UNIT 23 IHL AND THE MANDATE OF THE CONSTITUTION OF INDIA

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23.1 INTRODUCTION

India has given ample exposition to the IHL Principles in its constitution. Article 51 of the constitution enjoins the state to 'endeavour to (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another...' Article 253 of the constitution empowers the Indian Parliament to enact any law in order to implement any treaty, or agreement to which India is a party, or even any decision of an international conference, notwithstanding anything contained in the constitution in respect of distribution of legislative competence between parliament and state (provincial) legislatures. International treaties do not automatically form part of national law. They must, where appropriate, be incorporated into the legal system by an Act of parliament. Ratification/accession of these instruments does not, however, make them enforceable per se before the courts nor do they override the municipal Law. But the courts can take them into account in appropriate cases while interpreting the statutory law, or constitutional provision, Municipal courts generally interpret statutes so that, as far as possible, they are consistent with the rules of international law binding on India.

The basic principles of IHL are reflected in numerous provisions of the constitution in Part III (Fundamental Rights), Part IV (Directive Principles of State Policy) and Part IV-A (Fundamental Duties). The IHL rules and principles of non-discrimination, right to life including prohibition on torture and inhuman treatment, prohibition of slavery, protection of children, women and family life, respect for religion, judicial guarantees to protect the core rights, protection of environment find a fair place in these provisions of the constitution. Article 14 and 15 ensure right to equality and non-discrimination; right to life and personal liberty is enshrined in Art.21. The Supreme court through its various judgments has expanded the ambit of Article 21, including practically all the rights necessary to 'live with human dignity'. Judicial
guarantees are placed in Article 20 and 22 of the constitution. Article 20 provides that ‘No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charges as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence.’ Article 22 ensures protection in the case of arrest and detention. Clauses (1) and (2) of Article 22 down the procedure to be followed when a person is arrested.

Article 23 provides protection against exploitation which has to be read along with Article 24 prohibiting employment of children in hazardous factory or mine and 39 (c), (e) and (f). Right to freedom of religion and environment find a fair mention in Articles 25, 48-A and 51-A (g) respectively. But unlike the IHL, which does not allow any derogation from its rules, the rights enshrined in Part III (except Articles 20 and 21) can be modified or suspended under certain conditions. Articles 33 (Power of Parliament to modify the rights conferred by Part III in their application to Armed Forces, etc.) and 34 (Restriction on rights conferred by Part III while martial law s in force in any area) in corporate major exceptions to Part III. Under these articles, parliament has the power to modify and restrict these rights in their application to (a) the armed forces, and (b) forces charged with the maintenance of public order i.e., police force, (c) members of the intelligence organization, and (d) persons employed in the telecommunication systems setup for the purposes of any force or organization referred in clause (a) to (c). But this restriction or abrogation should be necessary to ensure the proper discharge of duties by the armed forces and discipline among them. Furthermore, these restrictions can be imposed only by parliament. However, the validity of any law made under Article 33 cannot be challenged on the ground of contravention of any of the fundamental rights.

Article 34 further imposes restrictions on these rights when martial law is in force in any part of the territory of India. This provision requires an Act of Indemnity to be enacted by parliament to cover illegalities committed by any person in the service of the state or any other person in connection with the maintenance, or restoration of order during the operation of martial law. Even though this provision is of wide amplitude, which may negate the protection accorded under other provisions of the constitution, unless an Act is passed by parliament, no indemnity is available for the illegalities committed during martial law. On the other hand, this provision does not talk about suspension of habeas corpus (constitutional remedy guaranteed under Art.32) which would not follow automatically by a mere declaration of martial law.

The Geneva Conventions were ratified by India on 16 October 1950 which was later incorporated into the Geneva Conventions Act, 1960. The Statement of Objects and Reasons specified the matters which required to be implemented by this enactment as follows:

- Punishment of ‘grave breaches’ referred to in Article 50 of the First Convention and equivalent articles of the succeeding Conventions;
- Conferment of jurisdiction on Indian Courts to try offences under the conventions, even when committed by foreigners outside India;
- Extension of the protection given under the existing law to the Red Cross and Geneva Cross to two new emblems, namely the Red Crescent and the Red Lion and Sun;
- Procedural matters relating to legal representation, appeals, etc.
The four Geneva Conventions are annexed to the Act as schedules; The Act repeals the earlier enactments, the Geneva Convention Implementing Act, 1936, The Act, since its enactment, except for once, has never been invoked but the measures are taken by authorities concerned to educate, and impart knowledge of IHL to armed forces.

On the efficacy of the Act, the supreme court in *Rev. Mons. Sebastian Francisco v. The State of Goa* has observed:

... The Act may by itself does not give any special remedy. It does give indirect protection by providing for breaches of Conventions. The Conventions are not made enforceable by the government against itself, nor does the Act give a cause of action to any part for the enforcement of Conventions. Thus, there is only an obligation undertaken by the Government of India to respect Convention regarding the treatment of civilian population, but there is no right created in respect of protected persons which the court has been asked to enforce.

The court declared: ‘If there is no provision of law which the courts can enforce, the court may be powerless and the court may have to leave the matter to what Westlake aptly described as indignation of mankind.’ The judgment is a pointer to the need for a thorough revision of the Geneva Conventions Act in order to create rights in favour of protected persons under these conventions. Further the jurisdiction of the court-martial under the Army Act, 1950, the Air Force Act, 1950 and the Navy Act, 1957 are specifically excluded from the purview of the Act (Section 7). Since the ambit of these Acts is well defined and wide enough with precise procedure for trial by ordinary criminal courts, the grave breaches defined under the conventions fall under section 69 of the Army Act to be tried by court martial but, at the same time, it does not oust the jurisdiction of the ordinary criminal courts. This aspects needs to be clearly specified under the Geneva Conventions Act.

The South Asian countries are in a pivotal position in the adherence to the principles of IHL because of their rich cultural heritage, which accord great value to human dignity in every adversity. Most of the countries are parties to the present day IHL in the form of parties to the Geneva Conventions. However, apart from India, practically no country has taken measures to make them a part of the domestic law, a fact which crucial for their enforceability. These countries are also shy of ratifying the two Additional Protocols of the 1948 Geneva Convention, with wider obligations than those under the conventions. Nevertheless, barring a few aberrations here and there, such a Pakistan’s violation of Geneva Conventions during the Kargil War in May-July 1999, in which one air force pilot, and six officials of the Indian Army were killed wantonly, the countries in the region have complied with the basic tenets of IHL.

India, by legislating the four Geneva Conventions through the 1960 Geneva Conventions Act, and giving the due place to human rights principles in the constitution has shown its commitment to IHL, making these principles a part of the rule of law in the country.

### 23.2 OBJECTIVES

After reading this unit, you should be able to:

- explain the relevance of IHL and Constitution of India;
Relationship of IHL with other Branches of Law

- explain the scope of Geneva Conventions Act of 1960; and
- discuss the various Implementing measures adopted by various countries.

### 23.3 GENEVA CONVENTIONS ACT, 1960

Having ratified Geneva Conventions on 16 October 1950, it took rather long for India to transpose them into its domestic law. The preamble to the Act stated that it was to 'enable effect to be given to certain international conventions at Geneva on the twelfth day of August 1949, to which India is a party and for purposes connected therewith'. According to the Statement of Object and Reasons, the matters which required to be implemented by the legislation were: punishment of grave breaches’ referred to in Article 50 of the First Constitution.

Equivalent articles of the succeeding conventions: conferment of jurisdiction of Indian courts to try offences under these conventions, even when committed by foreigners outside India: extension of the protection given under the existing law to the Red Cross and Geneva Cross, to two new emblems namely, the Red Crescent and the Red Lion and Sun: and procedural matters relating to legal representation, appeal etc. However, the Act contained a provision which stated:

No court shall be take cognizance of any offence under this Act except on complaint by the Government or of such officer of the Government as the Central Government may by notification specify.

Thus, unlike this provision, it is significant to note that the Zimbabwean Geneva Conventions Act of 1981 permits to private prosecution for an offence under the common Law. After analyzing various provision of the Act, one author concluded, ‘it appears as if the legislation was drafted and passed in a hasty manner.

**Self Assessment Question**


23.4 NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

**NATIONAL LEGISLATIONS OF VARIOUS COUNTRIES**

- AFGHANISTAN

The Order of the Minister of National Defence on the Establishment of a Board of Curriculum on [the integration of] the International Law of Armed Conflict into the Educational and Training Institutions of the National Armed Forces, as well as National Army Units was adopted in July 2005. The Order nominates the members of the Board and defines a number of duties and actions to be undertaken for the training and education of national armed forces in the law of armed conflict. These activities
include in particular the preparation of teaching materials, the appointment of instructors, and the proposed establishment of a legal department within the education and training institutions of the Ministry of Defence.

- **FRANCE**

Instruction No. 201710 on the implementation of the Decree relating to general military discipline was adopted on 4 November 2005. The aims of this directive are to define the rules relating to military discipline in the various army corps and their respective hierarchical structures. The directive outlines the duties and responsibilities of military commanders and their subordinates, as well as those of servicemen engaged in combat or held in enemy hands. While recalling that the primary duty of a subordinate is to obey orders, it stipulates that he or she must refuse to execute an order which is manifestly unlawful, subject to his or her criminal and disciplinary responsibility. The directive also provides for a range of measures to be taken for the treatment of prisoners of war. It addresses the duties and responsibilities of medical personnel in times of armed conflict and provides for the latter’s special protection and for their entitlement, in accordance with international humanitarian law conventions, to make use of the red cross emblem for the purpose of identification.

- **SINGAPORE**

The Biological Agents and Toxins’ Act No. 36 of 2005 was passed by the Parliament of Singapore on 18 October and entered into force on 3 January 2006. The Act implements the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction and provides for prohibitions relating to biological agents and toxins as defined in that Convention. Any person who contravenes the prohibitions contained in the Act commits a criminal offence and is liable to a fine or imprisonment, or both. Moreover, the Act stipulates that a District Court shall have jurisdiction to try certain offences under the Act (other than those defined under sections 5, 16 and 30), and to impose appropriate penalties.

- **SUDAN**

The Interim Decree Law concerning the Sudanese Red Crescent Society was signed and entered into force on 3 August 2005. The Decree defines the legal personality, mandate and spheres of competence of the National Society. It outlines the aims and responsibilities of the National Society as an auxiliary to the armed forces in the provision of medical services in all fields of activity specified under the 1949 Geneva Conventions in favour of military and civilian victims of armed conflict, and in support of state structures in emergency and aid activities. It reiterates the stipulation that the National Society shall be bound by the seven Fundamental Principles of the International Red Cross and Red Crescent Movement and declares misuse of the red crescent emblem of the Society to be an offence liable to punishment under domestic law.

- **SYRIA**

The Law No. 36 on the Protection of the Emblem was adopted on 23 November 2005. It defines the persons entitled to make use of the protective and of the indicative emblem. It also provides for the protection of the emblems and the names of the Red Crescent and red cross and for penalties in cases of emblem misuse, and
assigns responsibility for monitoring application of the law to the Syrian Red Crescent Society.

• UNITED KINGDOM (GIBRALTAR)


• UNITED STATES

The Directive of the Department of Defense 3115.09 on Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning was adopted on 3 November 2005. By the authority vested in the Secretary of Defence under Title 10, Title 50, United States Code, Executive Order 12333, “United States Intelligence Activities”, December 4, 1981, as amended, the Directive consolidates and codifies existing departmental policies, including the requirement for humane treatment during all intelligence interrogations, detainee debriefings or tactical questioning to gain intelligence from captured or detained personnel. It stipulates that all interrogations shall be conducted humanely and in accordance with applicable law and policy, including the laws of war, assigns responsibilities, and establishes requirements for reporting violations. The Amendment to the 2006 Department of Defence Authorization Bill relating to the military use of riot control agents was adopted on 9 November 2005. The amendment restates the current policy of the United States with regard to the use of riot control agents by military forces. It notably provides that riot control agents, as they are not chemical weapons, may be employed by members of the Armed Forces in war in defensive military mode in order to save lives. The President may consequently authorize their use as legitimate, legal and non-lethal alternatives to the use of lethal force.

23.5 CASE LAWS

COLOMBIA


The Constitutional Tribunal, having considered the purposes of the Optional Protocol, declared the latter consistent with Colombia’s Constitution, which recognizes the special protection and the specific rights of children, and called upon the State to adopt all measures required to give effect to these rights. The Tribunal held that the Optional Protocol, while increasing the protection of children from direct involvement in armed conflict and imposing commitments in this regard upon States Parties, develops and strengthens Colombia’s constitutional requirements.

On 10 May 2005, the Constitutional Tribunal of Colombia gave effect to draft statutory Law No. 064 (Senate) and 197 (Chamber) of 2003 regulating the mechanism established to conduct immediate investigations into enforced disappearances.
In examining the constitutionality of the draft law, the Court referred to the Inter-American Convention on the Forced Disappearance of Persons (adopted at Bele‘m do Para’ on 9 June 1994 at the Twenty-fourth Regular Session of the General Assembly), the Declaration on the Protection of All Persons from Enforced Disappearance, the Rome Statute of the International Criminal Court and the report of the Working Group on Enforced or Involuntary Disappearances.

GERMANY

On 28 July 2005, the Higher Regional Court of Cologne (hereinafter Regional Court) dismissed an appeal concerning the civil responsibility of the German State for alleged violations of international humanitarian law committed by NATO forces in Kosovo.

The case concerned the civil law suit brought against the German state by the victims of a NATO air bombardment which had destroyed a bridge in the Serbian town of Varvarin, thereby killing both military personnel and civilians.

The bridge, it was claimed, had served no military purpose and had not represented a legitimate military target at the time. In a first judgment in the case, the District Court of Bonn had rejected the compensation claims and dismissed the case as a matter of principle, holding that any entitlement based on public international law only existed between states and that no exceptions to this principle could be derived from the rules of international humanitarian law.

In contrast to the lower court, the Higher Regional Court of Cologne, while ruling against the claimants on the facts of the case, accepted the claim in principle. The Court first confirmed that no individual claim to compensation existed under international humanitarian law. It did not, however, exclude the possibility of claims based on national law as such, and notably on the German law, deriving from Germany’s Basic Law and Civil Code, on compensation for wrongful acts committed by government authorities. In support of its ruling, the Regional Court referred further to recent developments in international law, such as the evolving codification of rules on the protection of the individual under human rights and humanitarian law, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Rome Statute of the International Criminal Court.

The Higher Regional Court nevertheless rejected the claims and held that German officials had not, in view of the facts of the case, violated any laws by their indirect involvement in the bombing and therefore had not triggered the liability of the German state.

SPAIN

On 5 October 2005, Spain’s Tribunal Constitutional ruled that cases of genocide committed abroad could be prosecuted in Spain, irrespective of whether the victim is a Spanish national. In so doing, the Constitutional Court overruled the interpretation given by Spain’s Tribunal Supremo (Supreme Court) to section 23(4) of the Organic Law on the [organization of the] Judicial Power (i.e. the judicial system), on the grounds that it had denied the right to effective access to justice as guaranteed under Section 24.1 of the Spanish Constitution.

The case in question related to the prosecution of acts committed in Guatemala in the 1970s and 1980s and alleged to have constituted crimes of genocide, terrorism and torture. The plaintiffs challenged the restrictive interpretation given by the Supreme
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Court to the principle of universal jurisdiction under Spanish law. Section 23(4) of the Organic Law on the Judicial Power recognizes the principle of universal jurisdiction over several crimes, including genocide and terrorism. The Supreme Court had rejected the case, on the basis of the principle of subsidiary under section 6 of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, and ruled that the plaintiffs had failed to prove that the courts of another state (Guatemala) had de facto rejected the claim. The Constitutional Court decided that such an interpretation defeated the purpose of universal jurisdiction as provided for under both Spanish law and the Genocide Convention, and held that it is enough, in order for domestic courts to exercise jurisdiction, to present serious and reasonable evidence of a failure to prosecute. Furthermore, the Constitutional Court rejected the Supreme Court’s assertion that, since no international treaty establishes the principle of universal jurisdiction, universal jurisdiction is restricted under customary international law. While referring to the definition of universal jurisdiction in criminal matters given by the Institute of International Law in 2005, the Constitutional Court held that international law does not subject the competence of States to prosecute genocide and punish offenders to the existence of a connection or link with the place of jurisdiction, whether based on the principles of territoriality, active or passive personality, or national interest.

UNITED KINGDOM

On 12 August 2005, the United Kingdom’s High Court of Justice rejected the case advanced on behalf of a dual British and Iraqi national arrested and detained in Iraq by British forces on suspicion of membership in a terrorist group deploying its activities in Iraq. In the proceedings, the claimant contended that his continued detention in Iraq and the failure to return him to the United Kingdom were unlawful and in breach of the rights conferred on him by Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as scheduled to the United Kingdom’s Human Rights Act 1998. In rebuttal, the main argument of the defendant Secretary of State was that the claimant’s detention was authorized under United Nations’ Security Council Resolution 1546 of 8 June 2004 (hereinafter Resolution 1546), and that the effect of the said resolution was to displace the claimant’s rights under the ECHR.

The Court first examined the scope of application of the 1998 Act. In so doing, it recognized that the latter was capable of applying to the claimant since he had been detained, although outside the UK, in a facility operated by British forces. It also confirmed, on the basis of precedent, that UK courts had a duty to interpret the Human Rights Act and the latter’s jurisdictional scope in a manner consistent with the duties of the UK under the ECHR as interpreted by the European Court of Human Rights in Strasbourg. Accordingly, the public authorities of the UK were required to secure the rights recognized under the Convention.

The Court then proceeded to examine whether Resolution 1546 had the effect, as a matter of international law, of displacing the claimant’s right to liberty and security of person as recognized under Article 5 of the ECHR. The Court first recognized that the said rights, while deriving from Article 5 of the ECHR as set out in Schedule 1 of the Human Rights Act, are domestic rights conferred by the UK Act and enforceable before UK courts. Considering the natural meaning and context of Resolution 1546, the Court determined that the latter’s intention had been to continue the mandate of the multinational force in Iraq after the transfer of authority of the Coalition Provisional Authority to the Iraqi Interim Government. Hence, the Court concluded, by Resolution
1546, the Security Council had continued the powers previously exercised by the multinational force when in belligerent occupation; these, the Court held, included the power under Article 78 of the Fourth Geneva Convention of 1949 relative to the protection of civilian persons in a time of war to detain persons for imperative reasons of security, and thus had the effect of displacing Article 5 of the ECHR.

Considering further the lawfulness of the detention under the regime established by Resolution 1546, the Court concluded that the procedures applicable to the claimant’s detention did not strictly meet the procedural requirements under Article 78 of the Fourth Geneva Convention, but that the non-compliance was in its view more technical than substantial. Last, in examining the legality of the defendant’s failure to return the claimant to the UK, the Court concluded that the power of internment under Resolution 1546 is directed towards the detention of persons in Iraq, not their removal there from. Consequently a transfer to the UK would involve actions inconsistent with Resolution 1546. For these reasons, the Court dismissed the case brought on the claimant’s behalf.

UNITED STATES

On 9 September 2005, the US Court of Appeals for the Fourth Circuit reversed the judgment of the District Court of South Carolina, which had held that the US President lacks the authority to detain militarily a US citizen arrested in the United States on suspicion of having been recruited abroad by al Qaeda members in order to commit terrorist acts in the US. Following the President’s determination that the appellant in the case was an enemy combatant, the latter had been taken into military custody and had subsequently filed a petition for a writ of habeas corpus.

The District Court had held that his continued detention was unlawful under the Constitution and the laws of the United States and that the defendant should have been either charged or released.

The issue raised before the Court of Appeals was whether the President possesses the authority to detain militarily a US citizen closely associated with al Qaeda, an entity with which the United States is at war, who had taken up arms on behalf of that enemy in a foreign combat zone, and who thereafter had travelled to the United States with the avowed purpose of further prosecuting that war on American soil against American citizens and targets.

The reasoning of the Court of Appeals is based on the Authorization for Use of Military Force Joint Resolution, enacted by the US Congress on 18 September 2001, which states that “The President is authorized to use all necessary and appropriate force ... in order to prevent any future acts of international terrorism against the United States ...”, as well as on the Supreme Court’s ruling in the Hamdi v. Rumsfeld case. In that decision, the Supreme Court had interpreted the Joint Resolution and upheld that the Executive has the authority to detain citizens who qualify as “enemy combatants” within the meaning of the laws of war. The petitioner in the present case contended that his situation was different from that of Hamdi, for the latter had had been captured on a foreign battlefield. Referring to the reasoning of the Supreme Court, the Court of Appeal found no support for a distinction to be drawn on the basis of the locus of capture and concluded that the petitioner’s military detention was authorized as an incident fundamental to the President’s prosecution of the war against al Qaeda in Afghanistan. The petitioner also contended that his military detention was “neither necessary nor appropriate”, since he was amenable to criminal prosecution. The Court of Appeal held that the availability of criminal
process cannot be determinative of the power to detain, since the mere availability of criminal prosecution could not, of itself, guarantee the very purpose for which detention is authorized in the first place, namely the prevention of return to the field of battle.

In the case, the Court of Appeals concluded that the petitioner unquestionably qualified as an “enemy combatant” and that his military detention was therefore justified and fully authorized under the Authorization for Use of Military Force Joint Resolution.

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<td>2) Analyse the judicial trends of various countries regarding the application of IHL principles at the National levels.</td>
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23.6 SUMMARY

- In this unit we have discussed about the Constitutional provisions dealing with the application of International Humanitarian Law. Article 51 of the constitution enjoins the state to ‘endeavour to (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another.

- We have also covered about Geneva Conventions Act 1960. Statement of Object and Reasons, the matters which required to be implemented by the legislation were: punishment of grave breaches’ referred to in Article 50 of the First Constitution.

- We discussed the National Legislations dealing with the implementation of International Humanitarian Laws of countries such as Afghanistan, France, Singapore, Sudan, Syria, United Kingdom, and United States of America.

- We have also discussed about the Case Laws of countries such as Germany, Spain, Columbia, United Kingdom and United States.

23.7 TERMINAL QUESTIONS

1) Discuss the various National Legislations of countries dealing with the implementation of International Humanitarian Laws.

23.8 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Section 23.3

2) Refer to Section 23.5
Terminal Question

1) Refer to Section 23.4 and 23.5

23.9 GLOSSARY

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<th>Term</th>
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<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization.</td>
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<tr>
<td>Preamble</td>
<td>A preamble is an introductory and explanatory statement in a document that explains the document's purpose and underlying philosophy.</td>
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<tr>
<td>Fundamental Rights</td>
<td>Fundamental Rights is a charter of rights contained in the Constitution of India. It guarantees civil liberties such that all Indians can lead their lives in peace and harmony as citizens of India.</td>
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23.10 REFERENCES AND SUGGESTED READINGS

2) Geneva Conventions.
3) Additional Protocol - I.
4) Additional Protocol - II