

Impact of the Assistance to and Protection of Victim and Witness act to the Fair Trial Concept

RMJ Ranatunga#

Sri Lanka Army, Sri Lanka
#jayanath.ranatunga@gmail.com

Abstract: *Protection of Victims and witnesses is one of the important aspects in the Criminal justice system. No doubt that it shall be the duty of the state to preserve the rights of the concerned parties by enacting effective legislative enactments. On the other hand the concept of fair trials shall be upheld at every situation. There can not be any derogation to this vital fair trial concept by any means. Provisions and practical application of the legislative enactment prevailing concerning protection of victims and witnesses contains provisions contrary to the fair trial concept. The possible recommendations on legal reforms and mechanisms to uphold fair trial concept while focusing on the rights indicated within the concerned of legislative enactment is addressed by this article.*

Keywords: *Victims, Witnesses, Fair Trials*

1. Introduction

As privileged citizens of this wonderful island nation we have come across if not we have heard about the ways that the suspects of criminal matters are treated by police and other entities. On the other hand, there are plenty of examples to show the manner in which the victims and the witnesses of crimes are treated and the hardships they face from the suspects and their counterparts. Having the legitimate intention of protecting the victims and witnesses and to abide by the internationally required standards by March 7, 2015, the Assistance to and Protection of Victims and Witnesses Act No. 4 of 2015 ("Act") was enacted.

There is no doubt that it is the duty of the state to protect citizens from crimes, including victims, witnesses, sources of information, and others. The ability to investigate and prosecute organized criminal groups successfully relies on the safety of witnesses and victims. The Organized Crime Convention of year 2000, Article 24 deals with witness protection. This clause aims to protect witnesses in criminal proceedings from punishment. Some examples of these techniques include witness relocation and allowing them to testify in a way that ensures their safety.

In the Sri Lankan context, there are situations where the rights vested in suspects by the Constitution and other legislative enactments are blatantly violated by the application of provisions of the Assistance to and Protection of Victims and Witnesses Act No. 4 of 2015. To be specific, certain fair trial concepts such as *audi alteram partem*, Presumption of innocence and unnecessary involvement in the execution of rule of law can be highlighted as examples.

CHARACTERISTICS OF WITNESS PROTECTION PROGRAMS

Organized criminal figures were the most frequent perpetrators of witness intimidation, which necessitated the use of protective services for the victims. Police informants and criminal acquaintances of defendants were the most usually protected witnesses. Yet witness for the suspect is also a recognized "witness" (Liam, 2006) whereas considering the practical aspects

prevailing in Sri Lanka the witnesses for the defense are often neglected and their rights are vulnerabilities are generally neglected.

The European Court of Human Rights observed in the case of *PS v Germany*, 2003 “principles of fair trial require that the interests of the defence are balanced against those of witnesses and victims called upon to testify, in particular where life, liberty or security of person is at stake”. (Enrique, 2005)

With that an individual witness's level of risk irrespective of the fact that the witness is for prosecution or defense must be taken into account while deciding on protective measures. National police forces typically manage most witness protection programs, and the majority of programs based on these enacted laws neglect certain protections vested on witnesses for all the parties.

As a whole, it is submitted that people and news organizations are of the belief that witness protection measures are required and should be put in place for the prima facie aggrieved party (Rosalind, 2007). The majority of governments have realized the importance of enhancing the monitoring, evaluation, and safeguarding of witnesses' rights in courtrooms around the world. Yet it is clear that there is a lacuna in certain aspects.

Open-source information is missing in order to objectively analyze witness protection systems among jurisdictions. There has been a scarcity of research on the effectiveness of witness protection programs in preserving the witnesses of the defense which plays a vital role in the fair trial concept. As a means of protecting witnesses of all parties from intimidation or revenge, specific processes must be implemented. This kind of safeguard is essential to maintaining the rule of law and upholding the concept of fair trial.

As long as the defendant's safety is not compromised, an escort or separate waiting room may suffice. Additionally, the judiciary may close the courthouse and secure evidence, provide temporary safe homes, utilize voice distortion and facial disguises or conduct testimony through video conference to protect witnesses of all parties instead of protecting the witnesses of the “victim/s”. (Enrique, 2005)

In some cases, even the defense needs a witness' cooperation, additional safeguards like a formal witness protection program are necessary since an organized criminal group's influence and control is so widespread. These cases necessitate a new identity and a new location, either within the country or outside of it, for the witness's protection.

A closer look is needed at the new legislation that came into effect on March 7, 2015, the Assistance and Protection of Victims and Witnesses Act No. 4 of 2015. Defining, protecting, and enforcing the rights and entitlements of crime victims and witnesses, as well as outlining the duties and responsibilities of the state, judges, and other public officials in promoting these rights, protections, and enforcement, will go a long way towards helping and protecting these people. To be sure, each of these objectives is a strong step in the right direction, but the manner in which they would be accomplished under this Act raises several questions on the balance of uplifting fair trial concepts.

A VICTIM BECOMES A HEAVILY INVOLVED IN THE INVESTIGATION PROCESS

Perhaps there are provisions in Act No. 4 of 2015 that give victims of crime the right to inquire about how an investigation into their complaint is progressing by submitting a query to the investigating police station or other authority, the Attorney General or the Registrar of Court, as applicable. This includes inquiries about hearing

dates, progress of judicial proceedings, dispositions, an arrest, acquittal, or conviction of an accused or suspected person and the date on which that person will be sentenced or acquitted, respectively .

To prosecute people who commit crimes, the state has certain obligations to investigate and prosecute. The Act No. 4 of 2015, on the other hand, aims to make it the possibility of the victim to pursue the alleged criminal records to its completion. This is a blatant violation of the Fair trials as it allows the prosecution to influence the due process of law.

Certain offences such as rape and assault, allow the culprit to be identified and tracked down before the arrest. Before a suspect in a criminal case may be identified, it is common for investigations to be conducted. This "Act" appears to indicate that the alleged perpetrator has always been known to the claimed victim. Victims may be subjected to harrowing injustices in criminal investigations as long as the perpetrators of their alleged crimes are known to them before this "Act" may be used to press charges against them.

In a few areas, the "Act" makes it crystal clear what should have been obvious all along. Every police officer, police station, and other police unit has the duty to investigate a complaint made by a victim of crime in accordance with Section 3 of the Police Department's Code of Conduct. For this purpose, the British prior to the independence, by way of legislations vested certain powers to the current police force of Sri Lanka. Further, Attorneys at law can represent victims in any inquiry into an incident, including criminal and medical investigations and magisterial inquiries, so that the appropriate authorities can make any necessary representations on their behalf. (Rosalind, 2007)

If the victim so desires, they can also request a certified copy of the cause of death form as well

as any other expert reports and police reports filed in the Magistrate's Court as well as Medico-Legal and Registry of Fingerprint reports. At a time when the perpetrator's identity is still required to be proved before a competent court, the victim has the opportunity to prey on the entire judicial system, including the police and judges by accessing these reports. (Liam, 2006) However, there is a clause which states the Magistrate may refuse to issue a certified copy of these reports if the police consider that doing so may compromise ongoing investigations. Before, during, and after any investigation, trial, or appeal, victims have the right to interact with the Attorney General in writing or through legal counsel. This includes non-summary inquiries, trials, and appeals. It is also possible for a victim of an incident to submit written communications or statements, as well as get a response from an investigator to an investigation into the offense.

Hence, would having the ability to exert pressure on investigators, the Attorney General, and the courts during the appeals process have any advantage for victims? The victim has the right to seek redress from a variety of people . There will be even more strain on the Attorney General's Office, law enforcement, and the courts as a result of the increased workload. Moreover, this can be identified as a direct involvement in the execution of justice.

It is the victim's right to be present at all judicial or quasi-judicial proceedings relating to the offense, unless a court or tribunal finds that the victim's testimony would be materially harmed by hearing other evidence or that the proper administration of justice can only be ensured by excluding the victim from the hearing of certain portions of such proceedings.

As a victim, one has a right, either personally or through legal counsel, to describe how the offense affects their life, including their physical

state of mind, occupation or profession, income and other areas of quality of life and property. (Enrique, 2005) If this is explained taking into consideration a fight taken place and if both parties are injured there may be an ambiguity as to who the actual victim is.

In considering the above, the courts have the power to hear appeals and applications for revision from the victim of a crime on how that crime has affected his physical health, mental well-being, career or professional activity and income in addition to all the other areas of his personal life. (Liam, 2006)

ADVERSE LEGAL IMPLICATIONS OF NATIONAL AUTHORITY FOR VICTIMS AND WITNESSES OF CRIME

Additionally, the Act establishes a National Authority for Victims and Witnesses of Crime , which will be overseen by a Board of Management, in addition to the previously mentioned measures that provide victims greater leverage over law enforcement, the Attorney General's Department, and the courts itself. When it comes to receiving complaints concerning potential abuses of victim or witness rights, the tasks and responsibilities of this authority include conducting investigations into these alleged or suspected abuses and compelling the relevant authorities to take appropriate corrective action.

The victim and witness protection authority shall have the authority to require any person other than a judicial officer or the Commissioner of the Commission to appear before the Authority and produce any document, a certified copy thereof, or other material in his or its possession or custody in order to conduct investigations into allegations of an imminent violation of a victim or witness's rights(Liam, 2006).

In fact any occurrence or procedure can be accessed by the Authority to conduct an investigation and record it at any moment. That is to say, if the police, the Attorney General's office, and the courts refuse to let the victim get the National Authority for the Protection of Victims of Crime and Witnesses to do its duty, the victim can. According to Section 14(1)(f) of the Act, the authority may solicit, accept, and receive donations, bequests, or grants from sources inside or outside Sri Lanka and utilize them to carry out its duties and functions creating certain adverse impacts to the fair trial concept and even on sovereignty.

Section 24(3) prohibits the Authority from asking or accepting help from any foreign government or national, foreign, or international organization unless the Attorney-General and the Secretary to the Ministry of the Minister in charge of Foreign Affairs have granted their prior consent. However, this is of no use in the real world. It is the responsibility of the Attorney General and the Minister of Foreign Affairs (minister) to ensure that all funds are obtained legally.

The Act No. 4 of 2015 therefore can be described as a fragile piece of legislation from start to finish. It is unclear as to why foreign aid is required in order to safeguard the rights of victims and witnesses. The National Authority for the Protection of Victims and Witnesses could be used by foreign parties interested in certain cases to exert pressure on the police, (Rosalind, 2007) Attorney General's Office, and even the courts. Anyone who flouts the Authority's rules is guilty of contempt, which is punished by the Supreme Court as if it were a crime against the Supreme Court itself.

The Supreme Court may receive a certificate from the Authority stating that someone has violated the Authority's rules of procedure by engaging in an act of contempt against the

Authority. Any evidence that has been verified to be genuine is admissible unless the contrary is proved. Contempt charges against the Authority may not be brought against any member of the Authority, even by a Supreme Court, as long as they are brought by a third party.

Other institutions, such as the National Authority for Victims and Witnesses of Crime and Witnesses, have been established to safeguard victims and witnesses. Specifically, the "Victims and Witnesses Assistance and Protection Division" is to be established and maintained by the Inspector General of the Police in accordance with any guidelines issued by the National Authority for Protection of Victims of Crime & Witnesses to provide assistance and protection to victims of crime and witnesses, in accordance with Act No. 4 of 2015. An Inspector General of Police chosen as a board member of the National Authority for Victims and Witnesses would supervise the Division's Senior Superintendent.

In addition to the investigations conducted by its own officers, these special police units will also enlist the help of any other officers who may be able to aid in the investigation. The Assistance to and Protection of Victims and Witnesses Act, No. 4 of 2015, does not help victims or witnesses; rather, it gives interested parties in Sri Lankan courts better access to cases breaching the fundamentals of fair trial concepts.

MODUS OF HINDERING FAIR TRIAL REQUIREMENTS

It is the right of an accused to a fair trial. Victims and witnesses are critical to the success of a legal system, and their protection is essential. This precaution must not endanger the right of the accused to a fair trial. Article 14 of the ICCPR ensures that anybody facing criminal charges has the right to a fair trial. (Enrique, 2005)

Article 13(3) of Sri Lanka's Constitution protects the rights of those who have been accused of a crime. A person accused of a crime has several rights as per the provisions of Code of Criminal Procedure. Testing a witness's reliability and credibility through cross-examination is an effective strategy whenever an allegation or an accusation is brought against a person. Further, defendants possess a right to be represented in person or by an attorney is provided for under sections 201 and 202 of the Code of Criminal Procedure act and the opportunity to present evidence in front of them under section 260 of the said act.

For example, expunging witnesses' names and addresses from public records may not always be in the best interest of their constitutional rights. If anonymity is used, these rights will be questioned, and their use will be questioned as well. Examining the procedures thoroughly prevailing under the established procedural aspects in criminal law it is evident that concealment of the identity of the witnesses may have adverse impacts to the fair trial concepts.

PUBLIC TRIALS

A fair trial must be open to the public unless there is a compelling cause to keep it private. As indicated earlier Article 14 of the International Covenant on Civil and Political Rights guarantees "a fair trial" for everyone. Trial shall be impartial, competent, and open trial by law-enforced tribunals.

The "act", on the other hand, recognizes that the press and the public may be prohibited from a trial in whole or in part. to keep the peace, uphold morals, or safeguard national security in a representative democracy to the extent that it is strictly necessary to protect the parties' private lives, circumstances where public disclosure could impair the interests of the parties, the opinion of the court justice".

Open clinical trials are preferred for a variety of reasons. One of them is maximizing. allows additional witnesses to come forward and provide pertinent information, which reduces the likelihood of witness perjury, public scrutiny and criticisms against the courts for concealing the proceedings. As a result, public hearings are necessary for fair trials.

It is therefore necessary to not take it for granted and it is critical to the administration of justice. In the role of witness safety, protocols can lead to the public being separated from the trial or the disclosure of information about the victims and their families being withheld.

There are a number of factors to consider when considering whether or not to conduct public trials (Rosalind, 2007). No doubts that there are plenty of circumstances where it is necessary to have closed trials, yet there may be circumstances where parties may mislead the courts to have concealed proceedings in our adversarial justice system.

2. Recommendations

Perhaps As per the travaux preparatoires of the Assistance to and Protection of Victims and Witnesses Act No. 4 of 2015 the motives of the “act” are clear, it can be recommended to have;

- Certain inquisitorial aspects deviating from the typical adversarial system when certain orders like cancellation of bail is made by the courts.
- Allow authorized parties such as the media and general public to witness the court proceedings when trials are heard the Assistance to and Protection of Victims and Witnesses Act No. 4 of 2015 and establish a code/ make amendments to act, to impose liabilities to the witnessing parties to protect the confidentiality of the witnesses.
- Impose legal concepts similar to “pre-trials” when allegations are brought against

suspects by the prosecution on intimidations, threats or inducements.

- Impose limitations on the magnitude of involvement by the victims or witnesses on the investigations and other material steps.
- Make amendments to notify to the courts by way of reports, when third parties are involved in the investigations and other material proceedings

3. Conclusion

Travaux preparatoires and the practical implementation of the Assistance to and Protection of Victims and Witnesses Act No. 4 of 2015 denotes that this much needed piece of legislation is enacted with the intention of providing redress to victims and witnesses. Yet it is prima facie clear that there are critical lacunae in this positive legislative enactment contrary to the fair trial concepts which are internationally recognized. There are practical instances to specify that certain parties tend to use the gaps of this legislation to obtain unfettered advantages, if not to impede on the rights of the citizens. Some of the procedural aspects adopted in courts in certain instances paved its way to set negative precedence on the practical application of this enactment, yet again hindering the vital fair trial concepts.

It is therefore vital to address these indicated gaps of the legislation to provide efficient and effective protection mechanism to the witnesses and victims. Incorporating and adopting aforementioned procedural and other recommendations will pave its way to uplift the travaux preparatoires of this piece of legislation uplifting the fair trial concept.

References

Enrique E, 2005, Manual for Human Rights Defenders , Dublin, *Front Line Publishers*, Vol 2, p.47-51

Liam M., 2006, Proactive Measures Presence: Strategies for Civilian Protection, *Centre for Humanitarian Dialogue*, 14, pp. 411-415

Rosalind S., 2007, The Draft Bill for the Assistance and Protection of Victims of Crime and Witnesses: Critique and Recommendations, Centre for Policy Alternatives, Colombo, , pp. 5-45
https://cpalanka.org/wp-content/uploads/2007/10/_and_Witness_Protection_Bill.pdf

PS v Germany (2003) 36 EHRR 61 (22)

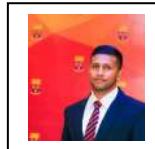
Osman v United Kingdom (1998) 29 EHRR 245.

Van Colle v Chief Constable of Hertfordshire (2008) UKHL 50.

Acknowledgment

I appreciate all who supported me (especially Charya, Parents and Mevin) by various means in the process of drafting this research paper, even by a word of mouth. I thank you all and you all have a special place in my heart.

Author Biography



Attorney-at-Law by profession with LL.M (UoC) and LL.B (Second Upper) qualifications. Obtained Diploma in Forensic Medicine.

Experienced in Presenting papers in Local and International research conferances.

“Come High Water, Come Hell”; Kinetic Weaponization of Water and the Interplay of International Humanitarian Law and International Disaster Law

N Amarawansha#

#narmadaamarawansha@gmail.com

Abstract: *The reverberating effects of mankind’s continued harnessing of the destructive potential of water and his deployment of such potential as a weapon in armed conflict, either as a means or a method of warfare, are extensive. Although international law provides, albeit insubstantially, for the protection of persons concurrently affected by armed conflict and disasters, it does not provide explicitly for disasters that are resultant to an ongoing armed conflict. This paper seeks to fill this gap by elucidating the instrumental international humanitarian law framework that implicitly prohibits the deployment of water as a kinetic weapon and the instrumental international disaster law framework that provides for response and relief in the event of disasters eventuated by the kinetic weaponization of water. In exploring the interplay between international humanitarian law and international disaster law pertinent to disasters eventuated by the deployment of water as a kinetic weapon in armed conflicts, the paper justifies why international humanitarian law prevails over international disaster law as *lex specialis* in the provision of protection for persons victimized by such disasters in armed conflicts.*

Keywords: *International Humanitarian Law, International Disaster Law, weaponization of water*

1. Introduction

The history of man incontrovertibly evinces that mankind is a warring race immanently

called to conflict (Adam Fergusson, 1992), and of the innumerable armed conflicts man has engaged in through the three millennia past, water remains an integrant in innumerable wars waged (Peter H Gleick, 2006). The harnessing of the destructive potential of water and its subsequent deployment as a weapon of war by man is a marked exemplification of water as an integrant in armed conflict. Herein, the destructive potential of water comes to be employed as both a means and a method of warfare in the conduct of hostilities in armed conflicts globally, and that notwithstanding the myriad of provisions and prohibitions under international law.

The deployment of water as a weapon in armed conflicts beget multitudinous ramifications that are disastrous in, but unlimited to, the humanitarian paradigm (Camilo Sarmiento and Ted R Miller, 2006) invoking the interplay of international humanitarian law and international disaster law in the context of armed conflict. Ergo, this paper is written with the purpose of elucidating the existent instrumental legal framework, enumerating the provisions and prohibitions under international humanitarian law and enumerating the perplexities and provisions under international disaster law, pertinent to the kinetic weaponization of water in the humanitarian paradigm. The paper is limited to the armed conflicts traceable to the twentieth and twenty-first centuries only.

WATER IN WAR

A trifold classification contrived by the Pacific Institute provides that water as an integrant to conflicts, armed or not, could either be a trigger for conflict, a weapon in conflict or a casualty of conflict (Pacific Institute, 2021). The tactical deployment of water as a weapon in armed conflict, either as a means and/ or a method of warfare, is traceable to the ancient Greeks (AK Chaturvedi, 2013) and the Islamic State post 2012 (Ibrahim Mazlum, 2017) alike. It is posited that water could be deployed as a weapon in armed conflict as one of three classes, namely toxic weapons, deprivatory weapons and kinetic weapons.

Although this paper is centered on the deployment of water as a kinetic weapon, it is acknowledged that transpositions between the aforementioned classes of weapons are an actuality dependent upon the circumstances of the armed conflict, including the calculated and/ or uncalculated changes in the course of the conflict as charted and/ or uncharted respectively by the armed actors that weaponized the water. Such transposition is amply evidenced in the flooding of the Pontine Marshes south of Rome, by the German army in 1944, wherein water deployed as a kinetic weapon through the opening of dykes to obstruct the Allied forces by forcing a flood transposed into a toxic weapon through the deliberate introduction of malaria to the flood water leading to casualties amongst combatants and civilians (Erhard Geissler and Jeanne Guillemin, 2010).

KINETIC WEAPONIZATION OF WATER

The deployment of water as a kinetic weapon entails the targeting, or controlling, of a body of water and the concomitant releasing en masse of such water, thereby deliberately exploiting its inherently dangerous kinetic potential rendering it a weapon in warfare. The isolated targeting of a dam controlled by an

adversary in an armed conflict in order to enfeeble such adversary is an exemplification of the kinetic weaponization of water as a means of warfare as evidence in the diversion of the water of the Jubba River in Somalia by Al Shabaab in 2018, forcing the adversary to an undefendable territory by flooding the defendable territory (Christina Goldbaum, 2018). Correspondingly, the sporadic or systematic release of water held in a dam, or series of dams, controlled by an armed actor in an armed conflict as an offensive stratagem intended to impede the belligerent activities of an adversary is an exemplification of the kinetic weaponization of water as a method of warfare evidenced in the control of multiple dams in Iraq and Syria by the Islamic State between 2014 and 2017 (Leith Aboufadel, 2017).

PROVISIONS AND PROHIBITIONS – INTERNATIONAL HUMANITARIAN LAW

The kinetic weaponization of water, as a means or method of warfare, is not explicitly provided for under international law. Nonetheless, cognate implicit prohibitions pertinent to the conduct of hostilities in armed conflicts exist in international law, notably under the Additional Protocol I and Additional Protocol II to the four Geneva Conventions, and under customary international humanitarian law. The existent provisions implicitly prohibit the kinetic weaponization of water by providing for the release of water as a dangerous force consequent to the deliberate targeting of a work or installation containing such force as opposed to explicitly prohibiting the targeting, or controlling, of a work or installation with the singular intention of releasing the water contained, that has the potential of being a dangerous force, as a kinetic weapon.

Article 56 of Additional Protocol I provides for the consequent kinetic weaponization of water in international armed conflicts. Herein, per

Article 56 (1), Additional Protocol I prohibits works or installations holding dangerous forces, such as dams and/ or dykes, from being the object of an attack regardless of their status as military objectives thereby preventing the release of dangerous forces that could cause severe losses among the civilian population. In an international armed conflict, the attacking of works or installations holding containing dangerous forces in contravention of the prohibition per Article 56 (1) of Additional Protocol I, thereby deploying water as a kinetic weapon, amounts to a grave breach of international humanitarian law, per Article 85 (3) (c) of Additional Protocol I, if the armed actor attacked with the “knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 a) iii)”. An extension of the prohibition under Additional Protocol I exists in relation to the attacking of military objectives at or in the vicinity of the aforementioned works or installations thereby prevent similar consequences per Article 85 (3) (c).

Correspondingly, Article 15 of Additional Protocol II provides for the consequent kinetic weaponization of water in non-international armed conflicts. Yet, aberrantly, no grave breaches provision akin to Article 85 (3) (c) of Additional Protocol I exists in Additional Protocol II with regard to non-international armed conflicts. Comparable to the absence of the grave breaches provisions in Additional Protocol II is the absence of the extension of the prohibition on the implicit weaponization of water as a kinetic weapon in the context of non-international armed conflicts as opposed to that provided per the second limb to Article 56 (1) of Additional Protocol I.

Notwithstanding the prohibitive provisions per Article 56 (1) of Additional Protocol I, an exemption lies with regard to dams and/ or

dykes used regularly, significantly and directly in support of military operations in excess of their normal function. The exemption permits the attack on such works or installations if it is the only viable means to terminate such support to the adversary in an international armed conflict per Article 56 (2) (a) of Additional Protocol I. An extension of such permissive exemption under Additional Protocol I exists in relation to the attacking of military objectives located at or in the vicinity of such dams or dykes per Article 56 (2) (c) of Additional Protocol I. The airstrikes by the US led coalition on Islamic State targets in the vicinity of the Mosul dam, Haditha dam and Fallujah dam in Iraq in 2014 is an exemplification of this exemption in praxis (Julian E Barnes, 2014). The exemptions per Article 56 (2) of Additional Protocol I are bound nonetheless by the obligations on precaution per Article 57 of Additional Protocol I and the necessity for the taking of practical precautions to obviate the release of dangerous forces Article 56 (3) of Additional Protocol I. It is noteworthy, and aberrantly so, that a no permissive provisions exist on the implicit kinetic weaponization of water in non-international armed conflicts.

The prohibitions enumerated per Article 56 1 of Additional Protocol I and Article 15 of Additional Protocol II are found in customary international humanitarian law per Customary International Humanitarian Law Rule 42. The rule in customary international humanitarian law reflects the practice of States, as provided through a multitude of military manuals, such as per Paragraph 8.5.1.7 of United States Naval Handbook of 1995, and domestic legislations that deem contravention of the stipulated prohibitions in international armed conflicts and non-international armed conflicts as offences, such as per Section 3 (1) and Section 4 (1) of the Geneva Conventions Act of 1962 of Ireland. The governmental policy of States

further reflects their bearing on the implicit customary international humanitarian law prohibitions on the kinetic weaponization of water, amply evidenced in the expression of the Office of the Human Rights Adviser of the Presidency of the Colombian Republic on “the need for restraint and precaution... with respect to an attack by government troops on a dam in order to dislodge guerillas” (Jean-Marie Henckaerts and Louise Doswald-Beck, 2009).

COME HIGH WATER

The deployment of water as a kinetic weapon in an armed conflict entails diverse ramifications that are disasters in their own right or exacerbate a core disaster. Flooding is the single most disastrous ramification of the deployment of water as a kinetic weapon in armed conflict, leading to incalculable losses amongst men and their property caught in the floods; amply evidenced in the destruction caused by the Islamic State through the inundation upstream the Fallujah dam, including the city of Abu Ghraib, consequent to the closing of the dam’s floodgates and diversion of its water in 2014 (United Nations Counter-Terrorism Executive Directorate, 2017).

The flooding is compounded by a myriad of resultant ramifications that include, but are not limited to, the transmission of water borne and vector borne communicable diseases as in flooding of the Pontine Marshes south of Rome by the German army in 1944 (Erhard Geissler and Jeanne Guillemin, 2010), the contamination of sources of fresh water, the contamination and/ or devastation of sources of food including livestock, as evidenced in the extensive losses amongst livestock caused by the inundation upstream the Fallujah dam eventuated by the closing of the dam’s floodgates and diversion of its water by the Islamic State in 2014 (United Nations Counter-Terrorism Executive Directorate, 2017),

infrastructural degradation, and psychological traumatization of the survivors of the floods.

RESPONSE AND RELIEF – INTERNATIONAL DISASTER LAW

The recognized response to flooding and to the concomitant ramifications are provided for under international disaster law. The International Law Commission’s Draft Articles on the Protection of Persons in the Event of Disasters of 2016 is the foremost instrument in international law that provides for response and relief in the context of disasters (Robin Geiss and Nilz Melzer, 2021). Yet the Draft Articles is a non-binding instrument and not customary international law unlike the greater body of international humanitarian law and, as the title of the instrument suggests, is comprised of draft articles that are not unanimously ratified by the international community (Giulio Bartolini, 2017).

Draft Article 9 provides that States are to reduce the risk of disasters by taking measures apt to prevent, mitigate and prepare for disasters. Draft Article 9 is complimented by Draft Article 10, imposing a duty upon a State affected by a disaster to “to ensure the protection of persons and provision of disaster relief assistance in its territory, or in territory under its jurisdiction or control”. Herein, Draft Article 11 to 17 provide for external assistance in disaster relief with an emphasis on the sovereignty of the affected State.

The Draft Articles is an instrument that comprehensively provides for disasters under international disaster law, yet such provisions are strictly pertinent to the disasters that eventuate in times and contexts of peace. Draft Article 3 Subparagraph (a) Commentary 12 of the commentary to the Draft Articles holds that armed conflicts are not provided for per Draft Article 3 (a). Therein, the Draft Articles remains implicitly impertinent to the disasters

consequent to the deployment of water as a kinetic weapon in armed conflict. It is explicitly provided through Draft Article 18 (2) that the Draft Articles “do not apply to the extent that the response to a disaster is governed by the rules of international humanitarian law”, that is in armed conflicts. Draft Article 18 (2) thus mirrors Paragraph 1 (4) of the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance of 2007 in excluding the provisions of international disaster law to armed conflicts and/ or to disasters that transpire in the context of armed conflicts.

Classification of the armed conflict concerned, and other concomitant circumstances and complications only heighten the inapplicability of international disaster law in armed conflicts, including the kinetic weaponization of water. Herein lies the need to give thought to the interplay between international humanitarian law and international disaster law, especially to provide for the suffering that ensues from disasters in armed conflict, effectuated by the deployment of water as a kinetic weapon or otherwise.

*INTERPLAY – INTERNATIONAL
HUMANITARIAN LAW AND INTERNATIONAL
DISASTER LAW*

The disasters that demand giving thought to the interplay between international humanitarian law and international disaster law could be categorized as complex emergencies, which is as the Inter-Agency Standing Committee defined in 1994, “a humanitarian crisis in a country, region or society where there is total or considerable breakdown of authority resulting from internal or external conflict” (United Nations Refugee Agency, 2001). In such complex emergencies wherein disaster is eventuated by the kinetic weaponization of water, the invocation of Draft Article 18 (2) would evince that international

humanitarian would be applicable as the *lex specialis*. Yet, this notion remains rather convoluted for the regime of international law that provides most protection in the context of a disaster consequent to the deployment of water as a kinetic weapon would rely purely on the aggregate circumstances of the armed conflict and crisis in question.

Such complexities are reflected per Draft Article 18 Commentary 9 of the commentary to the Draft Articles, which provides that in situations of armed conflict, “the rules of international humanitarian law shall be applied as *lex specialis*, whereas the rules contained in the present draft articles would continue to apply “to the extent” that legal issues raised by a disaster are not covered by the rules of international humanitarian law”. In that, per Draft Article 18 Commentary 9 of the commentary to the Draft Articles, the Draft Articles would provide *cassus omissus* to international humanitarian law “in the protection of persons affected by disasters during an armed conflict while international humanitarian law shall prevail in situations regulated by both the draft articles and international humanitarian law”.

The application of international humanitarian law, rather than international disaster law, as the *lex specialis* to provide for disasters eventuated by the deployment of water as a kinetic weapon in armed conflict is propitious in the provision of protection to those victimized in light of the personal and geographical scopes of application of international humanitarian law. Herein, the personal scope of application of international humanitarian law casts a wider protective net by encompassing the protection of victims of armed conflict, irrespective of whether their victimization is attributable solely to the armed conflict or to a disaster in the context of an armed conflict. The overarching application

of the personal scope of international humanitarian law, as opposed to that of international disaster law which provides for those victimized by disasters in the context of peace, ensures the prioritization of the needs of the civilian population in times of an armed conflict irrespective of circumstances effectuating such needs.

The application of international humanitarian law as the *lex specialis* in providing for disasters in the context of armed conflicts is apt in terms of the geographical scope of application of international humanitarian law. Upon adoption of a purely functional approach in addressing the complexities concomitant to the circumstances of disaster, such as the collapse of infrastructure, and armed conflict, such as the loss of territorial control, international humanitarian law prevails as the most viable regime that provides for the protection of the victims of combined circumstances, that is the victims of disasters in the context of armed conflict. Moreover, international humanitarian law prevails as the more efficacious regime in providing for disasters and armed conflicts that exists concurrently, including disasters eventuated by the deployment of water as a kinetic weapon in armed conflicts, and that in light of the circumvention of the aforementioned complexities.

An exemplification of the efficaciousness of international humanitarian law as the *lex specialis* in providing for disasters in armed conflicts is evidenced the provisions for consent to relief operations. Although Draft Article 13 provides for the question of consent of the affected State on the provision of external relief, it remains wholly inadequate for application in the contexts of an armed conflict. Alternatively, the question of consent to relief is provided for in international humanitarian law, yet with a focus on the

actualities of the armed conflict, especially in terms of how an armed conflict is classified. Herein, per Article 59 of the Fourth Geneva Convention, international humanitarian law provides for the provision of humanitarian relief by “States or by impartial humanitarian organizations such as the International Committee of the Red Cross” in cases of occupation per Article 59 Paragraph 2 of the Fourth Geneva Convention. Correspondingly, Article 70 of Additional Protocol I provides for the provision of humanitarian relief in the context of international armed conflicts whilst the provisions of humanitarian relief in non-international armed conflicts is provided for per Article 18 of Additional Protocol II with an emphasis on the particularities of such armed conflicts.

COME HELL

The flooding eventuated downstream the river Sutlej in Pakistan by the release of water by India from a dam upstream as recent as August 2019 (Reuters, 2019) evinces that water continues to be employed by man as a means and method of warfare and deployed as a kinetic weapon in armed conflicts regardless of their classification. Yet, notwithstanding such actuality, the predominately prohibitive, and partially permissive, international humanitarian law framework provides only implicitly for the kinetic weaponization of water, that is in consequence to the deliberate targeting of a work or installation containing such force as opposed to explicitly prohibiting the targeting, or controlling, of a work or installation with the singular intention of releasing the water contained as a kinetic weapon.

Since international humanitarian law does not prevail as an explicitly preventive framework providing for the kinetic weaponization of water at present, mankind must rely on the responsive framework of international law to

provide for the disasters eventuated by the deployment of water as a kinetic weapon. Yet, man is nonetheless limited by recourse to international humanitarian law over international disaster law in providing for such disasters. The prevalence of international humanitarian law as the *lex specialis* in provision of response and relief in the wake of disasters that exist concurrent to armed conflicts remains efficacious as it provides for the unique operational dynamics of armed conflicts and coincidental disasters (Marwan Jilani, 2009). Ergo, international humanitarian law prevails as the framework applicable to the disasters eventuated by the deployment of water as a kinetic weapon in armed conflicts as it better provides for those victimized by such disasters.

References

Adam Fergusson, *An Essay on the History of Civil Society* (Cambridge University Press 1992) 31-34

AK Chaturvedi, *Water: A Source for Future Conflicts* (Vij Books India 2013) 208

British Broadcasting Corporation, 'US Strikes Islamic State Militants at Iraq's Haditha Dam' (*BBC*, 2014) <<https://www.bbc.com/news/world-middle-east-29098791>> accessed 10 June 2021

Camilo Sarmiento and Ted R Miller, *Costs and Consequences of Flooding and the Impact of the National Flood Insurance Program* (Pacific Institute for Research and Evaluation 2006) 7-8

Christina Goldbaum, 'To Ambush and Kill American Green Berets, Al Shabaab Diverted a River' (*Daily Beast*, 2018) <https://www.thedailybeast.com/to-ambush-and-kill-an-american-green-beret-al-shabaab-diverted-a-river?_twitter_impression=true> accessed 13 June 2021

Dire Tladi, 'The International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters: Codification, Progressive Development or Creation of Law from Thin Air?' (2017) 16 *Chinese Journal of International Law* 425-451

Erhard Geissler and Jeanne Guillemin, 'German Flooding of the Pontine Marshes in World War II: Biological Warfare or Total War Tactic?' (2010) 29 *Politics and the Life Sciences* 1, 4-22

Giulio Bartolini, 'A Universal Treaty for Disasters? Remarks on the International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters' (2017) 99 *International Review of the Red Cross* 1103-1137

Giulio Bartolini, 'The Draft Articles on "The Protection of Persons in the Event of Disasters": Towards a Flagship Treaty' (*EJIL Talk*, 2016) <<https://www.ejiltalk.org/the-draft-articles-on-the-protection-of-persons-in-the-event-of-disasters-towards-a-flagship-treaty/>> accessed 26 May 2021

Marwan Jilani, 'IDRL: Protection of Persons in the Event of Disasters' (IFRC, 2009) <<https://www.ifrc.org/fr/nouvelles/discours-et-points-de-vue/discours/2009/idrl-protection-of-persons-in-the-event-of-disasters/>> accessed 12 June 2021

Ibrahim Mazlum, 'ISIS as an Actor Controlling Water Resources in Syria and Iraq' in Ozden Zeynep Oktav, Emel Parlar Dal, Ali Murat Kursun (eds), *Violent Non-state Actors and the Syrian Civil War: The ISIS and YPG Cases* (Springer 2017) 110-123

International Committee of the Red Cross, *Additional Protocol I 1977*

International Committee of the Red Cross, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949*

International Law Commission, Draft Articles on the Protection of Persons in the Event of Disasters 2016

Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules* (Cambridge University Press 2009) 140

Julian E Barnes, 'US Steps Up Airstrikes in Iraq's Anbar Province' (*Wall Street Journal*, 2014) <<https://www.wsj.com/articles/u-s-steps-up-airstrikes-in-iraqs-anbar-province-1413732164>> accessed 23 May 2021

Leith Aboufadel, 'ISIS Attempt to Halt Syrian Army Advance by Flooding East Aleppo Villages' (*Al Masdar News*, 2017) <<https://www.almasdarnews.com/article/isis-attempts-halt-syrian-army-advance-flooding-east-aleppo-villages/>> accessed 23 May 2021

Pacific Institute, 'Water Conflict' (*Pacific Institute*, 2019) <<https://www.worldwater.org/water-conflict/>> accessed 15 May 2021

Peter H Gleick, *Water Conflict Chronology* (Pacific Institute for Studies in Development, Environment, and Security 2006) 1

Reuters, 'Pakistan Accuses India of Waging 'Fifth-Generation Warfare' in Kashmir by Using Water as a Weapon' (*South China Morning Post*,

2019)

<<https://www.scmp.com/news/asia/south-asia/article/3023486/pakistan-accuses-india-waging-fifth-generation-warfare-kashmir>> accessed 11 June 2021

Robin Geiss and Nilz Melzer, *The Oxford Handbook of the International Law of Global Security* (Oxford University Press 2021) 569

United Nations Counter-Terrorism Executive Directorate, 'Physical protection of Critical Infrastructure Against Terrorist Attacks' (United Nations, 2017) <<https://www.un.org/sc/ctc/news/document/cted-trends-report-wednesday-8-march-2017-physical-protection-critical-infrastructure-terrorist-attacks/>> accessed 22 May 2021

United Nations Refugee Agency, 'Coordination in Complex Emergencies' (*UNHCR*, 2001) <<https://www.unhcr.org/partners/partners/3ba88e7c6/coordination-complex-emergencies.html>> accessed 29 May 2021

Author Biography



The author is an Attorney-at-Law of the Supreme Court of Sri Lanka and a Master of Laws (Switzerland). The author's areas of research include international humanitarian law, law of the sea and national security.