nation-states. These international principles and standards collectively go by the nomenclature of laws of war, law of armed conflict or the current term in use, the international humanitarian law.

This Chapter is an attempt to understand international humanitarian law, its philosophical foundations, its evolution and development in the form of various conventions and declarations that form the body of international law and the international humanitarian law since its codification in 1864. This chapter focuses its attention on the violations of international law and international humanitarian law during the decade-long contra war and the low intensity conflict in Nicaragua between 1981-1990. This chapter is divided into three sections. The First Section examines the international law applicable to internal armed conflicts and its violations in Nicaragua by the United States. Section Two examines the principles, origins and development of international humanitarian law and its violations in the Nicaraguan conflict. The Third Section examines the controversial mining of Nicaraguan harbours by the CIA and its political and legal fallouts.

Section One

International Law And Internal Armed Conflicts.

However before we understand the violations of international humanitarian law in Nicaragua, we have to understand few aspects of international law applicable in internal armed conflicts. According to the noted political scientist Hans. J. Morgenthau, intervention, "is as ancient and well-established an instrument of foreign policy as are diplomatic pressures, negotiations and war".¹ The emergence of the superpowers with conflicting interests, ideologies claiming for them zones of influence and hegemony has made the global arena, until the demise of the Soviet Union and the end of Communism, a hot bed of big power interventionist policies and practice especially in the Third World.

The principle of non-intervention in international law is a contractually binding principle and international obligation, found its expression in the Inter-American System. This was when the American Republics signed in 1933 at Montevideo the "Convention on the Rights and Duties of States". Article 3 proclaimed, "No State has the right to intervene in the internal or external affairs of another state".² In 1936 in the Inter-American Conference at Buenos Aires, the American States signed the Additional Protocol to the Non-Intervention. Article 1 of the Protocol provided that "High Contracting Parties declare inadmissible the intervention of any one of them directly or indirectly and for whatever reason in the internal or external affairs of the Parties".³ Article 15 of the Charter of the Organization of American States signed in Bogota in 1948 declares as one of the fundamental rights and duties is that "no State or group of states has the right to intervene directly or indirectly, for

¹ Hans J. Morgenthau, *To Intervene Or Not To Intervene*, Foreign Affairs (Council on Foreign Relations, New York), Volume 45, No 3, April 1967, p. 425.

² Marjorie Whiteman, ed., *Digest Of International Law*, Volume 5, (Washington DC, Government Printing Office, 1965), p 421, Edward. J. Frenwith, Comp, *Treaties, Conventions International Acts, Conventions And Agreements Between The United States Of America And Other Powers, 1923-1937*, Senate Document No 134, 75th Congress, 3rd Session, , (Washington DC, Government Printing Office, 1938) , p. 4809.

³ *ibid*.p. 4822, Ann Van Wynen Thomas and A.J. Thomas Jr., *Non-Intervention: The Law And Its Import In The Americas*, (Dallas, Southern Methodist University Press, 1956) , Pp. 62-63.

any other reason whatever, in the internal or external affairs of any other state". The foregoing principle prohibits not only armed force but also any form of interference or attempted threat against the personality of the state or against its political, economic and cultural development and elements.⁴

The United Nations was founded on 24 October 1945 on the principle of "Sovereign equality of all its members".⁵ The members pledged themselves to refrain in their international relations from the threat or the use of force against the territorial integrity or the political independence of any state, or in any other manner, which is inconsistent with the principles and the purposes of the United Nations.⁶ The United Nations Charter does not, however, impair the right of a state to resort to force (*Jus ad Bellum*) in the exercise of its right to self-defense. Article 51 of the Charter of the United Nations states "nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against the member of the United Nations".⁷ This implies that only in the event of an armed attack, only "if" an armed attack occurs shall this right be invoked. The right of self defense to be legally justifiable, according to the United States Secretary of State Daniel Webster, who wrote in 1837 to the British Government following the Caroline Incident that the government had to show the existence of "necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation" and "the act justified by the necessity of self-defense, must be limited by that necessity and must be kept clearly within it".⁸ This standard communicates the idea that the failure to restrict the reason for self-defense and the justifiable response would give the governments a legal excuse for escalating a conflict much to the detriment to world order. Prof. Kelsen wrote that since the United Nations Charter does not define the term armed attack

⁴ *United States Treaties And Other International Acts Series 2361 April 30, 1948.*

⁵ Article 2 para 1, *Charter Of The United Nations*, [http:// www.un.org/ aboutun/ charter/](http://www.un.org/aboutun/charter/) (Accessed on 21 September 2001).

⁶ *Ibid.* Article 2, para 4.

⁷ *Ibid.* Chapter VII.

⁸ Quoted in Ian Brownlie, *International Law And The Use Of Force By States*, (Oxford, Clarendon Press, 1963), p. 43.

used in Article 51, members of the United Nations exercising its right to individual or collective self-defense may interpret armed attack to mean not only an action in which the state uses its own armed forces against another state but also aids and initiates a revolutionary movement which takes place in another state.⁹

The Inter-American Treaty of Reciprocal Assistance (the Rio Treaty) incorporates this right and declares that an attack on any American state is an attack against all American States. This Treaty goes beyond the Charter of the United Nations in creating a legal obligation on the United States and the other American Republics to assist in meeting such an armed attack. However, Article 5 (1) states that (1) No consideration of whatever nature whether political, economic or military or other wise may serve as a justification for aggression and (2) A war of aggression is a crime against international peace. Aggression gives rise to international responsibility. Third parties and the United Nations itself may order military or non-military action to restore peace in the territory of the state. MacDougal and Feliciano state that under the Charter system the response in defense must not only be necessary but also be proportional. Proportionality in coercion constitutes a requirement that the responding coercion be limited in its intensity and magnitude to what is reasonably necessary promptly to ensure the permissible objectives of self-defense.¹⁰

The most comprehensive of the United Nations General Assembly resolution was adopted on 21 December 1965 under the title "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Sovereignty".¹¹ It has since become a part of the "Declaration of the Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of

⁹ Kelsen, *Collective Security Under International Law*, International Law Studies, Volume 49, 1954, p. 88., see also John Norton Moore, *The Secret War In Central America : Sandinista Assault On World Order* (Frederick, Maryland, University Press of America, 1987), p. 77.

¹⁰ John Norton Moore, *The Secret War In Central America*, *ibid.*, p. 80.

¹¹ *General Assembly Resolution 2131, XX, Yearbook Of The United Nations 1965*, (New York, UN Office of Public Information, 1967) , Pp. 94-95.

the united Nations” adopted by the General Assembly on 24 October 1970 in commemoration of the twentieth anniversary of the founding of the United Nations.¹² In 1981 the United Nations renewed its efforts in this direction by adopting the Declaration on the “Inadmissibility of intervention and interference in the Internal Affairs of States”.¹³ Typical paragraphs as proclaimed by the successive declarations reads “no state or group of states has the right to intervene directly or indirectly, for whatever reason, in the internal or external affairs of any other state. ”Consequently armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic, and cultural elements are in violation of international law”.¹⁴ The principle of international law adopted by a unanimous or near unanimous vote by the General Assembly is no longer considered to be mere recommendations but are now widely recognized as an authoritative interpretation of the Charter of the United Nations as also customary international law. However the typical non-intervention declarations prohibit intervention or interference without clearly defining it leaving the meaning open for questions concerning intervention and the principle of non-intervention in international law. There is no consensus about the definition of non-intervention.¹⁵

However three situations in which the issues of inadmissible intervention arise are 1. Assistance to the incumbent government, which is a party to the internal strife in the target country particularly when such assistance involves the deployment of the military personnel of the sending state. This act raises the issues of self-determination, disturb public order of the world community and leads to the globalisation of what should be an internal conflict. This may elicit hostile reactions from the other powers that

¹² *United Nations General Assembly Resolution No 2625, XXV Yearbook Of The United Nations 1970 (1972), Pp. 785-792.*

¹³ *United Nations General Assembly Resolution No 2625, XXI, Yearbook Of The United Nations 1981 (1985), Pp. 147-149.*

¹⁴ *United Nations General Assembly Resolution 2625, XXV Yearbook Of The United Nations 1970, (1972), Pp. 788-792.*

¹⁵ John Norton Moore, *The Control Of Foreign Intervention In Internal Conflict*, Virginia Journal of International law. 1969,Pp.205-342.

might threaten to counter-intervene on the other side of the internal strife of the target state. The second context is by applying the pressure on the target State to influence its behavior to do something, which the government would otherwise do or not do. The impermissibility of intervention is dependent on the degree of coercion applied. The third situation is dictatorial intervention. What separates intervention from normal practice of statecraft is the element of dictation or coercion.

The 1970 Declaration on the Principle of International Law Concerning Friendly Relations and Cooperation Among States proscribes "the use of economic, political or any other type of measure to coerce another state". Any action aimed at assisting the anti-incumbent elements in a target state would provoke issues of intervention. Such acts would give rise to not only subversive intervention but also indirect aggression, which is considered today as serious as direct aggression. Armed intervention involving the military force used against the target state through the proxies or mercenaries constitute the most coercive form of intervention. The absence of comparable wrongs by the target State to warrant the plea of self-defense constitutes the most serious form of offenses under the international law. Direct or indirect aggression especially aimed at policy changes in its political authority structure of the target State is the most serious form of aggression.

These were the charges that Nicaragua brought against the United States before the United Nations Security Council and the International Court of Justice at The Hague in the spring of 1984. According to the 1974 Resolution of the General Assembly the act of aggression was defined as 1. The invasion or attack by the armed forces of a state on the territory of another state; 2. Bombardment or the use of any weapons by the state against the territory of another state; 3. Blockade of the ports or coasts of a state by the armed forces of another state; 4. Action of the state in allowing the use of its territory which it has placed at the disposal of another state or to be used by that other state for perpetrating an act of aggression against the third state; and 5. The sending by or on behalf of a state, of armed bands,

groups, irregulars or mercenaries which carry out acts of armed forces against another state, of such gravity as to amount to the acts listed above or its substantial involvement therein".¹⁶ Article 1 of the 1947 General Assembly states that whatever the weapons used any aggression whether committed openly or by fermenting civil strife in the interest of a foreign power or otherwise is the gravest of all crimes against peace and security throughout the world. In 1954 the United Nations General Assembly resolved that the use of force to deprive people of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.

Profs. Thomas and Thomas, experts on the OAS system wrote that armed attack includes not only direct use of force but also indirect use of force through irregular groups, or terrorists who are citizens. Article 1 of the 1947 General Assembly states that whatever the weapons used any aggression whether committed openly or by fermenting civil strife in the interest of a foreign power or otherwise is the gravest of all crimes against peace and security throughout the world. In 1954 the United Nations General Assembly resolved that the use of force to deprive people of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention. Profs. Thomas and Thomas, experts on the OAS system wrote that armed attack includes not only direct use of force but also indirect use of force through irregular groups, or terrorists who are citizens but political dissidents of the victim nation. They characterized such indirect use of force as inter aggression in that it includes the aiding or influencing by another government of hostile and illegal indirect attack against the established political order or the government of another country.¹⁷ Prof. Oscar Schachter wrote, "it would not only be illegal for a state to finance insurgent movements or to allow its territory to be used for organizing and training armed opposition movements but such tactics would open that state to an

¹⁶ *General Assembly Resolution 3314 XXIX*, 29 UNGAOR Supplement (No 31) at 142 UN Doc A/9630 (1970).

¹⁷ Quoted in, John Norton Moore, *The Secret War*, *Supra* Note 9, p. 77-78.

armed defensive action by or on behalf of the victim of the indirect aggression".¹⁸

Hence it can be rightly said that once the states parties become party to the international instruments all the principles become legally binding and also become a part of the customary international law. Under no circumstances can the parties violate these provisions and shrug their responsibilities and the obligations. Since these conventions have been voluntarily entered into the onus of ensuring that the provisions are faithfully adhered to and the responsibilities of honoring the international obligations and commitments rests with the states themselves. Only under the extreme conditions and exceptional circumstances can these principles of non-intervention and non-aggression be set aside and that too with the consent of the international community. These wars of aggression and interventions by great powers fall in the realm of crimes against peace. Nevertheless wars and armed conflicts are a reality and hence this phenomenon has to be contended with. The international community has to address the issues of humanitarian problems to the vast numbers of people affected by war and armed conflicts and this falls in the realm of the whole body of international law termed international humanitarian law or the laws of war.

Violations Of International Law In Nicaragua-Intervention And Aggression

On 27 June 1986 the International Court of Justice at The Hague ruled by a vote of 12-3 in favor that the United States was in violation of international law by "Training, arming, equipping, financing and supplying the Contras (the Nicaraguan counterrevolutionaries), or otherwise encouraging, supporting, and aiding military and paramilitary activities in and against Nicaragua,¹⁹ and ordered the United States to pay compensation to Nicaragua for the damages caused by the low intensity conflict waged

¹⁸ *Ibid.*, p. 78.

¹⁹ *Case Concerning Military And Paramilitary Activities In And Against Nicaragua (Nicaragua Versus The United States) (Merits)* Judgment Of 27 June 1986, in International Court of Justice (ICJ) Reports, 1986, para 292 (3), p .146.

against Nicaragua.²⁰ Here was the world's leading democracy accused of and found to be guilty of the most serious offense under the United Nations Charter and customary international law; namely war of aggression and armed intervention. This support to the counterrevolutionaries and pitting them against the Marxist Sandinista Government of Nicaragua violated the basic principles of non-intervention, non-aggression, refrain from the use of force, right of nation states to independent self-reliant development formulated by the most authoritative institution in the world embodying the rule of law in international relations. Commenting on the United States withdrawal from the World Court proceedings one editorial put it United States showed "little remorse turning its back on not only the international Court of Justice, but also forty years of leadership in the cause of world peace through law".²¹

By launching the low intensity conflict against Nicaragua the United States supported counterrevolutionaries violated the basic tenets of international humanitarian law and the laws of war in their zealotry and their effort to overthrow the Sandinista regime of Daniel Ortega during the period 1981-1990. These tenets are envisaged and enshrined in the 1949 Geneva Conventions and the Additional Protocols of 1977 to the Geneva Conventions.

Ironically the World Court Judge Stephen. M. Schwebel of the United States who gave his dissenting judgment in the Case of Paramilitary and Military Activities against Nicaragua (Nicaragua vs United States) on 27 June 1986, had wrote when he was a representative to the United Nations Special Committee on the Definition of Aggression, that "the Charter of the United Nations makes no distinction between the direct and indirect uses of force and that the most pervasive forms of modern aggression tend to be the

²⁰ *Ibid.*, para 292, 13, 14, 15, p. 149.

²¹ Thomas M. Franck, *Icy Day At The ICJ Editorial Comment*), American Journal of International Law (American Society Of International Law , New York) , 79, 1985, p. 379.

indirect ones".²² Serious violations of not only international law but also international humanitarian law and the laws of war had taken place in Nicaragua by the United States indirectly and by its supported forces namely the counterrevolutionaries or the contras. This section aims to find the nature of the violations both of international law as well as international humanitarian law and the laws of war.

Was the United States justified in arming, training, equipping, and directing the counterrevolutionary movement against the legitimate government of Nicaragua under the international law and customary international law? The answer is in the negative. The two principles upon the actions of the United States against Sandinista Nicaragua hinges upon are 1. Nature and extent of the prior wrongs alleged to have been committed by Nicaragua to warrant the launching the low intensity conflict against it and 2. The proportionality of United States response to these alleged wrongs.

United States stated objective in launching the low intensity conflict against Nicaragua was to interdict the arms supply to the Farabundo Marti Liberation Nacional (FMLN)/Revolutionary Democratic Front (FDR) guerrillas in El Salvador waging their own revolutionary war against their right-wing civilian/military junta which was supported by the United States during the years 1981-1983. The United States Department of State put out a White Paper entitled, "Communist Interference in El Salvador" issued on 23 February 1981,²³ whose accuracy however and credibility has been questioned by the press, nevertheless showed that the Sandinista Government had been involved in the arms supply to the leftist guerrillas in El Salvador.²⁴ Nicaragua had offered arms, ammunition, ideological support and

²² Quoted in Abram Chayes, " *Nicaragua, The United States And The World*, Colombia Law Review, Volume 85, 1985, fn 101, p. 1466.

²³ *United States Department Of State, Communist Interference In El Salvador, 23 February 1981, Special Report No 80* (Washington DC, Department of State, Bureau of Public Affairs, 1981).

²⁴ Wayne Smith, *Dateline Havana: Myopic Diplomacy*, Foreign Policy, Volume 48, Fall 1982, p. 161.

base facilities to El Salvadoran FMLN guerrillas and its leadership. But the extent of their support is not very clear.

However after the 23 October 1983 United States invasion of Grenada, Nicaragua in a panic reaction had stopped the arms flow and sent the FMLN/FDR leadership packing from Nicaragua in the fear that the United States may launch a similar invasion against itself.²⁵ If the Sandinista government had supported the El Salvadoran guerrillas, it constituted an act of aggression and interference in the internal affairs of El Salvador, a clear breach in international law. El Salvador had the right to invoke the right of individual and collective self-defense and request armed assistance from the United States. However no such request was forthcoming from the El Salvadoran side. Which means that the United States did not have the legal sanction to invoke the principle of collective self-defense under the United Nations Charter and the Rio Treaty of Reciprocal Assistance of 1947. If we use the reason of the Sandinista government support to the El Salvadoran guerrillas as a justification for its low intensity conflict in Nicaragua there was no need to undertake the entire operation, done through covert/ clandestine means, by supporting the Nicaraguan contras. An operation which was set in operation as soon as the Sandinista government assumed office on 21 July 1979. Under the principle of collective self-defense it was not at all necessary to counter intervene under the cover of secrecy and in such a covert/ clandestine manner. United States had already employed legitimate methods of suspension of the \$15 million of emergency aid, which was to be disbursed to the government in 1981, this aid was out of the \$75 million of the emergency aid which was approved by the Jimmy Carter Administration in April 1980.

The incoming administration of Ronald Reagan had on 1 April 1981 had terminated all aid to Nicaragua,²⁶ as also the economic pressures that

²⁵ Roger Fontaine, *Choices On Nicaragua*, Global Affairs, Summer 1986, p. 113.

²⁶ *Assistance To Nicaragua*, Statement Issued by the Department of State, 1 April 1981, *American Foreign Policy Current Documents: 1981*, (Washington DC, Department of State, 1984), p.

was put on national and international lending agencies such as the World Bank and the International Monetary Fund (IMF) etc. to deny access to the desperately needed credit all could be termed as legitimate responses to the Nicaraguan interference in El Salvadoran affairs by the United States.²⁷ Even the 1 May 1985 Economic Embargo imposed on Nicaragua could be regarded as the justifiable economic intervention in retaliation against the Sandinista support to the Salvadoran guerrillas. According to David MacMichael, a high ranking CIA analyst on Central America until 1983, the United States systematically misrepresented Nicaraguan involvement in the arms supply to Salvadoran guerrillas to justify its efforts to overthrow the government of Nicaragua.²⁸

Nevertheless the United States and the contras professed objective was to interdict the arms supply lines to the Salvadoran guerrillas. But by 1985 it had transformed into "Changing the Nicaraguan government in its present structure" in the very telling words of President Reagan himself, clearly the objective was to overthrow the Sandinista government and replace it by a regime which would be conducive to the interests of the United States.²⁹ The CIA-supported contra activities were directed not at the arms interdiction, which it never did and never managed to capture any arms allegedly sent by the Sandinistas to the Salvadoran guerrillas, but were targeted at the selected government infrastructures, economic targets, civilians, any visible signs of development brought about by the revolutionary process and the Cuban supported programs and infrastructure in Nicaragua.

It was stated that the United States military support to the Sandinistas posed a threat to the United States and to the security of the Central American region and hence the covert action that was undertaken against

²⁷ See Michael E. Conroy, *Economic Aggression As An Instrument Of Low Intensity Conflict*, in Thomas Walker, ed., *Reagan Versus The Sandinistas : The Undeclared War On Nicaragua* (Boulder, Westview Press, 1987).

²⁸ Marlene Dixon, ed., *On Trial: Reagan's War Against Nicaragua*, (San Francisco, Synthesis Publications, 1985), p. 131, New York Times 11 June 1984.

²⁹ President Reagan's News Conference, in New York Times 22 February 1985, in *Public Papers of the Presidents Of The United States Of America: Ronald Reagan, Book 1: January*

Nicaragua was justified in terms of self-defense. But it was widely acknowledged that Cuba and the Soviet Union would not dare to invoke openly the right to use force, this especially after the Cuban Missile Crisis in October 1962, as the fundamental political reality was that both Cuba and the Soviet Union acknowledged that the United States was the hegemonic actor in Central America, intervening on behalf of Nicaragua would engulf not only the region into turmoil but also escalate the regional conflict into a third world war which both the United States definitely desired to avoid.³⁰

It was clear to everyone that the United States was intervening in the internal affairs of another state, which was prohibited under international law without the legal sanction, request by the incumbent government of the victim state, in this case El Salvador, or invitation by the established insurgency holding territory and operating as a de-facto government, authorization by a competent global or regional organization, evidence of gross human rights violations by the target state which warrants such intervention, or danger to the lives and property of the United States nationals abroad (the reason for the Invasion of the small state of Grenada in 1983).

With respect to the principle of proportionality United States Secretary of State Daniel Webster in 1842 following the Caroline Incident wrote to the British government that the claim of self-defense to be legally justifiable, had to show "necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation" and the "act justified by the necessity of self defense must be limited to that necessity and kept clearly within that".³¹ Whatever may be the extent of the Sandinista support to the Salvadoran guerrillas the initial actions taken by the United States could be justified as acting in self defense, measures such as military aid to El Salvador, Honduras and Costa Rica, offering sanctuary and base facilities to

1- June 26 1985, (Washington DC., United States Government Printing Office, 1988), Pp. 200-202.

³⁰ Harold Molineu, *U.S. Policy Towards Latin America: From Regionalism To Globalism* (Boulder, Westview Press, 1986)

³¹ Ian Brownlie, *International Law*, *Supra* Note 8, p 43

the Nicaraguan Democratic Front (FDN) forces in Honduras and the Democratic Revolutionary Alliance (ARDE) in Costa Rica, joint military exercises with Honduras was in collective self defense. After the suspension of the support to the FMLN/FDR leadership and the stoppage of arms to the Salvadoran guerrillas in the wake of the invasion of Grenada in October 1983, what was the need for the United States to escalate its involvement by authorizing the CIA covert activity in the country and also in January-February 1984 by placing mines in Nicaraguan territorial waters and harbors, this in a clear breach of international law.

The second document that was put out by the United States to justify its intervention and war of aggression in Nicaragua was the Department of State's "Revolution Beyond the Borders", on 13 September 1985, which claimed that the Sandinista Nicaragua was exporting its revolution to its neighbors and thus destabilizing the Central American region.³² This title Revolution Beyond Our Borders was taken from a speech given by the Nicaraguan Minister of interior Tomas Borge and quoted out of context to justify the intervention by the United States. Tomas Borge merely stated that the Nicaraguan revolution was a part of the international revolutionary movement. This revolution would serve as an example to other people and nations who were facing oppressive regimes, inspire them to oust their regimes and put governments in its place who would be people oriented.³³

While the United States and the neighboring states of Honduras and Costa Rica, the former by aiding, training, equipping and supporting the counterrevolutionaries was involving in an indirect aggression against Nicaragua, the other Central American states, by offering its base facilities to the Contras were themselves not only aggressors but also a party to the war of aggression, violating the basic principles enshrined in the Charter of the

³² Department of State, *Revolution Beyond Our Borders: Sandinista Intervention In Central America*, Special Report No 132 , Summary in Department of State Bulletin, Volume 85, No 2104, November 1985, Pp. 68-70.

³³ *Interior Minister Tomas Borge 19 July Speech*, Foreign Broadcast Information Service, 21 July 1981

United Nations, the Organization of American States and the Inter- American Treaty of Reciprocal Assistance of 1947, in short the basic tenets of international law and customary international law, namely armed intervention and aggression. All these violations eventually led to the violations of international humanitarian law in Nicaragua by the United States supported Contras. But before going on to discuss these violations an understanding of international humanitarian law in all its multifaceted dimensions is imperative.

Section Two

International Humanitarian Law- Theory And Practice

International humanitarian law is that branch of public international law and comprises the code of conduct, principles, rules and regulations applicable in times of armed conflicts. These principles and rules aim to restrict the means and methods of warfare and proclaim to the world that the right of the parties and the belligerents in conflict, both in international and non-international armed conflicts, to choose means and methods of warfare is not unlimited.³⁴ Prohibitions are also placed on the use and employment of weapons, which may cause superfluous injury or unnecessary suffering.³⁵ International humanitarian law seeks to protect the victims of armed conflict as well as persons who are not or no longer taking part in the hostilities such as the wounded, sick members of the armed forces on field, the wounded, sick and shipwrecked members of the armed forces at sea, the prisoners of war and the civilian population such as men, women and children who are not participating in the hostilities.³⁶ International humanitarian law or the laws of war consists of The Hague and The Geneva Conventions.

³⁴ Article 35, para 1, *Protocols Additional To The Geneva Conventions Of 12 August 1949, Relating To Protection Of Victims Of International Armed Conflicts, (Protocol 1) Of 8 June 1977 (Henceforth, Additional Protocol I)* , See [http:// www.icrc.org/ihi..nsf/WEBCONFULL?Open View](http://www.icrc.org/ihi..nsf/WEBCONFULL?Open+View) (Accessed on 20 November 2000), All texts of the International humanitarian law and the laws of war treaties are from the ICRC Website unless specified.

³⁵ *ibid*, para 2.

³⁶ See *The Four Geneva Conventions Of 12 August 1949, Geneva Convention For The Amelioration Of The Condition Of The Wounded, Sick In Armed Forces In The Field (Geneva Protocol 1), Geneva Convention For The Amelioration Of The Condition Of Wounded, Sick And Shipwrecked Members Of Armed Forces At Sea (Geneva Convention 11) , Geneva Convention Relating The Treatment Of Prisoners Of War (Geneva Convention 111), And*

Definitions

The Law of The Hague or the Laws of war emerged in the late nineteenth century during the 1899 Hague Peace Conference. This branch of international humanitarian law establishes the rights and obligations of belligerents in the conduct of military operations. These laws place restrictions and limits on means and methods of warfare to minimize the dangers to the enemy forces and limit the suffering of innocent civilians and victims during armed conflict. This law is sometimes referred to as the principle of restriction or the principle of inadmissibility of using barbaric and inhuman methods and means of warfare. The Law of The Hague places restrictions on weapons, which cause superfluous injury or result in unnecessary suffering.

The Geneva Law or the international humanitarian law is designed and aimed at protecting military personnel who have become hors de combat, who are not or no longer taking part in the hostilities, who have laid down arms.³⁷ The wounded and sick soldiers in field,³⁸ the armed forces at sea,³⁹ the prisoners of war,⁴⁰ and the civilian population who are not involved in the armed conflict,⁴¹ in short the victims of war or armed conflict, are the target of the Geneva Law.

The international humanitarian law as we know today combines the Law of The Hague and the Geneva Law. Which is aimed at restricting the means and methods of warfare employed, places prohibitions on certain categories of weapons employed in armed conflicts, and also ensures and guarantees protection to the persons not involved in the conflict and other war victims. In other words, it refers to the rules governing the actual conduct of armed conflict (*jus in bello*) and not to the right to resort to armed force (*jus*

Geneva Convention Relative To The Protection Of Civilian Persons In Time Of War (Geneva Convention 1v) ,

³⁷ Common Article 3 para1., *The Geneva Conventions Of 12 August 1949.*

³⁸ See, *1949 Geneva Convention I*

³⁹ *1949 Geneva Convention II*

⁴⁰ *1949 Geneva Convention III*, see also *1929 Geneva Convention Relative To The Protection Of Prisoners Of War., Of 29 July 1929.*

⁴¹ *1949 Geneva Convention IV.*

ad bellum). The cardinal principle is that *jus in bello* applies in cases of armed conflict, no matter what its reason or the nature is, already underway and is not concerned with whether the inception and reason for undertaking the conflict or hostilities is lawful under *jus ad bellum*. However on certain occasions both *jus ad bellum* and *jus in bello* overlap with respect to the principle of proportionality, i.e. in *jus ad bellum* relating to the right to self-determination and in *jus in bello* relating to the conduct of hostilities. Sometimes serious violations of *jus in bello* (civilian massacres, human rights violations, genocide, terrorism) have been invoked by the states and the international organizations as a justification of direct or indirect intervention through surrogates, proxy armies acting on behalf of superpowers and big states. Thus linking *jus in bello* with *jus ad bellum*.⁴²

A definitional problem arises out of the concept of war in that the contending parties to the conflict do not formally declare many of the present conflicts wars. Many of the low intensity conflicts of today are not declared wars. Hence many of the international humanitarian law conventions and treaties concluded after the World War II, refer to the term armed conflict rather than use of the term war.⁴³ The term international armed conflict with the suffix applicable in armed conflict has become the accepted term by the international community, the International Committee of the Red Cross and Red Crescent Societies and by the United Nations. International humanitarian law in addition could be used to encompass the relevant parts of the international human rights instruments.⁴⁴

⁴² See Christopher Greenwood, 'The Relationship Between *Jus Ad Bellum* And *Jus In Bello*', Review of International Studies (British International Studies Association, Cambridge), Volume 9, No 4, October 1983, Pp. 221-234.

⁴³ Article 8, para 2 (e) (iii) and Article 21 (1) (b) of *The 1998 Rome Statute Of The International Criminal Court*, 17 July 1998, Article 2, para 2 of the *1994 Convention On The Safety Of United Nations And Associated Personnel*, 9 December 1994, 34, International legal Materials (American Society of International Law, Washington DC), (1995), Pp. 482-493, See also in Adam Roberts and Richard Gueliff, ed., *Documents On The Laws Of War*, (Oxford, Oxford University Press, 2000). Pp. 619-636.

⁴⁴ Article 1, 1993 *Statute Of The International Tribunal For The Prosecution Of Persons Responsible For Serious Violations Of International Humanitarian Law Committed In The Territory Of Former Yugoslavia Since 1991*, 25 May 1993, UNGA Doc. S/25704/, 3 May 1993, Article 1, 1994 *Statute Of The International Tribunal For The Prosecution Of Persons*

Types Of Conflicts

International humanitarian conventions, treaties and declarations define and distinguish between three types of armed conflicts. 1. International Armed Conflicts; 2. Non- International Armed Conflicts; and 3. Internal Disturbances. International armed conflicts according to the four Geneva Conventions of 12 August 1949, Relating to the Victims of Armed Conflicts, and the Additional Protocol I to the Geneva Conventions of 12 August 1949, Relating to international Armed Conflicts of 8 June 1977, refers to and defines international armed conflicts as conflict or fighting between the armed forces of at least two or more states, i.e. inter-state conflict. In this definition is included the wars of national liberation movements. It applies in all cases of declared wars between two or more states.⁴⁵ This definition includes armed conflicts in which peoples are fighting colonial domination, alien occupation and against racist regimes in the exercise of the right to self-determination and the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among Nations in accordance with the Charter of the United Nations.⁴⁶

Non- International Armed Conflicts are defined as armed conflicts occurring on the territory of the nation state between regular armed forces of the incumbent government and identifiable dissident armed groups, or between armed groups fighting one another, locked in a power struggle in a civil war. These armed groups should be under responsible command, exercise a control over the territory as to enable them to carry out sustained and concerted military operations and also to implement the provisions of the

Responsible For Genocide And Other Serious Violations Of International Humanitarian Law Committed In The Territory Of Rwanda And Rwandan Citizens Responsible For Genocide And Other Such Violations Committed In The Territory Of Neighboring States Between 1 January-31 December 1994, UNSC RES. S/ RES/955, 8 November 1994, Preamble 1997 Ottawa Convention On The Prohibition Of The Use, Stockpiling, Production And Transfer Of Anti- Personnel Mines And On Their Destruction, 18 September 1997 , Article 13, para (a) 1994 San Remo Manual On International Law Applicable To Armed Conflicts At Sea , 12 June 1994.

⁴⁵ Article 2, 1949 Geneva Convention I, Geneva Convention II, Geneva Convention III , Geneva Convention IV,

⁴⁶ Article 1, para 4, 1977 Additional Protocol I

international humanitarian law.⁴⁷ In this definition one can include proxy wars, low intensity conflicts through local or regional surrogates waged by the superpowers and other powers. As long as direct intervention by the superpowers or any other states does not take place, one can safely say that they are non-international armed conflicts. However such conflicts have been increasingly termed as internationalized internal armed conflicts.

Internal disturbances are serious disruptions of internal order in the territory of states, resulting from acts of violence. Such disturbances are of the nature of riots, isolated and sporadic acts of violence, struggles between factions or against the state authorities not falling in the category of armed conflict.⁴⁸

Principles of International Humanitarian Law

International humanitarian law is founded on certain basic principles upon which the entire edifice of the international humanitarian law is based. These principles are, international humanitarian law firstly is based upon the principle of means and methods of warfare. This principle excludes from warfare and armed conflict any unrestricted use of force, which create the threat of mass extermination of persons taking no part in the ongoing hostilities. Weapons that inflict superfluous injury of unnecessary suffering and make human death inevitable violate this principle. International humanitarian law prohibits the use of certain weapons and means and methods of warfare considered to be barbarous, violent and against all principles of humanity.⁴⁹

Those weapons, which are treacherous in character or have indiscriminate in character are also among the prohibitions laid down by the international humanitarian law.⁵⁰ Civilian targets such as towns, cities, human

⁴⁷ Article 1 para 1, 1977 *Additional Protocol To The Geneva Convention Of 12 August 1949, And Relating To The Protection Of Victims Of Non- International Armed Conflicts (Protocol II)*, Of 8 June 1977.

⁴⁸ *Ibid* Article 1, para 2.

⁴⁹ Article 22, 1907 *Hague Convention Vi Respecting The Laws And Customs Of War On Land* 18 October 1907.

⁵⁰ Article 23, para (b), 1907 *Hague Convention Iv*, Article 36, 1977 *Additional Protocol I*.

habitats,⁵¹ environment,⁵² cultural property,⁵³ works and installations containing dangerous works and forces like dams, dikes and nuclear power generating stations, petroleum storage facilities are placed under the many restrictions by the international humanitarian law.⁵⁴

Many philosophers and writers shown the ages have taken great pains to elaborate the basic principles that govern international humanitarian law. The eighteenth century French philosopher Jean-Jacques Rousseau in his work *The Social Contract* in 1752, wrote that once the combatants lay down their lives they are ordinary men and it is unlawful to kill them.⁵⁵ This statement established the first principle of international humanitarian law, namely the principle of humanity. In 1899 at The Hague Peace Conference a Russian delegate Fyodor Martens laid down the codified principle of humanity. He stated that in all cases not covered by international humanitarian law “civilians and combatants remain under the protection and the authority of the principles of international law derived from custom, from the principles of humanity and from the dictates of public conscience”. A principle, which was agreed to by the Hague Peace Conference, as well as the Geneva Conventions.⁵⁶

While Rousseau and Fyodor Martens laid down the principles of humanity the authors of the 1868 St. Petersburg Declaration formulated the principles of military necessity and the prevention of unnecessary suffering.

⁵¹ Article 51, para 5 (a), *Additional Protocol 1*.

⁵² 1976 *United Nations Convention On The Prohibition Of Military Or Any Other Hostile Use Of Environmental Modification Techniques*, The Hague 10 December 1976, , 1994 ICRC/UNGA *Guidelines For Military Manual And Instructions On The Protection Of The Environment In Times Of Armed Conflict*.

⁵³ 1954 *Hague Convention For The Protection Of Cultural Property In The Event Of Armed Conflict*, And *Regulations For The Execution Of The Convention For The Protection Of Cultural Property In The Event Of Armed Conflict*, The Hague, 14 May 1954, 1954 *Additional Protocol*, And The 1999 *Second Protocol For The Protection Of Cultural Property*, The Hague, 14 May 1999.

⁵⁴ Article 56, 1977 *Additional Protocol I*, Article 15 *Additional Protocol II*.

⁵⁵ Jean-Jacques Rousseau, *A Treatise On The Social Contract*, Book 1, Chapter IV.

⁵⁶ Article 62, 1949 *Geneva Convention I And Geneva Convention II*, Article 142 *Geneva Convention III*, Article 158 *Geneva Convention IV*, Article 1, *Additional Protocol I*, Preamble 1980 *Convention On The Prohibitions Or Restrictions On The Use Of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious Or To Have Indiscriminate Effects*, Geneva, 10 October 1980.

This Declaration stated, "considering, that the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy. That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the suffering of disabled men, or render their death inevitable".⁵⁷ Thus laying down the principle that it is forbidden to employ weapons, which cause unnecessary suffering of the armed forces already disabled by the conflict.

The principle of discrimination or distinction between the civilian population and combatants, civilian objects and military objectives is the cornerstone of the international humanitarian law. The entire foundation upon which the principle rests is that the "Parties to the conflict shall at all times distinguish between the civilian population and combatants, and between civilian objects and military objectives and shall direct their operations only against military objectives".⁵⁸ L. Oppenheim speaks of the basic rule, which prohibits "direct assault on non combatants".⁵⁹ The principle of discrimination applies to the selection of the means and methods of warfare, weaponry, and targets. Discrimination also is applied and refers to geographical and other limitations.

The principle of proportionality seeks to strike a precarious balance between two divergent interests, consideration of military necessity and the requirement of humanity. Proportionality in the conduct of armed conflict (*jus in bello*) encompasses the proportionality of a military response to the enemy action in relation to anticipated military advantage to be gained and the proportionality in reprisals.

Added to these principles are the time-honoured notion of chivalry, which has been followed over the ages by the kings, knights and princes.

⁵⁷ Saint Petersburg Declaration Renouncing The Use In Time Of War, Of Explosive Projectiles Under 400 Grams Weight, St Petersburg, 29 November- 11 December 1868.

⁵⁸ Article 48, Basic Rule Additional Protocol I,

⁵⁹ L.Oppenheim, *International Law; A Treatise*, Volume II Section I (London, Longmans, 1960).

Chivalry entails that "dishonorable means (treacherous), dishonorable expedients and dishonorable conduct during armed conflict are forbidden".⁶⁰ Under this principle it is forbidden to resort to perfidy.⁶¹ However ruses of war are not prohibited on the grounds of military necessity.⁶²

Other principles of international humanitarian law include the principle of the promotion of and respect for the fundamental human rights and freedoms, which are basic to the human existence.⁶³ In armed conflict both the international humanitarian law and human rights law apply concurrently, such as the principles of equality and non-discrimination in all forms and manifestations.⁶⁴ Added to this list of fundamental rights is the promotion of friendly relations among the nations of the world.⁶⁵

Another principle of international humanitarian law is the promotion of social and economic progress and improvement of the standards of life in larger freedoms including education and culture.⁶⁶ Protection of the vital interests of human beings, dignity,⁶⁷ natural environment are also the objectives of the international humanitarian law as also it offers protection to the cultural property and heritage of humanity. Prohibitions are also imposed on the use of unrestricted force in military action, acts of violence, intimidation, public insults and acts of reprisals.

The most important principle of international humanitarian law relating to armed conflict is the principle of the restriction of the means and methods

⁶⁰ *United States Department Of Navy (Jointly With Headquarters US Marine Corps And Department Of Transportation, US Coast Guard, The Commander's Handbook On The Law Of Naval Operations, Nwp-I-14 M,(Norfolk, Virginia, October 1995) , p 5-1.*

⁶¹ Article 37 para(1) , *Additional Protocol I*

⁶² *Ibid*, para (2) .

⁶³ See 1948 *Universal Declaration Of Human Rights, Of 10 December 1948*, UNGA Res. 217 A (III), UN Doc. A/810, at 71,(1948).

⁶⁴ *Ibid*, Article 2, para 2, *International Covenant On Economic, Social And Cultural Rights Of 16 December, 1966* UNGA Res. 2200 (XXI), 21 UNGAOR Supp. (NO 16) at 52-58, UN Doc A/ 6316, And *International Covenant On Civil And Political Rights Of 16 December, 1966.*, UNGA Res. 2200 (XXI), 21 UNGAOR Supp. (NO. 16), at 52-58, UN Doc. A/6316.

⁶⁵ *Charter Of The United Nations, 24 October 1945*, [http:// www.un.org/aboutun/charter/](http://www.un.org/aboutun/charter/) (Accessed on 21 September, 2001).

⁶⁶ Common Article 13 of *Geneva Convention III And Geneva Convention IV*

⁶⁷ Common Article 3, 1949 *Geneva Conventions*, Article 75, *Fundamental Guarantees Of Additional Protocol I*, Article 4, *Additional Protocol II*.

of warfare and restricting the belligerents in their choice of such means and methods. This principle also refers to as the principle of restriction or the principle of inadmissibility of using barbaric and inhuman means and methods of warfare. These principles were formulated in the 1868 St. Petersburg Declaration, which states that, "the technical limits at which the necessities of war ought to yield to the requirement of humanity".⁶⁸ In the 1907 Hague Convention Respecting the Laws of War and Customs of War on Land which categorically stated that the "right of the belligerents to adopt the means of injuring the enemy is not limited".⁶⁹ This principle lays down the foundation for the various conventions, treaties and declarations through the nineteenth and twentieth century which restricted certain types of weapons and which combined together to form the body of laws termed as the law of The Hague.

In the application of the principles the arguments of military necessity cannot be used as pretexts for the evasions of honoring the obligations and the responsibilities of the provisions of the law. The principle of military necessity has been rejected as a defense for acts forbidden by the customary and conventional laws of war or international humanitarian law. This is so as these laws are formulated, conceived, designed and developed keeping in view and after giving due consideration for the concept of military necessity. The Protocol I Additional to the Geneva Conventions of 12 August 1949, Relating to international Armed Conflicts, of 8 June 1977, is an excellent example of the convergence of the Law of The Hague and the Geneva Law. It combines the principles of restricting the means and methods of warfare and offers protection to the victims of armed conflict. Certain aspects of international humanitarian law are considered to be a part of customary international law they are considered to be applicable to that state which is not a signatory to the treaty.

⁶⁸ 1868 St. Petersburg Declaration

⁶⁹ Article 22, 1907 Hague Regulations

Application Of The International Humanitarian Law To Individuals

Laws of war or international humanitarian law are not only applicable and binding to states but also to individuals, especially to the individual members of the armed forces. Individual responsibility relates not only to the actual commission of the crime but also ordering, inducing, or facilitating it. The question of individual responsibility emerged in the course of first and World War II. The First inter-Allied Declaration was signed in 1942 at London, which stated that punishment of war crimes was one of the principal war aims of the Allied governments. In 1943 the Moscow Declaration stated that it was the intention of the Allied governments to adjudicate and punish war criminals in the countries where the crimes were committed. Major war criminals who had done grave breaches of the laws of war or international humanitarian law would be dealt with sternly and by the joint decision of the Allied governments. In 1943, itself, the London conference established the United Nations War Crimes Commission to investigate war crimes. In 1945 the Allied governments met in London to implement the Moscow Declaration and agreed to persecute and punish major war criminals of the European Axis powers.⁷⁰

The various War Crimes Tribunals such as the Nuremberg Tribunal (1945-1946) and the Tokyo Tribunal (1946-1947), the 1993 International Criminal Tribunal for former Yugoslavia (ICTY), 1994 International Criminal Tribunal for Rwanda (ICTR), and the 1998 Rome Statute of the International Criminal Court (ICC), testify to the fact that the individual responsibility is now become an accepted part of the international humanitarian law as well as customary international law. No person be it in the levels of the government or in the armed forces of the state parties to the conflict is spared in the event

⁷⁰ *Agreement For The Persecution And Punishment Of The Major War Criminals Of The European Axis, And The Charter Of The International Military Tribunal, London, 8 August 1945.*

of commission of what constitutes grave breaches of international humanitarian law or the laws of war.⁷¹

Statutes On Limitations

The capacity to punish the violators of international humanitarian law or the laws of war may be undermined by the statutory limitations prescribing the period within which proceedings may be instituted to enforce a right or to punish a violation must be taken. If necessary action is not taken within the stipulated period of time the right to take action may be barred.

Various international agreements have sought to limit the applicability of any statutes of limitations to war crimes and crimes against humanity. The 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity specifies that no statutory limitations may apply to such grave crimes. Issues of retro activity, the broad scope of the crimes and the politically motivated nation state system undermined the support to such a convention.⁷² In 1974 the Council of Europe adopted a Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,⁷³ but owing to political differences, had not entered into force. The 1998 Rome Statute of the International Criminal Court states, "The crimes within the jurisdiction of the Court (namely war crimes, crimes against peace and crimes against humanity) shall not be subjected to any statute of limitations".⁷⁴

⁷¹ See Thomas Graditzky, *Individual Criminal Responsibility For Violations Of International Humanitarian Law Committed In Non-International Armed Conflicts*, International Review of the Red Cross (ICRC, Geneva), No 322, 1 March, 1998, Pp. 29-56.

⁷² *Convention On The Non- Applicability Of Statutory Limitations To War Crimes And Crimes Against Humanity*, 26 November 1968 Also see Robert .H. Miller. *The Convention On The Non-Applicability Of Statutory Limitations To War Crimes And Crimes Against Humanity*, America Journal of International Law (American Society of International Law, Washington DC), Volume 65 1971, Pp. 476-459.

⁷³ *European Convention On The Non - Applicability Of Statutory Limitations To Crimes Against Humanity And War Crimes Adopted At Strasbourg*, 25 January 1974.

⁷⁴ Article 29, 1998 Rome Statute Of The International Criminal Court, 17 July 1998.

Application f International Humanitarian Law In Internal Armed Conflicts Or Non- International Armed Conflicts.

Since the end of the World War II, many conflicts have been civil wars or internal armed conflicts. With the outside states intervening on behalf of or in support of one or more parties to the conflict. Internal armed conflicts have become internationalized raising questions of the extent to which they can fall into the ambit of the laws of war or international humanitarian law applicable in international armed conflicts.⁷⁵ A number of writers have advocated that the essential principles of the laws of war or international humanitarian law should apply to the situations of civil wars. Emmer de Vattel wrote in 1758, "it is perfectly clear that the established laws of war, whose principles of humanity, forbearance, truthfulness, and honor which have laid down should be obtained on both sides in a civil war".⁷⁶ During the American Civil War (1861-1866) the Instructions for the Government of Armies of the united States in the Field, or the Lieber Code, drafted by a Professor of Colombia University Dr. Francis Lieber on the invitation of the then President Abraham Lincoln, which was issued to the Union Army. In 1921 the Tenth International Conference of the Red Cross meeting in Geneva passed a resolution affirming the right to relief for all victims of civil conflicts.

The International Committee of the Red Cross worked to ensure that the humanitarian principles were accepted and were applied in civil wars irrespective of the legal status of the parties to the conflict. During the Spanish Civil War (1936-1939) 27 Governments called for the protection of non-combatants in that civil war and urged that the prisoners of war should be held in accordance with the humanitarian principles as enshrined in the international humanitarian law.⁷⁷ The causes for the internal armed conflicts

⁷⁵ Hans- Peter Grassner, *International Non- International Armed Conflicts: Case Studies Of Afghanistan, Kampuchea And Lebanon*, American University Law Review (American University, Washington DC), Volume 33, No 1, Fall 1983, Pp. 145-161.

⁷⁶ Quoted in ' Introduction', Adam Roberts and Richard Guelff ed., *Documents On The Laws Of War*, *Supra* Note 43, p 22.

⁷⁷ Norman Padelford, *International Law And Diplomacy In The Spanish Civil Strife*, (New York, Macmillan, 1939), p. 95n.

to break out are manifold. It may be due to the non-observance of the rights of the minorities or human rights as enshrined in the international covenants on human rights or the crumbling of all government authority in the country as such various groups are engaged in a bitter struggle for power. It was recognized and realized by the states that unbridled violence and weapons of mass destruction cause just as much injury and destruction in civil war as much as they would do in conflicts between states. The law of non-international humanitarian law has an interesting peculiarity. If the law is to be applied it must be accepted and applied by both sides in the conflict. Thus, act of recognition of belligerency becomes very imperative in this context.

Recognition Of Belligerency

The application of the provisions of international humanitarian law requires recognition of belligerency by the government of the state in which an insurgency has taken place. This is the most important precondition. This recognition of belligerency is well established in customary international law, which provides with a means whereby the laws of war can be applied in non-international armed conflicts. If the lawful government of the state refused to recognize the belligerent status of the insurgent groups with which it was engaged in an armed conflict, practical as well as legal difficulties in the application of the international humanitarian law would arise.⁷⁸ In the twentieth century certain international agreements have established a basic written regime for the *jus in bello interno* not dependent upon the principle of the recognition of belligerency. This implies that certain fundamental humanitarian principles are applicable in non-international armed conflicts. For example Article 3 Common to the Four Geneva Conventions of 12 August 1949, which binds insurgents engaged in armed conflict to observe the provisions of the international humanitarian law or the laws of war. These provisions are equally binding on the insurgents as it binds the lawful

⁷⁸ See for the principle of recognition of belligerency, Hersch Lauterpacht, *Recognition And International Law*, (Cambridge, Cambridge University Press, 1947), Pp. 175-269, Also see Erik Castren, *Recognition Of Insurgency*, Indian Journal of International Law (Indian Society of International Law , New Delhi), Volume 5, 1965, Pp. 443-454.

government, being the agent of the state party. The brutality that was experienced during the Spanish Civil war in 1936 gave the first impetus to the incorporation of this Article. Article 19 of the 1954 The Hague Cultural Property Convention provide for the application of the provisions of the Convention in a situation of internal armed conflicts.

Article 6 of the 1977 Additional Protocol I to the Geneva Convention attempts to bring certain types of armed conflict otherwise considered as civil wars within the scope of the application of the laws of war governing states. Additional Protocol II relating to Non-International Armed Conflicts is an attempt to expand, develop and supplement the Common Article 3 of the Geneva Conventions. This Protocol does provide a whole set of guarantees and security to the victims of such internal conflicts.

In the 1990s new instruments that were applicable in non-international armed conflicts include 1996 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices as Amended, the 1997 Ottawa Convention on Anti-Personnel Mines and the 1998 Rome Statute of the International Criminal Court (ICC). All these international instruments contain an outline of the rules applicable in non-international armed conflicts. Including hostilities between the armed groups within the territory of the states.⁷⁹ There are no express requirements or conditions laid down in these international instruments with regard to the intensity, level or the violence in such internal conflicts. However Additional Protocol II Relating to the Non-International Armed Conflicts does not apply to situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence, and other acts of similar nature, not of the level of armed conflict.⁸⁰

The 1977 Additional Protocol II applies when the non-governmental armed forces and groups 1.who carry arms openly; 2.are under responsible command; 3.are able to respect the laws of war; and 4.also to exercise such control over a part of the territory as to enable them to carry out sustained

⁷⁹ Articles 8 (2) (c) (e)and (f) , 1998 *Rome Statute Of The International Criminal Court*, Article 6, *On Genocide*, Article 7 , *Crimes Against Humanity*

⁸⁰ *Ibid.*, Article 1 para2, *Material Field Of Application*.

and concerted military operations.⁸¹ Another category of combatants is the *levee en masse*. These are inhabitants of a non-occupied territory who on the approach of the enemy spontaneously and in mass uprising take to arms to resist the invading force without having time to organize into armed units, provided they carry arms openly and respect the laws of war, are given the status of combatants. This ensures them with the attendant rights and obligations.⁸²

That the insurgents carry on their struggle and conflict with the established government presupposes a degree of organization and also a responsible command conducting the operations. Hence it can be realistically expected that those in charge of the operations will respect and implement the laws of war or international humanitarian law.

International law as it is interpreted raises no objection to the intervention of a third state on the part of the incumbent of the state upon its invitation. But intervention on the side of the insurgent or a rebel movement is generally considered as an unwarranted intervention in the internal affairs of the target state.⁸³ These internationalized non-international conflicts pose unusual problems to international law as well as for the application of international humanitarian law or the laws of war. Generally the law of international armed conflicts should apply for the simple reason that the humanitarian problems are similar to that of the international armed conflicts. And hence must be treated accordingly.

Problems of the application of the laws of war or the international humanitarian law in civil wars and internal armed conflicts arise out of the concept of state sovereignty. It can however be said that the insertion and adoption of Common Article 3 of the 1949 Geneva Conventions of 12 August 1949, constitute the first breach in the wall of state sovereignty. The principal attribute of state sovereignty is the inherent right of the state to develop as it

⁸¹ *ibid.*, Article 1 para 1

⁸² *Hague Convention VI, Regulations II, Article 4, 1949 Geneva Convention III*

⁸³ Michael B. Akehurst, 'Civil War', in Bernhardt, ed., *Encyclopedia Of Public International Law*, Volume 3 (Amsterdam, North Holland Publishing Co., 1983), Pp. 83-93.

sees fit. This breach in sovereignty is therefore a bold one. Members of the armed groups could be described as insurgents, revolutionaries/counterrevolutionaries, secessionists, freedom fighters or any other groups fighting the incumbent government to take over the reins of power. States in which the conflicts are taking place retain the right to use force in their territory in order to maintain internal law and order.

However limits are placed on the manner in which the internal order may be restored and maintained. The main prohibitions and restrictions of certain weapons of mass destruction that are laid during the non-international armed conflicts are the chemical and bacteriological or biological weapons, bullets that expand on the human body, poison, mines, booby-traps, and other devices as defined in The Protocol II to the 1980 Convention on Conventional Weapons. Indiscriminate use of incendiary weapons against the civilian population and civilian objectives are also prohibited. The general rules governing the conduct of hostilities applicable in Non- International armed conflicts are respecting the distinction between combatants and civilians, prohibition of attacks against civilian population and targets, weapons causing superfluous injury or unnecessary suffering, resort to perfidy, attacks on civilian dwelling and buildings, objects indispensable to the life of the civilian population.

Also one of the conditions attached to the application of the Additional Protocol II Relating to the Victims of Non- International Armed Conflicts is that the armed groups or the insurgents must occupy a part of the territory and exercise such control as to enable them to carry out sustained and concerted military operations and to implement the Protocol. Unfortunately this condition considerably narrows down the scope of application and restricts the application to only those situations where the insurgents and the rebel/dissident forces occupy or control territory. In internal armed conflicts where there are armed groups fighting an internecine fratricidal, or in situations where the rebel/insurgent armed forces are operating from the bases across the international borders, as is in Kashmir in India and in

Nicaragua where the Counter-revolutionary forces were operating from bases in Honduras and Costa Rica and in the United States, application of such a Protocol raises legal questions and poses a stumbling block in the application of Protocol II, thus narrowing down the material field of operation.

International Humanitarian Law or the Law of Geneva

It is common knowledge that the armed conflicts result in mass suffering of the people, inflict unnecessary suffering on the people and results on the attacks on the human dignity of the people. To address the problems of the victims of war and to protect the human rights and dignity of the people not involved in the armed conflicts the international community devised the Law of Geneva or the Law of the Red Cross. This is the international humanitarian law as the world has come to know this body of law in the realm of public international law. International Humanitarian Law is embodied in the Four 1949 Geneva Conventions of 12 August 1949, Relating to the Victims of Armed Conflicts and the Two Additional Protocols to the 1949 Geneva Conventions of 8 June 1977.

International humanitarian law applicable to armed conflicts, are based on certain principles, which are 1. The principle of protecting the civilian population from the effects of wars and armed conflicts; 2. The principles of protecting the victims of wars and armed conflicts; 3. The principle of protecting the civilian facilities from the ravages of wars and armed conflicts. This is the principle of distinction and discrimination between combatants and civilians (non-combatants) and the distinction between civilian facilities and military objectives. The international humanitarian law or the Law of Geneva is founded on certain principles, which are grounded and derived from the international human rights instruments. These principles include the promotion of and respect for fundamental human rights and freedoms, which is basic to international humanitarian law.⁸⁴

⁸⁴ See *Universal Declaration Of Human Rights Of 10 December 1948*

International humanitarian law includes the principle of equality and the principle of non-discrimination in all forms and manifestations.⁸⁵ This principle states "rights enunciated in the present Covenant will be exercised without discrimination of any kind".⁸⁶ Among the principles of international humanitarian law is the principle of the unity of rights and duties. It recognizes the responsibilities of governments and individuals for the observance of human rights and fundamental freedoms. The principle of right of peoples and nations to self-determination is the cornerstone of international humanitarian law. This principle ensures the favorable conditions for the exercise and observance of human rights and freedoms. The basic aim of the laws of war would cover the protection of human rights. Hence one has to consider the principle of prohibition or restriction of certain types of weapons and the means and methods of warfare and its close association to the international human rights instruments. This places obligations on the states to establish regimes based on freedom and democracy. As also the possibility of a state unleashing the wars of aggression and employing weapons of mass destruction, is either greatly restricted or ruled out altogether.⁸⁷

Hence international humanitarian law is made up of three parts, 1.international legal standards regulating the basic human rights and freedom in peacetime; 2. International legal standards regulating the human rights and freedoms in wars and armed conflicts; and 3. Legal standards curbing the arms race by banning or restricting the use of certain types of weapons and promoting disarmament.⁸⁸

⁸⁵ Article 2 para 2 of *International Convention On Economic, Social And Cultural Rights*

⁸⁶ as race, color, sex, language, religion, political or any other opinion, national or social origin, property, birth or any other status, Article 2 para 1 of *International Covenant On Civil And Political Rights*.

⁸⁷ A. Eide *The Laws Of War And Human Rights: Differences And Convergence*, A Robertson, *Humanitarian Law And Human Rights*, in *Essays On International Humanitarian Law And Red Cross Principles, In Honor Of Jean .Pictet*. (The Hague, Nijhoff, 1984)

⁸⁸ G. J. Draper, *The Relationship Between Human Rights And The Law Of Armed Conflicts*, In *Yearbook Of Human Rights* , (Tel Aviv, University of Tel Aviv, 1977) .

In this connection mention must be made of the legal instruments which have direct relation to the wars and armed conflicts, be it international armed conflicts or internal armed conflicts. These legal instruments address the humanitarian problems caused by the outflows of refugees, which are the direct repercussions of these wars and armed conflicts. The 1951 Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees of 31 January 1967 is also a source for the international humanitarian law as these legal instruments address the humanitarian problems caused by wars and armed conflicts. Other non-binding instruments that has emerged in the recent era is the London Declaration of International Law Principles on Internally Displaced Persons, of 29 July 2000, and the Guiding Principles of Internal Displacement of 11 February 1998 as also the London Declaration on Internally Displaced Persons of 29 July 2000. This development was necessitated due to the presence of masses of population who have been rendered internally displaced due to armed conflicts, development projects and also natural disasters, living in refugee-like situations.

Evolution of the Law of Geneva

The law of Geneva or international law offers protection to the victims of armed conflicts and wars and to those persons who are not involved in the armed conflicts. Namely civilians and the military personnel who are hors de combat or have laid down their arms or have surrendered. The Law of Geneva or the international humanitarian law had small beginnings in the nineteenth century when in 1864 sixteen states converged in Geneva at the initiative of the Government of Switzerland and adopted the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field on 22 August 1864.⁸⁹ The Swiss government was pressurized by the founding members of the International Committee for the Relief to the Wounded, formed in 1863 by five Swiss citizens. This convention was further

⁸⁹ *Convention For The Amelioration Of The Condition Of The Wounded In Armies In The Field, 22 August 1864.*

revised when the international community adopted the Convention for the Amelioration of the Condition of the Wounded and Sick in the Armies in the Field in Geneva on 6 July 1906,⁹⁰ and the 1907 Hague Convention X for the Adaptation to Maritime Warfare of the Principles of the 1906 Geneva Convention. This Convention was aimed at protecting the wounded and sick members of the armed forces at sea.⁹¹ The 1906 Geneva Convention was replaced by the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field in Geneva on 27 July 1929. Another important development in the field of humanitarian law was the adoption of the Geneva Convention Relative to the Treatment of Prisoners of War of 27 July 1929. In the post Second World War era it became necessary to revise and upgrade the Geneva Conventions of 1929. In the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August 1949, attended by sixty four states, convened by the Swiss government, this conference adopted the four Geneva Conventions to revise the 1929 Geneva Convention for the Relief of Wounded and Sick in Armies in the Field; 1907 Hague Convention X for the Adaptation to Maritime Warfare of the Principles of the 1906 Geneva Convention; and the 1929 Geneva Convention Relative to the Treatment of the Prisoners of War.

In addition to these revisions the conference was to establish the fourth convention, which was the Convention for the protection of Civilian Persons in Time of War. Hence the Diplomatic Conference in Geneva on 12 August 1949 approved and adopted the four Geneva Conventions dealing with 1. Wounded and Sick in Armed Forces in the Field; 2. Wounded, sick and Shipwrecked in Armed Forces at Sea; 3. Prisoners of War; and 4. Civilians. For the purpose of this thesis only the Geneva Convention Relating to the Civilians and Additional Protocol II will be discussed at length. However

⁹⁰ *Convention For The Amelioration Of The Condition Of The Wounded And Sick In Armies In The Field*, 6 July 1906.

⁹¹ *Convention X For The Adaptation To Maritime Warfare Of The Principles Of The Geneva Convention*, *The Hague*, 18 October 1907.

the cardinal norm is the Red Cross and the Red Crescent emblem of the International Committee of the Red Cross is protected from the misuse or abuse in the first Geneva Convention of 12 August 1949.⁹² This misuse of the emblem of the International Red Cross constitutes a war crime, which should be respected under all circumstances.

Geneva Convention IV Relative to the Protection Of Civilian Persons in Time of War.

This is the first treaty, which is devoted to the treatment and the protection of civilians who are not taking part in the armed hostilities, whether they are in the hands of the adversary, or in occupied territory or in internment camps. Since the emergence of the civilized world began and the inception of conflicts between people and nations, it is common knowledge that the civilians were the major victims of such wars and armed conflicts as they were caught in the crossfire between the nations at war or between the factions and armed groups engaged in the internal armed conflict. The development of modern weapons of mass destruction has exposed the civilian population to the hazards of wars and armed conflicts, the world over. The experiences of the Second World War had catastrophic effects on the civilian populations in besieged and bombarded cities and in occupied territories. The Geneva Convention IV Relating to the Protection of Civilian Persons in Time of War of 12 August 1949 makes a singular contribution to the law protecting the civilian populations from the ravages of wars and armed conflicts. And it is the longest of the Geneva Conventions, which explains the importance that the world community has accorded to the issue.

Victims of war and armed conflicts have increasingly been the civilian populations or the non-combatants, innocent victims who have been trapped and caught in the crossfire between the belligerent armies of state parties and also between the armed forces of the incumbent government and the insurgent groups, or among the various armed factions involved in a

⁹² Article 38 , 44 and 53, *Geneva Convention 1*.

internecine fratricidal civil war in a brutal struggle for power . Protection of civilian population and civilian facilities has been the cornerstone of the laws of war or international humanitarian law. A civilian has been described as a person who does not belong to the armed forces, personnel of the emergency volunteer corps, or detachments, personnel of organized resistance groups, to the population of unoccupied territory who on approach of the enemy takes up arms to fight the invaders before having the time to organize into a regular armed forces, the *levee en masse*, as also movements fighting for the right to self-determination and against the forces of colonialism.⁹³

The principle of discrimination is applied in this context in that “in order to ensure the respect for and protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants, and between civilian objectives and military objectives and shall accordingly shall direct their operations only against military objectives”.⁹⁴ The Article 3 Common to the 1949 Geneva Conventions, which is a mini human rights document in itself, prohibits any kind of violence to life and person of civilians taking no part in the conflict or hostilities.

The Nuremberg Charter provision lays prohibitions on murder, ill-treatment, deportation to slave labor, or for any other purpose of the civilian population. These are considered under the gravest of the crimes, namely war crimes.⁹⁵ The crimes against humanity include murder, extermination, deportation, other acts committed against the civilian population, persecutions on political, racial or religious grounds.⁹⁶ This convention aims at protection of the most vulnerable of the civilian population, which is the

⁹³ Article 4, para A 1, 2, 3, 6 , Geneva Convention IV, Article 50, *Additional Protocol I*, See also D.G. Burwell, *Civilian Protection In Modern Warfare: A Critical Analysis Of The Geneva Civilian Convention Of 1949*, Virginia Journal of International Law, Volume 14, No 1, 1973, Pp. 123-150.

⁹⁴ Article 48, *Additional Protocol I*.

⁹⁵ Article 6, para b, *Charter Of The International Military Tribunal Of 8 August, 1945*.

⁹⁶ *ibid.* para c.

wounded, the infirm,⁹⁷ the women and children.⁹⁸ This convention makes provision for the establishment of safety zones, with the consent of both the parties to the conflict in form of an open city.⁹⁹ It offers protection to the aliens who find themselves in the territory of the parties to the conflict, persons living in occupied territories, treatment of internees and offers special measures for the relief of civilians caught in the armed conflict. Section III contains prescriptions for the occupied territories such as the inviolability of rights, deportations, transfers and evacuations, children, labor, hygiene and public health, spiritual assistance, relief, penal legislation and the treatment of detainees.

Furthering the protections offered by the four Geneva Conventions of 12 August 1949, in the light of newer developments in the international scenario, the national liberation movements which had rocked the continents of Asia and Africa and the spurt of internal armed conflicts that shook the world in Latin America, it became imperative that these developments had to be taken into account. A series of diplomatic conferences from 1974 to 1977 organized by the International Committee of the Red Cross drafted and adopted the following instruments. The first was the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of international Armed Conflicts (Protocol I) and the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the protection of Victims of Non- International Armed Conflicts (Protocol II). These Additional Protocols supplemented the Four Geneva Conventions of 1949 and extended the protection to the victims of the internal armed conflicts which had been earlier covered by the Common Article 3 of the Four Geneva Conventions of 1949, The wars of national liberation, which had raged in Asia and Africa during the 1950s and 1960s, resulting in immense loss of lives and

⁹⁷ Article 16.

⁹⁸ Article 50.

⁹⁹ Article 14

property of the civilians and the persons not involved in the conflict, were upgraded to the status of international armed conflicts.

The post - Second World War era saw a number of conflicts taking place in the territory of the nation-states, conflicts between the armed forces of the incumbent government and the forces of the rebel or dissident groups, or conflicts between the armed forces of various insurgent groups involved in a bitter civil war. Hence it became imperative that the protections as envisaged in the Geneva Conventions and the Additional Protocol (I) to the Geneva Convention extended to the conflicts of non-international character or the internal armed conflicts or civil wars, which take place in the territory of the states. The result was the adoption of the Protocol Additional to Geneva Conventions of 12 August 1949, and Relating to the protection of Victims of Non-international Armed Conflicts (Protocol II). These two Protocols were adopted by the Diplomatic Conference on 8 June 1977. This text composing of 28 Articles elaborates the protections offered by the Common Article 3 of the Four Geneva Conventions of 1949.

However Article 3 Common to the Four Geneva Conventions is binding on those states, which have not ratified the Protocol II. For the first time the Protocol II codifies the prohibitions of attacks on the civilian population and of the use of force on individual civilians. This Protocol presents fundamental guarantees in form of prohibitions on violence to the life, health and physical and mental well-being of persons.¹⁰⁰ Children are the main focus of the Protocol II as in the internal armed conflicts since the Second World War there has been the phenomenon of child soldiers in the various conflicts that have taken place in the global arena in Asia, Africa and Latin America.¹⁰¹

Hence attention has been given to these most vulnerable categories of people. If these provisions are to be made applicable to the internal armed

¹⁰⁰ Article 4, *Additional Protocol II Relating To Non-International Armed Conflicts*, in particular murder, cruel treatment such as torture, mutilation or any form of corporal punishment, collective punishments, taking of hostages, acts of terrorism, outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault, slavery and slave trade in all its forms and pillage

¹⁰¹ Article 4, para 3

conflicts both the parties, the government and the insurgents have to accept and observe the provisions of the Protocol II. This Protocol exempts from the field of operations the situations of internal disturbances, tensions, riots and sporadic acts of violence which do not constitute armed conflicts and therefore not subject to international humanitarian law.¹⁰² These situations fall in the realm of the legal instruments pertaining to the human rights. The Article 1 of the Additional Protocol II that the insurgents “exercise control over a part of the territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.¹⁰³ This Article however narrows the field of operation and in situations of armed conflict where the armed groups do not hold territory only the Article 3 Common to the Four Geneva Conventions does apply. The Article 3 is now regarded as a part of customary international law and take on a special significance for limiting the use of force in internal armed conflicts and also preventing unnecessary suffering to the people already reeling under the ravages of the conflicts under way. This Common Article 3 is also an expression of unwritten general principles of law. It is absolutely binding international law or *jus cogens*. This Article calls on parties to a civil war to conclude special agreements so as to facilitate the application of these provisions.

One important addition to the Protocol is in form of Article 17, which prohibits forced movement of civilian population and civilians cannot be compelled to leave their territory for reasons connected with the conflict. Protection is also guaranteed to the objects indispensable to the survival of the civilian population,¹⁰⁴ protection of works and installations containing dangerous forces,¹⁰⁵ cultural objects and places of worship.¹⁰⁶ The main qualification of the application is that, “Nothing in this protocol shall be invoked for the purpose of affecting the sovereignty of a state, or the

¹⁰² Article 1, para 2

¹⁰³ Article 1

¹⁰⁴ Article 14

¹⁰⁵ Article 15

¹⁰⁶ Article 16

responsibility of the government, by all means to maintain or re-establish the law and order in the state, or to defend the national unity and territorial integrity of the state".¹⁰⁷ and the application of the Protocol shall not be "invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Parties in the territory of which that conflict occurs".¹⁰⁸ Part II of this Protocol states that, "The civilian population as such as well as individual civilians shall not be the object of attack. Acts or threats of violence, the primary purpose is to spread terror among the civilian population are prohibited".¹⁰⁹

Nevertheless the Protocol II is a significant development in the international humanitarian law that it breaches the principle of sovereignty of nation states. This principle was invoked by the states and the insurgent groups to perpetuate abuses on the civilian population, in the name of protecting its sovereignty and the territorial integrity. The rules pertaining to the prohibitions on the attacks on civilians and civilian targets has found its echo in the 1991 Operation Desert Storm Rules of Engagement Pocket Card which lays down that the civilian targets and population should not be targeted and also to treat the civilian population with respect and dignity.¹¹⁰ The 1993 International Criminal Tribunal for Former Yugoslavia (ICTY) Statute lists among the grave breaches of the Geneva Conventions the acts of compelling a civilian to serve in the forces of the hostile power, depriving the civilian of a right to a fair and regular trial, unlawful deportation, or transfer or deportation of a civilian and the taking of hostages,¹¹¹ as well as the gravest of all crimes, the crime of genocide.¹¹²

¹⁰⁷ Article 3, para 1

¹⁰⁸ *Ibid.*, para 2

¹⁰⁹ Article 13, para 2

¹¹⁰ Para B, 1

¹¹¹ Article 6 para b

¹¹² See 1948 Convention On The Prevention And Punishment Of The Crime Of Genocide, 9 December 1948.

Crimes Against International Law.

In every war or armed conflict since the ancient period to the present there has been individuals and cases of the violation of international law and the laws of war and the inhuman manner in which the wars have been waged by the parties to the conflict, be it the nation states or the armed factions in an internal armed conflict. It had become imperative for the world community to identify such violations and the violators and bring them to trial either in the national or military courts or the international tribunals established for the purpose. Meting punishment to the perpetrators of such gravest violations would go a long way in acting as a deterrent to the future possible violations of international laws and international humanitarian law. Under the principle of individual responsibility the 1907 Hague Convention recognizes the responsibility of the state for the acts committed by its armed forces.¹¹³ Vague references as regard to the compensation and to initiating the proceedings against such violators were found in the 1907 Hague Regulations.¹¹⁴ The 1929 Geneva Convention on the Wounded and Sick on the field provided for the punishments based on the national penal code legislation. At the conclusion of the First World War the Treaty of Versailles required the defeated power Germany to surrender for trial members of its armed forces charged with violations of the laws of war.¹¹⁵

The best known and much of debated of the Second World War trials were of course the international Military Tribunals of Nuremberg (1945-1946) to try the war criminals of Germany and the International Military Tribunal at Tokyo (1946-1947) to try the Japanese war criminals. On 11 December 1946 the United Nations General Assembly unanimously adopted the Resolution No 95 (1), which affirmed that the "principle of international law recognized by

¹¹³ Article 3

¹¹⁴ Article 53, 56

¹¹⁵ Articles 227-230, *Treaty Of Versailles*, 28 June 1919, <http://www.acusd.edu/gen/text/versaillestreaty/all440.html> (Accessed on 21 September 2001).

the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal. This Charter has become a part of the customary international law".¹¹⁶

The questions of individual responsibility to observe international law, obedience to superior orders, concepts of war crimes, crimes against humanity, crimes against peace and grave breaches of the Geneva Conventions, questions pertaining to the rights to a fair trial have found their later expressions in the Statutes of the 1993 International Criminal Tribunal for Former Yugoslavia (ICTY), 1994 International Criminal Tribunal for Rwanda (ICTR), and the 1998 Rome Statute of the International Criminal Court (not in force as yet). According to the Article 6 of the Statute of the Nuremberg Tribunal "planning, preparation, initiating or waging a war of aggression, or a war in violation of international treaties, agreements, or assurances or the participation in a common plan or conspiracy for the accomplishments of any of the foregoing acts "constitute the crimes against peace."¹¹⁷ These provisions reflect the right to use force of *jus ad bellum*. The war crimes¹¹⁸ and the crimes against humanity constitute the *jus in bello* in international law and has been defined as the "violations of the laws and customs of war".¹¹⁹ Both these crimes correspond to the Article 3 Common to the Four Geneva Conventions of 12 August 1949, and the Article 4 of the 1977 Additional Protocol (II) to the Geneva Conventions of 12 August 1949, and Relating to the Victims of Non-International Armed Conflicts. These crimes constitute grave breaches of the laws of war and international humanitarian law and the customary international law.

¹¹⁶ Affirmation Of The Principles Of International Law Recognized By The Charter Of The Nuremberg Tribunal Resolution No 95 (1) Of The United Nations General Assembly, 11 December 1946

¹¹⁷ Article 6 para a

¹¹⁸ Article 3, 1993 Statute Of International Criminal Tribunal For Former Yugoslavia. Article 5, 1994 Statute Of The International Criminal Tribunal For Rwanda, Article 8 , 1998 Rome Statute Of The International Criminal Court

¹¹⁹ Article 3, 1998 Rome Statute Of The I CC.

International Humanitarian Law, As A Part Of Customary International Law.

It is often state that international humanitarian law or the laws of war are a part of customary international law. Even the judgment of 27 June 1986 of the International Court of Justice at The Hague in the case Nicaragua versus the United States elevated the international humanitarian law as a part of customary international law.¹²⁰ According to the Court these rules are an expression of the fundamental considerations of humanity. This customary international law is considered to be binding on all states even those states, which are not a party to the conventions or treaties. Formation of such a law requires consistent and recurring action or inaction by the states as well as recognition by the states of such action or lack of it. The general principle and practice of states includes not only diplomatic and military behavior as also official statements, court decisions, legislation and administrative decrees. United States, though not a party to the Additional Protocol I of the Geneva Conventions views many of its provisions as reflecting customary international law.

Customary law develops over time and is generally binding on all parties to it as well as to states who are not parties to it. It arises out of state practice. The codification of customary international law could be traced to the famous Martens Clause which states "Until a more complete code of the laws of war is issued the high Contracting Parties think it right to declare that in the cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principle of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of public conscience". In the Geneva Conventions of 1949 the Martens Clause finds a place, reaffirming that even if a party denounces the Convention "This shall in no way impair the obligations which the Parties to the conflict shall remain

¹²⁰ para 218, *Case Concerning Military And Paramilitary Activities In And Against Nicaragua (Nicaragua V United States Of America, (Merits)*, Judgment Of 27 June 1986.

bound to fulfill, by virtue of the principles of the law of nations as they result from the usages established among civilized peoples from the laws of humanity and the dictates of public conscience".¹²¹

Means and Methods of Warfare, Applicable to Non-International Armed Conflicts.

Some of the International legal instruments which restrict the means and methods of warfare and proclaim to the world that the right of the belligerents to use force and means and methods of warfare is not unlimited. Also these instruments of warfare are restricted as they cause superfluous injury and unnecessary suffering. These instruments are applicable both in situations of international armed conflicts as well as in internal conflicts. These compose of poisonous and asphyxiating gases, conventional weapons as also Environment¹²² and Cultural Objects,¹²³ according to the laws of war and international humanitarian law, are not to be made military targets under any circumstances.

Law of war and international humanitarian law are the result of sustained and concerted international cooperation and coexistence and reflect the humanitarian concerns in nation states arising out of customs, traditions, religion and the collective conscience of humanity, which desires to outlaw war as a mechanism to resolve the disputes among nation states and

¹²¹ *Preamble, 1899 Hague Convention II On The Laws And Customs Of War On Land., Article 63, 1949 Geneva Convention I, Article 62, Geneva Convention II, Article 142, Geneva Convention III, Article 158, Geneva Convention IV, Article 1, 1977 Additional Protocol I, Preamble Additional Protocol II, Preamble Convention On Certain Conventional Weapons.*

¹²² *These are the 1925 Geneva Protocol for the Prohibition of the use in War of Asphyxiating, poisonous or Other Gases, and of Bacteriological methods of Warfare, of 17 June 1925, the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide, of 11 December 1948, the 1980 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have indiscriminate Effects, adopted on 10 December 1980, comprising of 1980 Protocol I on Non- Detectable Fragments, Protocol II on prohibitions or Restrictions on the Use of mines, Booby-traps and Other Devices. Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons and Protocol IV on Blinding Laser Weapons. The 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti- Personnel Mines and on Their Destruction, adopted on 18 September 1997 also see 1976 United Nations Convention On The Prohibition Of Military Or For Any Other Hostile Use Of Environmental Modification Techniques, Of 2 September 1976*

¹²³ *See 1954 Hague Convention For The Protection Of Cultural Property In The Event Of Armed Conflict, 14 May 1954.*

in intra-state disputes. It is a common saying that "Laws are there only to be broken" or in the words of Cicero "When arms speak the Law is silent" in the Nicaraguan conflict that waged during the period 1981-1990 there has occurred innumerable instances which can be stated to violate the principles of international humanitarian law and the laws of war as envisaged in the Geneva Conventions.

The counterrevolutionary organizations namely the Nicaraguan Democratic Front (FDN), led by Aldfonso Robelo, Adolfo Calero and Arutro Cruz, and military leadership of Enrique Bermudez, and the Democratic Revolutionary Alliance (ARDE) led by Eden Pastora were accused of a plethora of violations of the Geneva Conventions of 12 August 1949 (Article 3 Common to the Four Geneva Conventions) and the Additional Protocol II Relating to Non- International Armed Conflicts of 8 June 1977, the body of legal rules and standards which constitute the laws of war and international humanitarian law. As per the international humanitarian law Nicaraguan conflict is a non-international conflict, even though the Contras were sponsored by the United States. As the United States did not put into combat its troops directly it stands as a non- international conflict. However these types of conflicts are termed as internationalized non-international armed conflicts.

Contra War And Violations Of International Humanitarian Law In Nicaragua.

As defined by Paul Harvey, "Low intensity conflict ranges from sanctions to terrorism, to full scale insurgency to occasional spells of conventional war. It is termed as total war at the grassroots level and also characterized as violent peace".¹²⁴ While the high intensity and mid intensity conflicts involve massive use of weapons and troops in heavy or prolonged combat, low-intensity conflict relies on indirect or prolonged combat and makes sparing use of United States soldiers, limited use of firepower waged through

¹²⁴ Paul Harvey Syndicated Radio Commentator, Broadcast of 25 October 1986, quoted in Tom Barry and Deb Preusch, *The Soft War: The Uses And Abuses Of US Economic Aid In Central America*, (New York, Grove Press, 1988), p. 75.

psychological and political operations to control and coerce the populations of the target state.

Terrorist/counter terrorist activity, use of surrogate forces, public relations campaigns through public diplomacy and media manipulation to undermine the revolutionary process undertaken by the communist/socialist governments, and to develop the public support to the counter revolution for protracted low intensity conflicts, is the game plan of the United States after the debacle of Vietnam. In such scenario guerrilla wars, drug trafficking, domestic turmoil in the Third World nations are portrayed as an overall attack on the United States security and values. In such a defensive war the battle lines, according to David Caldon of the US, SOUTHCOM, is "where economic infrastructures, social traditions and political systems are eroded from within through the external support by both the military and paramilitary means".¹²⁵ Low intensity conflicts rely on Rambo-style raids and adventurism, covert activities, quick operations, support for the surrogate forces of freedom fighters and counter terrorist attacks.

The Freedom Fighters of President Ronald Reagan comprised of two important armed groups 1. The Nicaraguan Democratic Front (FDN) based in Honduras. Alfonso Robelo, Adolfo Calero and Arutro Cruz comprising the Civilian leadership and the military command in the hands of Enrique Bermudez, one of the officers in the erstwhile National Guard, headed this group. This contra group was comprised of the most hated members of the National Guard who had fled Nicaragua in the wake of the Sandinista Revolution in July 1979.¹²⁶ The second contra organization was the Democratic Revolutionary Alliance headed by Eden Pastora, who was the hero of the Sandinista revolution and a former Sandinista himself.¹²⁷ For

¹²⁵ David L Caldon, *The Role Of Security Assistance In The Irregular Conflicts Ongoing In The Caribbean Basin Today. Prevention, Deterrence, Counteraction*, The Disarm Journal (Defense Institute of Security, Wright Patterson Air Force Base, Oh), Volume 5, No 2, Winter 1982-83, p .31.

¹²⁶ See Peter Kornbluh, *Nicaragua: The Price Of Intervention: Reagan's Wars Against The Sandinistas* , (Washington DC, Institute for Policy Studies, 1987) , p. 25-28.

¹²⁷ *Ibid.*, Pp. 28-30.

these contras one road to Managua involved terrorist attacks, sabotage, attacks on the revolutionary process initiated by the Sandinista government of National Reconstruction led by Daniel Ortega. The low intensity conflict that was launched by the Reagan Administration against Sandinista Nicaragua, the covert/ clandestine activities mounted by the CIA and the direct attacks by the United States-supported counter revolutionaries was very brutal and violent. As Sandinista leader Bayardo Arce pointed out "There has possibly never been another moment in the history of the United States in which a country so tiny and underdeveloped has been treated with such aggressiveness".¹²⁸

To make certain concepts clear it is imperative to state at the outset that though the Nicaraguan counterrevolutionaries were 1, insurgents who carried arms openly; 2. Were organized under a chain of command; 3 recognizable at the distance; and 4. conducting their operations in accordance with the laws and customs of war. Though the precondition that they should hold territory and control over it as to enable them to carry out sustained and concerted military operations and implement the provisions as per the Additional protocol II was not present as the Nicaraguan Contras did not capture any territory, yet many of the provisions that are enshrined in the protocol II were violated apart from the Article 3 Common to the Geneva Conventions of 12 August 1949, as they are the basic principles of the international humanitarian law which should be followed in all armed conflicts, be it the international as well as internal armed conflicts and are a part of customary international law. These basic rules should be also applicable as they are rested on the principles of humanity, distinction between civilians and combatants, civilian objects and military objectives, military necessity and the principle of proportionality.

¹²⁸ Bayardo Arce Closing Speech To The First Congress Of Anti- Imperialist Thought, Managua, 18-20 February 1985, in William Robinson and Kent Norsworthy, *David And Goliath, Washington's War Against Nicaragua*, (London, Zed Books, 1987), p. 26.

Since the United States¹²⁹ and Nicaragua¹³⁰ were parties to the four Geneva Conventions of 12 August 1949, and the Additional Protocol II of 8 June 1977,¹³¹ United States did not sign the Additional Protocol I of 8 June 1977, Relating to International Armed Conflicts, it becomes imperative that both the two nations adhere to their obligations envisaged in these legal instruments. The nature of conflict in Nicaragua was termed as internationalized non- international armed conflict due to the United States sponsorship of the Nicaraguan Contras. As it did not intervene directly by placing its armed forces in combat with the Sandinista Government forces it was still an internal armed conflict. How important these rules of war are in such conflicts, which are fought in the global arena will be examined as we go along.

United States covert involvement in Nicaragua and the inception of the low intensity conflict was the starting point of the series of violations of the Geneva Conventions of 12 August 1949 and the Additional Protocol II Relating to the Victims of Non-International Armed Conflicts of 8 June 1977, began on the day the hated dictator of Nicaragua Anastasio Somoza Debayle resigned, and fled the country in the wake of the successful revolution of the Frente Sandinista de Liberacion Nacional (FSLN) on 17 July 1979.¹³²

On 19 July 1979 the United States operatives mounted a clandestine mission to evacuate commanders of the National Guard aboard the DC-8 plane disguised in Red Cross insignia and as workers of the international Red Cross. This plane airlifted dozens of the national guardsmen and their families to Miami in the United States who formed the incipient contra movement. Article 12 of Additional Protocol II state clearly that the distinctive

¹²⁹ United States signed the three Geneva Conventions on 12 August 1949, and the Fourth Convention (Civilians) on 8 December 1949 and Ratified them on 2 August 1955

¹³⁰ Nicaragua signed the four Conventions on 12 August 1949 and ratified them on 17 December 1953

¹³¹ Nicaragua signed the two Protocols on 12 December 1977 and Ratified them on 19 July 1999, see *President Reagan's Letter Of Transmittal Of Additional Protocol II 1977 To The US Senate*, S. Treaty Document No 2, 100th Congress, 1st Session At III 1987, Reprinted in *American Journal of International Law*, Volume 81, 1987, Pp. 910-912.

¹³² New York Times, 18 July 1979.

emblem of the Red Cross, Red Crescent or the Red Lion should be only used by medical and religious personnel and on medical units and transports and must be respected and not be used improperly. This misuse of the emblem is considered the gravest of all crimes under the international humanitarian law, a war crime.¹³³ Misuse of the Emblem is considered the gravest of all crimes and is reprehensible as such conduct during the course of hostilities destroys the confidence in the emblem. As per Article 85, 3 (f) of Additional Protocol I the perfidious use of the distinctive emblem is a grave breach of the protocol and a war crime.

The brutality of the Contra forces ranged from kidnapping to rape, assassinations, summary executions of public officials and wanton killings. Targeting of civilian populations, creating terror and fear psychosis among the civilian population, targeting of public health workers and health centers, literacy brigadistas, involved in literacy crusades in the country, international volunteers who had come to help the Sandinista government to bring the benefits of the revolutionary process and modern development to the common people, agricultural cooperatives were the strategy that was followed by the contras in order to terrorize the population to support the counterrevolution. Targeting vital bridges linking the interior parts of the country, oil and storage facilities located in civilian areas and devastating the countryside were the game plan of the Contras, who were in name only as the acts were too sophisticated to be carried out by the Contras. These were acts of the CIA/ Special Operations Forces (SOF) specially trained by the CIA to wage low intensity conflicts all around the world. These acts were not random or accidental acts, but were a deliberate part of the military policy of the low intensity conflict. Duane Clarridge, the member of the Nicaraguan Democratic Front (FDN), in a closed briefing to the House intelligence Committee testified that the contras had killed "civilians and the Sandinista

¹³³ Article 85, 3 (f), *Additional Protocol I*, See Christopher Dickey, *With The Contras: A Reporter In The Wilds Of Nicaragua* , (New York, Simon and Schuster, 1985), p. 55.

officers in the provinces as well as heads of cooperatives, nurses, doctors and judges” as a policy strategy, “After all this is War”.¹³⁴

Civilian Targets- Acts Of Terrorism.

In December 1981 an explosive device was placed aboard an Aeronica Jet at Mexico International Airport, timed to go off once the plane was airborne. But due a delay in the flight taking off the plane was destroyed before the passengers were to board the plane. The Nicaraguan Democratic Front claimed responsibility for the act.¹³⁵

On 20 February 1982 terrorism hit Managua. While the Customs workers were handling the baggage at the Sandino International Airport a powerful explosive device hidden in a suitcase detonated. The powerful explosion, which ripped through the customs lounge killed four and seriously injured three and destroyed the terminal. According to Hector Frances the explosives were placed by the FDN in Miami. The explosion took place just as the delegates of the permanent Conference of the Latin American Political Parties were arriving in Managua and the Mexican President Jose Lopez Portillo was scheduled to begin his state visit to Nicaragua later that week.¹³⁶

On 14 March 1982 a fifteen-man demolition squad of the FDN set C-4 charges (a powerful plastic explosive produced exclusively by the CIA and is twice as powerful as TNT) under the girders of the 400 feet long Rio Negro Bridge near the town of Somotillo in Chinandega province. The explosion brought the massive structure collapsing into the river. On the same day another elite commando unit executing a similar operation brought down the Rio Coco bridge, fifty kilometers near Ocotol. Reacting to these acts of terrorism the Sandinista government declared a state of emergency on 15 March 1982.¹³⁷

Continuing the rein of terror on 8 September 1982 a twin-engine light plane dropped two bombs near the house of the Nicaraguan Foreign Minister

¹³⁴ Miami Herald, 20 October 1984

¹³⁵ William Robinson and Kent Norsworthy, *David And Goliath*, *Supra* Note 128, p. 49.

¹³⁶ *Id.*,

¹³⁷ *id.*

Miguel de Escoto in Managua. The two bombs exploded on the grounds of the nearby elementary school.¹³⁸ On the same day a Cessna-404 plane flew low over lake Managua, approached the Sandino International Airport and dropped two 500-pound bombs. One hit a commercial airline while another fell near the installations of the Sandinista Air Force. Anti-aircraft batteries downed the airplane, which came down on the control tower. One was killed and three were injured. The contra outfit the Democratic Revolutionary Alliance (ARDE) released a communiqué in San Jose, Costa Rica claiming responsibility for the act.¹³⁹

On 9 September 1982 two Jet-28 fighter-bombers assaulted Corinto, Nicaraguan principal commercial and trade port. They aimed at the port's major bridge, Soviet Merchant vessels and the pair of petroleum storage tanks. But they failed in their mission as they were driven back by the Sandinista aircraft units.¹⁴⁰ However on 10 October 1982 United States aircraft flew over Corinto, distracting the attention of the city defense forces, while the United States Navy, Sea, Air, and Land units (SEALS) a naval branch of the Special Operations Forces using sophisticated artillery equipment speed boats launched rockets and fired machine guns at port installations. Within minutes a petroleum storage tank containing 1.6 million gallons of diesel fuel burst into flames. The explosions shook the city and heralded the beginning of a 48-hour nightmare for the residents of the city.

Local militia and Sandinista mass organizations swung into action evacuated the nearby residents and battled the blaze, which spread to an adjacent tank. Firefighters were brought in from other cities around the country. Volunteers erected sandbag walls to contain the flames and removed the goods awaiting shipment in port warehouses. Intense heat ignited the third fuel tank and Cuban, Mexican and Colombian firefighters were brought in. Fearing another explosion in nearby storage tanks containing jet fuel and gases Nicaraguan authorities evacuated the city "If all

¹³⁸ *Ibid.* p. 72.

¹³⁹ *Id.*,

¹⁴⁰ *Id.*

this had exploded not a soul would have been left in Corinto to tell about it" one weary Mexican technician told the authors. Four storage tanks, 660 tons of foodstuffs and forty tons of medical supplies donated by the United Nations were lost while the pump and pipe systems, cranes and warehouses were damaged in the blaze which raged out of control for two days.¹⁴¹ This was a clear violation of the protection given to the works and installations containing dangerous forces in the Additional Protocol II. Such acts are expressly forbidden if such attacks cause the release of dangerous forces and cause severe losses to the civilian population.¹⁴²

On 8 September 1983 the United States attacked Nicaragua for the first time directly when speedboats manned by the CIA controlled Unilaterally Controlled Latino Assets (UCLA's) a group of mercenary commando units hit Puerto Sandino.¹⁴³ One month later the US personnel conducted a helicopter raid on the Nicaraguan port of Potosi killing one Nicaraguan and wounding eight.¹⁴⁴ On 2 February 1984 UCLA pilots flying the United States military planes bombed a communications center and a military training camp in northern part of the country leaving four dead.¹⁴⁵ On 7 March 1984 American pilots flying a Hughes 500 helicopter provided a back up to the attacks launched by the UCLA-manned speedboats at the petroleum storage facilities at the San Juan del Sur port. A similar operation was carried out on the Puerto Sandino petroleum storage facilities on 30 March 1984.¹⁴⁶ On 9 April 1984 the CIA provide rocket and gunfire support against the Sandinista forces while the ARDE forces held the Oceanside village of San Juan del Norte for a period of 48 hours before the Sandinistas claimed it back.¹⁴⁷ All these acts violated the provisions of the Additional Protocol II relating to the Non- International Armed Conflicts. A plan called Bitter Christmas attempted

¹⁴¹ *Ibid.* p. Peter Kornbluh, *Nicaragua: The Price Of Intervention*, *Supra* Note 126, p. 48, Washington Post, April 18, 1984

¹⁴² Article 15, *Additional Protocol II*

¹⁴³ Peter Kornbluh, *Nicaragua: The Price Of Intervention*, *Supra* Note 126, p. 48

¹⁴⁴ *Id.*,

¹⁴⁵ New York Times, 3 May 1984

¹⁴⁶ Peter Kornbluh, *Nicaragua: The Price Of Intervention*, *Supra* Note 126, p. 48.

¹⁴⁷ The Wall Street Journal, March 6, 1985

to sow terror in the various cities around the country. C-4 plastic explosives packaged in flashlights and children lunch boxes was uncovered and presented to the journalists on 23 December 1982 by the Interior Minister Tomas Borge. These explosives were to detonate the charges in super markets, movie theaters and buses on Christmas Eve.¹⁴⁸ Acts of terrorism has been expressly prohibited under the international humanitarian law.¹⁴⁹

Targeting of the Civilian populations, as a part of the destabilization programme, was the hallmark of the low intensity program aimed at not only spreading terror among the people but also undermining the revolutionary process and the support to the revolution by targeting the institutions which have successfully implemented the revolutionary objectives. The deliberate targeting of the civilian population and the non-combatants expressly prohibited in the four Geneva Conventions of 12 August 1949 and the Additional Protocol II of the Geneva Conventions of 8 June 1977 which enshrines the basic rule of the international humanitarian law. "In order to ensure respect for and protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between the civilian objectives and military objectives and accordingly direct their operations only against military objectives".¹⁵⁰ "Civilian population as well as individuals shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited".¹⁵¹ Also among the prohibitions that are provided to the civilian population are that "starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless for that purpose objects indispensable to the survival of the civilian population such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking

¹⁴⁸ William Robinson and Kent Norseworthy, *David And Goliath*, Supra Note 128, p. 61.

¹⁴⁹ Article 4, para 2 (b).

¹⁵⁰ Article 13, *Additional Protocol II*

¹⁵¹ *ibid.*, article 13, para 2

water installations and supplies and irrigation works".¹⁵² In these prohibitions come health facilities, agricultural cooperatives, and other civilian targets. Other prohibitions, which are ensured in any conflict, are the prohibition on cultural objects and places of worship,¹⁵³ forced movement of civilians.¹⁵⁴

Targeting the civilian population and non-combatants became the official policy of the Reagan administration, which was implemented through the counterrevolutionaries. The main targets were the supporters and the beneficiaries of the Sandinista revolution including the members of the Sandinista organizations (representing over half of the population).¹⁵⁵ This policy was articulated by the CIA Manual Psychological Operations in Guerrilla Warfare, which was circulated by the CIA to the Nicaraguan contras. This 90-page booklet was written by a counterinsurgency specialist, calling himself John Kirkpatrick advised the contras to regulate their savagery to use implicit terror for political advantages. It states "In a revolution individual lives are under constant threat of physical damage, If the government police cannot put and end to the guerrilla activities, the population will lose confidence in the government which has the inherent mission of guaranteeing the safety of the citizens however guerrillas should be careful not to become an explicit terror because this would result in a loss of popular support".¹⁵⁶

This Manual, which was at the eye of the storm and the center of a major controversy explicitly stated that "targeted torture and assassination of teachers, health workers, agricultural technicians and their collaborators" is the main objective and the "killings are not random acts of terror by violence is a part of the logical and systematic policy".¹⁵⁷ This Manual specifically ordered to neutralize carefully selected and planned targets such as court

¹⁵² *ibid.* Article 14 ,

¹⁵³ *ibid.* Article 16

¹⁵⁴ *ibid.* Article 17

¹⁵⁵ William Robinson and Kent Norseworthy, *David And Goliath*, *Supra* Note 128, p 10

¹⁵⁶ *Psychological Operations In Guerrilla Warfare*, (New York, Vintage Books,1985). Quoted in Peter Kornbluh, *Supra* Note 126, p 43

¹⁵⁷ Sarah Miles, *The Real War: Low Intensity Conflict In Central America*, North America Congress on Latin America (NACLA) Report on the Americas (New York), Volume 20, No 2, April - May 1986, Pp. 7-48, p 34

judges, magistrates, police and state security officials and tax collectors.” Other forms of violence the CIA Manual advocated were creation of bands of contra provocateurs “armed with clubs, iron rods, placards and if possible small fire arms” to instigate violent confrontations with the Sandinista authorities.¹⁵⁸ Advocating murder violates the President order No 12333, which states that, “no person employed by or acting on behalf of the United States Government shall engage in or conspire to engage in assassination. and no agency may request any person to undertake activities forbidden by this order”.¹⁵⁹ However another agency had other plans.

The Defense Intelligence Agency reported that between t 14 March-21 June 1982 the Contra-CIA operatives involved in 1. Sabotage of highway bridges and attempted destruction of fuel tanks; 2. Sniper fire and attacks against small military bands; 3. Attacks of small guerrilla bands on individual Sandinista soldiers; 4. Assassination of minor government officials and Cuban Advisers; and 5. burning of customs warehouses and buildings belonging to the Ministry of Construction and Crops.¹⁶⁰ Another CIA Manual entitled *The Freedom Fighters manual* also called the CIA assassination Manual left behind after an attack on the city of Ocotol in June 1984 provided instructions for thirty eight sabotage tasks against the government -owned property, making slow fuses, construction of Molotov cocktails for the setting of police stations and fuel depots on fire, damage office equipment, clog toilets, slash tires puncture gas tanks, destroy the engines of the government vehicles, tear down electrical and telephone lines set warehouses on fire.¹⁶¹ The four Geneva Conventions of 12 August 1949 in its common Article 3, which is considered as the mini human rights document, lays down guarantees that must be given to the civilian population. These are 1.

¹⁵⁸ Peter Kornbluh, *Nicaragua: The Price Of Intervention*, *Supra* Note 126, Fn, 111, p. 230

¹⁵⁹ *The CIA's Nicaragua Manual*, P.104, Peter Kornbluh, *Nicaragua: The Price Of Intervention*, *Supra* Note 126 p. 45.

¹⁶⁰ Defense Intelligence Agency, *Weekly Intelligence Survey*, July 16, 1982, pp 20-21.

¹⁶¹ *The Freedom Fighters Manual* (New York, Grove Press, 1984, Quoted in Peter Kornbluh, *The Covert War*, in Thomas Walker ed., *Reagan Versus The Sandinistas*, *Supra* Note 27, see also New York Times 5 June 1983.

Violence to the life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; 2. Taking of hostages; 3. Outrages upon personal dignity, in particular humiliating and degrading treatment, and 4. Passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people". Common Article 3 adds *inter alia* prohibitions against collective punishments, terrorism, slavery, pillage and threats to commit the same.

In late 1981 Washington launched its Miskito offensive dubbed operation Red Christmas. This operation involved an invasion of the province of Zelaya Norte by the Miskito, Sumo, Rama Together (MISURA) and the Somocistas (former National Guardsmen of Anastasio Somoza Debayle) take Puerto Cabezas and declare the entire Atlantic coast of the Nicaraguan territory. Steadman Fagoth the leader of the MISURA kept threatening the Miskito community that anyone who failed to join the MISURA would be deemed a Sandinista and shot. On 14 December 1981 Fagoth's forces attacked a town of San Carlos on the Rio Coco (which had not heeded to the call to join the MISURA) kidnapped 12 villagers and murdered them on the other side of the border. Between 12-25 December 1981 Steadman Fagoth made repeated broadcasts that the Sandinista aircraft were coming to bomb Miskito villages and told them to cross the border to Honduras. Terrified by the disinformation campaign and responding to the call 10,000 inhabitants of the Rio Coco community crossed the river on to Honduras.¹⁶²

As a Contra officer put it which sums up the policy of the insurgents and their supporter the United States, "Come to the counterrevolution there will be massacre in Nicaragua. We have a lot of scores to settle. There will be bodies from the border to Managua".¹⁶³ Implementing the counter-revolution on 12 May 1980 the most brutal of the murders was of the literacy brigadista Georgino Andrade in the northern village of El Mancital The Somocistas

¹⁶² William Robinson and Kent Norsworthy, *David And Goliath*, *Supra* Note 128, Pp. 53-54.

¹⁶³ *Contra Officer*, *Newsweek*, 8 November 1982.

(former national guardsmen) dragged the young man into a corn field and tortured him for several hours and finally bayoneted him and then shooting him.¹⁶⁴ In December 1981 the contras overran the Atlantic coast community of Bilwaskarma . Doctors, nurses and health workers were beaten, raped and kidnapped. The hospital was destroyed.¹⁶⁵ The estimated value of damages to the health infrastructures from 1980 to September 1985 was estimated to be \$1.5 million. 61 health facilities were destroyed including three belonging to the Nicaraguan Baptist Convention.¹⁶⁶

On 24 July 1982 a heavily armed force of 100 contras swooped from a Honduran base of San Minhas , on to a town of San Fransisco del Norte in the province of Chinandega. The contras fired indiscriminately on the inhabitants killing fourteen and injuring four. Victorio Centeno a local Sandinista leader was dragged on to the main road and ordered to shout Lon Live Somoza. When he objected he was beaten to death in the presence of the townspeople contras who later kidnapped eight residents and took them to Honduras.¹⁶⁷ On 13 October the members of the Nicaraguan Democratic Resistance attacked the town of Pantasma , murdered forty seven people. There was no military significance in that town. In November 1984 the same contras attacked the coffee farm La Sorpresa killing seventeen residents, including four women and two children. During the Contra raid on El Nispero on 9 November 1986 two Sandinista soldiers, two elderly women, a young mother and two infants were killed and on 18 June 1987, a band of contras attacked a farming settlement in eastern Nicaragua and killed eight civilians and wounding ten others.¹⁶⁸ On 4 December 1984 the contras pounced on a truck carrying mostly communications workers from Managua between Esteli and Matagalpa, with automatic assault rifles, grenade launchers and rockets.

¹⁶⁴ William Robinson and Kent Norsworthy, *David And Goliath*, *Supra* Note 128, p 43

¹⁶⁵ Mirna Cunningham, *Black Scholars Interviews*, *The Black Scholar* (The Black Scholar, San Francisco) , Volume 14, No 2, March- April 1983, p .17-27.

¹⁶⁶ NICA, *The Baptist Church In Nicaragua*, *Nicaragua Update* (Central American Task Force, Cincinnati, Ohio), Volume 7, No 5, September - October 1985.

¹⁶⁷ *David And Goliath*, *Supra* Note 128, p 56

¹⁶⁸ San Francisco Chronicle, 19 June 1987.

The contras then proceeded to pour gasoline on the defenseless victims as they lay wounded and set fire to the vehicle itself. Nearly all the persons were killed. The contras had first bayoneted the people before setting fire to the vehicle.¹⁶⁹

In February 1984 the testimony of the contra atrocities by the Nicaragua victims made headlines all around the world, which testified to the brutality of the contra war. One traumatized woman in the Segovian mountains in late 1982 narrated the manner in which the contras raped her daughter and killed her son who resisted the rape.¹⁷⁰

A part of the concerted plan was targeting the international volunteers who had come to Nicaragua to take a look at the revolutionary process and also to assist the Sandinista government in carrying out its economic and social development works and aid the common people, and to deter the others who wanted to come to Nicaragua from participating in the development process and improving the lives of the ordinary people. Two West German women were kidnapped and raped in 1983 and a Swiss pacifist was killed in an ambush which also took the lives of five Nicaraguan women. In 1986 eight West Germans were kidnapped and held by the contras for three weeks before being released.¹⁷¹

On 26 August 1989 a group of 300 contras attacked a refugee settlement called El Acihole located near Rio Blanco and killed three and kidnapped two Nicaraguans. A second attack was more brutal.¹⁷² On 31 August 1989 thirty contras stopped a vehicle traveling near Sarayal, outside Jinotega, carrying sixty campesinos and singled out Marcos Castro, a civilian aged 40, one of the leaders at the Abisinia refugee settlement, took him away, gouged out his eyes out, castrated him, cut his tongue and broke his limbs before killing him.¹⁷³

¹⁶⁹ *David And Goliath*, *Supra* Note 128, p. 146.

¹⁷⁰ Envio, February 1984, quoted in, *David And Goliath*, *Supra* Note 128, p.56.

¹⁷¹ Peter Ford, *Nicaragua: A Siren To Many Foreigners*, The Christian Science Monitor (The Christian Science Monitor, Boston MA.,), June 12, 1986, p.7 .

¹⁷² *NICALINE Special Note. Appendix II*, 1989, Nicaragua Update September 5, 1989

¹⁷³ *Ibid.*,

The modus operandi of the contras was that the FDN contra units would come on an undefended village. Assemble all the residents in a town square and proceed to kill in full view of others all persons suspected of working for the Nicaraguan government or the FSLN including the police, local militia members, party workers, teachers and farmers from the government sponsored cooperatives.¹⁷⁴ Another report by an international organization OXFAM described the contras game plan. It states that the "Contras cross the border from the bases in Honduras to commit acts of sabotage, burning cooperatives, blowing up bridges, killing and kidnapping of teachers and health workers and farmers."¹⁷⁵

By September 1983 the contras had killed nearly seven hundred Nicaraguans and had caused \$600 million in damage to the economy. Between 1983 and September 1985 35 health workers were killed, 11 were wounded seriously. Among those who were killed were two international physicians, one from France and one from West Germany, The latter were killed in cold blood by the contras but not before they had raped and shot two nurses working with them.¹⁷⁶ The contras had defined the non-combatant international workers/volunteers as prime targets for kidnapping and assassination in a clear violation of the international humanitarian law, which makes a distinction between the civilians and combatants and civilian objects and military objectives.¹⁷⁷ On 3 June 1983 in the region of Jalapa area the Honduran artillery battalions pounded the town of Teotecacinte with mortar and cannon fire. 1000 men, women and children ran into the underground air raid shelters .The siege lasted three hours and provided the back-up for 600

¹⁷⁴ Affidavit To The International Court Of Justice, September 5, 1985., In Holly Sklar, *Washington's War On Nicaragua*, (Boston, South End Press, 1988), P.117.

¹⁷⁵ OXFAM America Report, *Facts For Action-Nicaragua Development Under Fire*, September 1983.

¹⁷⁶ Dieter Eich and Carlos Rincon, *The Contra: Interviews With The Anti-Sandinistas* (San Francisco, Synthesis Publications, 1985), Pp. 63-66.

¹⁷⁷ Peter Ford, *Nicaragua: A Siren For Many Foreigners*, *Supra* Note 171, p. 7.

Somocistas who crossed the border to attack selected targets, destroying about twenty tobacco sheds.¹⁷⁸

In 1985 the Ministry of Education suffered huge losses when 188 teachers and students were killed, 106 teachers were kidnapped, 27 schools destroyed, 19 schools damaged, 502 abandoned. 32,680 primary school students and 11,359 adult education students were left unattended and 181 teachers were dislocated. The number of the students in 1986 who would have been enrolled in schools and should have been actively pursuing their education would have numbered about 1,260,000 except for the war of aggression, the contras and the policies of the Reagan administration.¹⁷⁹ By the end of 1985 the Nicaraguan Ministry of Health estimated that 3,652 civilians had been killed, 4,039 wounded and 5,233 kidnapped during contra attacks.¹⁸⁰ In 1983 alone 103 medical workers, teachers, agronomists, church officials were murdered. Rural medical clinics, schools, farming cooperatives became the targets of the contra attacks. This Ministry also documented rapes, kidnappings, torture, mutilation and murders of Nicaraguan civilians comprehensively banned under the international humanitarian law.¹⁸¹ Americas Watch noted that the contras were systematically engaged in the killing of prisoners and the unarmed population carrying out their obligations and duties of the revolutionary process initiated by the Sandinista government.¹⁸²

Selective and indiscriminate attacks on civilians and torture and outrages on the personal dignity were the order of the day. The ironical twist to the contra tale and the counterrevolutionary war came on 30 May 1984 when the ARDE leader Eden Pastora called a press conference in La Penca

¹⁷⁸ William I. Robinson, *Nicaragua: Ready For The Worst*, *Apia News Service*, Managua 20 June 1983, *David And Goliath*, *Supra* Note 128, p. 63

¹⁷⁹ Central America Historical Institute (CAHI), *Education In Nicaragua: More Students, But What Are They Learning*, Update, Volume 5, No 21, May 1986, Pp. 5-6.

¹⁸⁰ David Seigal, *Nicaraguan Health. An Update*, (Latin American Studies Association, Pittsburg PA.) LASA Forum 9, Winter 1986, p. 30.

¹⁸¹ *Id.*,

¹⁸² Americas Watch, *Human Rights In Nicaragua: Reagan, Rhetoric And Reality*, (New York, Americas Watch, July, 1985), p. 16.

to denounce his colleague Alfonso Robelo's decision to merge his forces with the rival Nicaragua Democratic Front (FDN) . A powerful bomb exploded and in the blast Eden Pastora was injured which also killed four people. An American reporter Linda Frazer who had come to cover the event bled to death in the mud while the supporters quickly took away Pastora from the scene of the blast. This incident made a disillusioned Pastora leave the counterrevolution and go back to his earlier profession as a shark fisherman.¹⁸³

As the former spokesman of the FDN Edgar Chamorro explained it "It is a gross fabrication to claim that the contras are composed of democratic group. As I can attest the contra military force is directed and controlled by the officers of the Somoza National Guard. During my four years as a contra director it was a premeditated policy to terrorize the civilian non-combatants to prevent them from cooperating with the government. Hundreds of civilian murders, tortures and rapes were committed in the pursuit of this policy of which the contra leaders, their CIA superiors were well aware".¹⁸⁴ Joseph Adams, a former marine officer who served as the chief of security for FDN leader Adolfo Calero testified that he had helped maintain "a list of civilians marked for assassination when the contra forces entered Nicaragua."¹⁸⁵ As Enrique Bermudez, the military leader of the FDN forces ordered that the during the raids on economic targets in northern Nicaragua particularly coffee plantations and farming cooperatives, in the event of any resistance brought forth brutal retribution. The commandants in the field were authorized to select their targets to die and Bermudez would order his forces to have the throats of the prisoners slit rather than waste bullets".¹⁸⁶ As Adolfo Calero, the political military director of the Nicaraguan Democratic Front put it "There is

¹⁸³ Washington Post, May 30, 1986.

¹⁸⁴ Edgar Chamorro , Interview in 1986, in Thomas Bodenheimer and Robert Gould, *Rollback : Right Wing Power In US Foreign Policy* , (Boston, South End Press, 1989), p. 89.

¹⁸⁵ John Stockwell, *The Secret Wars Of The CIA*, 10 October 1987, The Other Americas Radio.

¹⁸⁶ Quoted in Terrell .J. and R. Martz, *Disposable Patriot: Revelations Of A Soldier In America's Secret Wars*, (Bethesda, MD, National Press, 1992) , p. 149.

no line at all, not even a fine line between a civilian farm owned by the government and a Sandinista military outpost hence killing a civilian is legitimate".¹⁸⁷

Destabilization as was done in Nicaragua in the 1980s and earlier in Chile in 1973 is a strategy to study the factors that constitute the basis of the society's cohesiveness and then using that knowledge to tear apart that society through programs of social, economic and diplomatic harassment and covert programs of psychological and paramilitary means. Massive displacements of the people and their lives led to destruction of the rural infrastructures. Transportation and storage systems resulted in the disintegration of the rural trading and market networks. The war impeded the health services and sanitation. Malaria and polio, which was completely eliminated by 1982 thanks to the massive vaccination campaigns, reappeared in 1984.¹⁸⁸ On 3 January 1982 the Reagan administration put out a press release highlighting a Honduran government report of a massacre of 200 Miskito Indians by the Sandinista troops inside the Honduran territory. Secretary of State Alexander Haig publicized photographic evidence of the "atrocious genocide actions by the Sandinistas against the Miskitos", a picture ostensibly of the FSLN officials burning the bodies of the Indians, However this photographs were taken in 1978 which was showing the civilian victims of Somoza National Guard being burned by the International Committee of the Red Cross for sanitary reasons.¹⁸⁹

Chemical And Biological Warfare

Biological or bacteriological warfare is the use of infectious micro-organisms (living substances) against people, livestock, and plants for the purpose of producing disability or death. The International Conventions to which the United States is a signatory, prohibit both the biological and

¹⁸⁷ New York Times 23 November 1984.

¹⁸⁸ Pan American Health Organisation (PAHO), EPI Newsletter, Volume 7, No 6 December 1985, p .7, *PAHO Status Of Malaria Programs In The Americas*, Epidemiological Bulletin (Washington DC), Volume 7, No 1, 1986, Pp. 1-5.

¹⁸⁹ Peter Kornbluh, Chapter " *The War At Home*", in *Nicaragua: The Price Of Intervention*, *Supra* Note 126, p. 176.

chemical warfare. The 1899 Hague Declaration II prohibited the use of projectiles whose sole objective was to diffuse asphyxiating gases, was derived from the general principles of customary international law prohibiting the use of poison and materials causing unnecessary suffering.¹⁹⁰ The 1925 Geneva Protocol for the prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed on 17 June 1925, which the United States ratified on 12 April 1975, expressly prohibits the use in warfare, asphyxiating, poisonous or other gases and of all analogous liquids, materials or devices.¹⁹¹ However with the experience of the violations of these provisions in the conflicts after the Second World War, in Vietnam, the Iran-Iraq war (1980-1988), in Central America in the 1980s the international community adopted the Convention Prohibiting of the Development, Production, Stockpiling and the use of Chemical Weapons and on Their Destruction in Paris, on 13 January 1993.

Contrary to the international humanitarian law as enshrined in these international instruments, as one Congressional report stated as early as 1969 "Biological weapons are extremely adequate for covert use. They function through delayed reaction. difficult to detect and only small amounts are needed, in addition biological agents are invisible, odorless and without flavor and since they do not normally produce immediate physiological damage, their early detection would be almost impossible".¹⁹² Hence they are ideal weapons for low intensity conflict.

In April 1984 peasants in the northern town of Yali reported that during the contra raid they were asked to vacate the town as they were going to detonate bombs that produced poisonous fumes. Two days earlier doctors in San Jose hospital had treated two ARDE members for burns caused by white phosphorous the use of which is expressly prohibited by the international

¹⁹⁰ *Laws Of War: Declaration On The Use Of Projectiles The Object Of Which Is The Diffusion Of Asphyxiating Or Deleterious Gases*, 29 July 1899.

¹⁹¹ *Protocol For The Prohibition Of The Use In War Of Asphyxiating, Poisonous Or Other Gases, And Of Bacteriological Methods Of Warfare*, 17, June 1925.

¹⁹² See *David And Goliath*, *Supra* Note 128, p. 173.

conventions. The ARDE claimed that they were injured when the explosives that they were carrying into the Nicaraguan territory accidentally exploded inside Nicaragua.¹⁹³

In early 1985 outbreak of dengue fever hit Nicaragua. This sickness, which produces intense muscular, bone and joint pains, high fever, eye irritations and splitting headaches. The dengue virus is transmitted by a common species of tropical virus *Aedes Aegypti* whose rapid reproduction makes it possible to spark off epidemics in densely populated areas by a small number of virus carrying insects namely mosquitoes. The virus-carrying mosquito can be introduced by over-flying aircraft, sea-based vessels or even by the agents using small methods as releasing of the shutter of the camera which triggers the virus. The first incident off dengue fever was reported in the southwestern port of San Juan del Sur and later affected about 500,000 people which represented a veritable time bomb. The Nicaraguan government declared a state of Epidemiological Emergency and the Ministry of Health launched a massive anti-dengue fever campaign. Officials in Managua led by the president Daniel Ortega on 28 September 1985 did not rule out the hand of the enemy in causing the outbreak of the virus as this epidemic was caused immediately after a series of low-level reconnaissance flights over the capital city. The Ministry of Health mobilized some 20,000 brigadistas to lead the neighborhood fumigation and sanitation campaigns, sent out fumigation aircraft and mobile pumps to drain out puddles. Hospitals and clinics set up round the clock dengue windows. By October 1985 the epidemic was brought under control causing 10 people to die, fumigation cost \$6.5 million alone, loss in millions of work hours and school hours and draining the nation's scant resources.¹⁹⁴

In late December 1985 the residents of Villaneuva and San Manuel in northwestern Honduras claimed that mysterious aircraft were spraying yellow

¹⁹³ *Id.*,

¹⁹⁴ *ibid*, Pp. 173-174., See also Ed Vuillamy, *US Prepares To Spray Genetically Modified Herbicides On Colombians*, London Observer, 2 July 2000.

rain in the night of 25 December 1985 and the flights had continued once every six months until late January 1986 people began complaining of all kinds of disorders including skin rashes, fevers, digestive and respiratory difficulties. The health disorders were identical to the one produced by Agent Orange, a toxic defoliant used in Vietnam by the United States. The National Industrial and Construction Union of Honduras charged the United States officials in the country were experimenting with lethal weapons/chemicals on the Honduran people with the objective of using them in Nicaragua and elsewhere in Central America.¹⁹⁵ These chemical and biological weapons were used after rapid strides in preventive health programs. Popular participation and cooperation was widespread in all the health sectors. The more the health programs became widespread and successful the counterrevolutionaries saw them as appropriate targets for their attacks.

On 5 October 1986 an American pilot Eugene Hasenfus flying a plane load full of arms was shot down by the Sandinista armed forces. Two other persons on board were killed, and Eugene Hasenfus was caught by the Sandinista armed forces. This operation was aimed at supplying arms to the Nicaraguan contras and to smuggle out cocaine. Even during the period of his incarceration as a prisoner he was treated in accordance with the rules of international humanitarian law, not by the regular armed forces but by the Sandinista militia. The main reason behind such treatment was that the Sandinista fighters had not only some education but also came from a more highly developed cultural framework, having lived in urban Nicaragua.¹⁹⁶ The real reason of the Reagan administration's war against Nicaragua is because "Nicaragua is in no way a threat to the United States. It has held elections, which were free of violence and less spoiled by intimidation and which offered a wider range of ideological choices than most elections in the region. It has

¹⁹⁵ See *David And Goliath*, *Supra* Note 144, p. 176, see also in brief Harvey Williams, *The Social Impact In Nicaragua*, in Thomas Walker, ed., *Reagan Versus The Sandinistas*, *Supra* Note 27, p. 25

¹⁹⁶ Joaquin Cuadra Lacayo, *International Humanitarian Law And Irregular Warfare: Lessons Learned In Latin America*, *International Review of the Red Cross* (International Committee of the Red Cross, Geneva), No 840, 31 December, 2000, Pp. 941-951.

pledged not to accept foreign bases, either for nuclear or conventional weapons on its territory and has offered to sign a treaty with the United States to that effect. Its only danger to Washington is that it sets an example of independence which has been lacking for decades in the Central American isthmus".¹⁹⁷ According to OXFAM America "only in Nicaragua has a substantial effort being made to address the inequalities in land ownership and to extend health, educational and agricultural services to the poor peasant families, commitment of the political leadership to improve the condition of the people and encouraging their active participation in the development process" and adds that it had to shift its focus from the development to war relief due to the low intensity conflict waged by the Reagan Administration and its proxy army the counterrevolutionaries.¹⁹⁸ As the noted political scientist and critic of American foreign policy Noam Chomsky put it "Starving peasants in Honduras who look across the border and see health clinics, literacy campaigns, increased production of subsistence and so on might ask "Why not us?" the rot may spread infecting the region and beyond threatening the United States control in more crucial domains".¹⁹⁹ This was the real threat to the United States and the *raison de'tre* of its low intensity conflict against Nicaragua.

Section Three

The Mining Of Nicaraguan Harbors

The National Security Council (NSC) plan called for the mining of Nicaraguan harbors. Three important ports of Puerto Sandino , El Bluff, and the Port of Corinto were the targets, the objective being the disruption of Nicaraguan trade and commerce and the undermining of the economy. Designed by the CIA Weapons Group, a munitions manufacturing division of the CIA with assistance from the naval Surface Weapons Center in Silver

¹⁹⁷ Manchester Guardian, 6 July 1986.

¹⁹⁸ OXFAM America *Special Report, Central America*, Fall 1986, Diana Melrose *Nicaragua: A Threat Of A Good Example*, (Oxford, OXFAM, 1988), Pp. 14, 26.

¹⁹⁹ Noam Chomsky, *Turning The Tide: The United States Intervention In Central America And The Struggle For Power*, (Boston, South End Press, 1985), p. 66 ff.

Springs, Maryland. The underwater charges deploying in Nicaragua consisted of large metal cylinders, packed with 300-pounds of C-4 plastic explosives enough to strike small fishing vessels and to damage larger vessels.²⁰⁰ Unilaterally Controlled Latino Assets (UCLA) commando teams operating from the mother ships anchored offshore deposited the mines in the shipping channels of Nicaraguan major Atlantic and Pacific coasts in January-February 1984.²⁰¹

Blowing up ships headed for Nicaraguan ports was one way to make a splash, an instrument of psychological warfare and create a fear psychosis in the minds of the Nicaraguans and to deter the other nations from having economic and trade relations with Nicaragua. On 5 January 1984 the CIA ordered the Nicaraguan Democratic Front (FDN) to take the credit for the mining of the harbours. According to the FDN spokesman Edgar Chamorro.²⁰² CIA/FDN broadcasts warned Lloyds of London, the shipping insurance company that the merchant vessels should stay away from the dangerous territorial waters if Nicaragua and that only the FDN had the knowledge of the location of the mines and the know-how of how to deactivate them.²⁰³ On 25 February 1984 three Nicaraguan fishing trawlers had struck the mines in the Atlantic port of El Bluff. By 10 April 1984 10 commercial vessels had struck the mines out of which six were non-Nicaraguan, the others were from Japan, The Netherlands, Liberia and from Panama as well as a Soviet oil tanker. Five sailors were injured by the exploding underwater charges. Two Nicaraguans were killed.²⁰⁴ After the Soviet tanker Lugansk struck the mines the Foreign Minister Andrei Gromyko issued a message to the United States charge in Moscow deploring the Act of banditry and piracy and accused the

²⁰⁰ New York Times, 1 June 1984

²⁰¹ *ibid.*, see also Peter Kornbluh, *Supra* Note 126, p 49

²⁰² The New Republic August 5, 1985, p 22

²⁰³ *Communique Of The Nicaraguan Democratic Front*, quoted in Peter Kornbluh, *Supra* Note 126, p. 49.

²⁰⁴ *Id.*,

United States government of carrying the policy of State-endorsed terrorism.²⁰⁵

The State Department issued a carefully worded denial of all information regarding the mining of Nicaraguan ports.²⁰⁶ In a Memorandum entitled "Use of Naval mines in the Exercise of Self-Defense" the State Department rationalized the deployment of mines as a legitimate means of interrupting the flow of arms destined for infiltration into the territory of El Salvador or to disrupt the flow of military and other materials essential to the attackers overall aggressive effort".²⁰⁷ The United States Ambassador to the United Nations Jean Kirkpatrick, in a speech before the American Bar Association (ABA) advanced the argument that unless all countries adhered to the international law "no nation need to do so. The rule of law did not require that one nation abide by the law if another did not. We cannot permit ourselves to be bound to unilateral compliance with the obligations which in fact exist under the Charter but are renounced by the other. This is not what the rule of law is all about".²⁰⁸ A special report by the Democratic Study Group of the House of Representatives concluded that the mining was "disrupting the export of Nicaraguan cotton and coffee crops at their period of maximum export activity thus further destabilizing the nation's economy by denying it much needed foreign exchange".²⁰⁹

Five merchant marine vessels including a Mexican oil tanker carrying 75,000 barrels of much needed fuel turned away. Coffee and cotton piled up in Nicaraguan docks.²¹⁰ Jaun Gazol, the Nicaraguan commercial Attaché to the organization of American States estimated that the mining had cost his country over \$ 10 million which included \$2 million in damaged boats, \$500,000 in port taxes due to delays in receiving imports, penalties on export

²⁰⁵ News and Views from the USSR, (Moscow) March 21, 1984

²⁰⁶ New York Times, March 22, 1984

²⁰⁷ Peter Kornbluh, *Supra* Note 126, p. 50.

²⁰⁸ *Id.*,

²⁰⁹ Quoted in *Id.*,

²¹⁰ *Id.*

contracts, perished goods and added transportation costs.²¹¹ Reagan's staunch supporter Senator Barry Goldwater (Democrat-Arizona) affirmed that the mining of Nicaraguan harbors was an "act violating the international law".²¹² Mexico characterized the mining as "counterproductive act" and called for the "total elimination of all armed violence, direct or indirect, against Nicaragua",²¹³ In an editorial of *Le Monde* (Paris) which observed that the mining set a dangerous precedent "The CIA has shown the way in Nicaragua for other countries tempted by operation of international gangsterism in the waters of the Persian Gulf, for instance, which is vital for the West's oil supplies".²¹⁴

In the United States on 10 April 1984 the Republican controlled Senate voted 84-12 in favor of a resolution condemning the President Reagan for the mining of Nicaraguan ports. The House of Representatives passed a similar resolution by a vote of 281-111.²¹⁵ Senator Patrick Leahy expressed what could be the sentiments of liberal opponents when he wrote, "Everything that is wrong about the mining operations, its illegality, its indiscriminate violence, its use of terror against the non-combatants, its harmful impact of the American capacity to use its influence to promote peace, its worsening and brutalization of American foreign policy, is equally true of much of the entire covert action program".²¹⁶ Chairman of the Senate Intelligence Committee Senator Barry Goldwater and Vice-Chairman Daniel Patrick Moynihan were angry with the Reagan administration for not keeping the Congressional intelligence Committees informed in compliance with the 1980 Intelligence Act which requires Congressional Committees to be kept informed of all intelligence activities, including any significant anticipated intelligence activity'.

²¹¹ Juan Gazol , *Statement To The Organization Of American States (OAS)*, April 24, 1984

²¹² *Time*, April 23, 1984 (Cover Page).

²¹³ Peter Kornbluh, *Supra* Note 126, p. 51.

²¹⁴ *Le Monde* (Paris) , 18 April 1984

²¹⁵ Peter Kornbluh, *Supra* Note 126, p.52.

²¹⁶ Patrick Leahy, *A Makeshift Policy, Leading To War*, *The Washington Post*, 15 April 1984

National Security Adviser Robert MacFarlane contradicted his statement and stated that the Congressional Oversight Committees were told of every important detail of the United States covert operations in Nicaragua and El Salvador including the mining.²¹⁷ Later on April 5 1984 the Senate voted to provide \$21 million in aid to the contras. As Tom Wicker asked "Where did they think the contras were getting the money, the materials, the training, the overall direction to do the job?, If not from the CIA? What's the difference between the CIA employees and the contra guerrillas?"²¹⁸ The Nicaraguan Minister of Interior Tomas Borge questioned "The same Senators who a few days ago approved \$21 million for the war against Nicaragua blushed about the mining of the ports but what do these Senators think that these millions of dollars are going to be used to plant flowers and vegetables on our fertile soil?"²¹⁹

Deactivating the mines was a very costly process for Nicaragua. Fishermen joined the coastguard divers in deactivating the mines. In this operations thirty people were injured by the exploding charges. Surface mines, which detonated by direct contact were the easiest to remove, but the mines placed on the harbour floor and set off by sonic waves or movement proved to be risky. A dozen vessels made a detour into Costa Rican ports where the merchandise were unloaded and then sent by land to Nicaragua. Nicaragua also set up an escape system by deploying its fishing fleet and coast guard units to steer foreign ships into port to safety.²²⁰ The Sandinistas on 30 March 1984 introduced the resolution in the United Nations Security Council denouncing the escalation of the acts of military aggression brought against Nicaragua. France and The Netherlands voted in favor of the resolution, while Britain abstained. The United States exercised its veto to

²¹⁷ Bernard L. Collier, *Macfarlane Says Hill Knew About The Mining*, Washington Times, April 13, 1984.

²¹⁸ Quoted in Miami Herald, 13 April 1984.

²¹⁹ *Ibid.*,

²²⁰ William Robinson and Kent Norseworthy, *David And Goliath*, *Supra* Note 128, p.101.

stave off the condemnation in the organization.²²¹ The French offered to help Nicaragua to clear the mines if the other friendly countries of Europe would also aid in the operations.²²²

Nicaragua and the International Court of Justice

On 9 April 1984 Nicaragua filed a formal complaint before the International Court of Justice at The Hague, calling on the United States to “cease and desist immediately from all use of force-direct or indirect, overt or covert, against Nicaragua”.²²³ In the proceedings of the Case Concerning the military and Paramilitary Activities in and Against Nicaragua the International Court of Justice relied on the declarations made by the parties in accepting the compulsory jurisdiction of the Court under the Article 36 of the Statute of the International Court of Justice. The Government of Nicaragua in its declaration dated 24 September 1929 had recognized the compulsory jurisdiction of the Permanent Court of International Justice.²²⁴ Nicaragua had contended that the United States had acted in breach of its obligations under the Treaty of Friendship, Commerce, and navigation signed between the two states on 21 January 1956.²²⁵ While the United States in its declaration deposited on 26 August 1946 had accepted the compulsory jurisdiction of the Court. But it had also stated that the compulsory jurisdiction would not apply to the disputes arising out of or related to events in Central America and the parties concerned would settle any such disputes.²²⁶ On 13 April 1984 the United States Ambassador at The Hague contended via a letter that the Court was without the jurisdiction and requested that the proceedings be terminated.²²⁷

²²¹ See H.M.L. Beri, *Mining Episode In Nicaragua*, Strategic Analysis (Institute for Defense Studies and Strategic Analysis, New Delhi) , Volume 8, No 2 , May 1984. p. 167.

²²² *Ibid.*, p. 166.

²²³ *Case Concerning Military And Paramilitary Activities In The Against Nicaragua (Nicaragua Versus The United States Of America) Request For The Indication Of Provisional Measures, Order Of 10 May 1984*, in International Court of Justice (ICJ) Report 1984 , para. 2.

²²⁴ *Ibid.* para .10.

²²⁵ *Ibid.* para 5, 7 (D).

²²⁶ *Ibid.* Para 8.

²²⁷ *Ibid.* para 6, 33.

On 10 May 1984 the International Court of Justice decided that the question of inadmissibility of the Nicaraguan application and the jurisdiction of the Court must be first addressed.²²⁸ To strengthen the case against Nicaragua, El Salvador filed an application of intervention in the ongoing proceedings against Nicaragua on 15 August 1984, five months after the instituting of proceedings by Nicaragua. It supplemented by a letter dated 10 September 1984.²²⁹ But the World Court after considering the application of El Salvador, on 4 October 1984 adjudicated that the Declaration of Intervention of the Republic of El Salvador was inadmissible in the ongoing proceedings in the Nicaragua versus the United States.²³⁰ After scores of testimonies and hearings the World Court on 26 November 1984 judged that it had the jurisdiction to sit on the case and that the Nicaraguan application was admissible.²³¹ President Reagan decided on 7 October 1984 that the United States terminated its acceptance of the Compulsory jurisdiction of the Court, a decision, which would take effect six months from that date.²³² The United States on 18 January 1985 announced that it was withdrawing from the proceedings in the Nicaraguan case as it felt that the World Court did not have the jurisdiction and the competence to hear the case.²³³

Nevertheless the International Court of Justice proceeded with the hearings of the Case despite of the absence of the defending party. Nicaraguan case rested upon the submission that the United States had acted in violation of the Article 2 para4 of the United Nations Charter and of customary international law, which obligates the states to refrain from the

²²⁸ See ICJ Reports (1984) for the Judgment

²²⁹ *Case Concerning Military And Paramilitary Activities In And Against Nicaragua (Nicaragua Versus The United States), Declaration Of Intervention Of The Republic Of El Salvador, Judgment Of 4 October 1984*, ICJ Reports (1984), para. 7.

²³⁰ *Ibid.*, see entire judgment.

²³¹ *Case Concerning Military And Paramilitary Activities In And Against Nicaragua (Nicaragua Versus The United States) Jurisdiction Of The Court And Admissibility Of The Application, Judgment Of 26 November 1984*, ICJ Reports (1984)

²³² *ibid.*, para 36, see also International Herald Tribune, 8 October 1985.

²³³ Department of State Bulletin, March 1985, Pp. 64-65, see also Abraham D. Sofaer, *The United States And The World Court*, Department of State Current Policy NO, 769, 1985-1986. also quoted in ,*Case Concerning Military And Paramilitary Activities In And Against Nicaragua*

threat or use of force.²³⁴ United States in its submission invoked Article 51 of the Charter of the United Nations and stated that it was acting in collective and individual self-defense, in response to the alleged armed attack by Nicaragua against El Salvador.²³⁵ This armed attack consisted of the provision of military aid to the Salvadoran guerrillas fighting the right-wing military/civilian junta.²³⁶ The Nicaraguan attorneys also charged the United States of perpetrating acts of aggression on Nicaragua.²³⁷

On 27 June 1986 the International Court of Justice by a vote of 12-3 decided that " the United States by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting, and aiding military and paramilitary activities in and against Nicaragua, has acted against the Republic of Nicaragua in breach of its obligation under customary international law not to intervene in the internal affairs of another state."²³⁸ By a vote of 12-3 it decided that the attacks on Nicaraguan territory in 1983-1984 namely the attacks on Puerto Sandino on 13 September 1983, and on 14 October 1983, an attack on Corinto on 10 October 1983, attacks on Potosi Naval Base on the night of 4/5 January 1984, and attack on San Juan del Sur on 7 March 1984, attacks on patrol boats at Puerto Sandino on 28 and 30 March 1984 and an attack on San Juan del Norte on 9 April 1984 involving the use of force the United States has acted in breach of its obligation against the customary international law not to use force against another state. It also stated that the United States in its over-flights over Nicaraguan airspace and the laying of mines in the territorial waters of the Republic of Nicaragua had acted in breach of customary international law, not to violate its sovereignty and not to interrupt peaceful maritime commerce.

(*Nicaragua Versus The United States Of America*) (*Merits*) Judgment Of 27 June 1986 , in ICJ Reports (1986) , para 10.

²³⁴ *Ibid.*, para 35.

²³⁵ *Ibid.*, para 35.

²³⁶ *Ibid.*, paras 51, 52, 53

²³⁷ *Ibid.*, paras 80-81

²³⁸ *Case Concerning The Military And Paramilitary Activities In The Against Nicaragua (Nicaragua Versus The United States) (Merits) , Judgment Of 27 June 1986.*

The United States by not making known the location of the mines was acting in breach of its obligations under the customary international law. The Court also found the United States indirectly guilty of violation of international humanitarian law by its commissioning of the Manual entitled "Psychological Operations in Guerrilla Warfare" in 1983 and disseminating it to the contra forces and also encouraging them to the commission of such acts, which are against the international humanitarian law. But the Court could not find a basis for concluding that the acts committed by the contras could be attributed to the United States directly. It ordered the United States to immediately refrain from all the acts and also ordered the United States to pay reparations to the tune of \$17 billion to the Republic of Nicaragua.

The World Court judged that the laying of mines in Nicaraguan territory was not only unlawful but also a breach of the principles of international humanitarian law underlying the Hague Convention No VIII OF 1907.²³⁹ This Convention bans the laying of automatic contact mines off the coast and ports of the enemy with the sole objective of intercepting commercial shipping. And to render such mines harmless within a limited time, to notify the location of the mines, which constitute danger zones, by a notice addressed to the ship owners through the diplomatic channels. Among the provisions of the Convention was that at parties to the conflict undertake to remove the mines, which they had laid. The World Court adjudicated that the rules enshrined in Common Article 3 of the four 1949 Geneva Conventions applying to the armed conflicts of non-international character should be applied. It categorically states that the United States was under the obligation to respect the Conventions and to ensure respect for them and thus not to encourage persons and groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 of the Geneva Conventions as this obligation derives from the general principles of humanitarian law to which

²³⁹ *Ibid.* paras 13 of the judgment

the Conventions give specific expression.²⁴⁰ Such principles have become absolutely binding international law: *jus cogens*.

However the World Court in its judgment did not consider the maneuvers held by the United States with Honduras near Nicaraguan borders, or the supply of funds to the contras amounting to the use of force. However this support given to the Contras was a breach of the principle of non-intervention.²⁴¹ The Court found after examining the material particularly the Executive Order of 1 May 1985 of President Reagan imposing economic sanctions, the mining of Nicaraguan ports and the direct attacks on ports and oil installations cannot be justified as necessary to protect the essential security interests of the United States.²⁴² To top it all the International Court of Justice awarded the Republic of Nicaragua an interim award of the sum of \$ 370.2 million to be paid by the United States as reparations.²⁴³

In the opinion of the President of the International Court of Justice Judge Nagendra Singh the peaceful solution of the disputes rests on the due observance of the two basic principles which is the non-use of force in inter state disputes and the principle of non-intervention in the internal affairs of the other states. He stated that these principles belong to the realm of *jus cogens* and hence is the corner stone of the human effort to bring peace in a world torn by strife.²⁴⁴

The dissenting Judge Stephen Schwebel agreed that the United States in its failure to make known the existence and the location of the mines laid by it, its causing of the publication of the manual Psychological Operations in Guerrilla Warfare, advocating acts such as rape, kidnappings and other acts was in violation of the laws of war and the international humanitarian law. Though the United States acted unlawfully against Nicaragua both directly and indirectly by its support to the contras yet it was

²⁴⁰ *Ibid.* paras 215-220

²⁴¹ *Ibid.*, paras 227-238

²⁴² *Ibid.*, paras 270-282

²⁴³ *Ibid.* paras 283-285

²⁴⁴ For the *Opinion Of President Nagendra Singh*, see ICJ Reports (1986) , Pp. 151-157.

justified because of the prior support that the Nicaraguans extended to the armed insurgency in El Salvador. The support to the Nicaraguan Contras was given in response to the Nicaraguan support to the armed insurgency in El Salvador, by providing them with the organization, planning, and training of the Marxist guerrillas in El Salvador and not only supplying them with arms, munitions and supplies but also command and control facilities which enabled the leadership to operate from Nicaraguan territory. Hence the United States was entitled to assist El Salvador in the exercise of individual and collective self-defense. He was of the opinion that the United States actions was proportional by its aiding of the Nicaraguan contras.²⁴⁵

The Court concluded that the Nicaraguan government was not responsible for any flow of arms to the Salvadoran guerrillas as it was not supported by any evidence by the United States. The withdrawal of the United States from the World Court proceedings undermined the principles upon which the international order of which the United States is a part and as well as also undermined the sanctity of the institution which was set up to uphold international law which regulates the peaceful relations among the states. The Reagan administration underestimated the international fallout that arose out of the mining episode. To say that this episode to a large extent accelerated the regional peace process, which was set in motion in September 1983 by the Contadora nations of Central America and the South American States would not be out of place in this context. In the words of Richard Barnett "No administration since the war has celebrated unilateralism as this one has. In national security, economic policy, and diplomacy, Washington prefers to advance US interests through its own initiatives and power rather than the mechanisms of international cooperation".²⁴⁶ According to Laurence .H. Tribe Tylor, the professor of Constitutional Law at the Harvard University "At home and abroad the Reagan administration has made clear that it will not be inconvenienced by mere laws; it will do as it

²⁴⁵ *Dissenting Opinion Of Judge Stephen Schwebel*, see ICJ Reports (1986), Pp. 266-527.

²⁴⁶ Richard J. Barnett, *A Dangerous Celebration Of America Unilateralism*, International Herald Tribune, 25 October 1985.

likes".²⁴⁷ Lauterpacht pointed out "It is a truism repeated with excessive frequency that the law is not a panacea and that not all causes of the international conflict or tension can be settled by law. But it is a fact that once the parties have submitted a dispute for judicial determination, the principle of the completeness of the legal order fully applies, with the result that all disputes thus submitted are fully capable of a legal solution".²⁴⁸

The United States was only following in the tradition it had set in the matters dealing with Central America, when in 1912 the Central American Court of justice adjudged and condemned the United States military intervention in Nicaragua, which was simply ignored by the United States, a decision which effectively destroyed the Court.²⁴⁹ The United Nations General Assembly in two of its resolutions called on the United States for its compliance with the judgment of the International Court of Justice, but to no avail.²⁵⁰ By this act of withdrawal from the World Court proceedings the United States demonstrated to the world that it could go any extent to subordinate international law and institutions to its national interests and foreign policy considerations and also a supreme contempt for the Court. A similar contempt that could be seen in the recent decision of the Administration of George Bush Jr., to withdraw from the International Criminal Court and the hostility it is exhibiting towards this institution.

The International Court of Justice Judgment of 27 June 1986 had its echoes in the proceedings of the International Criminal Tribunal for Former Yugoslavia (ICTY) in the Case of Dusko Tadic in 1995. The Appeals Chamber of the ICTY held that the Common Article 3 of the Geneva Conventions reflects the customary international law notion of the laws and

²⁴⁷ Laurence.H.Tribe, *Of Government And The Law*, International Herald Tribune, 25 October 1985,

²⁴⁸ Hersch Lauterpacht, *The Development Of International Law By The International Court*, (1953), Pp.4-5.

²⁴⁹ Noam Chomsky, *Manufacture Of Consent In Democracy*, Philosophy and Social Action, Volume 11, 1985, Pp. 21, 24.

²⁵⁰ *Judgment Of The International Court Of Justice Of 27 June 1986 Concerning Military And Paramilitary Activities In And Against Nicaragua-Need For Immediate Compliance*, UNGA. RES/41/31, Of 3 November 1986 and UNGA RES. 43/11, of 25 October 1988.

customs of war and acts may violate it “regardless of whether they occurred within an internal or an international armed conflict”.²⁵¹ In this Tribunal Final Judgment two Judges, Judge Ninian Stephen of Australia and Judge Lal Chand Vohrah of Malaysia interpreted the ICJ judgment of 27 June 1986 as requiring the government of a state to exercise effective control over the operations of a military force in order for the acts of that force to be imputed to that state.²⁵²

Presiding Judge Gabriella Kirk McDonald of the United States disagreed with the ICJ Judgment. She found that the World Court in the Nicaragua Case did not intend for an effective control standard to describe the degree of proof necessary for the determination of the agency between a government and a military force, but rather a finding of dependency on one side and the control on the other was sufficient. She opined that any such “effective Control” standard should be limited to the facts in Nicaragua. Nicaragua decision was primarily concerned with state responsibility for the violation of international humanitarian law and not with individual criminal responsibility, which was the case with regard to the peculiar facts of the United States-supported struggle of the contras in Nicaragua. The general principles of international law relating to state responsibility for *de facto* organs or agents to the specific circumstances of rebel forces fighting a seemingly internal conflict against the recognized government of a state, but dependent on the support of a foreign power in the continuation of that conflict. In this scenario the majority of the judges in the ICTY Chamber noted

²⁵¹ *The Prosecution Vs Dusko Tadic Decision On The Defense Motion For An Interlocutory Appeal On Jurisdiction. Case No 1t -94-1-Ar.72. 2 October 1995*, para 137. See also Marco Sassoli and Laura M. Olson, *The Judgment Of The ICTY Appeals Chamber On The Merits In The Tadic Decision*, International Review Of The Red Cross (Geneva, ICRC), Volume No 839, 30 September 2000, Pp. 733-769.

²⁵² Judge Lal Chand Vohrah, in Rochus. J.P. Pronk and Brian D. Tittermore, *ICTY Issues Final Judgment Against Dusan Tadic In The First War Crimes Trial Since World War II*, <http://www.wcl.american.edu/pub/humright/brief/14i3/icty43.htm> (Accessed on 27 January 2002), and for the Final Judgment see, *Prosecutor Vs Ducko Tadic a/k/a Dule, Sentencing Judgment, 14 July 1997*, http://www.un.org/icty/tadic/trial2/judgment/tal-ts1_970714e.htm (Accessed on 27 January 2002).

that the ICJ had set a high standard for determining whether or not the United States was responsible for the contras.

The United States participation even if preponderant or decisive in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets and the planning of the whole of its operation, is still insufficient itself on the basis of the evidence in the possession of the Court. This evidence is not enough for the purposes of attributing to the United States the acts committed by the Nicaraguan contras in the course of their military or paramilitary operations in Nicaragua. For this conduct to give rise to legal responsibility of the United States it would, in principle, have to be proved that the state had effective control of the military or paramilitary operations in the course of which the alleged violations were committed. Only if the acts of the Nicaraguan contras had to be attributed to the United States these acts "as acts of the United States against Nicaragua would have to be subject to the law of international armed conflicts."

According to the ICTY the two test of state responsibility arising out of 1. Responsibility arising out of unlawful acts of state officials and 2. Responsibility generated by acts performed by private individuals acting as de facto state organs. For this private individuals not only paid or financed by the state and their action be coordinated or supervised by this state but also that the state should issue specific instructions concerning the commission of the unlawful actions in question. This agency test was met by the use of Unilaterally Controlled Latino Assets (UCLAS) who were paid and supervised by the United States and in addition acted under their specific instructions. However this test was not applicable as far as the Contras were concerned as no specific instructions had been issued by the United States concerning the violation of international humanitarian law, which they had allegedly perpetrated.²⁵³ The UCLAS were non-nationals of the United States being in the pay and on direct instruction and under the direct supervision of the United States military and intelligence personnel to carry out specific tasks

²⁵³ *Prosecutor V Dusko Tadic (Appeals Chamber)*, Judgment Of 15 July 1999, Para, 114.

such as mining of Nicaraguan ports or oil installations. The Court led that their acts were imputable to the United States on account of the fact that in addition to being paid by the United States officials or agents they had been given specific instructions by these agents or officials and had acted under their supervision.²⁵⁴

According to the International Court of Justice where the relationship of a rebel force to a foreign state is one of dependence on one side and control on the other "it would be appropriate to equate the rebel force for legal purposes with an organ of that state acting on behalf of that state, then in such a case the conflict can be seen to be an international one, even if it is prima facie internal and there is no direct involvement of the armed forces of the state. However the conflict between the contras and the Nicaraguan government was not international because it was not proved that the United States had exercised enough control over the contra activities in all fields to justify treating the contras as acting on its behalf.²⁵⁵

However in the opinion of Judge Ago the misdeeds committed by some members of the contra forces should be considered as acts imputable to the United States is likewise in conformity with the provisions of the International Law Commission's draft. It would indeed be inconsistent with the principles governing the question to regard the members of the contra forces as persons or groups acting in the name and on behalf of the United States. Only in cases where certain members of those forces happened to have been specifically charged by the United States authorities to commit a particular act, or to carry out a particular task of some kind on behalf of the United States would it be possible so to regard them. Only in those cases does international law recognizes that the conduct of such persons or group, which are neither agents nor organs of a state, nor members of its apparatus, even

²⁵⁴ Ibid., para 109, *Military And Paramilitary Activities In And Against Nicaragua (Nicaragua Vs The United States Of America)*, Judgment Of 27 June 1986, para. 86.

²⁵⁵ Ibid. para 109

in the broadest acceptation of that term, may be held to be acts of that state.²⁵⁶

Referring in particular to the atrocities, acts of violence or terrorism and other inhuman actions that Nicaragua alleged to have been committed by the contras against the persons and the property of the civilian population, it holds that the perpetrators of these misdeeds may not be considered as having been specifically charged by the United States authorities to commit them, unless in certain concrete cases unchallengeable proof to the contrary has been supplied.²⁵⁷ Even the ICTY stated that the Nicaragua Case was not in consonance with the logic of state responsibility as Article 8 of the Draft Articles on State Responsibility adopted provisionally by the International Law Commission in 1998 stated that if it is proved that the individuals who are not regarded as organs of the state by its legislation nevertheless do in fact act on behalf of that state their acts are attributable to that state. The rationale is to prevent states from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by state officials, or by claiming that individuals actually participating in governmental authority are not classified as state organs under national legislation and therefore do not engage state responsibility. In other words states are not allowed to, on one hand, to act *de facto* through individuals and on the other to dissociate themselves from such conduct when these individuals breach international law. The requirements of international law for the attribution to states of acts performed by private individuals are that the state should exercise control over the individuals. The degree of control, however, may vary according to the factual circumstances of each case.²⁵⁸ The International Court of Justice set a particularly high standard for the determination of whether or not the United States was responsible for the actions of the

²⁵⁶ *ibid.* para 16.

²⁵⁷ *Id.*

²⁵⁸ *Prosecutor V Dusko Tadic*, *Supra* Note, 253, Para116, *Prosecutor V Zejnil Delalic, Zdravko Mucic (Aka Pavo), Hazim Delic And Esad Landzo (Aka Zenga), (CelebicI) (Appeals Chamber)*, Judgment Of 20 February 2001, para 17.

contras, *vis-a-vis* the effective control test and the agency test. As it was said when the responsibility for a military organization is in question, the overall control by a foreign state over that organization is sufficient to render the foreign state responsible for all the acts of that organization and to make the international humanitarian law of international armed conflicts applicable.²⁵⁹

No matter what the International Court of Justice had to say about the merits of the Nicaragua Case or that in the views of the Justices the case did not stand up to the test of Effective Control and the Agency Test.²⁶⁰ In the same International Criminal Tribunal for Former Yugoslavia (ICTY) Judgment in the Delalic Case which quoted extensively from the Nicaraguan Case and the Tadic Case which stated that the correct legal test for determining whether an armed conflict is international was set for the by the Appeals Chamber in the Tadic Appeals Judgment which rejected the effective control test in relation to the acts of the armed forces or the paramilitary units. It considered Nicaragua in depth and held that effective control test enunciated by the ICJ was not persuasive. The overall control test meant that the in order to attribute the acts of the military or a paramilitary group to a state it must be proved that the state wields overall control over that group, not only by equipping and financing the group but also by coordinating or helping in the general planning of its military operations ad activity. However it is also necessary that in addition the state should also issue either to the head or to the members of the group instructions for the commission of specific acts contrary to the international law.²⁶¹ This implies that the control required by international law may be deemed to exist when a state (or in the context of an armed conflict, the party to the conflict) has a role in organizing, coordinating and planning the military actions of the military group. This is in addition to

²⁵⁹ Marco Sassoli and Laura M. Olson, *The Judgment Of The ICTY Appeals Chamber On The Merits In The Tadic Decision.*, International Review of the Red Cross, No 839, 30 September 2000, Pp. 733-769.

²⁶⁰ See William J. Fenwick, *The Applications Of Geneva Conventions By The ICTY*, International Review of the Red Cross, 30 June 1999, Volume834, Pp. 317-329.

²⁶¹ *Prosecutor V Dusko Tadic (Appeals Chambe)*, Judgment Of 15 July 1999, , *Supra* Note 253 , Para 131. Quoted In *Prosecutor Vs Zejnil Delelic, Hazim Delalic And Esad Landzo (Aka.*

the financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto state organs regardless of any specific instructions by the controlling state concerning the commission of each of those acts.²⁶²

The threshold of the agency test and the effective control test was placed at a high level that it would have become difficult to prove the level of organizing, coordination, and planning of the strategies and the tactics the Reagan administration had been involved. Also it was increasingly difficult to prove the level of planning of the military actions of the paramilitary groups (contras) that was directed by the United States as also the financing, equipping and the training of those groups. Much of the lethal aid went in the guise of humanitarian aid and there was no way to prove that these contra groups were acting as de facto acts of the controlling state (United States).

Yet it cannot be denied that the Nicaraguan contras had violated the norms and legal standards laid down in the international humanitarian law and had violated the principles of the laws of war. All the acts that were prohibited by the Common Article 3 of the Geneva Conventions of 1949 and some of the provisions of Additional Protocol II Relating to Non-International Armed Conflicts of 1977, acts such as rape, kidnapping, indiscriminate attacks on civilians and facilities, mutilation, torture, attacks on installations containing dangerous forces, etc were committed by the contra forces. A force that was being portrayed as being the "moral equivalent of the Founding Fathers and of the French Resistance" President Reagan's "Freedom Fighters" proved to be nothing more than a ragtag army of former National Guardsmen who were in their earlier incarnation were the worst perpetrators of human rights and humanitarian law violators, who lacked the democratic credentials to take up the national leadership. By 1987 they were a spent force despite the millions of dollars that the Reagan Administration showered upon them and the massive support that they got from the United States.

Zengya), *Supra* Note 258, http://www.un.org/icty/celebici/appeal/judgment/cel_aj010220.pdf (Accessed on 27 January 2002).

²⁶² *Delalic Case (Celebici)*, paras 15-17.

Canada's leading newspaper, which was moderate and pro-US condemned the Reagan Administration for the acts of madness in organizing a band of cutthroats to attack Nicaragua under the direction of its bizzare cowboy leader in Washington.²⁶³ While the British press pleaded with President Reagan to, "come to terms with the reality in Central America and allow the peace plan to proceed instead of financing a murderous and incompetent band of contra mercenaries in his obsession with the overthrow of the elected government of Nicaragua", a crusade, which has, "brought dishonor to him and his administration". The Reagan administration, "flouted the rulings by the International Court of Justice and parallels the so-called Soviet Brezhnev Doctrine as applied in Afghanistan and Eastern Europe. It has caused deaths of tens of thousands of men, women and children and millions of pounds in destruction in an already wretchedly poor area of the world. The symbol of the Republican Party has of course been that of an elephant. It is dismaying to watch it behaving true to form with a gnat".²⁶⁴ As former Director of the Central Intelligence Agency (CIA) during the Carter era 1977-1991 Stansfield Turner in his testimony before the United States Congress in Aril 1985 stated that CIA actions in Nicaragua, "have to be characterized as terrorism, state-supported terrorism".²⁶⁵

In conclusion it is stated that, "Under US law any person who assists a felon in committing a crime-say by supplying the weapon used in assassination-is considered an accessory to the crime and can be punished accordingly. And while the same principle is not always applicable to international law logic suggests that any government which assists another in the abuse of human rights-say by supplying the weapons used for assassination-is an accessory to such offense and should be condemned accordingly. So long as Washington supplies repressive technology to foreign dictators, the United States will remain a party to any violations of human

²⁶³ Toronto Globe and Mail. Editorials, 5, 18, 28 March 1986.

²⁶⁴ Editorial, *Elephant And The Gnat*, Observer (London), 23 August, 1987.

²⁶⁵ Quoted in House Subcommittee on Western Hemispheric Affairs, "US Support for the Contras", 99th Congress., 1st Session, April 16, 1985, p. 4.

rights committed in those countries”.²⁶⁶ The same logic should be applied to the actions of brutal, insurgent guerrilla groups in the Third World who are sponsored, armed, trained and directed by the United States. However in the moment of victory of the opposition forces the Chamorro administration preferred to have the Sandinista government soldiers to surrender rather than annihilate them. It treated its prisoners well, did not stage large scale executions and did not resort to abductions and adopted a policy of healthy respect for and protection of the civilian population as a part of the Sandinista slogan of, “Implacable in combat, Generous in Victory”. These policies helped in furthering the process of reintegration, reconciliation and peace building.

²⁶⁶ Michael Klare and Cynthia J. Arnson, *Supplying Repression: United States Support For Authoritarian Regimes Abroad*, (Washington DC, Institute for Policy Studies, 1981), p. 7