CUSTOM AS A SOURCE OF INTERNATIONAL HUMANITARIAN LAW

Edited by
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ICRC

International Committee of Red Cross
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CUSTOM AS A SOURCE OF INTERNATIONAL HUMANITARIAN LAW

Proceedings of the Conference to Mark the Publication of the ICRC Study "Customary International Humanitarian Law" held in New Delhi, 8–9 December 2005

Edited by
Larry Maybee
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Organised Jointly by:

International Committee of the Red Cross (ICRC)
and
Asian African Legal Consultative Organization (AALCO)

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FOREWORD BY VINCENT NICOD

Many conflicts, both international and non-international in character, are raging throughout the world today. Parties to these armed conflicts are often accused of not obeying the law of war, and terrible atrocities are committed. Though they may sometimes be ignorant of this law, belligerents are neither legally nor morally free to make "their own rules" in a conflict. The modern development of international humanitarian law (IHL) has created written rules to regulate how wars are fought. Although there are many different IHL treaties, the difficulty with these so-called treaty-based rules is that they only apply to those countries that are parties to the specific treaties that contain them. This results in a tendency to take a narrow approach to the rules, their application and interpretation.

There are, however, many long-standing rules of international law that govern how adversaries should behave in conflicts. Many of them can be traced to ancient cultures, where they were implemented long before the notion of humanitarian law treaties ever existed in the western world. For the last ten years, ICRC legal advisors, with the assistance of legal experts from around the globe, have undertaken the task of collecting and studying these humanitarian rules and values, with the aim of producing a definitive record of the customary law rules that apply during armed conflict. The ICRC study *Customary International Humanitarian Law*, published in March 2005, is the result of this work. The Customary Law Study is a great achievement; it constitutes the first comprehensive study on the subject. The Asian regional launch of the Customary Law Study took place in New Delhi at a conference held on 8 and 9 December 2005.

The advantage of customary rules of IHL is that they bind all those who participate in armed conflict, whether they are parties to a specific treaty or not. In addition, customary law rules are not restricted in their field of application. Many of them apply to all forms of conflict, whether

international or non-international. These 161 customary law rules of warfare bind all belligerents on both sides of a conflict. They also fill the gaps that exist in the treaty rules applicable in non-international armed conflicts, including targeting, proportionality, precautions in attack and the protection of civilians and civilian property.

This is not to say that treaty law is now less important. The entire body of law should be seen in a holistic way, with both treaty and custom contributing in near equal parts to assist and protect the victims of armed conflicts. We in the ICRC urge all states to continue to join with the majority of the international community who have ratified the key legal instruments of IHL, such as the 1977 Protocols Additional to the Geneva Conventions, the Rome Statute for the International Criminal Court and the Ottawa Treaty banning anti-personnel landmines. We also urge states to take the steps necessary to implement these treaties, including enacting domestic legislation. This will allow these laws to be properly enforced in periods of armed conflict and internal violence, and help ensure better compliance.

We must all keep in mind, however, that this addition to the body of humanitarian law is not an end in itself. There must be strong leadership within governments to ensure the political will exists to enforce the law and to bring to justice those that fail to respect it. There must be legislative and judicial measures taken to enable breaches of the law to be repressed. Those deprived of their freedom and those who are tortured or otherwise ill-treated as a result of armed conflict, need full international compliance with all of the norms of IHL, both treaty and customary. What President Mandela once said of the ICRC can apply to IHL: "*it is not so much the good that you do which counts, it is the evil you prevent from happening…*"

At the ICRC we are pleased to see that this monumental work has by now been given its due recognition, through launch events around the world. The ICRC regional Delegation in New Delhi is proud to have been able to launch this publication in Asia, in collaboration with the Asian African Legal Consultative Organisation (AALCO). Several of the experts who contributed to the Customary Law Study participated in this event and expressed their opinions and views there. This compendium is the outcome of the proceedings of the conference to mark the regional launch and it includes the papers they presented there.

I am therefore pleased to see this compendium published, to be made available to all people of goodwill whom it will assist by giving them a reference point to the customary international humanitarian law. I would like to take this opportunity to congratulate the contributors to this compendium, for their expertise in contributing to the Study itself, as well as their generosity in providing their papers for publication.

Mr. Vincent Nicod
Head of Regional Delegation
International Committee of the Red Cross

New Delhi
December 2006

FOREWORD BY DR. WAFIK Z. KAMIL

The Asian-African Legal Consultative Organization (AALCO) is an intergovernmental organization comprising 48 Member States representing different legal systems of the Asian-African regions. The purpose of establishment of AALCO is to provide a forum for evolving alternative perspectives of international law particularly keeping in view the specific interests of the Developing Countries and Least Developed Countries. 2006 is the Golden Jubilee year of the Organization. In fifty years of its existence AALCO directly or indirectly, has been part of the every major development in the field of international law

AALCO shares a mutually supportive relationship with many international organizations, including the United Nations and many other inter-governmental organizations. International humanitarian law (IHL) is a major area of interest for AALCO and its member States. In this context, it is worth noting our close association with the International Committee of the Red Cross (ICRC). We have formalized our cooperation by signing a cooperation agreement on 17 December 2002. Promotion and development of international humanitarian law is the primary objective of our cooperation agreement and was a legalization of our existing and longstanding cooperation.

Accordingly, both organizations jointly organized a special meeting in conjunction with AALCO's Thirty-Sixth Annual Session in Tehran on an important item entitled "Inter-related aspects of International Criminal Court and International Humanitarian Law" and also a seminar on the various aspects of international humanitarian law on 17th November 2000 in New Delhi on the eve of AALCO's Constitution Day. After signing the Cooperation Agreement, and during the Forty-Second Annual Session of AALCO held in Seoul, South Korea (2003), a Special Meeting on "The Relevance of International Humanitarian Law in Today's Armed Conflicts" was organized with the full cooperation of the ICRC. The Session adopted the *Seoul Resolution on the Relevance*

of International Humanitarian Law in Today's Armed Conflicts. The Seoul Resolution contains a series of directives for the Member States, which include: *urging all parties in armed conflicts to respect and ensure respect for international humanitarian law whether as treaty law or as customary law, and to comply, inter alia, with the principle of distinction and the principle of proportionality during armed conflicts*.

Latest in the series is the the ICRC-AALCO Conference on Custom as a Source of Humanitarian Law, held in New Delhi on 8th And 9th December 2005. The Conference was jointly organized by AALCO and the ICRC to mark the launching of the ICRC study " Customary International Humanitarian Law" (Cambridge University Press, 2005). A galaxy of eminent academicians and practitioners, including representatives from 19 Asian Member States of AALCO attended the Conference. By this study, the ICRC aims to improve the understanding and dissemination of IHL in order to enhance respect for, and compliance with, IHL rules. The study resulted in the formulation of 161 rules, which have been categorized in six parts: these include the principle of distinction, specifically protected persons and objects, weapons, treatment of civilians and *persons hors de combat* and implementation. The customary principles contained in the study may not be an authoritative assertion, which States shall comply with, however, they will certainly help as an important guide for the application of customary international humanitarian law.

The effort of the ICRC to come out with a compendium of the proceedings is commendable. It will certainly act as a valuable reference source for academicians and practitioners working in the area of international humanitarian law. I wish to record my profound gratitude to the experts and participants who attended this Conference and made it a grand success. AALCO from its side will, jointly with ICRC, spare no efforts to disseminate to the maximum this "huge study" to the two regions of Asia and Africa and beyond.

Ambassador Dr. Wafik Zaher Kamil
Secretary-General
Asian African Legal Consultative Organization

New Delhi
December 2006

ACKNOWLEDGEMENTS

This Compendium is a compilation of articles and presentations made during the proceedings of the regional conference to mark the Asian regional launch of the ICRC Study "Customary International Humanitarian Law" held in New Delhi from 8 – 9 December 2005. It is our sincere hope that this Compendium will prove useful and contribute in some small measure to improved respect for and compliance with international humanitarian law, through a better understanding of the rules customary international humanitarian law that are applicable in armed conflicts.

We are delighted to place on record our deep appreciation to all those who were involved in the organisation of this event, both from the International Committee of the Red Cross (ICRC) Regional Delegation, New Delhi, and the Secretariat of the Asian African Legal Consultative Organisation (AALCO). We would like to acknowledge Mr. Vincent Nicod, Head of the Regional Delegation, ICRC, New Delhi and Ambassador Wafik. Z. Kamil, Secretary-General of AALCO for all their support and encouragement. A very special thanks goes to Ms. Pooja Ahluwalia, former Legal Officer of the ICRC Regional Delegation, and ICRC coordinator for this event. It was primarily due to her dedication and tireless efforts that the conference was made possible and enjoyed the success it did. Finally, the conference and this Compendium would not have been possible without the active support and steadfastness of all members of the ICRC Regional Delegation in New Delhi.

Many eminent international legal experts and delegates representing 23 countries participated in the New Delhi regional launch of the Customary Law Study. The countries represented included Afghanistan, Bangladesh, Bhutan, China, Cambodia, India, Indonesia, Iran, Japan, Kenya, Laos, Malaysia, Maldives, Mongolia, Myanmar, Nepal, Pakistan, The Philippines, Singapore, Sri Lanka, Thailand, Turkey, and Vietnam.

Speakers representing the ICRC, AALCO, the United Nations, the International Criminal Court and several notable universities also participated. We wish to express our heartfelt appreciation to all those officials who traveled to New Delhi to participate in this event and contributed to its success, though their presentations, questions and interventions.

We would like to express our sincere gratitude to the many international and regional experts for their excellent presentations during the conference, and for their generosity in permitting us to reproduce their presentations in this Compendium. Our special thanks go to: Judge C.G. Weeramantary, former Judge, International Court of Justice and Chairman of the Weeramantry International Centre for Peace Education and Research; Dr. Jean-Marie Henckaerts, Legal Advisor, ICRC, Geneva and Co-Author of the ICRC study "Customary International Humanitarian Law"; Dr. P. S. Rao, Member, International Law Commission and former Additional Secretary and Legal Advisor, Ministry of External Affairs, Government of India; Prof. V.S. Mani, Director, Gujarat National Law University; Prof. Amitabh Mattoo, Vice-Chancellor, University of Jammu; Prof. Djamchid Momtaz, Member, International Law Commission and Professor of International Law, Tehran University; Judge Philippe Kirsch, President, International Criminal Court; Dr. A. Rohan Perera P.C., Legal Advisor, Ministry of Foreign Affairs, Government of Sri Lanka; Justice J.S. Verma, Former Chief Justice, Supreme Court of India and former Chairman, National Human Rights Commission; Mr. Christopher Harland, Legal Advisor, Advisory Services, ICRC, Geneva; Prof. Françoise Hampson, Professor of Law, University of Essex, United Kingdom; Sri C. Jayaraj, former Secretary-General, Indian Society of International Law, New Delhi; Brigadier Titus K. Githiora, Chief of Legal Services, Department of Defence, Kenya; Ms. Daphna Shraga, Principal Legal Officer, Office of Legal Affairs of the United Nations, New York; Prof. Zhu Wenqi, Professor of International Law, Renmin University, Beijing; Dr. Ali Reza Deihim, Director, Ministry of Foreign Affairs, Islamic Republic of Iran and former Deputy Secretary-General, AALCO, New Delhi; Prof. L.R. Penna, formerly Senior Professor of International Law, National University of Singapore; Prof. Nurhalida Mohamed Khalil, Professor

of Law, University of Malaya; Ms. Jelena Pejic, Legal Advisor, and Head of the ICRC Project on the Reaffirmation and Development of International Humanitarian Law, ICRC, Geneva. We would also like to extend our thanks to Sri E. Ahmed, Minister of State for External Affairs, Government of India, for agreeing to inaugurate the conference.

Larry Maybee
Benarji Chakka

New Delhi
December 2006

INTRODUCTION

Larry Maybee*

The International Committee of the Red Cross (ICRC) published its ground-breaking study on Customary International Humanitarian Law in March 2005. The Customary Law Study was undertaken by the ICRC at the request of the 26th International Conference on the Red Cross and Red Crescent movement in December 1995. The Study, which was prepared with the assistance of a group of International Humanitarian Law (IHL) experts representing more than 50 countries contains the customary rules of IHL that are applicable in international and non-international armed conflicts. The main objective of the Study was to overcome some of the problems related to the application of IHL treaties and to fill some of the gaps in the treaty-based IHL rules applicable in non-international armed conflicts, which comprise the majority of the armed conflicts in the world today. The ultimate aim is of course to improve compliance with the rules of IHL, in order to reduce unnecessary suffering and provide better protection for the victims of armed conflict.

The ICRC Customary Law Study was a monumental undertaking, taking nearly 10 years to complete. Its authors and all those who contributed to it can be justifiably proud of their accomplishment. It represents the first time that an attempt has been made to produce, in written form, the customary law rules that are applicable in armed conflicts. The Customary Law Study consists of two volumes. Volume one, consisting of approximately 600 pages, contains the IHL rules that have been determined to be customary in nature, along with commentary on each of the rules. Volume two contains an exhaustive analysis of state practice, totalling more than 4000 pages. The Study was compiled

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* ICRC Regional Legal Adviser for South Asia, New Delhi. Editor of the present publication.

with the assistance of experts representing more than 50 countries, including 10 countries in Asia. In all, State practice from 148 countries was analysed. The results of the Study are both remarkable and encouraging.

The Customary Law Study concludes that many of the fundamental principles and rules of IHL are customary in nature and, further, that most are applicable in both international and non-international armed conflicts. Importantly, this includes the rules concerning the conduct of hostilities, such as the principles of distinction, proportionality, the notions of military objective, protection of the civilian population and precautions in the attack. The Study concludes that of the 161 rules determined to be customary, 147 are applicable in non-international as well as international armed conflicts. Further, these rules are binding on both sides to a conflict, whether government forces or rebel/insurgent groups. This is indeed reason for optimism, particularly given the lack of IHL treaty-based rules that are applicable to non-international armed conflicts.

The Study represents a significant milestone in international law and its publication comes at a critical time in the development of IHL. Over the past five years, since the tragic events of September 11, 2001 and the so-called "war against terrorism" that resulted, IHL has been the subject of intense scrutiny and international debate. These events have highlighted the continuing importance of international humanitarian law in today's world; they have also exposed certain weaknesses, including gaps in coverage and areas of IHL that urgently require further definition and development. We hope that the international attention and debate that has been focused on IHL during the past five years will ultimately result in an increased awareness of the rules of international humanitarian law that apply in all armed conflicts. It is further hoped that this attention will act as a catalyst for the positive development of international humanitarian law, where required. This development is particularly needed in non-international armed conflicts where the treaty-based rules are relatively few.

The publication of the Customary Law Study is, however, only the first step. To have the desired impact the Study will need to be distributed widely, studied and critically analysed by various sectors of society, including academics, government officials, the military and, of course,

the legal profession, including the judiciary. Academic writings and its use by judges in particular will be critical to the success of the Study. To be effective, the Study will need to become a credible and indispensable tool used by courts and tribunals to guide them in their decisions. Unless the Study is seriously considered by judges of national and international courts and tribunals, it will not effectively influence IHL, nor will it have the desired effect, which is to improve compliance and respect for IHL.

Since the ICRC Customary Law Study was published in March 2005, there have been various events held around the world to mark its publication. These have included launch events in Geneva, London, The Hague, Brussels, Washington, New York, Moscow, Montreal, Stockholm, Maxico City, Nairobi, Addis Ababa and Beijing. The launch event in New Delhi in December 2005 was, however, unique as it was the first truly regional launch. It was also the first launch event that provided a platform for senior government officials and military officers from 23 different countries to discuss the Customary Law Study, its relevance and implication for States.

The Customary Law Study is particularly important and relevant to Asia. History shows that this region has been prone to armed conflicts and other situations of armed violence. Countries in the region also have a rather weak record of ratification of IHL treaties and very few countries have taken the steps necessary to implement their IHL treaty obligations into domestic law. The application of customary rules of IHL is, therefore, very important in order to regulate armed conflicts for many countries in this region. Customary Law can help fill the gaps for those countries currently engaged in non-international armed conflicts, but this will require more than simply the publication of the Customary Law Study. It will take considerable effort to convince the relevant authorities to accept that they are legally bound by customary law rules. This will involve a great deal of dissemination and education regarding customary law generally and customary IHL rules specifically. It cannot be taken for granted that the various government forces and armed groups will automatically accept the application of customary law rules to their conflicts, let alone understand how to give them practical effect. Countries will need to review their domestic legislation to ensure their laws acknowledge these rules and that their courts can

enforce them. Military orders and directives will need to be changed to incorporate these rules, and instructions issued to ensure they are complied with. Training manuals will need to be changed to reflect customary law and incorporate it into their operations.

The Asian regional launch in New Delhi was an important step in this process. It not only publicised the Study, it created general awareness and generated discussion on some of the important IHL issues that are contained in the Study. The legal experts that were invited to speak at the regional launch provided excellent analyses and insights into the Study. All the speakers are internationally recognised experts; their presentations were made more relevant because several of them were involved in the actual preparation of the Study, either as members of the steering committee, regional research teams or as governmental experts. They highlighted the main achievements of the Study and confirmed its importance to the future development of IHL, but their presentations also raised some of the thornier issues, including matters that were not dealt with in the Study, and they made important recommendations for future work in this area. Judge Weeramantry provided a unique insight into the importance of customary law, from the perspective of one who has considerable academic as well as practical experience in this area as a Judge of the International Court of Justice.

During the Conference the speakers provided the participants with food for thought on many issues, as well as ideas for future research and work in this area. We are very fortunate that all of the speakers have consented to the ICRC Regional Delegation for South Asia reproducing their papers in this publication, which is a compendium of the proceedings of the *Conference to Mark the Publication of the ICRC Study on "Customary International Humanitarian Law"* held in New Delhi on 8-9 December 2005. We are confident that these papers will prove to be valuable source of information about the Customary Law Study for those who wish to study it further, whether for academic purposes or in their professional legal practices.

INTRODUCTION OF THE SESSION

Larry P. Maybee*

Your Excellency Shri E.Ahamed, Minister of State for External Affairs, Republic of India, Distinguished Delegates representing 23 Governments from throughout Asia, Excellencies, Members of the Diplomatic Community, Your Honours Judge C.G Weeramantry, former Justice of the International Court of Justice, and Judge Phillippe Kirsch, President of the International Criminal Court, Ambassador Dr Wafik Kamil, Secretary General of AALCO (Asian-African Legal Consultative Organisation) – partners of the ICRC and joint sponsors of this important event, Distinguished Guests, Ladies and Gentlemen.

It gives me great pleasure on behalf of the International Committee of the Red Cross and the Asian African Legal Consultative Organisation to welcome you to the Asian Regional Launch of the ICRC Study on "Customary International Law" (Customary Law Study).

At this time I would like to request the following to please come forward and take their seats on the dais for the Inaugural Session:

His Excellency Shri E. Ahamad, Minister of State for External Affairs, Republic of India; Your Honour Judge C.G Weeramantry, former Justice of the International Court of Justice; Ambassador; Dr Wafik Z. Kamil, Secretary General of AALCO, Mr Vincent Nicod, Head of Regional Delegation, ICRC New Delhi and Professor V.S. Mani, Director, Gujarat National Law University.

It is wonderful to see such a good turnout today for this regional launch event. It is very rewarding to see the officials from the governments of so many different countries throughout Asia represented here in New Delhi. We look forward to meeting and spending time with all of you, and also to your active participation at today's formal launch

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* ICRC Regional Legal Advisor for South Asia, New Delhi.

as well as during the working sessions tomorrow. For the members of the diplomatic community and other guests from New Delhi and throughout India, a special welcome. It is very encouraging to see so many influential and busy people from different professions and backgrounds taking an interest in international humanitarian law (IHL), and the ICRC Customary Law Study. Of course, your presence today is also a testament to the high calibre of international expert speakers that have kindly agreed to attend this launch and make presentations over the next two days.

The publication of the ICRC Customary Law Study is a significant achievement, which represents a significant milestone in this important area of the law. As you will hear from Dr Jean-Marie Henckaerts, one of the authors/editors of the Study, during the panel session later this afternoon, it was a monumental undertaking. The Customary Law Study was commissioned in 1995 and took nearly ten years to complete. It is the first time an attempt has been made to produce, in written form, the customary law rules that are applicable in both international and non-international armed conflicts. The Study will undoubtedly contribute significantly to the definition and development of IHL in the future. The sincere hope of the ICRC is that it will also contribute to better application, compliance and enforcement of IHL in armed conflicts of all types.

The ICRC Customary Law Study was published in March 2005. Since that time there have been various events held around the world – in Geneva, London, The Hague, Brussels, Washington and Montreal – to mark its publication. This launch event in New Delhi is, however, unique. It is the first regional launch, the only launch event held in Asia, and the first launch event providing a platform for government and military officials from many different countries to discuss the Customary Law Study and its implications. As you can see from the programme, during this conference presentations will be given by a variety of international experts on the Customary Law Study, its relevance and implications. We hope that these presentations will generate constructive discussion and debate among participants.

At this time I would like to turn the floor over to Mr Vincent Nicod to provide the Welcome Address.

WELCOME ADDRESS

Vincent Nicod*

Your Excellency Shri Ahamad, Minister of State for External Affairs, Republic of India, distinguished delegates representing 23 Governments of a big region, Excellencies, members of the Diplomatic community, Ambassador Kamil, Secretary General of AALCO (Asian-African Legal Consultative Organisation), distinguished guests, ladies and gentlemen.

The list of prominent persons present here today is too long to allow me to greet everybody personally, but this is a very healthy signal that, by your presence, you send to the world community. After all, dear Participants, you are representing, here, today, about half of the population of the world. This shows that, even in the midst of the most terrible situations - in time of war and conflict, humanity can prevail.

Belligerents in armed conflicts are often accused of not obeying the rules of war. Though they may sometimes be ignorant of the rules, they are neither legally nor morally free to make "their own rules" in a conflict. There are many long-standing rules of international law that govern how adversaries should behave. Many of these laws can be traced to ancient cultures, where they were implemented long before the notion of humanitarian law treaties ever existed in the western world.

For example Hazrat Abu Bakr, the first Caliph of Islam, instructed us:

> *Remember that you are always under the gaze of God; and on the eve of your death that you will have to reckon on the last day. When you fight for the glory of God, behave like men, without turning your back, but let not the blood of women or that of children or the aged tarnish your victory. Do not destroy palm trees; do not burn dwellings or wheat fields; never cut down fruit trees; only*

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* Head of Regional Delegation, ICRC, New Delhi

kill cattle when you need it for food. When you agree upon a treaty take care to respect its clauses. As your advance progresses, you will meet religious men who live in monasteries and who serve God in prayer: leave them alone, do not kill them or destroy their monasteries.

Closer to us in time - in 1858 - but further in geography, King Mosheshwe, of Lesotho in Southern Africa, sent a strong letter to General Boshoff, from South Africa, who was marching against him:

When you came to Thaba Bosigo, you fired more than ten cannon—shots at mission premises but the Lord did not allow you to touch them. (...) When I was at war with Sikonyela, I gave orders to my people not to destroy that chief's church and they did not touch it. (...) Your warriors deserve another great reprimand. (...) Why did they burn deserted villages on the road, and also the grass of the fields?

And now, if my heart could allow me to copy your children, I would be justified in carrying women and children into captivity, in killing old and sick people, and in sending into eternity all the blind people that I could find in the free state. I would also be justified in burning all the towns where yourself and your captains reside, but this, if I did it, would be too great a calamity...

We have got several reasons for wishing a fight. (...) You have destroyed our corn in several districts of the Lesuto, and because the people of those districts shall be hungry during the winter, we would like to look for some food in the Free State. (...) However, my name is Moshesh, and my sister is called "Peace".

Back again in History, centuries ago, the Laws of Manu instructed who could be attacked, and who should not be attacked during conflict. Those protected from attack included women, children, the aged and those warriors "*deprived* of *their chariot."* These beliefs of Mahabharata also banned the destruction of places of religion.

So, we see that, among others, in Islamic, Hindu and African cultures and traditions, the rules for the humanitarian conduct of warfare have existed for centuries. I am sure that our friends at AALCO could bring us many more examples of those rules. However, these rules tended to be passed by word of mouth only; they were not formally recorded in writing. The codification of these ancient rules into a permanent and written law, IHL (or IHL) began with the first Geneva

Convention in 1864. This is what gave Henry Dunant, the founder of the Red Cross and Red Crescent Movement, the first Nobel Peace Prize ever attributed, in 1901; the codification of these ancient rules in a permanent and written law, which was ratified and implemented by states. This was the beginning of so called modern IHL and it contributed to the development of many of the modern treaties dealing with behaviour in armed conflict.

But are these treaties, such as the 1949 Geneva Conventions, which are signed by virtually every country in the world, all the rules we need to protect the victims and regulate armed conflict? The answer is no. Treaties are written agreements between the States that sign them, but they are not legally binding on non-signatories. States are obliged to apply treaty law; but individuals who are not acting on behalf of states, yet who involve themselves in armed conflicts, are not bound by treaty law. There's also often argument about precisely what rules must apply. It was this argument about the applicability of treaty law which led to the desire to be more precise about the extent to which law commonly binds belligerents.

For the last ten years, the ICRC has been working with legal experts from around the globe and, in particular from many countries represented here today, in order to produce a definitive record of the customary rules of armed conflict, and this document is being publicly launched in Delhi today.

Some of the experts that contributed to the study are with us today and I would like to seize this occasion to present to you, ladies and gentlemen, our most sincere thanks and admiration for a job well done. You can be proud at seeing the fruit of your work. The ICRC is grateful to the countries represented by participants to this launch and tomorrow's workshop, for the effort made by their countrymen and women in compiling this record of customary rules.

The advantage of those customary rules of IHL is that they bind all those who participate in armed conflict, whether they have signed a treaty or not. In addition, customary law rules are not restricted in their field of application. Many of the rules apply to all forms of conflict whether international or internal. These 161 "non-treaty" rules of warfare or "customary" rules of warfare not only bind all belligerents to a conflict. They also greatly strengthen the weaker areas of treaty law, such as the protection of civilians and civilian property in times of internal armed conflict.

This is not to say that Treaty Law is now less important. The entire

body of law should be seen in a holistic way, with both Treaty and Custom contributing in near equal parts to assist and protect the victims of conflicts. We in the ICRC still urge all States to join with the majority of the international community who have ratified key legal instruments of IHL, such as the 1977 Protocols Additional to the Geneva Conventions and other treaties, such as the Rome Statute for the International Criminal Court and the Ottawa Treaty banning Anti-Personnel Landmines. We also urge states to take the steps necessary to implement these treatises including enacting domestic legislation. This will allow these laws to be properly enforced in periods of armed conflict and internal violence, and help ensure better compliance.

Senior bureaucrats and diplomats as well as legal, academic and military representatives from more than 23 Nations are gathered here today for the Asian launch of the Customary Law Study and this is also a tribute to those who contributed to the study. However, this addition to the body of humanitarian law is not an end in itself. There must be strong leadership within governments to ensure that the political will exists to enforce the law and to bring to justice those that fail to respect it. There must also be the legislative and judicial measures to enable breaches of the law to be repressed. While this launch signals a major step forward in the application of the law to all actors in armed conflict, much remains to be done.

By your presence here today, ladies and gentlemen, you have all made some contribution to this important study. But like all good students it is not enough to just attend the class - we need to see what is written on your report card as well. Those deprived of their freedom, and those who are tortured or otherwise mistreated as a result of conflict, need full international compliance with all of the norms of IHL - both Treaty and Custom. We therefore ask that some of the glamour of this launch be matched by the significant impact that you can all have in forcing compliance with the law and thereby truly protecting the human dignity of the victims of armed conflict. What President Mandela once said of the ICRC can apply to IHL that you, in your different capacities, can help being implemented: "*it is not that much the good that you do which counts, it is the evil you prevent from happening*"...

Mr. Chairman, ladies and gentlemen, I wish you an informative and interesting two day stay here in Delhi and a successful conclusion to

the hard work that has produced this study. I also hope that you will make these sessions lively through your active discussion and debate. I am confident this will result in a fruitful exchange of ideas and opinions which will enable us all to benefit from the vast experience assembled here - rich from many different horizons and cultures, and fed with diverse and noble humanitarian traditions.

I thank you for your attention.

INTRODUCTORY REMARKS

Wafik Z. Kamil*

His Excellency Mr. E. Ahamed, excellencies, distinguished guests, ladies and gentlemen.

At the outset, on behalf of Asian African Legal Consultative Organization (AALCO) and on my own behalf I would like to welcome all of you to this important conference to mark the publication of the ICRC study on 'Customary International Humanitarian Law' which is being jointly organized by the ICRC and AALCO.

As an intergovernmental organisation of 47 Member States, AALCO's primary function is to promote the development of international law and legal co-operation among the states of the Asian and African region. Since its inception AALCO has given equal importance to issues of human rights and humanitarian law along with other topics of international law. In recent years, it has been focusing its attention on human rights and humanitarian law matters which include Status and Treatment of Refugees, Legal Protection of Migrant Workers, Establishing Cooperation against Trafficking in Women and Children, International Terrorism and Deportation of Palestinians.

On this occasion, AALCO is proud to have a Conference on "Custom as a Source of Humanitarian Law" being jointly organized with the ICRC. It needs no mention that owing to its significant contributions to the development of IHL, ICRC is rightly recognized as the guardian of IHL. AALCO as one of the intergovernmental body is also keen to promote and codify international law.

I would also like to take this opportunity to highlight the close association AALCO has had with the ICRC over a long period of time. AALCO's association with ICRC is not new. It started with concrete

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* Secretary-General, Asian African Legal Consultative Organisation (AALCO).

steps in 1997 when both organizations jointly organized a special meeting in conjunction with AALCO's thirty-sixth annual session in Tehran on an important item entitled "Inter-related aspects of International Criminal Court and International Humanitarian Law". This cooperation further continued as AALCO and ICRC jointly organized a seminar on the various aspects of international humanitarian law on 17 November 2000 in New Delhi on the occasion of AALCO's Constitution Day. It is the determination to uphold IHL that continues to remain as the guiding principle for the joint efforts of both the organizations. We have formalized our cooperation by initiating a cooperation agreement in New Delhi on 17 December 2002 and by signing it in Geneva on 7 July 2003. Promotion and development of IHL is the primary objective of our cooperation agreement.

Further, it may be recalled that during the Forty-Second Annual Session of AALCO held in Seoul, South Korea (2003), we organized a Special Meeting on " The Relevance of International Humanitarian Law in Today's Armed Conflicts", with the full cooperation of the ICRC. The Session adopted the *Seoul Resolution on the Relevance of International Humanitarian Law in Today's Armed Conflicts* which contains a series of directives for the Member States, and urges all parties in armed conflicts to respect and ensure respect for IHL whether as treaty law or as customary law, and to comply, *inter alia*, with the principle of distinction and the principle of proportionality during armed conflicts.

IHL has been codified to a large extent in the form of treaty law. The developments that started in the late 19 century have been crystallized into important treaty obligations with progressive development in terms of scope of these obligations and also in terms of adherence by States. A series of Declarations, Conventions and Protocols were adopted in the last century that forms the crux of the IHL. To name a few, these include the 1899 and 1907 Hague Regulations; Geneva Conventions of 1949 and the 1977 Additional Protocols; 1972 Biological Weapons Conventions; 1993 Chemical Weapons Convention; 1997 Ottawa Convention on the Prohibition of Anti-Personnel Mines; 1954 Hague Convention on Protection of Cultural Property and its two Protocols; and the 1998 Statute of the International Criminal Court.

These treaties have also contributed to the growth of IHL. The four Geneva Conventions of 1949 and the Additional Protocols of 1977, and

the Banning of Landmines Convention of 1997 are among the major conventions concluded under the auspices of the ICRC. I would now like to highlight the relevance of customary humanitarian law in the present context. First, the making of international law is still reserved to states with some allowance for the role of intergovernmental organizations. Thus, treaties apply only to those states that have ratified them. Though the 1944 Geneva Conventions have been almost universally ratified, some states are still reluctant to become parties to the two Additional Protocols of 1977. This situation leaves considerable area unaddressed within the framework of treaty law. Here lies the relevance of customary international law.

Second, even though non-international armed conflicts represent the majority of present-day armed conflicts, treaty law does not regulate them in sufficient detail. The Additional Protocol II, which deals with non-international armed conflicts, contains only basic regulations on the conduct of hostilities and humanitarian relief operations. Further, many states have still not ratified it. At the time of writing AP II had been ratified by 159 states. Thus, the treaty law dealing with non-international armed conflicts and applicable to majority of states is, in many cases limited to common Article 3 of the four Geneva Conventions, as they have attained almost universal ratification. It is relevant in this respect to underline that in such internal conflicts, both governmental armed forces and rebel forces are bound by these customary rules and can be held accountable in cases of non-compliance.

Third, in order to determine which treaty law applies to a particular conflict, a prior characterization of the conflict as international or non-international is required and this is often difficult or subject to dispute. Customary law can be of great help here. It can guide us in finding rules that may apply equally in international and non-international armed conflicts, for example, the prohibition of attacks on women, children, journalists or humanitarian relief personnel and the prohibition of forced displacement of populations.

The identification of customary law is essential for reaching states as well as non-state actors. This exercise also helps to identify the process of hardening into custom of the norms stated in the conventions, which will also enhance respect for these norms and thus their effectiveness. Therefore the task undertaken by the ICRC and completed with due diligence in a decade time is a praiseworthy effort from the point of view of international law in general.

Therefore, I take this opportunity to express my appreciation to the ICRC for the extensive study made by them on customary rules of international humanitarian law applicable in international and non-international armed conflicts. The methodology and organisation of the Study would speak for itself for the amount of labour put in by the ICRC on this work. The Steering Committee of the Study consisted of eminent academic experts, which included Professors George Abi-Saab, Djamchid Momtaz and Theodor Meron, amongst others. Further, apart from the international sources taken from international and regional organizations, national sources collected from Asia, Africa, America, Australia and Europe have made this study more rich and authentic in content. Research in ICRC archives and expert consultations has further enhanced the significance of the Study. The study is comprehensive in nature as it attempts to explore the customary nature of humanitarian law principles. These include the principle of distinction; specifically protected persons and objects; specific methods of warfare; weapons; treatment of civilians and persons *Hors de Combat;* and implementation. I am convinced that this Study will contribute to the growing literature on the field of IHL.

It may be underlined on this occasion that identification of customary principles in international law is a difficult exercise, involving complex issues, such as state practice and *opinio juris*. Thus it becomes necessary to analyze each issue relating to customary nature of a principle in the particular context in which it arises. It is a fact that the 1977 Additional Protocols have not been adhered to by good number of states. This situation might lead to certain interpretative variations on the customary principles compiled in the present Study. Differences of opinion are bound to occur as has been the case with customary international law in general. However, this in no way belittles the significance of the Study. Though the customary principles contained in the Study may not be an authoritative assertion, which states are required to comply with, they will certainly serve as an important guide for the application of customary international humanitarian law.

I am confident that the academic discussions that are going to take place today and tomorrow will further clarify and contribute to the development of humanitarian law. We have a galaxy of eminent speakers with us for the two-day conference. We are happy that delegates from 18 Asian Member States of AALCO are attending this Conference. Also, Liaison Officers of several AALCO Member States are amidst us.

On behalf of AALCO and on my own behalf, I once again welcome you all to this conference and request you to enrich this occasion with your active participation in the discussions.

INAUGURAL ADDRESS

E.Ahamad*

Mr Vincent Nicod, Head of Regional Delegation of ICRC, Dr Kamil, SG of AALCO , Mr Larry Maybee, Mr Weeramantry, Prof. V.S Mani, my esteemed friend, Mirdha ji, excellencies, distinguished friends, ladies and gentlemen.

May I take this opportunity to convey my thanks to the organisers of this Conference and also my esteemed friend Mirdha ji for inviting me to attend this Conference. As a matter of fact, it is a great occasion for me to be in your midst as I was also a lawyer in my own way and very much interested in the legal matters and to spend some time distinguished lawyers and judges. But I am sorry, the Parliament is in session and like our practice in the Bar, we also have the Roster Duty where we must definitely be present. Therefore, I am constrained that I will have to go back; I hope you would appreciate the situation and excuse me for this 'audacity. I should be definitely present there as the Minister in charge of External affairs.

Dear friends, at the outset, I would like to congratulate the ICRC on the publication of the ICRC Study on "Customary International Humanitarian Law". I also congratulate the ICRC and the Asian African Legal Consultative Organisation (AALCO) for their initiative in organising this conference for the formal release of the Study and giving an opportunity to delegates to exchange views and interact with some of the experts involved in the preparation of the Study.

This Study is the result of several years of work, conducted by a number of experts from different countries, who have examined the State practice in arriving at the 161 customary rules of IHL. The massive work will require a thorough and in-depth examination by scholars, practitioners and governments. We hope that it will serve as a basis

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for future discussion and dialogue on the implementation, clarification and possible development of the law on the subject.

The objective of IHL is to limit the effects of armed conflict. It seeks to reduce unnecessary human suffering during an armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. IHL contributes to the maintenance of peace insofar as it promotes humanity in times of war by prescribing norms designed to alleviate suffering and moderation in conduct of war. It seeks to mitigate the effects of war by limiting the choice of means and methods of conducting military operations, and by obliging the belligerents to spare persons who do not or no longer participate in hostilities. IHL, however, does not deal with the issues concerning the legality of conflict which are dealt with under other rules of international law, notably the Charter of the UN.

While the origin of the current rules of IHL may be traced to the middle of the 19 century, a glance of the history of humanitarian law shows that rules on this subject are to be found in all cultures. In India, we have a very old tradition on respect of rules of war. In ancient India, the law on the subject was very clearly understood and widely known. The modern day rules pertaining to principles of distinction, unnecessary suffering, military targets, and prohibition of acts like treachery and attacking of person's *hors de combat* and humane treatment of prisoners of war find place in our ancient epics like Mahabharata. The Laws of Manu, considered among the world's premier compositions in ancient law, has a detailed description on the rules to be followed during wars. India is a party to the four Geneva Conventions of 1949 and has enacted the Geneva Conventions Act of 1960 to ensure national implementation of the Conventions.

The relevance of IHL in responding to the challenges of contemporary international armed conflict has increasingly been the subject matter of intense debate. The global fight against terrorism, regardless of how this phenomenon may be characterised in the legal sense, has led to a re-examination of the balance between the state security and individual protection. In this context, the over-riding challenge facing the international community is to find ways of dealing with new forms of violence while preserving existing standards of protection provided by international law.

The present day rules of IHL are contained in a number of Conventions dealing with matters ranging from the prohibition on the

use of certain weapons which cause indiscriminate damage and cause unnecessary suffering, to those that deal with means and methods of warfare. The Geneva Conventions and their Additional Protocols provide an extensive regime for the protection of persons not or no longer participating directly in hostilities. India is a party to most of the Conventions on the subject.

In international law, it is well accepted that apart from treaties establishing rules expressly recognised by the states, international custom as evidence of a general practice accepted as law, is also a source of international law. Treaties, since they are negotiated by states and accordingly reflect the agreement between the states on the rules of applicable and are further subject to a formal process of acceptance through signature and ratification, constitute the best evidence of the rules of international law. Treaties have the benefit of certainty since all state parties undertake to apply and be bound by their provisions. Treaties also have the benefit of providing clarity to the rules of law since the negotiations provide an opportunity for states to discuss any divergences if they may have and come to an agreement on what the rules are acceptable as binding.

Custom is the oldest and the original source of international law as well as of law in general. However, in order to be accepted as a binding rule, the custom must be one which is evidenced by the general practice of states accepted as law. Thus, for any customary rule to be accepted as binding, it must be shown that not only did the acts concerned amount to a certain practice but that they are such or are carried out in such a way as to be evidence of a belief that such practice is rendered obligatory of the rule of law requiring it. States, accordingly, must feel that they are conforming to what amounts to a legal obligation. Custom has advantage in that it does not require any express act of ratification or further acceptance by states. In the case of treaties and conventions, even after they are adopted, they need to be signed and ratified by a number of states before they enter into force. Rules under a treaty are binding only on the parties to the treaty, although to the extent that the treaty includes rules of customary law, such rules continue to bind all other states as well. However, customary law suffers from the disadvantage that it may be difficult to produce evidence of its recognition. Further, a rule of customary law may be limited in acceptance to a few states only, different customary rules may be

followed by different group of states or different regions of the world and even in cases where a general rule of customary law is accepted and established, there may be lack of agreement on matters of details.

I note from the programme that delegates from a number of Asian and African countries as well as from other parts of the world are participating in the conference and that the delegates including diplomats, judges, lawyers and professors as well as legal advisors to governments. I am sure that with the participation of so many distinguished experts, your deliberations in this conference will lead to a better understanding of the complex legal issues involved and will also lead to a wider recognition and more effective implementation of its principles which are directed at humanising the conduct of armed conflicts and lessening human sufferings.

I wish the Conference all the success; thank you very much.

INTRODUCTION OF JUDGE C. G. WEERAMANTRY

V. S. Mani*

Honourable Judge Weeramantry, Mr. Vincent Nicod, H.E. Dr. Kamil, Mr. Larry Maybee, Honorable Mirdha ji, Honorable Justice Rajendra Sacchar, Prof. Momtaz, my friend Dr. P.S.Rao, my numerous other friends, His excellencies, and other distinguished members of the audience.

Let me first of all thank both AALCO and ICRC for allowing me to participate in this very important occasion. I congratulate ICRC for having achieved this monumental milestone, a Study on International Customary Humanitarian Law. Maybe, it is a good idea to ask Judge Weeramantry, even hypothetically, whether the ICJ would have come out with a decision different from what it did in 1996, in the nuclear weapons case, had this study been published before that date. I leave that to him.

I felt humbled when I was asked to chair such an important session particularly with Judge Weeramantry to speak, and with such an august audience. But I relied on my past association with him and that helped me not to be cowed down by his long CV; which would run more than ten pages. He has written more than 20 books, and maybe, more than 150 articles. He has been a Judge on the ICJ from 1991 to 2000. Before that, he was a Professor of Law in Monash Law School. Before that, he was a Judge on the Federal Court of Sri Lanka. Each of these positions, he adorned with distinction. It was in 1986 that I came in contact with him when the Government of India decided to pursue its claims against Australia. In that context, it appointed a Commission of Inquiry. It then selected Prof Weeramantry, as its Chairman. In two years time, this three-member Committee went about collecting evidence; it

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is not just a question of collection of evidence in regard to Nauru's dispute against Australia. It was also about proposing how to remedy the environmental damage done to Nauru during colonial administration. The Weeramantry Commission came out with a 10-volume report and I still have a copy of that. Prof. Weeramantry also came up with a book entitled 'Nauru: Environmental Damage'. It is needless to say that if Nauru won the case before the ICJ, a substantial claim to credit should go to Weeramantry Commission. Then of course, we have had further associations. Judge Weeramantry has founded a very important International Centre for Nuclear Disarmament and Human Rights. He thought it fit to associate me with that. Most recently, under the encouragement of the ICRC, we were editing a book on IHL on South Asia. He was kind enough to contribute a paper, 'Buddhism and Principles of IHL'.

I am glad to report that the manuscript is now with the Oxford University Press. I do not know how much time they would take. It is important that the release of the ICRC work is being done in New Delhi and that Prof Judge Weeramantry has decided to give his benediction. I am saying this purposely. I remember the illuminating dissenting opinion he gave in the nuclear weapons case in 1996. The entire emphasis in his dissenting opinion has been on the role of international customary law in determining state attitudes and state conduct with regard to nuclear weapons. Speaking of IHL in that case, he found a number of peremptory norms of international law determining state conduct during armed conflict. I therefore, look forward to his address in the context of ICRC project which is being released.

Judge Weeramantry, sir, now the floor is yours.

THE REVIVAL OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

C.G. Weeramantry*

Your Excellencies, Your Lordships, this is indeed an historic occasion. We are witnessing one of the most important contributions made to the development of customary international law and it has been made in one of the most important areas of customary international law, namely customary international humanitarian law, because humanitarian law is one of the most practically important areas of international law.

The sources of international law are spelled out in article 38 of the Statute of the ICJ. That provision enumerates all the sources of international law and does not give priority to any one of them. But the sources enumerated there are treaty law, general principles of law recognized by the civilized nations – that is the antiquated phraseology of the Statute – customary international law, the writings of jurists and the decisions of courts as evidence of law. These are the sources of international law and, as I said, no priority is given to any one of them. They all rate as sources, but there is a popular belief that treaty law takes precedence over the fairly inchoate customary international law because treaty law is more precise, it is specific, and it deals with particular topics, after due deliberations by the countries concerned. So, there is a general feeling on the part of statesman and on the part of the public that treaty law has a certain edge of superiority over customary international law.

I believe that the reverse is the correct position, namely, that customary international law is in a sense much more important than treaty law because many of the principles that eventually get codified

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in treaties stem initially from the huge reservoir of customary international law, which is the repository of the traditions and the wisdom of the entire world community. Treaties, in fact, cover only a small area of the totality of the international law. Those are the areas where nations have got together and arrived at agreements, but there is a vast mass of general principles which can be brought into force dealing with particular matters and that source is what we term as customary international law. The traditions, the moral principles, the religious precepts of the whole world are contained in that reservoir. They are drawn from all the traditions and all the historical periods and it is a body of vast learning which needs to be comprehensively studied.

So, today we are celebrating the study of custom in the field of international humanitarian law (IHL). As you know, in this conflict-ridden world of ours, IHL has a very great role to play. It is an entirely uncivilized thing to go to war, but if we go to war, let us at least behave with some modicum of civilization. IHL contains the principles that tell us how that should be done. Without such studies as the one conducted by the ICRC, one would get lost in the search for principles; one could get confused in one's analysis and one would be dissatisfied with one's result because customary international law is an immense body of learning. Here we have the results of years and years of dedicated scholarship; nearly 4500 pages of assembled materials, all bringing together, for the first time ever, a whole range of materials drawn from customary international law, in relation to humanitarian matters.

That is indeed a cause for celebration; it is something that should be celebrated not merely within the four walls of this room. It should be a cause for worldwide celebration because here at long last, the results of years of study have produced an immense reservoir of principles, telling us how we must conduct ourselves if we are uncivilized enough to go to war. So, this is a worthy culmination of years of effort, a crowning achievement in the world of scholarship in international law. And it will be an essential tool from now onwards for a vast variety of people, including the police, the members of the armed services and their commanders, for bureaucrats, for foreign offices across the world, for the judiciary, for international lawyers, for academics, for NGOs, diplomats, students, those who have been at the receiving end of violations of these rules, and concerned citizens everywhere. I say, 'concerned citizens' and I am conscious that

'concerned citizens' form only a small section of the totality of the citizens of the world, which is very unfortunate. If more citizens of the world were concerned with these issues, we would not see the violations of international law, that we see all around us.

So, I think, it is a great thing and we must say from this room that there should be an educational process to tell the people of the world, the average citizens, the people who vote for Prime Ministers and Presidents, these are the laws of civilization which you, as civilized persons are bound to support and which you must ensure that your rulers do support, if you swear them into office. Unfortunately, the general public has not shown sufficient interest in these matters and it is our duty to stimulate greater interest in this field of study.

There is also another great value of customary international law. International law has grown up in recent centuries. When I say 'recent centuries', maybe you can even take 1625 as the starting point, when Hugo Grotius's great work on Law and Peace came forth. From then onwards, international law began to grow. That was a very great development of great value to civilisation, but it had one limitation. That is, it grew up in a Euro-centric, mono-cultural mode. It grew up as if international law was the product of one civilization and one culture. But it is a great need of our times that international law must break out of this mono-cultural mode and become a truly universal system; universalising international law is a great need of our times.

I have myself written a fairly large volume on universalising international law and I welcome this occasion because here we are provided the fruits of a period of several years of work in the universal field of law where principles, traditions, customs and rules from across the world have been gathered together by a team of dedicated scholars. So, this is another very important significance of this occasion. Customary international law, much more than treaty law, has the potential to universalize our body of international law. That is why I believe, and I have written myself to this effect, that customary international law is the most important source of law. It is from custom that all the other rules of law emerged; even the rules of treaty law emerged from customary international law. Take the rule *pacta sunt servanda*, which Grotius made the centrepiece of his new study of international law. *Pacta sunt servanda* is itself a product of customary international law because it is customary international law that tells us

that treaties are to be obeyed. So, the very strength of treaties is derived from a principle of customary international law. In the Eastern tradition, there is sometimes a story of the pupil who learns from the teacher and sometimes the pupil grows so big in his own estimate that he thinks he is bigger than the teacher, and eventually tries to outstrip the teacher. I am reminded of that when I think of treaty law, trying to outstrip customary international law. Treaty law grew out of customary international law; it derives its validity from the customary international law and therefore, customary international law is the mentor or *guru*, out of which treaty law has grown as a sort of disciple. So, let us remember that the main fertilizing source is customary international law. So, let us keep that in mind and proceed.

I must thank Prof. Mani for very his kind introductory comments, during which he has asked one or two questions. He asked whether the ICJ judgement would have been different had this Study been there. Of course, there would have given much more material to all those who were handling this matter, if this monumental Customary Law Study had been available then. I tried hard to draw into the decision as many principles of customary international law as I could, but my efforts would certainly have been enormously supported if there had been a body of learning like this available. So, I think, it might have drawn a little more attention to some of the aspects that hovered on the narrow borderline between the majority and the minority in that case and it might well have made a difference.

Secondly, he also referred to the Nauru Commission. That was a very important Commission in the sense that we were investigating a very important aspect of customary international law, namely environmental law. What we were trying to find out was whether the trustee power had violated the basic principles of environmental law, in their trust when they handled Nauru and when they extracted all the phosphate from that island, which was one of the world's richest repositories of phosphate. All that was based on customary international law; our report drew very heavily on customary international law because there was no treaty law. Very often people make this mistake of looking for something in treaties. If I may go back to the nuclear weapons case, I remember in the argument that took place before us, one of the lawyers for one of the nuclear weapons countries posed this question: where in the world of treaties, where in the world of

international agreements, where in the world of international documents, is there a prohibition against nuclear weapons? That completely overlooked the fact that in the repository of principles of international law, which we call customary international law, there were at least a dozen basic principles which were violated by the nuclear weapon. That again is an instance of how people look wrongly to treaty law for leadership, when they should be looking to the customary international law.

Once again, referring to the Nauru Commission, as Prof. Mani explained, we took two years and we did a very extensive study, not merely of Nauru but of the entire Pacific. There, we came across some terrible things in the history of the Pacific, after European traders came there. This is something that is pertinent to today's book launch. It is the question of arms dealers. One of the greatest difficulties in the world today is to match the power of the arms dealers because they are the greatest violators of some of these basic principles of international law and the arms dealers started their operations not merely in the 20 century; they have been in operation from the beginning of civilization. We saw this in our research in the Pacific, where we were researching the customs of Western traders. One of the things that we found was that the arms dealers came along to the Pacific. These poor people in the Pacific did not have any needs as such. But needs had to be created if trade was to be generated, so the traders started creating artificial needs. One artificial need that they created was the desire for tobacco. They started smoking schools and taught these people in the Pacific how to smoke. They were given free smokes. Once they came and got the free smokes and got hooked on the habit, then they wanted tobacco. At that time, they were told that if you want tobacco, you will have to pay for it or you give us something in exchange. Then again in regard to arms, they would give rifles to a few selected individuals in the islands. They gave ten rifles to ten young people who would go back to their villages and demonstrate their power. For the ten rifles given, there is a demand created for a hundred or a thousand rifles. So, that is good seed-money. The arms dealers would give those ten rifles out of the goodness of their hearts and then they get orders for 100 or 500 rifles; that is a good business. That is the way the arms dealers operate and still I am sad to say that they operate in the world in the same way, flouting all the rules of international law. We permit them

to flout these rules; we permit them to hawk these instruments of death which is the biggest industry in the world, in the so-called civilized age. Why? It is because we have lost sight of the principles of customary international law by which all the governments should be restraining the arms trade. We have lost sight of that and, in consequence, the world is plunged into one crisis after another.

So, humanitarian law is one of the most important areas law and we can feed it from many sources. It is of great importance because especially today it is growing very rapidly in several fields. We know that there are various international criminal tribunals which are now in operation; there are specific tribunals and there is also the ICJ. So, international criminal justice is moving forward very fast and this needs to be fertilized by a good knowledge of IHL. All the judges, all the prosecutors, everybody involved needs to have much better knowledge of IHL if international criminal justice is to flourish.

Then there is environmental protection. That is most important today because with the power of modern science and modern wealth, we are exploiting this poor Earth, this one Earth, which we all must share and which ten thousand generations after us also have got to enjoy. We, in one or two selfish generations are trying to de-spoil this Planet of all its resources. There must be principles of environmental protection. There are new problem areas surfacing all over the world – internal insurgencies, long term occupation of invaded territory, terrorism; all these things must attract the principles of IHL, if they are to be curbed.

There are also special types of weapons, as I said earlier. The arms industry is a very live one; they are going on very actively in their research. If you want research money to develop a new weapon, that money is very easily available. If you want research money to develop a course on humanitarian law, that becomes rather difficult to find. This is the problem with the world today. You find that money is still being put into arms research. Nuclear research is ongoing; better and better nuclear weapons are being made – more specific, more accurate and so on. Then there are chemical weapons, biological weapons, incendiary weapons, poisons, expanding bullets, exploding bullets, blinding laser weapons – all these are dealt with in this Study. The authors have brought together all the principles of customary international law that relates to this.

Now let me tell you something that looks quite funny. In the 19 century, the expanding or "dumdum" bullet had been invented. The expanding bullet was a bullet that, on entering the victim's body, expands and causes severe pain and suffering to the poor victim. So, all the so-called civilized nations met in the 19 century and said that this weapon is far too cruel to be used in warfare amongst civilized nations. Quite right. But those same nations, still calling themselves civilized, say that the nuclear weapon is quite in order. The "dumdum" bullet is wrong; it is quite contrary to all our principles, but the nuclear weapon is okay! That is the kind of ridiculous argument that is set up sometimes in the international world. Any school child will tell you how ridiculous it is. But people at the helm of affairs in this world do not. It is for us, the ordinary citizens of the world, the lawyers, the students, the academics and others to bring to their attention how idiotic this would appear to a visitor from outer space for example, who might come to this Planet and he is told that the "dumdum" bullet is very bad, but the nuclear weapon is quite all right. He would think that we had taken leave of our senses! But that is the way that we operate in this modern world. If we can correct that, then IHL will be the way we can correct it.

The history of humanitarian law is a history of the drawing together of the principles from several sources as I told you earlier. Because of the multiplicity of sources, there have been many problems besetting customary international law; there was no one collection from all the sources. That has been remedied today and now, with the publication of this Customary Law Study, there has finally been a collection from all the sources. There were previously separate studies conducted in different countries, but they had not all been drawn together. There had been no one source of general reference, but now here we have it. There was an infinite variety of state practices, and you have to evaluate these state practices to determine whether they amount to customary international law, and here we finally have a tool for doing so, with the collection of all those state practices. Then there are numerous new fields of application of customary international law, such as the environment, new types of weapons and so on. There is lack of public knowledge, but now with this Study there is some reason to think that the lacuna has been filled.

The belief that treaty law is more important than customary law is not accurate; I have already dealt with that. But why is customary international law so essential? Of course, I have told you that it is the repository of all the traditions of the world, but also, there are very often gaps in treaties. Treaties, sometimes deal with a certain matter, but omit reference to other related matters. Customary international law will assist you to fill those gaps in the treaties. Then, there can sometimes be difficulties in the interpretation of treaties. There are several interpretations possible and lawyers will argue for all of those; customary international law can tell us which of those interpretations is preferable.

Then again, we have the 1949 Geneva Conventions which might command international allegiance, but the 1977 Additional Protocols do not and that was referred to by one of the earlier speakers. Also, there are a large number of non-international armed conflicts going on in the world today – severe internal conflict and so on. Treaty law and all these conventions would not apply to them, but certainly customary international humanitarian law would.

Treaty law has a number of weaknesses, so what are they? To obtain a treaty, you have to obtain the consent of a country. To obtain a universal treaty, you have to obtain the consent of all the states in the world. You can well imagine how difficult that would be. You can very rarely get all the states of the world to agree to any one proposition. So, there will always be a number of states who will say that they are not parties to that treaty and so, are not bound by it. But of course, if you have the customary law principles, you can say that here is the principle; it is a general principle which all nations accept and so, you are bound, irrespective of whether you have individually consented to it or not.

Today many states are trying to be very self-important; they want to show how much they are in control of their own affairs. Accordingly, they do not want to derogate from any part of their national sovereignty by subscribing to a treaty. You cannot bind them by obtaining their consent to the treaty because they will not give you their consent; however, if you can get them caught within the network of customary international law, then you can bind them. We all know how difficult drafting negotiations are. There are many diplomats here who will tell you how sometimes days and weeks and months they have to talk about

the meaning of a particular clause in a treaty. Then, there is the difficulty of obtaining ratification and accessions even after the treaties has been signed; there will always be countries remaining outside the treaty regime.

People try to pour scorn on customary international law, by saying how can you say that all the nations have agreed on such a matter. Believe me, there is a huge amount of commonality in the shared traditions of the world. If we look at the matter closely enough, we find that people of goodwill and commonsense across the world are agreed on a vast number of matters which we might initially think they might be divided on. I recall when Mrs. Roosevelt and her Committee were working on the Universal Declaration of Human Rights; all the *pundits* of the time said that this was an absurd endeavour because you could never get an agreed document across all the cultures of the world. They all poured scorn on the Committee and its work, till eventually the Committee, through its perseverance, evolved the Universal Declaration of Human Rights in 1948, defying all the *pundits* who had predicted that this was not possible. There, you see that there is a huge area of common human sentiment which can be brought into these matters and this has only to be explored for us to realize how rich it is.

Let me give you a few illustrations from the work of that ICJ. Prof. Mani drew attention to the nuclear weapons case. Now, in the nuclear weapons case, I wrote a separate opinion and in it I drew very heavily on customary international law. One of the matters I drew upon was in the Ramayana – you get similar things in the Mahabharata also – there is this little episode: Rama was told at one stage by his military advisors that there was a hyper destructive weapon that was available and they were inviting him to use it. But of course, so great was the respect for law; it was said to him that you cannot use this weapon, without first consulting the sages of the law. The sages of the law were consulted and they gave their opinion and said that you cannot use this hyper destructive weapon; it will ravage the countryside of the enemy; it will kill vast numbers of the enemy; that is not the purpose of war. The purpose of war is not to exterminate your enemy and destroy his countryside. The purpose of war, if at all, is to subjugate your enemy so that you can live in peace with him thereafter. They said that this goes beyond the purpose of war and so, you cannot use it.

I use that as an instance of the way in which the wisdom of customary international law could help us in our modern age when we are losing sight of some of these basic principles; give us some enlightenment in dealing with a weapon of this nature. Incidentally, it is quite interesting that in the Ramayana, you also get some very interesting passages about the kinds of weapons that were available. I remember reading Viswamitra, who was a great sage who was the teacher of Rama; At one stage, he had been a warrior and a king and he had certain weapons at his disposal. This is the description of one such weapon: Viswamitra used all the missiles whose secrets had been revealed to him: the soporific missile – that is the missile that puts the enemy to sleep; the intoxicating missile; the missile that contains something, which when it gets into the atmosphere, intoxicates the enemy and make him incapable of defending himself. Missiles that are unbearably hot – the missiles that dries up everything; the missiles that tear things apart; the missile which like the thunderbolt, shuts everything. And yet another missile is so deadly as death itself. It is almost as if they were describing the nuclear weapon. These are all the weapons that were available then. Against that background of imagination as to what weapons could be made, the sages of the time said that you cannot use these in war because they go contrary to the principles of civilization. So, there is an illustration of how customary international law can help us in the matter of weapons.

I will give you another illustration of customary international law applying in another context. In the ICJ we had a case between Hungary and Slovakia, which related to the taming of the waters of Danube. Slovakia was complaining that some hydro-electric works that Hungary was doing with this water were damaging the environment of Slovakia. We were all invited to go to the scene, and all the 15 Judges went there to see the site. Incidentally, the Judges of the ICJ very rarely go to a scene, but we all went there with jeeps all around, helicopters going ahead because the Judges were all going in a row; they were15 gentlemen in the van. At the site, we found that there was this very impressive looking reservoir that had been created by Hungary. All my colleagues looked in amazement at what was a very great work of engineering. Of course, I had to go to each one of them and tell them that this was rather a small project compared to the enormous reservoirs that were constructed in my country of Sri Lanka 2000 years ago.

Otherwise, they could catch the belief that it is only because of the western world that they get all the technology; that all technology has come from the West. This is the important principle of modern international law. The principle is this: we have this principle of trusteeship of Earth resources, which modern international law has worked out, out of the cleverness of the modern knowledge, etc. So, I related to them this story which I referred to in my separate opinion. The Great Emperor Ashoka had a son, Mahinda as you know, who was a Buddhist Monk and he came to Sri Lanka. He accosted the King of Sri Lanka when he was out on a hunting trip. The King was out with some 100 of his followers, hunting deer in the royal forest. The Monk accosted the King and said, what is it that you are doing? You know they are the poor animals. For the sake of your pleasure, you are attacking and killing. But he said, remember, you may be the King of this Land; you may think that you are the owner of this land, but you are not the owner; you are only the trustee. You hold it for the benefit of those who have to use it, both now and in the future.

So, that is the first principle of modern environmental law which we think, we have rediscovered out of our modern genius. But there it was, 2000 years ago, preached by Mahinda to the King of Sri Lanka. That is the sermon that converted Sri Lanka into Buddhism. I cited that as an example of the basic principles of environmental law, having been worked out in antiquity. Furthermore, there is the principle of sustainable development. One of the great problems of modern international law is the question of sustainable development. In fact, there had been Heads of State summits on sustainable development. There was the Summit of Chief Justices also on sustainable development because we have to develop our resources for the benefit of people, but we cannot develop them at the expense of sustainability. So, there is an uneasy tension between the needs of development and the needs of sustainability – the two are in opposition to each other and they have to be balanced. The ancient Kings were able to do that because our ancient Kings said of course, development is important. We had the great King called Parakrama Bahu who said that not one drop of water is to flow into the ocean without first serving the needs of man; it should be used for irrigation before it goes into the sea. That is development. At the same time, however, he said that this development has got to be not for you and me, not for the next generation or the

one thereafter, but for centuries. We know today that some of these reservoirs that were made 2000 years ago, are still used by the farmers. That is the best example you can find of the modern principle of sustainable development and customary international law can give us that.

Then again, there was a case involving Giant Mian Island and the Christians of boundary delimitation. But there we had to go at length into the question of equity. What is equity in international law? I wrote another extensive opinion on equity in international law and how all the cultures and legal systems of the world can nourish and fertilize our understanding of equity. There can be equity of results, equity of principles, equity of procedures and so on, but in all of these our traditional systems can give us a lot of guidance. Then again we have inter-generational rights; that is another very important aspect of customary international law. There is also the wisdom of Africa, which Bishop Desmond Tutu has referred to quite often. If you take a decision about any important matter, it is a decision for humanity that you are taking. Humanity consists not only of we who are alive, here and now, but also those who went before us and those who are yet to come. So, there is a three-fold aspect of humanity. You cannot take any major decision relating to the use of Earth resources, relating to the land or relating to human future, unless you give attention to all those three aspects of humanity: those who went before us; what were their traditions; those who are alive now, what are their needs; those who are to come after us, what will be their inheritance. All of them have to be taken together; that is some of the great wisdom of Africa, which if only the modern law had taken into account, we would not have the environmental problems that we have today.

Then, we have this phenomenon that modern international law is moving towards the concept of community of nations – not the rights of individual nations. As part of a world community there are some general principles that apply, such as the principle of duty towards others; our ancient systems are very rich in this. In Japanese law for example, there is hardly a word for right. All the emphasis is on duty. What are your duties towards the community, the state, etc? And customary international law is very rich in concepts of duty. So, all of these are very important factors that we have to take into account in considering how customary international law is to the field in which

we are researching it. Here, we are researching it in humanitarian law.

Going back again to the nuclear weapons case, we have humanitarian principles from all cultures; environmental principles of trusteeship of Earth resources (i.e.) we cannot damage our Earth resources by using nuclear weapons. Then, we have human rights principles. They are all trampled under foot by the use of the nuclear weapon which can exterminate a hundred thousand or more people in a second; this denies the rights of future generations. The protection of cultural property is denied. All the customary system of law can assist us in international humanitarian law.

I already spoken to you about Hinduism and the example of the hyper destructive weapon. Islam is also very rich in principles of humanitarian law – for example, poisoned arrows are forbidden. One example from Christianity, in 1137 the Church said that the cross bow which had then been invented was too wicked a weapon to be used in warfare among Christian people. The Solemn Council of the Church condemned the cross bow and said that Christian nations could not use it because it was too cruel to be used in warfare. So, wherever we look, we will find great wealth of material which can certainly enhance our treatment of anything to do with IHL.

Let me also say just a few words about some of the great systems. I spoke of Hugo Grotius and 1625, the year he wrote his volume of War and Peace. It was supposed to be the first book on international law. What the Western world totally failed to realize was that 800 years before Grotius, the Islamic philosophers had produced full-scale treaties on international law. Ashabani and others had written on the law of War and Peace, the sanctity of treaties, humanitarian conduct, how to treat prisoners of war, etc. which are all the sum and substance of modern international law. They were all there in those ancient treaties. Here, I will again give some examples from the Prophet's teaching and taught by his Commander Habi Sufian. He laid down ten commandments for warfare, which included do not kill a woman, a child or an old man; do not cut down fruitful trees; do not destroy inhabited areas; do not slaughter sheep, cows or cattle or camel, except for food; do not burn date palms; do not embezzle, etc. All those laws which have to be followed during wartime are laid down as obligations in terms of Islamic teaching. The Calif, when writing to his commanders I think: do not commit perfidy; do not mutilate; do not kill children and so

on. All these are very specifically stated. Do not misappropriate booty; non-combatants are to be protected, prisoners of war are to be treated kindly; sick and wounded should be given medical treatment and so on. So, quite apart from the Quranic teachings there are innumerable traditions of the Prophet, which deal with proper conduct, even at the time of warfare. Then, in Islamic law, the different aspects of international law are quite elaborated and this forms the part of a body of learning that is the basis of that pool, the reservoir of customary international law from which we can fertilize modern international law.

I have written a book on this some years ago, calling international perspectives drawn from Islamic law and many commentators have said that they had not realized how detailed the Islamic tenets are in international law.

Likewise, in Hindu law, there is tremendous richness of specific examples, specific teachings of how you conduct yourself in battle, how it is unethical to kill a person who is intoxicated or who has a broken limb or is unarmed or is staffed. That is equal to the killing of a child and what you have got to see is what principle is behind it. It is amazing how much futuristic thought has gone into the Hindu considerations of matters pertinent to the laws of war.

Buddhism, of course, totally outlaws war. War is not countenanced as a possibility of proper conduct in Buddhism. But Buddhism is extremely rich in its psychological examination of the causes of warfare. What is it that causes conflict? Violence begets violence; force begets force; anger begets anger; violence never sees us through violence and so on. The peaceful resolution of disputes is at the heart of Buddhism. At the heart of that peaceful resolution is a great deal of psychological learning about the way in which human minds work and the Buddha has analyzed it in very minute detail – what is it that leads from tiny cause of dissatisfaction, to displeasure, to anger, to enmity, to hatred, to mortal hatred and so on. Even righteous indignation, the concept that is sometimes approved by philosophers is torn apart in Buddhist teachings and Buddha has condemned even righteous indignation as an ignoble concept because if you permit indignation to remain, then it grows and it becomes hatred, l, etc. So, you have to nip it in the bud. When I was in the court, I took advantage of the opportunity that I had to get the greatest sculptor that Sri Lanka has produced in modern times, Ranasinga, to produce a sculpture of Lord Buddha, settling a

dispute in Sri Lanka between two warring Tribes. So, there is a large Bronze sculpture that now hangs in the ICJ, outside the Judge's deliberation chamber, as a reminder to them as to what is important and what their duty is, etc. In this beautiful Bronze sculpture, you see the two leaders on either side, breaking their swords at the Buddha's feet. So, that is an example of Buddhist teaching in relation to war and the laws of war.

Likewise in Christianity, the Councils of the Church from the ancient times have said – I gave you the Council's example of 1137 – and the teachings of Christ himself (i.e.) he who lives by the sword shall die by the sword. All this lies at the heart of Christian teaching. Later, doctors of the Church sometimes, distorted this message, but you have to go to the heart of the message of Christ and there you see that peace is the basic message and anything that goes contrary to the fundamental dignity of the human person is contrary to the teachings of Christ. I have analyzed the Lords Prayer word by word and shown that there are embedded in the Lords Prayer at least 100 basic human rights. You can spell them out in detail, if you just contemplate the words of the Prayer. This again would be one of the most important sources of customary international law, because we are looking not for formulated treaties, we are looking for basic principles.

So, all of these teachings and sources are very important. I think we have got to arm ourselves against modern positivistic thought. There are some philosophers who are very positivistic. They want the law to be precisely formulated. They trace the ancestry to John Austin in the 19 century. John Austin, the English Jurist who even said, how can international law be law, because it cannot be enforced. So, there is no such thing as international law, but many people still are of the view that because of the lack of specificity in customary international law that it lacks the force of law. That is something that we, as scholars, have got to counter, forcefully.

This Study by the ICRC will have a great effect in showing that customary international law is indeed law, whatever Austin and all the positivists may say. There is an increasing tendency towards codification of international law, which again people think is the only way to make the international law clear. But here this Study is an example which shows that we can get our answers from customary international law. I could go on at great length about these matters, but perhaps I should

end at this stage.

Customary international law is one of the most important sources of law to fertilize international law of the future. We have got to respect it; we have got to develop it; we have got to research it and do so in every field; this Study by the ICRC is a monumental piece of research that has been done in the field of customary international humanitarian law. My congratulations go out to the editors and all who have participated in this Study. It is something that will serve the interests of humanity for generations to come. Through international law and through the fertilizing influence of customary international law, we will strengthen the case for humanitarian conduct on the battlefield. Some day, of course, we will have to eliminate war, but till we eliminate war, we must at least have the humanitarian rules of war being observed. This will be a very powerful tool to that end. I congratulate the authors and I congratulate the ICRC.

Thank you.

INTRODUCTORY REMARKS OF THE SESSION

Amitabh Mattoo*

Dear panelists, all the participants in this very important conference on Customary International Humanitarian Law, distinguished guests, ladies and gentlemen.

In the earlier session, you heard about the path-breaking study on the Customary International Humanitarian Law which has been made possible because of the work done by the ICRC. In this session, we are focusing on this study.

We have three distinguished panelists who are intimately connected with this research and compiling of the study. I, as a graduate-student in England, was told by my professor that there are two kinds of chairs. When professors are asked to chair the session, they are usually of two kinds – the first is a maximalist kind of a chair, who believes that he knows everything. This type usually does not let the panelists get a word edgewise, and, especially if there are graduate-students in the audience, then, it does not matter what the rest of the audience thinks, because the graduate-students will applaud whatever the professor has said. Then there is a minimalist kind of a chair, who does what he is supposed to do, essentially introduce the speakers, keep the time and perhaps lead the discussion and make some quasi-intelligent observations at the end.

I will be the latter – a minimalist chair- not only because I am not qualified really to chair a session with such distinguished panelists, but also because there are no graduate-students of mine who will applaud me afterwards, if I speak for most of the time. After judge Weeramantry's masterly presentation, it is a challenge for all speakers to say something new. However, I shall celebrate and applaud this fantastic work done by the ICRC, to bring together this *magnum opus*, which unfortunately

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I have not yet seen. I was told that this has been posted to me, but Jammu being Jammu; it did not reach in time. But I have seen the review or a synoptic study done by Dr. Jean-Marie, in the journal and some of the conclusions are really path-breaking. As all of you heard in the last session, Customary International Humanitarian Law is important not just because most IHL has not been codified, but also because what is codified is usually just a minimal acceptable understanding between nation-states.

In any case, many of the states have not adhered to or accepted the 1977 Additional Protocols or even the Geneva Conventions of 1949. Given the new distinctions being made between international and non-international conflicts, I think to look at customary law is both important and critical. How universal is this customary international law? I think academic reviews of this study will essentially focus on that.

We all know of the dangers of cultural relativism. I am sure in fact that given the fact that this study took ten years, and was finally arrived at after consultation with a range of experts from all over the world, this Study promises not to be tainted by cultural relativism and perhaps these 161 Rules it arrives at earlier were talked about, which are probably universal in nature.

The first speaker today is one of the editors of this book – Dr. Jean-Marie Henckaerts. He has been a legal advisor in the ICRC legal division since October 1996. He has been the head of the project on Customary International Humanitarian Law. He was also member of the ICRC delegation to the diplomatic conference on the second protocol to the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict. Dr. Jean-Marie has a power point presentation. We could perhaps initially limit the presentations to about 20 minutes each, if the panelists are so-willing, which will leave us enough time for discussion.

So, without much ado, Dr. Jean-Marie.

THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW – AN ASSESSMENT

Jean-Marie Henckaerts*

Thank you, Professor Mattoo. Good afternoon ladies and gentlemen, your excellencies, it is a true pleasure for me to be here today and to share with you some observations on the Study on Customary International Humanitarian Law. It is of course difficult to speak after such a brilliant presentation by Judge Weeramantry, but I shall try to do my best.

I. Introduction

The sources of international law are set out in Article 38 of the Statute of the International Court of Justice (ICJ). The main sources are treaty law and customary international law. There is a common belief that the treaties are the most important source, but as Judge Weeramantry pointed out, customary international law precedes treaty law and provides a reservoir of principles and rules on which the codification of treaties is based.

The history of the codification of international humanitarian law (IHL) started in 1864; that is about 150 years ago. But prior to that – many examples have been given by Judge Weeramantry – there have been 100s, if not 1000s of years, of humanitarian rules, based on customs. Because of the widespread codification of humanitarian law, we tend to overlook the fact that customary humanitarian law continues to exist.

In the codification of humanitarian law the main milestones includes:

- 1864: First Geneva Convention Protecting Wounded and Sick Soldiers

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- 1907: Hague Regulations Governing the Means and Methods of Hostilities
- 1925: Geneva Gas Protocol
- 1929: Two Geneva Conventions updating the Protection of Wounded and Sick and adding rules on the Protection of victims
- 1949: Four Geneva Conventions
- 1954: Hague Convention and Protocols on the Protection of Cultural Property
- 1972: Biological Weapons Convention
- 1977: Protocols Additional to the Four Geneva Conventions updating the rules on the protection of victims – Protocol I International Armed Conflict and Protocol II Non-International Armed Conflicts
- 1980: CCW and Protocols dealing with Certain Conventional Weapons
- 1993: Chemical Weapons Convention
- 1997: Ottawa Convention Banning Anti-Personnel Landmines
- 1998: Rome Statute of the International Criminal Court

Against the background of this wealth of treaty law and the detailed codification of humanitarian law, we tend to forget that customary law actually lay at the basis of humanitarian law and continues to exist in parallel with these treaties today. So, the study on customary humanitarian law actually goes back to the origins of humanitarian law, to custom.

II. Background of the Study

Why this study today? Why was it suddenly felt in 1995, when the study was mandated, that it was so important to clarify the content of customary humanitarian law? This was mainly the result of three impediments to the application of treaty law in practice that came to forefront at that time. In other words, the clarification of the content of customary law was felt to be necessary because there were certain problems with the application of treaty law.

The main impediments to the application of humanitarian treaty law today are that (1) ratifications are required for treaties to apply; (2) treaty law governing non-international armed conflicts is fairly limited and (3) the characterization of conflict is required prior to determining which treaty law applies, and this is not always easy.

With respect to the first impediment, the need for treaty ratification, this problem does not affect the application of the Geneva Conventions since they have been ratified universally today. Hence, it was decided that the study should not focus on the customary nature of the Geneva Conventions. As they have been ratified universally, they are binding on all states as a matter of treaty law anyway. The problem is rather relevant for those treaties that are not universally ratified, i.e. the Additional Protocols, the Hague Conventions and the weapons conventions. For example, although the Additional Protocols have been ratified by some 160 states today – an impressive ratification record by any measure – that still leaves an important number of states outside the framework of this treaty regime. This also implies that in different conflicts, different treaty regimes apply.

The second impediment is that treaty law, to the extent it is applicable, offers only a rudimentary framework for the regulation of non-international (or internal) armed conflicts, in particular with respect to the conduct of hostilities. Common Article 3 of the Geneva Conventions, the only provision of the Geneva Convention that is formally applicable to internal conflicts, does not as such deal with the conduct of hostilities. In addition, Protocol II, to the extent that it does apply, in other words, to the extent that the country in question has ratified it, does not deal with the conduct of hostilities, as well as some other issues, in sufficient detail either. For example, unlike Protocol I, Protocol II does not lay out the distinction between military objectives and civilian objects. So, it does not provide for any specific protection of civilian objects in general, nor does it define civilian objects and military objects. This is problematic in practice because even in internal armed conflicts, armed forces, both state armed forces and opposition forces, will actually be required to limit their military operations to military objectives.

Another example is the protection of journalists. There is an extensive provision on the protection of civilian journalists in international armed conflicts in Protocol I. But there is nothing in Protocol II. So, does that mean that journalists are not protected in internal armed conflicts? As Judge Weeramantry has rightly said, it is not because treaty law does not say anything, that there are no rules, in particular as custom may fill the gaps.

A third example is the issue of the missing. Again there is an extensive provision on the obligation to account for missing persons in international armed conflicts in Protocol I, but there is nothing in Protocol II. Obviously persons also go missing in non-international armed conflicts. So, this issue had to be addressed in practice and has been regulated to some extent. In other words, it is not because Additional Protocol II is silent on this issue that international law contains no rules altogether.

The third impediment, already mentioned by Ambassador Kamil, is that the characterization of the conflict is required in order to determine whether it is only common Article 3 or the entire body of Geneva Conventions that applies, whether it is Protocol I or Protocol II that applies. This requires a determination as to whether the conflict is international or non-international. That can be problematic in some cases. For example, the current conflicts going on in and around the Democratic Republic of Congo or the conflicts in the former Yugoslavia were not easy to characterize as international or non-international because in reality it was a mix of both. In these situations, the determination of the applicable treaty law may be difficult and to the extent that it is possible, the overlapping application of different treaties to different parties to the conflict creates complicated legal constructions.

III. Characteristics of the Study

The first characteristic of this Study is that it has been carried out pursuant to an international mandate. This mandate came from the 26 International Conference of the Red Cross and the Red Crescent in December 1995, at which all the states were present and had a right to vote. So, it is a mandate adopted by the international community of states. The Conference invited the ICRC to prepare, with the assistance of experts in IHL representing various geographical regions and different legal systems, and in consultation with experts from governments and international organizations, a report on customary rules of IHL, applicable in international and non-international armed conflicts, and to circulate a report to states and competent international bodies.

So, we have circulated the report, now referred to as a Study because of its size (2 volumes) and have sent a copy to each office of the legal advisor of foreign affairs of all states, to all national societies of the

Red Cross and Red Crescent, to all national humanitarian law committees and to some 50 international organizations.

Secondly, the Study was carried out in cooperation with a very large number of experts from around the world. A steering committee of 12 renowned professors of international law oversaw the conduct of the Study and we have the pleasure of having two of them among us, Professor Djamchid Momtaz from the University of Tehran and Professor Françoise Hampson from Essex University. They designed a plan of action to carry out the Study which resulted in the commissioning of some 50 reports on state practice by professors from all around the world. In the end, we ended up having 47 such reports – about 10 from Asia, 10 from Africa, 10 from the Middle East, 10 from Europe and 10 from the America. This was done is order to achieve a study that is based on practice from all over the world and not fall in the trap of having something which would be, for example, Euro-centric by citing examples of practice from a few Western States only.

Hence, we had to do a very comprehensive collection and analysis of state practice. We also looked at state practice in international fora, in particular the UN, regional organizations and international conferences. We also did additional research in our own archives where we examined 40 recent conflicts and received additional information from our delegations.

In total, we ended up relying on military manuals, legislation and case law, to name just these three sources of state practice of 148 States. So, in terms of geographic scope and coverage the study is very comprehensive and this had never been done before to this extent.

Finally, we also organized two consultations with 35 governmental experts who were invited in their personal capacity. Dr. P S Rao was the representative from India who was invited to these consultations.

The third characteristic is its inductive methodology where we tried to follow the methodology set out by the ICJ on how to determine the content of customary international law. Throughout the process we worked our way up, inductively, from the practice that was collected in Volume II to the formulation of the rules in volume I.

So, chronologically, Volume II came first as it supports the conclusions in Volume I. Volume I also refers back consistently to the practice in Volume II on which the conclusions are based.

As is well known, customary international law is defined as a "general practice accepted as law". A general practice is understood as extensive, representative and uniform practice, it is not required to prove that the practice be universal (which would be impossible to prove in most cases). So, the rules contained in this Study are supported by extensive, representative and uniform practice. Under the term "practice", we understand official governmental documents like military manuals which set forth training schedules for armed forces, which contain mandatory rules for armed forces to comply with and which they most often comply with. It also includes national legislation, national and international case law. It further includes official statements of acceptance, rejection or condemnation of certain behaviour, reservations made upon ratification of treaties and other similar official statements. Finally, reports on military operations and other types of official reports are also included.

But a general practice is not sufficient; it also has to be accepted as law. This requirement sets rules of customary international law, a source of binding rules, apart from rules of mere comity. There are certain practices which are carried out frequently and uniformly throughout the world, such as sending letters of condolences when a Head of State dies, but nevertheless no one would say that there is an obligation to do so because this is a rule of mere comity. The sending of such letters of condolence confirms to a settled practice but does not involve a sense of legal obligation. But the 161 rules identified in this Study are different as they do constitute rules of law. These rules are basic and will be recognized as forming a set of essential rules of humanitarian law. They set forth, e.g., the protection of the civilian population, the prohibition of indiscriminate attacks, the prohibition of sexual violence and many other, similarly important rules of humanitarian law.

Obviously, there exist in the application of IHL contrary practice, namely violations of existing rules. In the *Nicaragua* Case the ICJ has stated that the conduct of states should, in general, be consistent for a given to rule to exist as customary law and that instances of conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. So, to the extent that certain practices are seen as violations of existing rules, these (contrary) practices do not in fact negate the existence of customary rules, but in fact, reaffirm their existence.

IV. Content of the Study

This part will address (1) the subject matter covered by the Study, (2) give a very brief summary of the rules and (3) focus on some selected issues.

The Study contains 44 chapters dealing with a variety of subjects. Ambassador Kamil has mentioned them:

- The principle of distinction
- Specifically protected persons and objects
- Specific methods of warfare
- Weapons
- Treatment of civilians and persons *hors de combat*
- Implementation.

This structure can be found in both Volume I and in Volume II. So, any chapter in Volume I has a corresponding chapter in Volume II.

These 44 chapters deal with a wide variety of issues. So, it is a comprehensive study. Nevertheless, it is not exhaustive. It does not deal with all subjects of IHL. There are certain issues not dealt with, because of lack of time or other reasons. So, for example, there is no chapter specifically dealing with the identification of medical personnel, cultural property and so on. Similarly, there is no chapter as such on the subject of occupation, although the Study comprises a few rules dealing with occupation. Occupation was not dealt with as such because it is dealt with in the Hague Regulations which were found to be part of customary international law by the International Military Tribunal (IMT) at Nuremburg and it is dealt with in the fourth Geneva Convention which has been universally ratified. So, there was no compelling reason to include occupation as a separate subject.

In Volume I the Study has identified 161 rules of customary IHL. Of these, there are 12 that apply only in international armed conflicts. These include the few rules contained in the study on occupied territory, as well as the definition of armed forces and combatants and the rules on entitlement to combatant status and prisoner-of-war status – issues that are only relevant in international armed conflicts. There are two rules applicable only in non-international armed conflicts, dealing with amnesty at the end of hostilities and reprisals in non-international armed conflicts. But the vast majority of the rules that were identified, namely

147, are applicable in *any* armed conflict. From the point of view of the ICRC this is the most important outcome of the Study, as 8 out of 10 of the conflicts in which the ICRC is present are of a non-international character.

A few selected issues can be presented to underline this. I have already mentioned that on the conduct of hostilities, both common Article 3 and Additional Protocol II contain a very rudimentary framework: there are no specific provisions on the distinction between civilian objects and military objectives, on indiscriminate attacks, on the principle of proportionality, on precautions in attack which are so important to be able to implement the principle of distinction. However, rules governing these issues have been found to exist under customary law, applicable in both international and non-international conflicts.

The same is true for the regulation of weapons where many of the rules were originally formulated for international conflicts. It is only in recent years that the scope of application of some treaties on weapons was expanded to non-international conflicts. Similarly, we have found that state practice transformed many of these rules into customary rules applicable to both international and non-international conflicts. But we have been able to prove this based on the actual state practice and not on arguments of logic, which could easily be made because it is of course, not logical to be prohibited from using a weapon against a foreign enemy, and yet to be able to use it against one's own population. But we have avoided using the argument of logic by pointing at specific state practice supporting the application of these rules in internal conflicts.

I have said that the Study is comprehensive, but not exhaustive. It is also not exhaustive in responding to all the issues that have come up. As has been mentioned before, sometimes, there is agreement on the rule, but the devil is in the detail and maybe, there is disagreement about the meaning of certain words. This has also come out in the study and through the examination of state practice.

These are some issues requiring clarification that we have identified in doing the study. A first example would be the definition of civilians in non-international armed conflicts. This is related to the question of whether the members of armed opposition groups – rebel groups if you

like – are civilians who lose their protection from attack because they take a direct part in hostilities or whether they are something akin to armed forces. This has not been clarified in state practice.

The very concept of direct participation in hostilities itself proved to be unclear. Various lists of examples are cited in practice, but there did not seem to exist any agreement on acts such logistical support, the housing and feeding of rebel forces and other grey areas. Therefore, the ICRC has started a process aimed at clarifying this concept through a series of expert meetings that started in 2003.

A final example would be the principle of proportionality. Practice shows very widespread support for this principle. However, the practice we have collected does not give any more practical guidance as to how to operate this principle, namely how to weigh incidental civilian losses against the military advantage of an attack.

V. Conclusion

I will sum up now and present the main conclusions of this Study which go back to the reasons why this Study was carried out.

First, this goes back to the impediment that a number of treaties are not universally ratified and this hampers their application – there is nevertheless widespread acceptance of a number of basic rules and principles contained in these treaties. As a result, as a matter of customary law the rules and principles are applicable to all states regardless of their ratification or not of relevant treaties.

Second, this goes back to the impediment that the framework for non-international armed conflicts is rudimentary – the Study has identified nearly 150 rules that apply equally in international and non-international conflicts. As a result, we can rely on a more detailed normative framework for non-international conflicts, as developed under the impulse of state practice.

Third, this goes back to the problem of characterization of the conflict – to the extent that these customary rules are the same in both international and non-international conflicts, the Study identifies a common standard of behaviour applicable in any armed conflicts. States

have developed these rules to apply across the board because these are basic rules whose respect is required in any armed conflict.

CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: SOME FIRST IMPRESSIONS

Pemmaraju Sreenivasa Rao*

Mr. Chairman distinguished members of the panel and honored guests, ladies and gentlemen. Greetings, I am grateful to the ICRC and its regional office in India and AALCO for the invitation extended to me to participate in this important meeting organized on the occasion of the release of the seminal study on Customary International Humanitarian Law.

I. The Significance of the Study on Customary International Humanitarian Law

Since the end of Second World War efforts are underway to enlarge the sphere of application of international humanitarian law (IHL). To day the problem is less of enlargement of the substantive area of IHL and more of lack of effective implementation of the law that already exists. ICRC must be commended for its dedicated and professional effort not only to get the IHL codified and widely disseminated but also to get the content and the sphere of the application of the IHL continuously clarified and expanded.

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The two-volume Study (the second volume on practice is in two parts) published under the auspices of the ICRC this year is a major piece of work to promote the objectives of IHL (hereinafter is referred to as the Study)[1]. The main purpose of the Study is an ambitious but admirably achieved one, that is, to identify the customary norms of IHL that transcend the narrow confines of treaty regimes (in which, in some cases, they are incorporated but also those that existed outside the framework of the international or bilateral treaties), and hence binding on all states, whether or not they are parties to any particular treaty regime.[2]

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[1] The study is the result of a carefully structured (in terms of 161 Rules) and meticulously researched materials (historical origins, incorporation in treaty provisions and national legislations, confirmed in military manuals or assertions in official statements of states, parties or not parties to the relevant treaties, claims similarly made by such states in armed conflicts, decisions of the national and international tribunals) under the direction and supervision of some of the best known experts in the filed. The conclusions are drawn after well-organized deliberations over a period of time among a wide section of experts and concerned participants drawn from all the regions of the world. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volumes I (on Rules) and II (on practice, in two parts), (Cambridge University Press, 2005).

[2] J. M Henckaerts notes the relevant treaty regimes: the1949 Geneva Conventions and the 1977 Additional Protocols provide an extensive regime for the protection of the persons not or no longer participating in hostilities. The regulations of means and methods of warfare in treaty law goes back to the 1868 St. Peters Declaration, the 1989 and 1907 Hague Regulations and the 1925 Geneva Gas Protocol and has most recently been in reiterated, revised and up-dated through the 1972 Biological Weapons Convention, 1977 Additional Protocols, and the 1980 Convention on Certain Conventional Weapons and its five Protocols, the 1993 Chemical weapons Conventions and the 1997 Ottawa Convention on the Prohibition of the Anti-personnel Mines. The protection of cultural property in the event of armed conflict is regulated in detail in the 1954 Hague Convention and two Protocols. The 1998 Statute of the International Criminal Court contains *inter alia* a list of war crimes subject to the jurisdiction of the Court. See his "A Study on Customary International Humanitarian Law: A contribution to the understanding and respect for the rule of law in armed conflict", *International Review of the Red Cross*, vol.87(2005), pp.175-212.

The Study is bound to be an invaluable source of reference to all decision-makers including the judges of national and international tribunals concerned with the application and implementation of the IHL. It is an inevitable and authoritative source material for any further research and advancement of the law in future. As Judge Koroma noted in his foreword for the volumes (p.xiii) the Study will surely aid and enhance the ”(K)nowledge of the relevant customary law on the part of various actors involved in its application, dissemination and enforcement…”

It is difficult in a short presentation to review the Study in all its aspects. Custom as a source of international law has played a dominant role for a long time in the earlier years prior to the establishment of United Nations. But since then however, codification and progressive development of international law is sought to be achieved through the conclusions of international treaties. This is done to such an extent as to relegate custom as a source of international law to secondary level. The mystery surrounding the identification of the *opinio juris* apart, the lack of any consistent practice among nearly 185 states, how so ever “practice” is defined is perhaps another reason for our hesitant reliance on custom as a source of international law in the contemporary world. Nevertheless I believe it is beyond doubt that custom continues to play an important role as a source of international law in spite of the number of treaties that occupy the field today. In spite of the many treaties that govern a given area of international law, custom continues to be an important element in the interpretation of the solum of rights and obligations that exist. The Study should be commended not only for the clarity of most of the principles it convincingly identified as the customary principles of international law, but also for reiterating the value of custom as a source of international law.

Having said this it is but fair to say that the debate about the customary nature of one principle or the other referred to in the Study would still be around us in the years to come. This is not a deficiency of the Study rather I take it the very purpose of it. We need a continuous debate and continued evolution of universal consensus and respect for the fundamental principles of IHL. Further, the main value of the Study lies in its attempt to alleviate the difficulties caused by problems that are inherent in the implementation of the IHL. I shall address some of them and specifically those that concern the protection of the

environment and legal status of the nuclear weapons. This will be done with due regard for the relevant Rules noted in the Study with a view to assess the scope and significance of the current status of the law.

II. Some Problems Inherent in the Implementation of IHL

The distinction between legitimate military targets and protected categories of objects and persons gets blurred when considerations of military necessity and overall military advantage weigh in planning an attack.[3] Incidentally a civilian object is defined as one that is not a military object. Any loss of life of civilian life is often justified as unavoidable, incidental and collateral damage. The problem becomes even more complicated in the case of internal armed conflict, where the definition of a "civilian" and the concept of "direct participation" get complicated as the members of the resistance force do not often distinguish themselves and deliberately mask their identity until the moment of attack.

The principles that parties to the armed conflict should avoid means and methods of warfare which are likely to cause unnecessary suffering to the enemy combatants and that they use only that much force that is necessary and proportional to gain military advantage are honored more in breach. It is often argued that military advantage to be gained may not necessarily be related to the particular or isolated event in the armed conflict but may be related to gaining such advantage for the entire conflict if that is possible.

Proportionality in attack is equally difficult to define and establish and even more so if it is coupled with the concept of military advantage. For example, the Rome Statute under Article 8(1) provides jurisdiction to the ICC over war crimes when committed 'as part of a plan or policy or "as part of large-scale commission of such crimes." Further, according to Article 8(2)(b)(iv) of the Statute an intentional launching of an "attack

[3] Any installation otherwise protected under Article 56(1) of AP. I loses its protection if it also provides significant and direct support of military operations and if attacking it represents the sole means to end such support (Article 56(2). Also any other military objects located in the vicinity of civilian infrastructure my also be attacked if such attack offers the "sole" feasible means of terminating "significant and direct" support for the military operations. Article 56(2)(c)].

in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects…which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" is a war crime. This article, despite its value for the protection of environment to which we shall refer in a moment, would put the burden of proof on the prosecution to establish knowledge of the person(s) concerned, and it would also have to prove that the impacts are "clearly excessive" in relation to the anticipated military advantage in any trial of the war crime.[4] Further, while the principle of distinction is reiterated in the case of internal armed conflicts, the Rome Statute under Article 8(2) (c)[dealing with internal armed conflicts] or Article 8(2)(e) [dealing with serious violations of the laws and customs applicable in armed conflicts not of international character, within the established framework of international law], does not repeat the same prohibition contained in Article 8(2)(b)(iv). It is instructive to note that the 1977 Additional Protocol II, which deals with armed conflicts not of an international character, does not contain an explicit reference to the principle of proportionality.

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[4] Marcose A. Orellana, "Criminal Punishment for Environmental Damage: Individual and State Responsibility at a Crossroad", *The Georgetown International Environmental Law Review*, vol. XVII (2005), p.694.

[5]On the possible interpretation and the significance of the *Martens Clause*, which refers to the laws of humanity and the dictates of the public conscience, Antonio Cassese, "*The Martens Clause:* Half a Loaf or Simply a Pie in the Sky?", *European Journal of International Law*, vol.11(2000), pp. 187-216. According to Cassese, the *Martens Clause* is a contemporary legal myth of the international community. The author dismisses the more radical interpretation whereby the clause upgrades to the rank of sources of international law the "laws of humanity" and the "dictates of public conscience". He also finds the other interpretation, whereby the clause merely serves to reject a possible a contrario argument, namely that whatever is not prohibited is permitted, with a view to preserve any other pre-existing obligations, is equally without merit. He suggests that the clause was essentially conceived of at the 1899 Hague Peace Conference, as a diplomatic gimmick intended to break a deadlock in the negotiations between smaller and Great Powers. He suggests that the clause could nevertheless be given a twofold legal significance. First, it could operate at the interpretative level: in case of doubt international rules of humanitarian law should be construed in a manner consonant with standards

Against this background, the Study makes a good case that the test of proportionality is equally applicable in the case of internal armed conflict. It cites the principle of humanity[5], which is explicitly mentioned in the preamble to the Additional Protocol II. It further noted that there have been some recent attempts by States to include this principle in treaties they concluded. The International Criminal Tribunal For Former Yugoslavia (ICTY) jurisprudence also is referred to which confirmed the "the customary nature of this rule in non-international armed conflicts."[6]

III. Protection of Environment in times of Armed Conflict

Thus while there is need for further effort on the part of the international community to find ways and means to enhance the protection of the civilians and the civilian objects and to ensure a more humane conduct of warfare and humane treatment of persons, disabled in armed conflicts or detained in any form of custody of a state, I believe there is also an urgent need to enhance the protection of the environment itself in the times of the armed conflict[7]. It is common knowledge that states routinely use destruction of the environment to gain military advantage[8].

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of humanity and the demands of public conscience. Secondly, the clause, while operating within the existing system of international sources, could serve to loosen - in relation solely to the specific field of humanitarian law - the requirements prescribed for *ujus* whilst at the same time raising *opinio* to a rank higher than that normally admitted. See on the meaning and importance of *Martens clause*, both in times of peace and war, Dinah Shelton and Alexander Kiss, "*Martens Clause* for Environmental Protection", *Environmental Policy and Law*, vol.30/ 6(2000), pp.285-286.

[6] The Study, note 1, vol.1 on Rules, pp.46-50, at p.49.

[7]First the protection of the environment in international humanitarian law is not explicit and is mostly subordinated to the protection and survival of the civilian population; and protection of the environment per se is not conceived at all. While several instruments could be counted as helpful to the protection of the environment, it should be noted that they do not explicitly mention environment. Alexander Kiss and Dinah Shelton, *International Environmental Law*, third edition, 2004, p.736

[8] As recently as the conflicts in Vietnam, the Kosovo conflict, and Iraq, environment

One question that arises in interpreting and applying the provisions concerning the protection of the environment is whether the destruction was wantonly attempted or caused in pursuit of military advantage. In other words, issues arising in connection with the protection of the civilians and civilian objects would also arise, *mutatis mutandis*, in connection with the protection of the environment.

On the positive side, several instruments could be counted as helpful to the protection of the environment. It is however clear that the 1976 Convention on Military or any Other Hostile Use of Environmental Modification Techniques (ENMOD) prohibited only that level of destruction, damage or injury which produced widespread, long-lasting or severe environmental effects as the means of destruction, damage or injury to any other state party. Similarly Article 35(3) of the 1977 Additional Protocol 1 to the Geneva Convention prohibited the employment of methods and means of warfare which are "intended or may be expected to cause widespread, long-term and severe damage to the natural environment" without linking this impact on civilians or

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was severely destroyed with the widespread use of chemical defoliants, poisoning of wells, pursuing the scorched earth policy and engaging in indiscriminate bombing, burning of oil wells. See Marcos A. Orellana, note 4, pp.673-696, at p.675 and citations therein. According to a series of investigations conducted by the UNEP and other organizations and institutions, " fires from over 600 oil wells ignited by Iraqi forces (and finally extinguished in Nov.1991 only) caused large-scale atmospheric pollution and "black rains" in Kuwait and beyond, affecting human health, soil, water, and living resources , agricultural crops and cultural heritage; an estimated 60 million barrels of oil, released into the desert through "oil trenches" and from exploded or damaged wells , caused large-scale soil and water contamination and formation of oil lakes in an area covering 114 square kilometers; an estimated 6-14 million barrels of oil, released into the sea (from pipelines, offshore terminals and tankers) deliberately or as a result of combat activities, cause large-scale pollution of marine resources and of some 1500 kilometers of Gulf coastlines; an estimated 1.6 million mines and 109, 000 tons of unexploded ammunition were left behind, and vast areas of ecologically fragile desert terrain were degraded by military fortifications and vehicle movements; in addition, there were adverse environmental impacts from the influx and transit of thousands of refugees displaced to neighboring countries in the wake of the conflict". See Peter H. Sand, "Compensation for Environmental Damage from the 1991 Gulf War", *Environmental Policy and Law*, vol.35/6 (2005), pp244-249, p.244.

civilian objects as ENMOD did. It is a matter of debate as to which of the two thresholds noted have provided for a better protection of the environment. The provisions of the Additional Protocol I are more restrictive compared to the ENMOD in so far as the threshold is concerned but may have improved the situation by establishing "an absolute ceiling of permissible destruction" while ignoring the "the traditional balancing of military necessity against the quantum of expected destruction". However the Rome Statute in Article 8(2) (b) (iv) appear to link the two considerations[9]. The Study noted that while the ENMOD Convention prohibited deliberate use of techniques to modify the environment, the Additional Protocol I refers primarily to the effects on environment and establishes ceiling beyond which destruction is not permitted.[10] In so far as Additional Protocol II is concerned there is no provision concerning the protection of the environment. However the combination of the limited scope of ENMOD and the limited or more restricted nature of the definition of threshold specified by Protocol I may arguably be seen as sharply reducing the practical impact of the prohibitions contained in these two instruments, even if one considers them to be customary law[11].

Against the above background, Chapter 14 on the Natural Environment (Rules 43-45) of the Study makes an engaging reading and comes out with some valuable and thought-provoking conclusions. Rule 43 notes that no part of the environment should be attacked unless

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[9] Alexander Kiss and Dinah Shelton, *International Environmental Law*, third edition (2004), p.738.

[10] The Study, note 1, vol. I, p.155

[11] In the context of ENMOD Convention, the committee on Disarmament, which suggested the following 'understanding' annexed to the Convention, interpreted these terms. Widespread: covering an area of several hundred square kilometers; and Long-Term: extending over a period of months or approximately one season; Severe: involving a serious or significant disruption or harm to human life, to natural or economic resources or other goods. In contrast Additional Protocol I defines the "long-term" as a matter of decades. The difference is important in that ENMOD only deals with the limited category of environmental-modification techniques (which, with the exception of herbicides, have never actually been developed), whereas it is Protocol I that would govern environmental damage caused by all other means of warfare. Kiss and Shelton, note 9, pp.737, 738.

it is a military objective and any destruction of the same is prohibited unless required by military necessity. Further, launching an attack on a military objective is prohibited if it involved incidental damage to the environment, which would be excessive in relation to the concrete and direct advantage anticipated. Rule 43, according to the Study, acquired the status of customary law and is applicable both in the case of international and internal armed conflicts[12]. Rule 44 which states that the methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment, is customary law for the international armed conflicts but, the Study noted, only arguably so in the case of internal armed conflicts.[13]

As we noted above, the Rome Statute contains a similar provision to prohibit damage to environment but only a damage that is "excessive in relation to the concrete and overall direct advantage anticipated". ICRC maintains that the phrase "overall military advantage" is not of any particular significance. However, States, like the USA, U.K. and France appear to maintain that military advantage to be anticipated may be broadly interpreted to mean the overall advantage and not necessarily the advantage in a single or isolated episode. The Committee established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia was of the view that the environmental impact of that bombing campaign was "best considered from the underlying principles of the law of armed conflicts such as necessity and proportionality."[14] The Committee, it is true, however suggested that in order to satisfy the requirement of proportionality, attacks against military targets which are known or can reasonably be assumed to cause grave environmental harm may need to confer a "very substantial military advantage in order to be considered legitimate."[15] In view of these factors, the conclusions drawn by the ICRC would require some explanation to be put it in proper perspective.

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[12] The Study, note 1, p.143

[13] Ibid., p.147.

[14] Ibid., vol. I, p.145.

[15] Ibid.,p.146

IV. Role and Status of the Principle of Precaution in the Context of IHL

It may be recalled that the ICJ had occasion to deal with issues and status concerning emerging principles of international environmental law in some recent cases. The Court in the 1995 *Nuclear Tests* case (Request for an examination of the Situation) did not consider the merits of arguments relating to the need for prior assessment and application of the precautionary principle but referred to the broad obligation of states to respect and protect natural environment.[16] The Court in the 1996 *Nuclear Weapons* case stated, "States must take environmental considerations into account when assessing what is necessary and proportional in the pursuit of legitimate military objectives."[17] In that case the Court only recognized a "general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control", which it stated, "is now a part of the corpus of international law relating to the environment." [18] It also referred to "important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in an armed conflict"[19].

Keeping in view these pronouncements of the Court, the Study points out that the parties to an armed conflict are required to take all feasible precautions to avoid and in any event to minimize incidental damage to the environment. It is further suggested that lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions. Even though the Court as noted did not make any explicit references to the principle of precaution, the Study suggested that ICJ in the 1996 *Nuclear Weapons* case endorsed some basic principles of

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[16] Ibid., vol. II, p.875.

[17] Legality or the Threat of Use of Nuclear Weapons, Advisory Opinion, *I.C.J. Reports* (1996) pp.226, 242, para.30

[18] Ibid., vol. II, p.869. See also, Legality or the Threat of Use of Nuclear Weapons, Advisory Opinion, *I.C.J. Reports* (1996) pp.226,241-242, para.29.

[19] Legality or the Threat of Use of Nuclear Weapons, Advisory Opinion, *I.C.J. Reports* (1996) pp.226,243, para.33.

environmental law, which included *inter alia*, the precautionary principle[20]. In addition, the precautionary principle, according to the submissions made by the ICRC in 1993 to the UN General Assembly, is "an emerging, but generally recognized principle of international law."[21]

These observations raise a question about the status, scope and application of the principle of precaution in international law, which is still a matter of debate. While the importance of the "principle", and some suggest that this is an "approach" better termed as a "standard"[22], is increasingly being realized[23], the risks being taken by states to promote their urgent national security and development are debated essentially in terms of economics and equity and even in terms of morality. States are urged to keep all social and economic costs and benefits of the application of the principle of precaution, while arriving at any decision. The obligation involved is one of looking for better and better scientific evidence gathered from multiple independent and publicly accountable institutions without conflict of interest. It is also a principle that at best would shift the burden of proof from the plaintiff

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[20] Ibid., vol. I, at p.150, and n. 44.

[21] Ibid., p.150

[22] Sonia Boutillion, "Precautionary Principle: Development of an International Standard", *Michigan Journal of International Law*, vol.23 (2002), pp.429-469, pp.468,469. A similar, yet not identical view is expressed by McIntyre and Mosedale who assert that: "The Precautionary Principle is therefore a Tool for Decision Making in a Situation of Scientific Uncertainty, which Effectively Changes the Role of Scientific Data", see, McIntyre and Mosedale, "The Precautionary Principle as a Norm of Customary International Law", *Journal of Environmental Law*, vol. 9(2) (1997), at p. 222.

[23] According to Sands the language of Principle 15 of the Rio Declaration on the principle of precaution now attracts broad support and the principle reflects customary law, see Sands, Principles of International Environmental Law, (Cambridge: CUP, 2003) 2nd Edition, at p. 268,274. See also generally Nicolas de Sadeleer, Environmental Principles; From political Slogans to Legal Rules (Oxford: OUP, 2002), pp.91-223. The Precautionary principle has been endorsed by almost all international instruments on the environment since 1992. See. Alexandre Kiss and Dinah Shelton, *International Environmental Law* (Ardsley, NY Transnational Publishers, 2004), Third Edition at p.207.

to the defendant to prove that actions taken do not pose irreparable damage to environment and/or interests of the public[24].

While there is some justification for the Study to suggest that the precautionary principle is an emerging principle of international law, it should have qualified its statement in the light of the highly abstract and general nature of the obligation involved and the uncertainty surrounding its scope and the precise limits of its application in the context of IHL.

The Study also considered the validity and applicability of environmental treaties in times of armed conflict but is not able to conclude, because of conflicting or opposing views of states in this regard, whether they would be binding on the parties during the armed conflict.[25]

V. ILC's Work on the Status of Treaties on Environment during the Armed Conflicts

The International Law Commission (ILC) received and considered at its fifty-seventh session (2005) the first report on the topic of "Effect of Armed Conflict on Treaties", which is now one of the topics on its agenda. Ian Brownlie, the special rapporteur on the topic, does not find any clear principle in favor of the survival of the treaties on environment during an armed conflict. According to him these treaties could not be categorized as they are too varied and the intention of the parties is generally not specified. Further, he noted that the right of self-defense is not restricted in any manner except that it meets the tests of necessity and proportionality. He also believed that the ICJ in the advisory opinion in the *Nuclear weapons* case stated that there is "general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause

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[24] See for the application of the principle of precaution in India, which the Supreme Court declared as the law of the land, A. P. Pollution Control Board V. M. V. Nayudu, 2002(2) SCC 62. For a comment on the principle, Law Commission of India, One Hundred Eighty Sixth Report on Proposal to Constitute Environment Courts, Sept. 2003, p.18: Available at <*http://lawcommissionofindia.nic.in/reports*>.

[25] Ibid., p.151.

such damage; and the prohibition of attacks against the natural environment by way of reprisals."[26] There is however some enthusiasm within the Commission to promote the validity of environmental treaties during an armed conflict.[27]

On the use of destruction of the natural environment as a weapon, the Study doubts the customary law status of the ENMOD Convention but believes that there is widespread, representative, and uniform practice to conclude that the destruction of the natural environment may not be used as a weapon[28]. The Study addressed the principle of the protection of the environment in the context of the internal armed conflicts and concluded that it "is less clear" that the rule in both its parts is applicable to such conflicts as customary law[29]. However, it expressed the hope that it would become a customary law "in due course of time."[30]

In this connection, it may be useful to highlight the following points: The Court in the *Gabcikovo-Nagymaros* case[31] noted that environmental protection is an "essential interest". Accordingly, States and all parties to a conflict are required to uphold their international obligations to protect the environment even during an armed conflict and to not lightly discard them. The party engaging in an armed conflict in violation of international law must be deemed to be under a stricter duty to respect its obligations towards the environmental protection.[32] Even the party

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[26] First Report on the Effects of Armed Conflicts on Treaties, ILC, 57session, A/ CN.4/ 552, 21 April 2005, para 90.

[27] Report of the International Law Commission on the work of its 57 Session, UNGA, Official Records, Sixtieth Session, A/60/10, para 172, pp.65-66.

[28] Ibid., p.156

[29] Ibid.,

[30] Ibid., p.157.

[31] Judgment, para 121

[32] The sanctions imposed on Iraq and the compensation it required to pay for the damage done to the environment provides an instructive example. See A. Kiss and D. Shelton, supra note 6, pp.744-750. The UN Claims commission recently, while processing theF4 category (on environment and public health) claims rendered a decision awarding a combined total of US$5.26 billion to Iran, Jordan, Kuwait, Saudi Arabia, Syria and Turkey. This is the largest amount of compensation ever

acting in self-defense should take these obligations seriously and cannot abandon them without a justifiable military necessity.[33] In any case all the parties to armed conflict should be put under an obligation to restore the environment where possible or at any rate minimize and repair the damage as far as possible. Where restitution is not possible the duty to pay compensation must be clearly imposed. In this regard, even though the present draft articles on prevention and international liability are strictly confined to activities undertaken during peacetime, and set to govern damage done only in a transboundary context, there is no reason why they cannot by agreement or analogy be made applicable to the case of damage to environment during an armed conflict. Those draft articles on prevention and principles on allocation of loss are designed to apply to lawful activities and to any damage resulting despite observance of all duties of diligence prescribed by duties of prevention and best practices followed by the state or entity involved.[34]

VI. The Legality of the Threat or the Use of Nuclear Weapons

Turning to another important aspect of the Study, it is stated that nuclear weapons are prohibited as means of warfare because of their inherent inability to respect principles of distinction and proportionality.[35] The USA, U.K., and France contest this view as nuclear powers.[36] The views of the other nuclear powers and particularly that of the Russian

awarded in the history of international environmental law. See Peter H. Sand, note 8, p.245.

[33] The conflict involving the former territories of Yugoslavia provides lessons to be learnt. The Report of the Committee established to review the NATO bombing campaign which recommended against an investigation of the impact of NATO bombing on environment as the threshold to consider prohibited damage to environment was set too high to be breached, see Ibid., pp.751-753.

[34] For the ILC draft articles on prevention, see The Report of the ILC, UNGA, official records, Fifty-Sixth session, 2001, chapter V, A/56/10, paras 78-98. For the draft principles on international liability (the allocation of loss) in case of transboundary damage, The Report of the ILC, UNGA, official Records, Fifty-Ninth Session, A/59/10, chapter VII, paras158-176.

[35] The Study observed that the use of the nuclear weapons could be regarded as unlawful on the basis of the rules, for example, the prohibition of indiscriminate

Federation and the Peoples Republic of China are more nuanced on the point. From the very beginning of their development and their unfortunate use on Hiroshima and Nagasaki in the World War II, there is enormous scientific evidence on the serious and irreversible harm nuclear weapons could cause. Enlightened public opposition is only growing to their continued development and to the threat held out to their future use. However the nuclear weapons states oppose consistently all attempts to conclude any treaty prohibiting the nuclear weapons as a measure of disarmament. They equally reject the view that customary law outlaws the threat or use of the nuclear weapons in an armed conflict.

Given the consistent opposition of the nuclear powers since 1977 when this rule was adopted in a treaty form, the Study in connection with Rule 45 noted that in spite of a very large and widespread opinion and practice of states, and consequent emergence of customary international law obligation prohibiting the use of nuclear weapons, the three states are not bound by the obligation "if the doctrine of 'persistent objector' is possible in the context of humanitarian rules". The Study by itself, however does not explicitly take any position on the concept of 'persistent objector'.

The Study noted that there is uniform practice, in spite of the inconsistent practice and pronouncements of the same three states, USA, U.K. and France, binding even those three states, in favor of the prohibition of methods of warfare and use of conventional weapons that are intended or may be expected to cause widespread, long-term and severe damage to the environment.

The conclusion of the Study distinguishing the conventional weapons from the nuclear ones and yielding, albeit in a provisional or conditional manner, in the case of nuclear weapons to the claims of 'persistent objectors', to put it gently, is not one of the stronger spots of the Study and appear to raise more problems than it solves.

The doctrine of 'persistent objectors' and the principle of 'most affected states', require careful analysis because they are highly

attacks (Rule 11) and the principle of proportionality (Rule 14), The Study, note 1, vol. I, p.155.

[36] The Statements of USA, The Study, vol. II, p.895, U.K. and France, Ibid., pp. 152, 153.

debatable concepts in the context of evaluation of customary law. These concepts tend to overemphasize the play of power over legitimacy and universality as basis for international law[37]. The conclusion of the Study I am afraid, is at once inconclusive and fails to take full note of the interests of all states which are most affected by any threat or prospect of the use of nuclear weapons. Even the states that supported the view that nuclear weapons should be treated as prohibited should, I submit, not be held accountable, as they are only trying to promote the emergence of a universal prohibition. Under the circumstances, it is fair to say that the prohibition applies to one all at certain point in time, in spite of the earlier objections of some states or if these objections are still considered valid, then there is no prohibition binding any state. The Study could have done better in simply noting its inability to come to any conclusion on the legal status of nuclear weapons, and leaving it where the ICJ left it as part of its advisory opinion on the legality of the threat or use of nuclear weapons in 1996.

VII. Concluding Remarks

The prohibitions against attack on non-military targets, disproportionate attacks, and wanton destruction in the absence of military necessity, are much more important and much more established as customary law, despite difficulties associated with assessment, than the "absolute" prohibitions in ENMOD and Protocol I. Here the ICJ's recognition of the application of these principles to the natural environment is the key development.

The prosecution of at least some of those persons accused of serious, systematic and massive violations of IHL in the recent armed conflicts, subject of course to the due process of law and to the human rights

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[37] J. I. Charney, "The Persistent Objector Rule and the Development of Customary International Law", B.Y.B.I.L., vol.LVI(1985) pp.1-24, doubts its permanent role in the formation of custom. Ted L. Stein, " The Approach of Different Drummer : The Principle of the Persistent Objector in International law", *Harvard Journal of International Law*, vol.26(1985), pp.457-482, examines various difficult issues connected with the sustainability of the principle, where he noted that the application of the principle in contexts other than Asylum and the Fisheries cases, "is much less straightforward", p. 480.

of the accused[38], and the case law of the International Criminal Tribunal for the former Yugoslavia and Rwanda are important contemporary developments. This case law is also hailed for its contribution to the progressive development of law through judicial interpretation and judicious innovation to bridge the gaps and creatively enlarge the scope of the application of the law.[39] They underscore the point that the dictates of the IHL are not mere exhortations to be invoked or ignored to suit ones convenience[40]. They also serve a notice to all future violators that they may be held accountable for their crimes. The establishment of the International Criminal Court at The Hague is yet another step in the direction of promoting an effective and universal system of international criminal justice free from the odium of "Victor's Justice".[41]

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[38] There are some recent developments, which appear to make States more accountable and transparent than before. States are under increasing pressure to be more transparent and humane in the treatment of persons who are under any form of detention and thus denied of their freedom. The judicial process is invoked in every jurisdiction to safeguard basic human rights and fundamental guarantees.

[39] Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press, 2002), ch.4.

[40] Respect for international humanitarian law and its effective implementation is sought to be achieved through several strategies, for example: clarifying the content of the law, particularly the customary law, enlarging its scope to cover existing gaps, training military personnel and persons in command of the military operations and educating all concerned decision-makers including the concerned public through wider dissemination of the law and the essence of the legal principles, besides ensuring effective and expeditious prosecution of the persons accused of war crimes. See The Study, note 1, Rules 139-161, pp.495-621

[41] The Rome Statute is in many ways a laudable international effort to make international criminal justice system a reality. However in the opinion of this author it suffers from important deficiencies. For example, it is over-inclusive in as much as it enlarged the concept of crimes against humanity and subjects crimes committed in internal armed conflicts also to its jurisdiction. At the same time it is also under inclusive in as much as it failed to include the crime of aggression and the crime of international terrorism and international trafficking in narcotic drugs in the crimes punishable by the Court. Further while the Statute makes the use of certain weapons of mass destruction in an armed conflict a war crime, it does not criminalize the

use of nuclear weapons in an armed conflict. An Indian proposal at the Rome Conference to make it a crime was defeated by a motion to take no action on the proposal. The issue of making the jurisdiction of the ICC complimentary to the jurisdiction of the national criminal courts is accepted but the primacy of national jurisdiction is qualified. Further, there is always the possibility for the political considerations and double standards to take advantage of the international criminal jurisdiction enshrined under the Statute. On the question of the applicability of the universal jurisdiction to try the offenders of the crimes against humanity and crimes of war, Christian Tomuschat, "Universal Criminal Jurisdiction with respect to the Crimes of Genocide and War Crimes", *Yearbook of the Institute of International Law*, vol.71, Part I, Session of Krakow, Preparatory Work, 2005, pp.213-265, and for comments of Members and draft resolution proposed, Ibid., pp.267-288.

THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW – AN ASSESSMENT

Djamchid Momtaz*

I thank you for the kind words addressed to me. Ambassador Kamil, Dr. Rao, Dr. Jean-Marie Henckaerts, Excellencies, dear colleagues, ladies and gentlemen,

The study on Customary International Humanitarian Law is without any doubt a monumental work and represents a landmark in the progressive development of IHL and it will ensure I am sure, greater protection for war victims, especially during non-international armed conflicts.

As a member of the Steering Committee of the Study, I was closely involved in this important task and I am aware how difficult the assessment of Customary International Humanitarian Law is.

I would like to take this opportunity to thank once more – not only the ICRC, but also the authors of the Study, Mr. Henckaerts and Prof. Louis Doswald-Beck for the excellent work that they have achieved. It goes without saying that one of the major findings of the Study, as Mr. Henckaerts pointed out, is the fact that the regulation of non-international armed conflicts is more detailed in customary law than in treaty law.

I will start my expose by saying a few words regarding the question of definition of non-international armed conflicts. What I want to say is what we mean by non-international armed conflict. Considering the definition of non-international armed conflict provided by Article 1 of the Protocol II Additional to the 1949 Geneva Conventions, this question of the definition of the non-international armed conflicts arises: should

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we rely on the high threshold provided by this provision and limit the scope of the Study to armed conflicts which take place in the territory of a High Contracting Parties between its armed forces and the dissident armed forces or other organized armed groups which under responsible command, exercise such control?

If we rely on the definition of the non-international armed conflicts given by Protocol II, we have of course, to exclude armed conflicts in which dissident-armed groups do not control part of the territory of the state and also those armed groups without the participation of governmental armed forces.

I think personally that such an approach is not in accordance with the recent state practice evolving during the last decade. I am referring to the definition of the non-international armed conflicts, given by the International Criminal Tribunal for former Yugoslavia (ICTY) in *Tadic* Case decision on 2nd October 1995. The International Criminal Court (ICC) Statute dated 1988 relies on this practice and in Article 8, we can find exactly the same definition of the non-international armed conflicts as that found in the *Tadic* Case.

According to Article 8, as I said, of the ICC Statute, when a protracted armed conflict between governmental authorities and organized armed groups or between such groups takes place in the territory of a state, the armed conflict is considered to be a non-international one. Unfortunately, the Study does not take sides on this important matter and fails to give any definition of non-international armed conflicts.

I agree, an elephant is an elephant and we do not need to have a definition of what is an elephant. But I think that it will be good to have a definition of non-international armed conflicts in the Study. It goes without saying that the definition provided by the ICC Statute by embracing much more internal armed conflicts has my preference, and if adopted, it will ensure a better protection to victims of this kind of armed conflict.

My second point concerns the approach taken by the Study regarding the applicability of the IHL during non-international armed conflicts. The international legal rules governing combat operations, largely as has been said, codified in The Hague Convention of 1907, have traditionally been regarded as applicable only to international armed conflicts.

During the Diplomatic Conference leading to the adoption of the two Protocols Additional to the Geneva Conventions, Part IV of the Draft Protocol II on Methods and Means of Combat which dealt with part of the Law of The Hague, was completely unfortunately dropped. I think, this elimination during the Conference, cannot be taken as evidence against its customary law character. In other words, the customary law character of these rules cannot be affected by this deletion since a Diplomatic Conference obviously lacks the power to abrogate customary law by mere decision.

To argue the contrary would mean that combatants must be trained to fight in two different ways, according to the legal character of the conflict and without restraint in an internal war.

From the humanitarian point of view, the same rule should protect victims of international and non-international armed conflicts. I am referring once more to the ICTY decision in the *Tadic* Case. In this case, it found out that many of the laws and customs concerning the means and methods of warfare, the so-called the Hague Law, had become applicable in internal armed conflict as well.

The ICTY in this decision concluded that there had now developed a body of customary law regulating the conduct of hostilities in internal armed conflicts, the principle features of which were: the protection of civilian population, the principle of distinction between civilian and combatant, between military target and civilian targets; the principle of protection; and finally the proscription on the means and methods of warfare including prohibited weapons such as chemical weapons.

Hopefully the Study reaches the same conclusion as that of the decision taken by the ICTY in the *Tadic* Case. I would like to draw your attention to the rules contained in chapter I to IV of the Study, applicable *mutatis mutandis* both in international and non-international armed conflicts.

The third and the last point that I want to raise or address is the question of criminalization of the violation of the applicable rules during non-international armed conflicts. That is of course the question of non-compliance with IHL during this kind of conflicts. Regarding the question of criminalization of the violation of these rules, the revised Mines Protocol to the 1980 Inhumane Weapons Conventions – I can say that it is the only international instrument that may obligate states parties to ensure mandatory universal jurisdiction over any person

committing grave violations of the Protocol, even in non-international armed conflicts.

I think personally that the Security Council of the UN played a very important role in the criminalization of the violations of the IHL during internal armed conflicts at the beginning of the last decade. I am referring to the conflict in Somalia in 1993 and Burundi in 1996. In these two cases, the Security Council called for individuals to be held accountable for IHL violations. In establishing the two ad-hoc tribunals, it is the ICTY and International Criminal Tribunal for Rwanda (ICTR), the Security Council did not distinguish between international and non-international armed conflicts, nor did limit the notion of individual responsibility only to international armed conflicts.

It is needless to say that perpetrators of atrocities in internal wars should not be treated more leniently than those engaged in international war. It is interesting to note that Article 4 of the Statute of ICTR provides for criminal responsibility of those persons who have violated provisions of Common Article 3 of the Geneva Conventions and also violated Protocol II Additional to these Conventions.

The ICTY concluded in the *Tadic* Case – and I am referring to that once more and it will be the last time – that Customary International Law imposes criminal liability for serious violation of Common Article 3 and for breaching certain fundamental principles and rules regarding the means and methods of combat applicable during non-international armed conflicts.

The practice of some states indicates also a very clear move towards recognizing that violations of Common Article 3 during non-international armed conflicts give rise to individual criminal responsibility and that universal jurisdiction may be extended to violations of IHL during this type of armed conflicts.

The study takes into account this evolution and confirms that individuals are criminally responsible for war crimes they commit during non-international armed conflicts. I would like to draw your attention to Rule 151 of the Study providing this and I am quoting: “individuals are criminally responsible for war crimes they commit”. I also want to draw your attention to Rule 156 declaring this and I quote: “Serious violations of IHL constitute war crimes”.

The Study underlines the fact that state practice establishes this rule as a norm of Customary International Law applicable in both interna-

tional and non-international armed conflicts. I am talking about the violation of the IHL that constitute war crimes. The consequence of this finding is that states non-parties to a non-international armed conflicts may extend their universal jurisdiction to serious violations of IHL committed during these armed conflicts.

In other words, the jurisdiction given to states is not a mandatory universal jurisdiction involved in the "grave breaches" system as we can find in the Four Geneva Conventions. Nevertheless, the ICTY indicated in the *Tadic* Case that a change in customary law may occur so that the "grave breaches" system may eventually operate regardless of whether the armed conflict is international or internal.

In its judgment of 16th November 1998, in the *Celebici* Case, the ICTY concluded that there was a possibility that customary law had already reached the stage of development referred to by the Tribunal in the *Tadic* Case. I am talking about the applicability of the "grave breaches" system in non-international armed conflicts. The principle of *nullum crimen sine lege* does not, in my view, preclude the development of criminal law in this field. This principle requires that international tribunals should apply rules of IHL which are beyond any doubt part of Customary International Law. In our case, this condition has been already fulfilled.

In conclusion, regardless of the nature of the universal jurisdiction involved, we can argue that insofar as individual commits a crime in non-international armed conflicts, states may resort to universal jurisdiction as an enforcement mechanism of IHL. I just wonder why the commentary of Rule 144 proposed by the Study refers only to diplomatic protests and collective measures as means through which states may exert their influence to stop violations of IHL. I think the recourse to the principle of universal jurisdiction can be a very good means to stop violation of IHL.

I am confident that the exercise of universal jurisdiction by states non-parties to non-international armed conflicts will be a very useful tool to ensure respect of IHL by parties to such conflicts. Actually, as the ICRC has repeatedly stated, the obligation to ensure respect – we find this phrase in Article 1 common to the four Geneva Conventions and Protocol I Additional to the Geneva Conventions – of IHL included in Common Article 1 requires that states do all in their power to ensure that the corpus of law is universally respected.

Before ending my expose, I hope that the criticism of the Study would be a basis for discussion, on the clarification, interpretation and development of IHL. Thank you very much.

INTRODUCTION OF JUDGE PHILIPPE KIRSCH

Wafik Z. Kamil*

We are extremely honoured to have amongst us today, an eminent personality, His Excellency Judge and Ambassador Philippe Kirsch, President of the International Criminal Court, to deliver the Keynote Address on the topic "Customary Humanitarian Law, its Enforcement and the Role of the International Criminal Court."

His Excellency Judge Philippe Kirsch needs no introduction in international law circles. However, I would like to highlight some features of his career. Judge Kirsch has a wide professional experience in the field of International Criminal Court (ICC), International Humanitarian Law (IHL) and International Criminal Law, and this makes him the most apt person to deliver the lecture on the current topic.

It is almost impossible to list his achievements and experiences, within the allotted time we have. But to mention a few, they include his role and experience as the Chairman of the Preparatory Commission for the ICC 1999-2002; Chairman of the Committee of the Diplomatic Conference on the establishment of the Criminal Court 1998; Chairman of the UN Ad-hoc Committee; and the General Assembly 6th Committee Working Group for the suppression of the Act of Terrorism. Currently he is the member of the Group of International Advisors to the ICRC.

He has been very much related professionally to activities and bodies on the ICC, IHL, and International Criminal Law. He has also published a number of articles and books related to these topics.

Today's topic chosen also has immense relevance in the present context. The ICC is a body where both IHL and International Criminal Law are enforced. The contribution of customary law in drafting the constitution of the ICC, the Rome Statute, is immense. Also, in educating

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the cases, customary humanitarian law will invariably play an even greater role. I trust Judge Kirsch will provide a detailed account of the linkages between the customary law, customary humanitarian law, its enforcement, and the role of the ICC.

May I take this opportunity to share a few points on AALCO's interaction with the ICC, AALCO has been following the developments relating to the establishment of the ICC since its 35th Session held in Manila in 1996. The initial discussion in AALCO relating to the establishment of the ICC was first held during two special meetings, convened within the framework of the 35th Session in Manila and the 36th Session in Teheran. We had a special meeting exclusively on the inter-related aspects between the ICC and humanitarian law at its 36th Session. Thereafter, AALCO's Secretariat has been following this topic with great interest and it is deliberated at every Session.

I would like to recall that I represented AALCO in the conference held in Rome from 15th June to 17th July 1998. Parallel to this meeting, two meetings were organized by AALCO at the Rome Conference with the aim to collate the views of the AALCO member-states on the contentious issues before the Conference. The views expressed at those meetings were then forwarded to the Chairman of the Committee, Judge Kirsch. The outcome of the Rome Conference, the work of the Preparatory Commissions and Assembly of States Parties and other major developments are promptly reported for the benefit of the AALCO member-states.

We also have had the honour to have the Vice-President of the ICC, Judge Acua, at the 44th Session held in Kenya in Nairobi. She made a brilliant presentation, entitled "International Criminal Court, Independence and Inter-Dependence." I have been mandated by the 44th Session to explore the feasibility of convening an inter-sessional meeting, mainly to explore the implementation of the Rome Statute through national legislative mechanisms, and to contribute to the process of elaboration of the definition of the crime or aggression. I will definitely explore this possibility with Judge Kirsch.

Now, with these few words, ladies and gentlemen, I have the honour to give the floor to His Excellency Philippe Kirsch.

CUSTOMARY HUMANITARIAN LAW, ITS ENFORCEMENT, AND THE ROLE OF THE INTERNATIONAL CRIMINAL COURT

Philippe Kirsch*

I. Introduction

It is my great pleasure to speak to you today. I would like to thank the International Committee of the Red Cross (ICRC) and the Asian African Legal Consultative Organization (AALCO) for organizing this event.

The publication of the ICRC's study on Customary International Humanitarian Law is an important and highly anticipated event. I congratulate the ICRC and all those involved in the Study on this achievement.

The different panels and presentations during this conference illustrate the relevance of customary international humanitarian law to a wide range of situations. In my remarks today, I would like to focus on three themes. I will speak about:

- The importance of Customary International Humanitarian Law;
- The need to enforce International Humanitarian Law; and
- The relationship between Customary International Humanitarian Law and the International Criminal Court (ICC).

II. The Importance of Customary International Humanitarian Law

The international humanitarian law (IHL) of course consists of both treaty and customary law. Each source of law plays its own critical role in advancing the objectives of the law. Treaties have the advantage

* President of the International Criminal Court.

of clearly specifying the obligations of all parties. Treaties often give formal expression to customary rules. They allow for states to expressly consent to be bound by the obligations contained therein.

It is therefore important for many states that the granting of rights and the imposition of obligations be codified in treaties. The Rome Statute is a good example of this crystallization of customary rules. Many of the component crimes of crimes against humanity and to a lesser but significant extent war crimes were articulated for the first time in treaty form in the Rome Statute. The drafters of the Statute referred to customary law in formulating these crimes. Indeed, the ICRC study points out that "the negotiation of the Statute of the ICC was based on the premise that, to amount to a war crime to be included in the Statute, the conduct had to amount to a violation of a customary rule of international law."[1]

All states were invited to participate in the Rome Conference which created the ICC, and all states were likewise invited. To participate in the preparatory commission which drafted the elements of crimes.

The crimes defined in the Rome Statute were intended to reflect customary international law and were further elaborated in the elements of crimes. It is significant that the elements of crimes were adopted by consensus among states. At that time all states participated in the preparatory commission as such, these instruments clearly reflect the *opinio juris* of the international community, further supporting the customary nature of crimes within the court's jurisdiction.

Relying on treaties alone entails at least three limitations. First, reaching a consensus among a large number of states on the text of a treaty is rarely achieved. Second, once the text of a treaty has been adopted, the treaty must still be ratified by states in order to have widespread effect. The result of those two limitations is that complex, widely-ratified treaties such as the 1949 Geneva Conventions and the 1977 Additional Protocols are the exceptions rather than the rule.

Third, international law is continuously evolving. Existing treaties do not always accurately reflect the current status of the law.

Because of the challenges associated with relying on treaties, customary law plays an important role. Customary norms develop

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[1] Jean-Marie Henckafrts and Louise Doswald-Beck, *Customary International Humanitarian Law* (2005), p.572

through state practice and *opinio juris.* As this process is more flexible than that involved in treaty negotiation and ratification, it helps international law to keep pace with the dynamic and fast-paced world it regulates. Many of today's armed conflicts occur outside the framework of the Geneva Conventions. In such conflicts, customary law takes on added importance.

Relying on customary law, however, likewise involves a major challenge, which is to discern the precise content of custom. For this reason, the ICRC's impressive survey of state practice is a valuable resource for practitioners.

This survey may be used as a starting point to determine the extent of state practice and *opinio juris* relevant to a particular international humanitarian law norm in a specific situation.

III. Enforcement of International Humanitarian Law

I would like to turn now to the enforcement of customary international humanitarian law.

To be effective, customary international law must be enforced. Judge Nagendra Singh, the former President of the International Court of Justice (ICJ) and of the Indian Society of International Law (ISIL) stressed the crucial importance of enforcement mechanisms in his lecture and article entitled "enforcement of human rights in peace and war, and the future of humanity."

He warned, "if the legal link of enforcement is missing the world of law would degenerate to a moral recommendation to be ignored at will"[2].

The ICRC Study emphasizes that there is a customary obligation upon states under IHL to respect and ensure respect for IHL. this obligation is enshrined in Common Article 1 to the 1949 Geneva Conventions and Additional Protocol I. As indicated in the ICRC Study,

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[2] Nagendra Singh, "Enforcement of Human Rights in Peace and War, and the Future and Humanity", in *The Evolution of International Law since the foundation of the U.N. with Special Emphasis on Human Rights* (Thesaurus Acroasium of the Institute of Public International Law and International Relations of Thessaloniki, vol. XVI,Session 1985), pp.449-558 and 460.

all individuals, whether state or non-state actors, are liable for war crimes.

The ICRC Study identifies several means for enforcing international humanitarian law. These include:

- Enacting a number of bilateral and multilateral measures aimed at states that breach IHL,
- Strengthening domestic measures regulating conflicts such as military manuals, and
- Focusing on the individual responsibility of perpetrators of serious violations of IHL through the criminal prosecution of such individuals.

With respect to individual responsibility, the ICRC identifies two important principles as having attained customary law status. First, individuals are criminally responsible for violations of IHL which constitute war crimes. Second, each state is under an obligation to prosecute perpetrators of war crimes. The Statute of the ICC acknowledges this obligation, recalling in its preamble "the duty of every state to exercise its - criminal jurisdiction over those responsible for international crimes."

Over the past years, a system of international criminal law has developed around the principle of individual criminal responsibility. International courts have been established to prosecute the most serious international crimes in cases where states have been unwilling or unable to investigate or prosecute such crimes. Two UN ad-hoc tribunals and different internationalized criminal courts have been established to prosecute international crimes committed in specific situations.

The ICC has recently been established as the world's first permanent and immediately available international criminal tribunal with jurisdiction over the most serious international crimes, including war crimes. The ad-hoc tribunals were pioneers and demonstrated that international criminal justice can work. Nevertheless, as a permanent court, the ICC has some advantages over ad-hoc tribunals regarding the scope of its jurisdiction:

- The ICC possesses jurisdiction over the nationals and territory of all states parties to the Rome Statute. It also has jurisdiction in situations in which a state which is not a party to the Statute nevertheless chooses to accept the jurisdiction of the court; and

where a situation is referred to the Prosecutor by the Security Council of the United Nations. By their very nature, the ad-hoc tribunals only cover particular situations, circumscribed by geographical limitations.

- Temporally, the ICC has jurisdiction over genocide, crimes against humanity and war crimes committed since the entry into force of the Statute on 1 July 2002, with no limitation in the future. In contrast, ad hoc tribunals are generally a response to events in the past.

These features contribute to the ICC's role as an enforcer of IHL. And through enforcement, the ICC is also intended to deter potential future violations of IHL.

IV. Customary International Humanitarian Law and the International Criminal Court

I would now like to turn more in detail to the multifaceted relationship between Customary International Humanitarian Law and the ICC. Customary International Humanitarian Law is relevant to the ICC in at least three ways.

First, as mentioned earlier, the drafters of the Rome Statute drew on custom to arrive at the definitions of the various crimes within the jurisdiction of the ICC. The Rome Statute is thus, in this respect, a codification of customary norms.

Second, under Article 21(1)(b) of the Rome Statute, judges of the ICC may refer to the established principles of the international law of armed conflict as a secondary source of law when appropriate.

Third, the jurisprudence of the ICC may very well spur the further development of IHL, notwithstanding Article 10 of the Rome Statute. Indeed, the ICRC Study makes numerous references to the decisions of the ad-hoc tribunals and of other international courts as subsidiary sources of IHL.

I would like to focus in a little more depth on how the ICC may influence the development of IHL. This process is shaped by the particular relationship between the ICC and national criminal jurisdictions.

Judge Nagendra Singh repeatedly commented that the enforcement of human rights and humanitarian law is a matter for both national and

international institutions[3]. The primary responsibility for their enforcement lies with states. This is reflected in the ICC. The Court is founded upon the principle of complementarity. The court will investigate and prosecute those accused of genocide, crimes against humanity, and war crimes only when states are unwilling or unable genuinely to do so in their national courts. In order to determine unwillingness, the ICC will examine whether a state has acted in such a way so as to try to shield an accused from criminal responsibility. In order to determine whether a state is unable to bring transgressors to justice, the Court will consider whether a state's national judicial system has partially or totally collapsed.

Within this framework of cooperation, national prosecutions of international crimes are influenced by the operations of the court. States have already begun reviewing and improving existing legislation enabling them to prosecute war crimes in national courts or enacting legislation implementing the Rome Statute. This includes states parties, but it is also important that non-states parties have reviewed their own legislation in light of the Rome Statute. These laws may comprise evidence of state practice as regards the enforcement of IHL. In this way, the ICC can influence the development of IHL.

V. Conclusion

Today is the anniversary of the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide.

That Convention recognized that criminal prosecutions at the national and international level are essential to enforcing the prohibition on genocide. The same also applies with respect to war crimes and crimes against humanity, as well as to IHL more broadly.

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[3] Nagendra Singh, "*Enforcement of Human Rights in Peace and War, and the Future of Humanity"*, in *The Evolution of International Law since the foundation of the U.N. with Special Emphasis on Human Rights* (Thesaurus Acroasium of the Institute of Public International Law and International Relations of Thessaloniki, vol. XVI, Session 1985), pp. 449-558; Nagendra Singh,"The Fourfold Aspect of the Concept of Human Rights and the Importance of Humanitarian Laws of War " in E.S. Venkataramiah, ed., *Human Rights in the Changing World* (Indian Branch of the International Law Association, 1988), pp. 268-303.

The goal of effective enforcement of IHL has been made more closely attainable by the establishment of the ICC. 100 States have ratified the Rome Statute thus far. As more states ratify the Statute, the Court's role as an IHL enforcement mechanism will become more pronounced.

Yet as I have stressed today, the ICC is not in itself a panacea. The effective enforcement of IHL is a collective challenge. The primary responsibility belongs to states. The Court plays a specific role.

International and regional organizations as well as civil society also have their roles in ensuring respect for IHL and protecting individuals from unnecessary death and suffering in times of armed conflict.

The publication of the ICRC Study is a valuable contribution towards these goals. In closing, allow me, on behalf of the ICC to once again convey congratulations to the ICRC for the completion of this ambitious Study.

INTRODUCTORY REMARKS OF THE SESSION

A. Rohan Perera*

I intend to give as much time as possible to the discussion that is to follow. Therefore, the time limit of 20 minutes will also be applied strictly to the three speakers. So, without further ado, I invite Justice J.S. Verma, who has a distinguished judicial career in India. He commenced his career as a Judge of the Madhya Pradesh High Court and culminated his appointment as the Chief Justice of India in 1997. He is known for his judicial creativity on issues relating to gender and social justice. He also has an impressive record as an ardent advocate of human rights. During his tenure as the Chairperson of the National Human Rights Commission of India, he is well known to have given a special thrust to social, economic and cultural rights, along with group rights against marginalised minorities.

The theme of his contribution is "Relevance of Customary Law to the Ratification of IHL Treaties by States." He will address the issues of ratification decisive in implementing IHL, the added value of customary law and also the role of the national institutions such as Supreme Court and the National Human Rights Commission in expanding the national legal framework by attracting customary IHL. Without further ado, let me now invite Justice Verma to make his address.

* Legal Adviser, Ministry of Foreign Affairs, Sri Lanka.

RELEVANCE OF THE RATIFICATION OF INTERNATIONAL HUMANITARIAN LAW TREATIES BY STATES

J. S. Verma*

Thank you, Dr. Perera. Distinguished ladies and gentlemen on the dais and in the audience,

Indeed, it gives me great pleasure to be amongst you this morning. All of you, I am sure, are far more knowledgeable in the field of international law and IHL. So, I will confine myself to speaking more of the experience of which I have been a part in India: the experience of trying to implement the customary international humanitarian law, even in the absence of treaty obligations. How can national institutions discharge that very important function and make the IHL effective in the sphere in which they act? My personal experience of being involved in quite a few of those experiences, I would like to share with you.

I will begin by saying that if the national institutions are strong enough and they try to bring about as much creativity in the discharge of their functions, as they are expected to, then it would become a reality, something which so far, to a great extent, has been eluding us, as a mirage.

The basic principle of common law — that in the absence of Statute law, courts must resort to "justice, equity and good conscience" for deciding – is also the basic premise of the customary international humanitarian law because that is applied on the principles of humanity and from dictates of public conscience which means the same as justice, equity and good conscience.

I will come straight to the point – so that I may be able to utilize the time allotted to me, as effectively as I can – to share with you,

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the experience in India over the years which has really brought us to the conclusion, and that incidentally we had occasion to say in one judgement in 1997, of which I happened to be the author, taking a step further ahead of the Bangalore Principles. The Bangalore Principles require the national or domestic law to be interpreted consistent with the international law. But then, we have gone further in the *Vishaka* Case judgement, as it is known, and reported in *All India Reporters of 1997*, Supreme Court at page 3011. What we have said is that as a canon of construction, reliance can be placed on not merely the provisions of international conventions, but also on the international norms, which would cover everything falling within the meaning of customary international humanitarian law for the purpose of interpreting the constitutional guarantees in the domestic law, to not only fill gaps therein, but also to expand their content and scope, "except to the extent of inconsistency between the two".

I can tell you from my experience, which has been fairly long on the Bench, I did not find any situation where there was any inconsistency between our national law and the customary IHL to act as a constraint on us. Why? It is because there are enabling provisions in the Constitution, to be more specific: Article 14 guarantees the Right to Equality which the Supreme Court expressly said, contains the rule of non-arbitrariness; and Article 21, Right to Life and Personal Liberty. Right to Life has been interpreted to mean, Right to Life with dignity so that every aspect of human dignity is within Article 21 and human dignity is the quintessence of human rights. I have not been able to find anything, which is outside their scope. So, in Article 21, we have read everything, which is necessary for respect of human rights, every aspect of human dignity; and Article 14, as I have said includes the rule of non-arbitrariness.

The interpretation of these two articles in the Constitution of India has enabled reading into them everything that you can think of under the customary international humanitarian law. The case in which we said so expressly is the *Vishaka* Case judgement. Even though the critics term it as judicial legislation, there is no attempt, as yet, to enact legislation by the Parliament to deal with "sexual harassment", which is its subject matter. This judgement defines "sexual harassment", placing reliance on the Beijing Principles of Independence of Judiciary, Convention on Elimination of Discrimination against Women (CEDAW)

and everything that we could find in the international instruments, including the customary law, and reliance was placed on the provisions in the Constitution, including Article 141 which says that whatever the Supreme Court says is the law of the land.

We declared it to be the law, until such time as Parliament legislates to cover that field. It was a judgement rendered on 13 August 1997 and you would be interested to know that the Parliament has not yet chosen to enact legislation to substitute it, probably because they thought that they could not do better at present; and the executive has been busy implementing it. The service rules have been amended, the public sector undertakings have been asked to act accordingly. Educational institutions and other institutions, including private sector have been asked to implement it. The mechanism suggested therein for the purpose of implementing it is in place, without any express legislation to that effect.

I have referred to it as an extreme example to indicate the extent to which, and why is it accepted? As long as it is something that promotes the public interest, it is going to be accepted. Having said that, way back, much earlier than that, questions arose with regard to persons who were suspected to have infiltrated into the North East, and were not even accorded the refugee status. Today, we are still talking of a national law to deal with the refugees. I am talking of the area where either we are not a party to that treaty or have at least not ratified it. Even then, all those provisions have been implemented in this manner.

The Supreme Court held in that context that even non-citizens, which is a very wide expression, are entitled to right to equality under Article 14, Right to Life and Personal Liberty under Article 21 and Right to Freedom of Religion under Article 25. If you are interested, I will give you the citation. This was a case brought by the National Human Rights Commission. It is reported in *All India Reporters 1996*, Supreme Court at page 1234.

Then, there is another area. India had entered reservation to Article 9(5) of the International Covenant on Civil and Political Rights (ICCPR), which speaks of the right to compensation for violation of human rights. In a Judgement which is called *Neelabati Behra* Case, and the citation is *All India Reporters* 1993, Supreme Court 1960 of which also incidentally I happened to be the author, we construed Article 32 which is the constitutional remedy in the Supreme Court for enforcement of

fundamental rights, itself being a fundamental right, as well as Article 226 which is another constitutional remedy available in the High Court for enforcement of fundamental rights, to include within it, the remedy of compensation where enforcement of fundamental right or human right was not possible in any other manner. That was a case of a custodial death. So, when the person dies, you cannot issue a writ of *Habeas Corpus*. The argument before us was to dismiss the petition as infructuous, because production of a dead man is not possible. It occurred to us and we said so, that people would be tempted more to kill than to maim if this be the law. This cannot be the law and therefore, we held that compensation is a mode of enforcement of a fundamental right when no other mode is available. *Vishaka* Case judgement came much later – I was the author of both. However, in spite of India's reservation, we relied on Article 9(5) of ICCPR to support the conclusion that was reached on the basis of the constitutional remedies. These are some of the instances to indicate what the Supreme Court of India has been trying to do.

I also had the privilege to be the Chair of the National Human Rights Commission after I left the Supreme Court, from 1999 to 2003. I would like to refer to two provisions of the Statute under which the National Human Rights Commission was constituted, which are significant. The Protection of Human Rights Act, 1993, is in consonance with the Paris Principles for setting up national institutions. It defines "human rights" to include not merely all the constitutional rights which I have already indicated as wide enough to include everything needed, but as a matter of abundant caution, it includes also those which are contained in the two Covenants of 1966 – the ICCPR and the ICESCR (International Covenant on Economic, Social and Cultural Rights). This is a wide definition. The National Human Rights Commission and the State Commissions are constituted under that Statute. That is how we are able to function. One of the provisions specifically made therein, is the authority or the power of the Commission to grant *interim* compensation apart from the other directions it might give, for the prosecution of the perpetrators or the violators of human rights, etc. and which is called *interim* relief. So, the same principle that you find was laid down by the Supreme Court in the *Neelabati Behra* Case of compensation as a remedy for violation of human rights is incorporated in it.

The other matter, to which I would like to expressly refer, relates to relief and rehabilitation measures after the Orissa cyclone in 1999 and the Gujarat Earthquake in 2001, where all these provisions for rehabilitation, etc. were resorted. More specifically, what happened as a result of large-scale displacements? The nature of conflicts has altered considerably during the last half a century; now more non-combatants are involved and there is more internal displacement to which the same principle is applied. So, unless we extend these principles to those situations, probably, the needed result cannot be achieved.

You must have heard of the Gujarat Communal violence, of February-March 2002. There, the first question was the extent – if at all there was a responsibility of the state. The National Human Rights Commission laid down the principle that the state is responsible for all the violations of human rights occurring within its jurisdiction because it is a primary and inescapable responsibility of the state to see that no violations take place therein. Even for those violations that may be attributable to non-state players, there is a duty of the state to prevent. What do you do when these things happen? There, we applied the principle of *res ipsa liquitur* in the Law of Tort, which means that failure to explain satisfactorily the incident that you are duty bound to prevent is sufficient to hold you responsible. Then, what happens? If you are responsible, how do you bring about the end result? We said very clearly in no uncertain terms that Prof. Van Boven principles of "reparation" must be applied for doing complete justice to the victims.

I will read out some portions of a letter which I wrote to the Prime Minister, just before I demitted office in January 2003, where all this was reiterated. That letter is now Annexure 1 to the National Human Rights Commission's Report of the year 2002-2003. Some portions of the proceedings where we laid down this principle are also quoted in it. You will see that it is ultimately customary international humanitarian law applied to non-international situations of internal conflicts. These days, when these situations are causing similar effect in much larger numbers than in the regular conflict situations, I think the significance increases.

Now about the role of the International Criminal Court (ICC). We said about crimes against humanity that if the national institutions fail to do the needful, there would be a situation for outside intervention. And that is a good enough reason for the national institutions to do

the needful so that such a situation is not created. There is certainly a paradigm shift in the concept of national sovereignty with the obligation to report to treaty bodies, etc. For crimes against humanity, there is a clamour, rightly, for universal jurisdiction. There is greater responsibility on the national institutions to rise to the occasion and avert that consequence.

May I read out to you some portions of that letter which is an annexure to the report of the National Human Rights Commission of the year 2002-03? This is a letter dated 3 January 2003 in which these principles have been clearly spelt out. What I wrote was: there are two over-arching principles in the discharge of our responsibilities. Firstly, to promote and protect human rights in our country with all the vigour and integrity that our constitution, laws and treaty obligations require. There is a clear emphasis on that.

Then I referred to the human rights situation in Gujarat. And further, it is said: It would also affect the prospects – that is what needs to be done, if it is not done – of long-term peace and reconciliation, and potentially and equally dangerously, render the country vulnerable to the charges of granting impunity to those who have violated the constitution and the laws of our land and international human rights instruments, that our country is in honour bound to uphold.

Then, I said: there has been vast growth in the scope and range of human rights jurisprudence over the past years. This jurisprudence has in particular, developed in two directions. Firstly, the state has increasingly been held responsible, not only for the acts of its own agents, but also for the acts of non-state players acting within its jurisdiction, when large scale human rights violations have occurred. Secondly, when the institutions of a state have appeared to act inadequately to address certain grave categories of human rights violations or appeared to grant impunity to those involved in said violations, the emerging jurisprudence has pressed for accountability before international forums and tribunals.

Then, further, I end by saying: contemporary human rights jurisprudence requires that the victims must have ready access to the legal system that prompt and effective steps are taken by the system to ensure that effective disciplinary administrative, civil and criminal action is taken against those guilty of acts of omission or commission resulting in violation of human rights, that reparation is provided. Here,

I mentioned Prof. Van Boven's principle, that reparation is provided individually or collectively to those who have suffered and that the reparation is proportionate to the gravity of the violations and the damage that occurred and that it include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Then, I of course end with the hope that this should be done.

Now, one more instance of National Human Rights Commission because that is also relevant. That is about the "Right to Food". An order was made on 17 January 2003, which was actually the last order I made in that office because that was the last day I was in that office. There were certain cases of death in Orissa, which were alleged to be starvation deaths. The state's defence was that they were not starvation deaths. We said that even if it is not starvation, the right to food has to be seen as right to be free from hunger, food security, etc. – Article 11 of the Covenant and Article 21 of the Universal Declaration. They were also relied on in this order along with the provisions in the Constitution; one of the Directive Principles contained in Article 39, which are principles fundamental in governance, to ensure adequate means of livelihood to everyone. We relied on that as well as Article 21, which I have already referred and Article 47 that requires minimum nutritional needs to be met. In this order, which is also contained as an annexure in the National Human Rights Commission report, we referred to this and ultimately said that it is the obligation of the state which must be so viewed; it is not a charity which the state is doling out; it is the discharge of that obligation to ensure adequate means of livelihood to every citizen. What is of significance and why I am mentioning it here is that we relied on Article 11 of the Covenant and Article 25 of the Universal Declaration of Human Rights. We also recommended that the relief codes be amended in the states, accordingly, to emphasize on food security and the states' obligation instead of treating it as an act of philanthropy or charity. So, this is how the national institutions in India have been trying to import the IHL, irrespective of whether there is any treaty obligation or not, whether there is ratification of any particular Covenant or not. We have been trying to read them into the constitutional guarantees.

So, what I am trying to say is that it is possible, even without ratification of treaties, without treaty obligations, to incorporate all these, because these are good practices based on the basic principle of

jurisprudence of “justice, equity and conscience”. These are certainly extensions of that principle. If we, in this age of globalization, speak of a global village, then, that is the minimum we need to do.

Thank you very much for your attention.

RELEVANCE FOR THE NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

Christopher Harland*

Thank you very much. It is a great pleasure to be with you this morning. I plan to cover some of the elements of the ICRC's thinking about the effect of the Study on national implementation of International Humanitarian Law (IHL), and some of the projects we may be working with you over the coming years.

I. Uses to make of the Customary International Humanitarian Law Study

There are of course many uses that may be made of the Customary Law Study. We have heard Judge Kirsch mentioning some of them, including uses that courts may make of the Study. We have heard also from the former Chief Justice of India as to some of the uses that they had made of customary law in general, including with respect to human rights. Certainly we expect that courts will make more and more use of the Study.

But we also hope that military manuals, for example, will reflect the rules of customary IHL identified in the Study. We hope that military training will also reflect some of the elements of the Study, and expect that members of the academic community will make use of the Study. Some professors from whom we heard these past few days appear to be interested in adapting their materials, reflecting what is in the Customary Law Study and using it with their students. Treaty negotiations in the future may have cause to look at the Customary Law Study,

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including the International Criminal Court (ICC) Review Conference in 2009.

We further anticipate that the ICRC will use the Customary Law Study in discussions with parties to armed conflicts in seeking to ensure that behaviour of arms-bearers conforms to IHL, both treaty-based and customary. In addition, we hope that national legislation and other national measures will take into account the Customary Law Study. In this brief presentation, I will concentrate on national legislation. Within national legislation, I will focus on war crimes. The ICRC is engaged in discussions with states around the world, obtaining their comments on the Study and what changes should be considered for future editions. But let us set that aside for now and let us begin with the assumption that one agrees with the content of the 161 rules that are set out in the customary IHL Study.

II. National Legislation and the War Crimes Section of the Study

What are war crimes, according to the Study? Rule 158 at page 607 of the Volume I of the Study reads that states must investigate war crimes allegedly committed by their nationals or armed forces, and if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects. Thus, there is a duty to be able to prosecute war crimes, and to do so normally require legislation.

If states must be able to prosecute war crimes, what then are war crimes? Rule 156 of the Study says that serious violations of IHL constitute war crimes. Of course this begs the question, what crimes are serious violations of IHL? Rule 156, in its commentary, lists 67 war crimes. Note that the 67 war crimes that are listed are provided as an indication as to what constitute war crimes, but not expressly described as such. There are 43 crimes that are listed which apply in international armed conflicts, (IAC) and 24 are in non-international armed conflicts, (NIAC). They are listed in pages 568 to 603 of the Study, Volume I.

Twelve of these war crimes that are listed in the commentary to Rule 156 do not appear in either the Rome Statute or as grave breaches in the Geneva Conventions or Protocols. These twelve include, in

international armed conflicts:

1. Despoliation [theft / robbery] of the wounded, sick, shipwrecked or dead
2. Attacking or ill-treating a *parlementaire* or bearer of the flag of truce
3. Collective punishments
4. Slavery and deportation to slave labour and, in non-international armed conflicts:
5. Using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including by impeding relief supplies
6. Using prohibited weapons[1]
7. Making non-defended localities and demilitarised zones the object of attack
8. Launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage
9. Using human shields
10. Making civilian objects the object of attack
11. Collective punishments
12. Slavery

III. Sample Methods of Incorporation

What could a state do with this information? A state could, for example, review its war crime legislation, keeping in mind these provisions. A few questions present themselves.

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[1] Rule 156 speaks only of a war crime of "using prohibited weapons". However, there exist additional treaty provisions in the 1972 Biological Weapons Convention, the 1993 Chemical Weapons Convention, the 1997 Ottawa Land Mines treaty, the 1976 Environmental Modifications Convention and the 1980 Convention on Certain Conventional Weapons and Protocols thereto relating to ban on and / or restrictions in the use of certain weapons. Some of these restrictions cover not only the *use* of such prohibited weapons, but also require States to enact legislation with penal sanctions for those who manufacture, sell, transfer, etc., the weapons.

First, in the country concerned, do violations of rules of international custom constitute crimes in domestic law? Many states may allow the use of custom before domestic courts for "rights" issues, for example, including those rights in the International Covenant on Civil and Political Rights (ICCPR). Some states may have a general provision relating to customary IHL which provides for punishments for breaches of such a rule. If breaches of customary IHL do not of themselves constitute crimes in internal law, then what other criminal provisions exist in the country's legislation for war crimes? This may of course depend on the treaties to which the state is a party.

A second question to consider is whether Geneva Convention legislation has been incorporated. This would normally include incorporation of the grave breaches of the Geneva Conventions and possibly also those in Additional Protocol I. Thirdly, a state may wish to review whether ICC implementing legislation has been incorporated, specifically legislation incorporating Articles 6, 7 and 8, (the crimes of genocide, crimes against humanity and war crimes) as crimes in domestic law. Note that these provisions contain most, but not all, of the grave breaches in Additional Protocol I as well as the four Geneva Conventions of 1949. The remaining twelve crimes mentioned above and considered in detail in the Study could then be considered for incorporation. I would offer three approaches undertaken by different States.

South Africa has adopted what may be termed a traditional approach. It has, or is in the process of, directly incorporating all international treaty obligations including the grave breaches provisions in Additional Protocol I and in the Four Geneva Conventions. The ICC crimes are expressly covered by ICC legislation in South Africa, as are weapons treaty related crimes.

In Canada, by contrast, since 2001 and the adoption of the Crimes Against Humanity and War Crimes Act, the term war crime (in section 6) has been defined "an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission." This would, as a result, seemingly include customary war crimes as they develop. The same law provides explicitly

that Articles 6, 7 and 8 (2) form part of custom. This is because the purpose of ICC was in fact to reflect on custom at that time. Geneva Conventions breaches in Canada are also covered in a separate Geneva Conventions Act.

A third example may be found with Germany. As I understand it, Germany enumerated all the crimes in the treaty obligations it had, but also referred to the ICRC Study as it was being developed, to cover additional customary crimes that may not have been reflected in the ICC or the Geneva Conventions grave breach provisions, when it was drafting its Code of Crimes Against International Law in 2001-02. The German model might be useful if the plan is to incorporate these crimes into one law. This could be done, for example, if there is an update of the penal code underway.

IV. Conclusion

It should be noted that the incorporation of the crimes appearing in the ICC Statute as a strategy presents advantages. In fact, some states are looking to incorporate the provisions in the ICC Statute as crimes despite not being a party to the Statute. This is because of a desire of states to make sure that they are able to try war criminals themselves, even if they do not sign up to the ICC system. This has become of interest since the reference to the ICC by the Security Council of the Darfur situation despite Sudan not being a party to the statue of ICC. A state that has incorporated these crimes may be in a position to argue that it is able to prosecute war crimes domestically because it has the tools necessary to do so. Another reason to do so is that although a violation of customary IHL may be incorporated as a criminal offence in domestic law, the country may wish to spell out explicitly these crimes in order to provide greater legal certainty. States may wish to use the ICC war crimes list as authoritative, and update them as the crimes in the ICC themselves are updated, all the while having regard to elements in the Study.

To conclude, I draw your attention to Rule 156 of the Study. If you agree with our assessment that these 67 crimes constitute customary international law, and if you agree with Rule 158, which requires the ability to prosecute for such crimes, and if you review your legislation and find that there are some gaps, and then what do you

do? The ICRC's Advisory Service on IHL of the ICRC wishes to extend an offer of assistance. There are five of us in Geneva, and there are ten others around the world including in our offices in Kuala Lumpur and in New Delhi. We welcome the opportunities to work with you to implement IHL treaty obligations as well those in customary IHL.

Thank you very much.

RELEVANCE FOR THE PROSECUTION OF VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

Francoise Hampson*

Excellencies and distinguished participants, it is indeed a great honour to have been invited to address this particular launch-meeting of the ICRC Customary Law Study. I was involved in the work of the Steering Committee and the Group of Experts in the Study where I supervised the British State practice report, which was one of the more interesting ones for a variety of reasons and I was also involved in dealing with the fundamental guarantees section.

I will be considering at the end of my presentation the particular role of the Study with regard to enforcement and the usefulness of the Study in that regard. As was mentioned in the introduction, I come to this area being bilingual – I speak human rights law and I speak humanitarian law too and I do know the difference. But some of the impulses that are relevant in one sphere are relevant in another sphere. The challenge in the past 50 years of human rights law has been making human rights law real. We are in the process of beginning to confront the challenge of making humanitarian law real and we are only just starting out. I am emphasizing this because I am coming out of this as somebody who wants the perpetrators prosecuted and yet I have been singularly alarmed by some of the things that have emerged as to how states are choosing to give effect to their obligations. It seems to me that the suspected perpetrators – until they are convicted, they remain suspected perpetrators – have rights and one of those rights is actually for criminal legislation, to define clearly what the crime is that they are charged with. I will come back to that later.

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My topic is enforcement. I want to briefly mention a couple of points to do with implementation because it seems to me that there is a very close relationship between implementation and enforcement. The more effective the implementation, the less the need for enforcement. I think it would be possible to say that any violation is *prima facie* evidence of inadequate implementation. There are certain limited cases where an individual runs amuck even though he has been trained, he knows that it is illegal, etc., where there is nothing wrong with the implementation, but these are the exceptions. Generally speaking, if you are looking out for a widespread interrogation practices whether in Bahrain, whether in Abu Ghraib or elsewhere, then you are not talking just about violations, you are talking about inadequate implementation. So, one need to look at both the ends of the spectrum.

In the earlier presentation, Chris Harland was deliberately focusing completely and legitimately on legislation with regard to war crimes. Implementation in fact covers a huge range of activities and too limited a view has been taken of implementation in the past. It has been assumed in some quarters that all this meant was passing legislation to give effect to the Geneva Conventions. So, what you said in your legislation was that the Geneva Conventions have to apply and perhaps it also included educational initiatives that tended to focus principally, understandably, on the military. But in too many cases, the focus was exclusively on the military. I would suggest that if you do not ensure that any person within your jurisdiction knows enough to know how to behave if they find themselves in the conflict zone, then you fail to implement the obligations under the Geneva Conventions. For me, that means education of civilians is non-negotiable and, of course, you need specialist education for people with special roles in situations of conflict. That includes personnel who do not normally fight overseas, but might be called upon to do so. It also includes medics and civil defence personnel covered by Additional Protocol I. I think, it would be helpful if the ICRC perhaps could organize a session where they could just exchange ideas on the range of things that need to be covered to ensure effective implementation. They cannot coerce states in this area, but may be if they suggest a range of activities there could be checklist and it would actually help states consider what they are doing in the area. One of the things that I would suggest that the ICRC should be doing is looking at the way in which domestic law is interpreted. In other words, they

need to look at the judiciary because if you are interpreting for example, a domestic crime of rape, in the way in which it was universally interpreted until 20-30 years ago, then you are not actually going to be in line with international law.

So, turning to the question of enforcement, the way in which I am interpreting it, it means courts; the courts cover a wide-range of possible things. There is one that we tend to forget. The actual treaty regime in humanitarian law is traditional international law. It is interstate law; it is civil in character. The Geneva Conventions are not a criminal statute. They define the things the states are required to make criminal, but that does not mean that the definition of grave breaches is adequate to constitute the definition of the crime. However, a state can be brought before a tribunal by another state for violations of the Geneva Conventions. For example, whilst it is not the legislation that it is under scrutiny, the International Court of Justice (ICJ) currently has on its docket a case brought by Bosnia-Herzegovina against the Federal Republic of Yugoslavia, concerning in fact alleged genocide, but the same principle would apply. We must never forget that enforcement of humanitarian law ought to mean using the ICJ and they have indicated their willingness to be used in that way.

The courts that are going to be most involved in the enforcement of IHL are clearly criminal courts of some description. One such court would be domestic in the sense that they will see themselves as acting domestically. They would be exercising jurisdiction either over the national things or against perpetrators of crimes within the territory. It is worth remembering that there are two types of criminal courts that may have jurisdiction. One is military courts martial; we must never neglect them. The other type is the civilian criminal courts.

In that regard, the human rights lawyer in me makes me say that human rights law regards it as unacceptable to subject civilians to trial by a court that includes one or more members from the armed forces. So, you are going to need to ensure that more war crimes trials against civilians are conducted in civil criminal courts, if you see what I mean. There can, in addition, be criminal proceedings before the courts of the states and occasionally, there may even be other types of proceedings before the courts of those states where the issue of war crimes could be relevant. For example, if a state is considering deporting someone or is considering extraditing a person to another state, that is where

we direct criminal proceedings. But the issue of the suspected commission of war crimes might be relevant. So, the first question that we need to turn to customary international law for is in what circumstances is the violation of customary humanitarian law, a crime of universal jurisdiction? It is easy in relation to domestic trials. So, it is like trials over national, trials within the territory. It is more complicated in the case of trials of that state. So, we have to address this question of universal jurisdiction before we get into the definition of war crimes.

The treaties only address the question of jurisdiction in relation to grave breaches, which is a technical term in the Geneva Conventions and Additional Protocol I. States have universal, mandatory jurisdiction over grave breaches as defined in the Geneva Conventions and Protocol I. That is to say that they are obliged to exercise jurisdiction over foreigners for the reporting. What is striking is that a few cases have been brought even where the states were under treaty obligation. There are plenty of cases where individuals are suspected to having committed grave breaches. But how many grave breach proceedings have there actually been? Apart from that, there is a much-neglected provision in the Geneva Conventions which actually says that high contracting parties have an obligation to suppress all of the violations of the Conventions. It must logically include violations of Common Article 3, but you would not have guessed that from the practice before 1990. In this regard, there is nothing in the treaties that suggest special rules on jurisdiction apply. That means, you have to turn to customary international law in order to determine whether these are crimes of universal jurisdiction.

Now, we know that under the international law on jurisdiction there is a category called crimes of universal jurisdiction. But it does not tell you what those crimes are. So, the first thing that we have got to look at is, are our violations war crimes or are they violations of the laws on customs crimes and, if so, are they crimes of universal jurisdiction? In order to answer that, we have to look not at customary law on jurisdiction, but at customary international humanitarian law. That is precisely what the International Criminal Tribunal for former Yugoslavia (ICTY) had to do in its first case, in the *Tadic* Case. The ICTY knew that it had jurisdiction over violations of the laws and customs of war, but it had to actually decide whether the concept of violations of the laws and customs of war covered the violations of Common Article 3 of the Geneva Conventions, whether the violations

were a matter of individual responsibility and, if so, whether they were covered separately as a matter of criminal responsibility? The ICTY in the *Tadic* Case answered those questions in the affirmative, while looking for evidence of state practice and *opinio juris*. Their task would have been much easier if it had the ICRC's Customary Law Study as a reference.

The significance of the customary rules on the criminal character of war crimes is that it enables you to determine that these crimes are of universal jurisdiction. That means, those states are at liberty - not obliged - to prosecute for any war crime and not just the grave breaches of the Geneva Conventions. Now, there are a variety of reasons why those states might want to prosecute. First, if there is no extradition arrangement between them and another state or some other entity and an individual is within the territory and is publicly alleged to have committed serious violations. That was precisely the problem that Denmark faced when they realized that they could not use their extradition legislation that was applied between states to transfer to the ICTY. So, on the one hand, they could not legally transfer the person against whom there were serious allegations, but since the allegations were in the public domain, they did not want to leave things up in the air and do nothing. In other words, they found themselves in a situation where they were pushed into – saying that they were willing, gives the wrong impression, they were eager – a situation where they needed to bring some form of criminal proceedings. Since Danish law allows for the exercise of universal jurisdiction, they brought proceedings themselves.

In this area, concerning this question of pressure to bring proceedings, it is important, to remember that most states now have recognized that, at least in the case of other states, impunity does tend to lead to escalating violations. In other words, even if you do not like addressing impunity in your own jurisdiction, there is a good reason why you might want to address impunity in another jurisdiction. The exercise of the jurisdiction of those states has got another advantage. It avoids the problem of transfers of individuals to a place where they might not get a fair trial or where there is a serious risk of ill treatment. Recently in the UK, there were proceedings against an Afghan warlord. They rendered the obligations under the Torture Convention, but it was an exercise of universal jurisdiction. The Afghan warlord could not be

transferred back to Afghanistan, firstly because of question as to whether he would get a fair trial and secondly, because it was foreseeable that he would say that he could not safely be transferred because he would be subjected to unlawful treatment. So, the UK, despite its reluctance to use universal jurisdiction, but recognizing that it had obligations under the Convention Against Torture, had no option but to bring proceedings based on universal jurisdiction. The really great news is that it worked. Henceforth, whenever the UK says the reason for not exercising universal jurisdiction is that this is not practical (i.e.) how on earth can you ever bring proceedings when all the witnesses were abroad and all the evidences abroad and it really did not make sense? The fact is that they have done it and it worked – they secured a conviction. I hope that this example is going to be used to put pressure on other states that are reluctant to exercise universal jurisdiction, because it would avoid some of the problems that were arising with regard to transfers.

Only last night I understand from a news headline that the House of Lords has ruled that you cannot use evidence extracted under torture – even torture abroad – so as to get evidence on the basis of which to deport somebody. If you have got the evidence that he has committed an international crime, the answer is not to transfer him, the answer is to try him yourself. So, I think there is going to be increased pressure on states coming from both the human rights angle and humanitarian law for them to exercise universal jurisdiction and anything you can do to put pressure on the UK Government to change its attitude, I would be profoundly grateful for!

Although I think this will be less important than the other two, it is also the case that other states might want to take action; that is, to give some sort of effect to Common Article 1 obligation under the Geneva Conventions. The difficulty there is that the states are now going backwards on what Common Article 1 would mean. There are suggestions that actually it does not impose an obligation with regard to third states, although it has obligations with regard to their own forces.

So, summing up both sections, the states clearly need to know, whether they can try foreigners, and whether they have jurisdiction. They can only answer that with reference to customary humanitarian law. They then need to change the domestic law, if their domestic law does not recognize universal jurisdiction. It is not enough to say that international

law recognizes it, because jurisdictional rules are domestic. That leaves aside the question of prosecution of nationals and the prosecution for offences within the territory.

The next question with regard to enforcement is what are violations of the laws and customs of war? That involves two different questions. Firstly, what behaviour forced it into that category? Secondly and separately, what are the elements that need to be proved in order to establish the crime in question and those are separate questions. We know what constitutes grave breaches. They are defined in the Geneva Conventions and Additional Protocol I, but the treaties do not answer the question of what constitutes a violation of the laws and customs of law, which is the customary international law formula that is also used in the Fourth Hague Convention.

So, again, you have to turn to customary humanitarian law in order to answer the question of what behaviour constitutes a war crime. The ICTY, and to a lesser extent, International Criminal Tribunal for Rwanda (ICTR), and to an even lesser extent, the hybrid court in Sierra Leone, have found a considerable amount of customary international law that they were able to rely on as evidence of what constitutes a war crime. They have not just had to rely on treaty law, because, as we have seen already over the past couple of days, although treaty laws are good starting point they are incomplete, particularly with regard to non-international conflicts. Take the case of weapon use. The ICTY did not just rely on custom. It relied on common sense, when it said that if a weapon is inhuman in an international conflict, it must be inhuman in non-international conflict. The characteristics of what is inhuman are the same. That is not the matter of controversy, it is a matter of commonsense and so, with one swipe, they were able to change the perception of what the law was, and in fact, since then, the treaty regime has kept pace. So, sometimes, treaties are the product of being given a nudge by custom.

That brings me back to the point that I made in the introduction. I think there is an important issue about defining crimes. It is all very well to say when you approve of the creation of the crime, but it is a good thing to know, now that we know that anything prohibited in an international conflict is prohibited in a non-international conflict. If I were a person accused of a war crime, I would have reservations. If I was charged with allowing a child to join my rebel unit in 1995,

and I was told that we decided that not only is the customary law now, but in 1995, it was customary law that you want now to accept the voluntary participation of a child in my unit, I hope that my legal advisor might be raising a stink about that. I am entitled to know, at the time I engage in an act, whether that act is a crime, including whether it is established as a crime under customary international law and not simply whether it is activity that is disapproved of. Before you lock somebody up, you need to be confident about criminal nature of the act at the time it was committed.

That raises the next question. Assume that "x" is suspected of carrying out ill treatment on a detainee in a non-international armed conflict. Let us assume that you might want to argue that that treatment was torture – or humiliating treatment – we now know that that is a violation of the laws and customs of war, even in non-international conflicts. But what is it that you need to establish in order to make out the charge? The charge is clear – inhuman treatment, but what are the elements? What is the mental element or *mens rea* of the crime? When you are looking up this question of the elements that are needed to establish a crime, it raises a very interesting question of where do you turn to get information on this? Are you turning to customary law, which I assume means the practice of states supported by *opinio juris* (this is complicated by the fact that the practice of states in international law concerns the behaviour of other states) or are you instead looking up to the general principles of law, recognized by all nations? It may be that we need to look at the relationship of customary international law and the general principles of law recognized by the official civilized nations. But they are different; we may need both because it seems to me that once you start looking at the elements of the crime, you are dealing with something that is particular to criminal law and it may be that the sources of customary international criminal law may be rather different from the sources of other customary law. As I keep hammering away at, you cannot start enforcing things unless you know what the crimes are and unless you know how to prove them.

So, there is a need to clarify the crimes that have been created at the domestic level. That is illustrated by some of the proceedings that are currently underway in the UK as a result of the conflict in Iraq. We in the UK have never previously known of so many proceedings, even though since 1945, I think there is only one year

when the British Armed Forces were not involved in hostile activities somewhere. So, why all the attention? There are two reasons why I think we are getting more proceedings, but I am confident that the foreign office would disagree with this.

The first reason is the Human Rights Act. The individuals can bring complaints against the state for violations of human rights, where the victims are within the jurisdiction. That means that someone, for example, who is complaining that their next of kin died in detention or was tortured can use the human rights act. That means investigations must be conducted. The other reason, I am sure – but again I am sure that this would be denied – is that we can say that we are doing something because we have ratified the ICC and so we do not have to transfer anybody to that tribunal; accordingly we have to bring proceedings.

So, why are they occurring? Most of the proceedings are court martial proceedings where basically they are being prosecuted for crimes under English law; they are not being prosecuted for "war crimes". Mendonker is being prosecuted for the negligent discharge of his duty. There is no problem with translating things in these terms. Indeed it may make more sense for the soldiers to have terms that they are used to. This is why I think I was stunned by Section 6 of the Canadian legislation, as Christopher Harland referred to. I believe that section is in breach of human rights, because it has got no legal certainty. It is not because it is inevitable, as a legal certainty, that you can have legal certainty, but you need to define the crimes and it is easier to do it in domestic law terms. I think you do need to make sure that the national definition of a crime is the same as the international definition.

One of the best examples I can think of is rape. If you do not define it in the way in which the ICTY and now the ICC defines rape, then you may bring national proceedings for example for assault, but if you bring in proceedings for assault, the range of penalties would not be adequate for what is in fact rape. It would an interesting question for the ICC as to whether the domestic proceedings in this case would be completely inadequate and thereby attract the jurisdiction of the court. So, you are going to need to sort out your charging practice and in order to do that, you are going to have to sort out the domestic definition of the crimes.

Finally, I want to just flag three points because they raise interesting questions. The first is the question of enforcement and domestic implementation with regard to command responsibility. In this area there is plenty contained in the treaties and the ICTY has found plenty in custom, but very many domestic legal systems and very many domestic commanders appear to find a great difficulty in accepting the principle that they might go to jail on the conduct of somebody under their command. Perhaps if you want to enforce IHL, the best way forward is by effective command responsibility. Although it is often hard to identify who may have committed a violation, it is relatively easy to know which unit was in which place on which day and you know the commanding officer. So, you have got more chance of identifying a suspected perpetrator and effective prosecution for command responsibility is more likely to act as a deterrent. I know that if I was going to be found responsible to the acts of students under my non-command, but vague authority, it would give me a much greater interest in what it is that they are getting up to.

The second thing that I want to flag is the issue of duress, which is an issue when under national domestic legal systems and it must not be confused with the defence of superior orders that raises different issues, although some commentators sometimes seem to confuse them. Again, I think, the question of duress and whether there can be a question of defence to a war crimes charge raises a question of criminal law rather than a traditional question of customary law. So, you are mainly to get the answer to whether duress is a defence and if so, in what circumstances, from the general principles of law rather than from customary international law. And linked with that, there is the question of defence's superior orders.

I hope when the ICRC is tempting to persuade the states to implement their obligations, they actually push this as far as they can go, if a state does not have specific legislation, it may have it contained in rules particularly applicable to the military. If they have a formula which says that a person is required to obey orders, then I hope that the ICRC insists on the insertion of another thing and I hope they do not limit that to the armed forces; since there is also civilian command responsibility. Anybody in any situation obliged to obey a lawful order needs to be reminded of this.

I do not think we would have found the Rome Statute without the work of the ICTY, because they showed that it was possible to prosecute for war crimes. The interesting thing is that the ICTY showed you could do it even where you have to rely to a considerable extent on custom. But a limiting fact with the Rome Statute is that the ICC only has jurisdiction for crimes within the jurisdiction of the court, as contained in its Statute. The list in the Rome Statute is not exhaustive; there are people who have been jailed by the ICTY who could not have been jailed by the ICC because the ICTY relied on customary formulas. That is particularly true with the extremely limited list of violations of the laws and customs of war in non-international conflicts. I think that it will be possible to argue particularly for the third states that they are in fact violations of the customary rules on war crimes. For example, was an indiscriminate attack against civilians intentional? Anything that involves the use of proportionality in non-international conflicts does not seem to be there. I hope the third states are not going to treat the list in the Rome Statute as anything other than the starting point.

So, for both parties to the Rome Statute and non-parties, it is vital to use customary international law for a very wide variety of questions in the area of enforcement, not just what are the crimes, but what do you do about jurisdiction, what do you do about defining elements of the crime, etc. The big advantage of custom is that it is flexible. You do not enter with a rigid list, but the position has to be clear. You cannot afford to be exercising criminal jurisdiction with fuzzy offences.

I think, this suggests that the world owes an incredible debt to the ICRC and more particularly Jean-Marie Henckaerts and Louise Doswald-Beck for this Study because it is so necessary that, if it had not existed, we would have needed to invent it. I hope that you can persuade states to put in mass orders for copies of the Study, for every level of criminal court, including courts exercising judicial review. I do not see why the ICRC should pay for all the copies. I think, the states should show their commitment to implementation and enforcement by buying lots and lots of copies, including volume II, because that contains the really important materials.

How important is this Study? In the past 15 years, we had seen the transformation of what is possible with regard to the prosecution of war crimes, particularly in non-international conflicts. What is likely to happen in the next 15 years? Having seen the negative effects of

9/11, which means that at the moment we do not want to negotiate any kind of treaties, which would be bad news. We are seeing increasing pressure from civil society on the effective enforcement of the rules. So, there is a greater expectation of criminal proceedings against suspected perpetrators. If that can carry on and if that is accompanied by increasing difficulties for extradition and transfer, then you are going to see in the next 15 years more and more use of universal jurisdiction. In that case, the Study is going to be regularly cited all over the place. I hope the ICRC will either issue supplements to keep it up to date, both volumes I and II, or that there will be updated versions, printed at 5-year intervals. I think, in this regard, a special dispensation should be given to Switzerland and the ICRC; the prohibition of inhuman treatment should not apply to Jean-Marie Henckaerts; he should be required to keep it updated.

Thank you.

INTRODUCTORY REMARKS OF THE SESSION

C Jayaraj*

Panel III is on the theme, "The Implications of Customary International Humanitarian Law for the Conduct of Military Operations".

We have seen from yesterday that each major component or area of humanitarian law was seen in the context of work that has been produced by these impressive volumes of the Customary Law Study.

Today's discussion will be engaged in the implications of Customary IHL for military operations. Perhaps, as we all recall, The Hague Law on Customs of Warfare began with the perception as to how to regulate the conduct of military hostilities. At that time, war was not an illegitimate thing; it was a legitimate instrument of national policy. But even then the concern was how to regulate it so that the considerations of humanity could be taken into consideration in making military advances or advantages or even treating something as a military objective.

I think, as the Chair, I will not be speaking on the merits of the issue now. I am very honoured to Chair this Session. We have a very impressive panel here; some of whom have practical experience in military operations. We have as our first speaker, for this Panel, Brigadier Titus K Githiora, the Chief of Legal Services, Department of Defence, Government of Kenya. Brigadier Githiora is also a member of the ICRC's International Group of Advisors. He is not only a Brigadier, but also he an Instructor of the Course on IHL to his own armed forces. He is also a faculty member in the International Institute of Humanitarian Law in San Remo, Italy. He will be speaking on "Implications for General Military Operations".

We also have Ms. Daphna Shraga, the Principal Legal Officer in the Office of Legal Affairs of the UN, New York. She will be speaking

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on “Implications for Peace Operations.” Then we have Prof. Zhu Wenqi of Renmin University, Beijing. He will be speaking on “Implications for Non International Armed Conflicts.”

With this, I welcome all of you to this Session and now I request the first speaker, Brigadier Githiora, to address us.

IMPLICATIONS FOR GENERAL MILITARY OPERATIONS

Titus K. Githiora*

I. Introduction

Much of IHL treaty law is part of customary international law and the ICRC Study on Customary Law addressed issues which are found in treaties that have not been universally ratified. Those issues are indeed the challenges facing military forces in contemporary armed conflicts. They include direct participation in hostilities and the use of civilians, conduct of hostilities including use of precision weapons, non-international armed conflicts and terrorism. Commanders in the field are finding the traditional approach where IHL clearly made enemy forces the target more and more difficult to follow. The conduct of military operations in the modern battle space now sees terms such as "limited operations" where the need to keep causalities at levels, acceptable to the public is paramount; "pre-emptive operations" mainly against terrorist groups and "attrition operations" to wear down an enemy. The "enemy" now includes forces or armed groups who balance the conflict by resorting to dirty weapons and refuse to obey IHL. This scenario makes it difficult to extend the traditional protections available under IHL.

The Study's identification of the gaps existing in IHL treaty law shows the limits of regulation of the conduct of hostilities in both international and non-international armed conflict. Those limits do not, however, leave a gap since the identification of the customary nature of specific treaty provisions closes such gaps. States as well as armed groups are bound by those customary rules which have wide acceptance. Since military manuals are verbal and physical acts of evidence of

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practice, their inclusion in the Study's findings on the binding nature of customary rules of IHL has a very important significance for the conduct of military operations. Customary law for the military has added value because it provides more details than treaty law particularly for non-international armed conflicts.

II. Responsibility and Implications of the Study

Command responsibility applies in both international and non-international armed conflicts. Recent case law at the International Criminal Tribunal for former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) has established this. The traditional compromise between humanitarian considerations and military necessity must not be upset by any military commander who invokes military necessity to justify deviation from IHL obligations. The customary law study highlighted these IHL obligations whose implications for the conduct of military operations include the following:

A. "Combatants" and "Civilians"

The Study found that practice was not clear whether in non-international armed conflicts, armed groups were to be considered members of the armed forces or civilians. Additional Protocol II as well as other treaties dealing with non-international armed conflicts does not define "civilians". The problem of loss of protection from attack for civilians remains a major challenge for the armed forces in non-international armed conflicts.

The consequences of doubt as to whether a civilian should lose protection from attack are grave for military personnel. Civilians who carry arms during attacks are targeted and the issue is not contested. Where participation in hostilities is not obviously "direct" neither the rules nor practice provide as yet a satisfactory definition of "direct participation". The military will continue to deal with this problem on a case-by-case basis. The use of civilians either as contractors, technicians or experts accompanying the armed forces poses this same challenge.

B. Proportionality in Attack

Another issue that remains without agreement after the Study of treaty provisions and states practice concerns balancing military advantage

against incidental civilian losses. There are serious challenges for the military arising from operations resulting in severe suffering of the civilian population. Modern real time information in such cases leads to loss of public support.

C. Precautions in Attack

Practice shows that the prohibition of attacks against installations containing dangerous forces likely to cause severe incidental losses among the civilian population is an important customary rule. The extra precautions to be taken by the military are similarly necessary where methods of attack cause severe widespread or long term damage to the natural environment. This particular prohibition has extensive support and is a well established customary rule. A party is not absolved from the duty to take precautions due to the lack of scientific certainty of the environmental effects caused by the means of attack. The natural environment may not be attacked unless it is a military objective and in any case such an attack may not cause excessive damage in relation to the military advantage expected.

D. Peace Keeping

Military forces welcome the establishment of the customary rule found in the ICC Statute prohibiting attacks against personnel and objects involved in peace keeping. The rule will continue to encourage participation in peace support particularly for countries whose troops have suffered from such attacks.

E. Third Party Communication

The practice which is now customary particularly where third parties facilitate communication between parties to a conflict is an important development. The involvement of impartial and neutral humanitarian organisations such as the ICRC or peace keeping forces as intermediaries has been significant for a return to peace in many areas of conflict. This is particularly important in failed states and areas where a government has lost control of territory occupied by armed resistance.

Military forces value this intervention which is allowed in IHL treaty law and use it for prisoner exchange and distribution of relief assistance to the civilian population in compliance with IHL obligation for sparing civilians from the effects of war.

F. Protection of Cultural Property

It is now accepted that in both international and non-international armed conflicts treaty rules prohibiting destruction, seizure or pillage of cultural property (historic monuments, religious or scientific buildings and objects) are customary rules. The duty for the armed forces to take precautions during the conduct of hostilities is clear and the penalties and stiff for any violation.

G. Weapons

Principles prohibiting use of weapons that cause superfluous injury or unnecessary suffering as well as indiscriminate weapons are customary in all armed conflicts. The study on state practice showed the long list of such weapons and emphasised that landmines and incendiary weapons may only be used with restrictions. The need to control the anti-personnel use of those weapons and emphasised that landmines and incendiary weapons may only be used with restrictions. The need to control the anti-personnel use of those weapons has expanded to include restrictions in non-international armed conflicts. Indeed many treaties are now extending the scope of applicability to non-international armed conflicts of significance is the ICJ *Nuclear Weapons* advisory opinion which stated that IHL rules on the conduct of hostilities applies to the use of nuclear weapons. This is important for the military as the use of prohibited weapons in violation of IHL treaty law and customary rules has serious sanctions for responsible commanders.

H. Protections under Human Rights Law

Applicability of international human rights law during armed conflict is of importance to the armed forces. Protections given under that body of law as well as IHL must be respected during the conduct of military operations. For the military the fundamental guarantees are best described in IHL language such as humane treatment for persons no longer taking a direct part in hostilities, prohibition of murder, torture, cruel treatment, mutilation, corporal punishment, rape or sexual violence as well as hostage- taking. This description reflects the substance of relevant customary rules.

III. Challenges

States and their armed forces remain with a vital responsibility to respect rules applicable to every type of armed conflict. The challenge is particularly important in non- international armed conflicts to day. The identity of the enemy has changed together with the nature of the warfare itself. The strong push for responsibility and accountability will increase. For that reason the pressure on the armed forces to face up to the challenges of training and conducting themselves in accordance with IHL rules is likely to be maintained.

IV. Conclusion

The responsibility to ensure that irregular fighters and armed groups respect IHL rules must be undertaken collectively by states, international and regional organisations and humanitarian organisations. The list of customary rules drawn by the ICRC Study covers the whole spectrum of IHL obligations during armed conflicts. Action should be initiated by military institutions to review their IHL manuals with a view to adopting a fresh approach to training and conduct of operations.

IMPLICATIONS FOR PEACEKEEPING OPERATIONS

Daphna Shraga*

The question of the applicability of international humanitarian law (IHL) to United Nations (UN) peacekeeping forces was for the first time raised by the International Committee of the Red Cross (ICRC) with the UN Force Commander in the Korean conflict. At the request of the ICRC, that the parties to the conflict apply *de facto* the humanitarian principles of the Geneva Conventions - which at the time of this exchange had not yet entered into force - the UN Commander replied that while his instructions were to abide by the humanitarian principles of the Geneva Conventions and Common Article 3, in particular, he was not in a position to abide by the detailed provisions of the four Geneva Conventions. Since then, in nearly every conflict in which peacekeeping operations were involved, the ICRC has drawn the attention of the Secretary-General of the UN to the application of the Geneva Conventions to forces put at the disposal of the Secretary-General, and the desirability that they be provided with the necessary instructions to ensure respect for the Conventions.

For almost four decades the question of the applicability of IHL to peacekeeping operations remained debatable. At the focus of the debate were two diametrically opposed positions of the ICRC and the UN, respectively. The thrust of the ICRC position was that the customary international law provisions which are binding upon all states in situations of armed conflict, should, in similar situations, be binding also on the international organization established by states, *albeit* with the necessary modifications.

The UN position was more nuanced. While declaring its commitment to the humanitarian principles of the Geneva Conventions, it continued

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to maintain that peacekeeping forces act on behalf of the international community, and cannot be considered as a "Party" or a "Power" within the meaning of the Geneva Conventions. As such, they are also impartial, objective and neutral, and by definition almost, cannot be subject to IHL in the conduct of their operations. It was furthermore maintained that the UN is not a party to the Geneva Conventions as their final clauses do not allow for the participation of international organizations.

But while declining to recognize the applicability *de jure* of IHL to peacekeeping operations, the UN had strengthened its implementation in the practice of UN operations. Beginning in the early 1990s, a standard provision was included in the Status of Forces Agreement concluded between the UN and host countries in whose territory peacekeeping operations were deployed, and according to which the UN undertakes to ensure that the operations of the force will be conducted with full respect for the principles and spirit of the general conventions applicable to the conduct of military personnel, namely the 1949 Geneva Conventions, their 1977 Additional Protocols, and the 1954 Hague Convention on the Protection of Cultural Property in the event of Armed Conflict. The state of operation undertakes the correlative obligation to treat UN forces at all times with full respect for the principles and spirit of the general conventions applicable to the treatment of military personnel.

No sooner had it been introduced in the Status of Forces Agreements, than the "principles and spirit" clause proved inadequate, and too abstract a notion to guide members of peacekeeping operations on questions of practical application. In the UN operations in Somalia and Bosnia and Herzegovina, where peacekeeping forces actively participated in combat operations, it could no longer be seriously argued that UN forces were mere observers in the theatre of war. In this and similar operations the need to concretize the broad formula of "principles and spirit" and define the rules applicable to the status of combatants, treatment of prisoners of war, protection of the UN distinctive emblem and such like, became acute. In the mid 1990s also, the recognition that the Geneva Conventions are indicative of customary IHL meant that their applicability in any given case depended little on participation in the Convention.

It was against this background that in 1999, the Secretary-General promulgated the Secretary-General's Bulletin on the observance by UN Forces of IHL. The Secretary-General's Bulletin originated in an ICRC initiative, which in 1995 convened a group of experts to develop a core IHL provisions applicable to peacekeeping operations and enforcement actions. The Bulletin is a three-page document containing ten sections in toto, governing the protection of civilian population, means and methods of warfare, treatment of civilians and persons *hors de combat*, treatment of detainees and protection of the wounded, sick and medical and relief personnel. It applies to UN peacekeeping forces operating under UN command and control when, in situations of armed conflict they are actively engaged therein as combatants, under Chapter VII mandate or in self-defence, to the extent and for the duration of their engagement.

In analyzing the Secretary-General's Bulletin in the light of the ICRC study, it would be my intention to underscore the contribution of the study to solidifying the customary international law character of those provisions of the Bulletin which, at the time of its promulgation, might not have been universally recognized as part of customary international law.

It should first be recalled that the underlying premise of the Secretary-General's Bulletin is the recognition that the Geneva Conventions as a whole form part of customary international law, and that, as such, they are applicable to UN forces in situations of armed conflict where UN forces participate therein as combatants. In the choice of the core IHL provisions, therefore, care was taken to ensure that they reflect beyond any doubt customary international law. The following, however, are some of the most notable exceptions:

- Attacks of objects indispensable to the survival of civilian population, and of installations containing dangerous forces which may cause the release of such forces and consequent severe losses among the civilian population are listed in Section 6 of the Secretary-General's Bulletin among the prohibited means and methods of combat. While not necessarily convinced that these provisions were part of customary international law as yet, the UN has nonetheless refused to allow the use by peacekeeping forces of means or methods of warfare of such a destructive scope and nature. Rules 42 and 43 of the ICRC

Study now proclaim these provisions to be part of customary international law.

- Section 6 of the Secretary-General's Bulletin "failed", in the view of some UN critics, to distinguish between international and non-international armed conflicts, thus extending the prohibition on the use of certain weapons to non-international armed conflicts and beyond what was generally considered as customary IHL. Broadening the scope of the prohibition, however, was intentional for a number of reasons.
  - Firstly, in the 1990s, the quasi-totality of peacekeeping operations were deployed in situations of civil wars and non-international armed conflicts, and the need to regulate their combat operations, given the paucity of IHL rules governing non-international armed conflicts, became ever more acute.
  - Secondly, it was a statement also that the UN force which, unlike any other, carries a stamp of international legitimacy, will consider itself in any kind of conflict bound by as high international standards as those applicable in international armed conflicts.
  - Finally, the active participation of a UN multinational force in an armed conflict, otherwise of a non-international character, internationalizes the conflict, with the result that in the relationship between the UN force and the parties to the conflict IHL applicable to international armed conflicts, apply.

But while in 1999 the prohibition on the use of many of the weapons grouped under Section 6.2 of the Secretary-General's Bulletin was considered part of customary international law applicable in international armed conflicts. In 2001, when the 1980 Convention was amended and its scope of application extended to non-international armed conflicts, Section 6.2 of the Bulletin, has acquired in retrospect a customary international law character, and its scope of application extended likewise to international and non-international armed conflicts. The prohibition on the use of laser weapons, however, which in 1999 was not even considered customary international law applicable in international armed conflicts, and for this reason was not included in the Secretary-General's Bulletin, is now recognized in Rule 86 of the

ICRC Study as part of customary IHL applicable in international and non-international armed conflicts alike.

In determining the customary international law character of the prohibition on attacks against peacekeepers and the legitimate scope of amnesty, the ICRC Study has contributed also to the principle of accountability for the most serious international crimes.

Attacks against peacekeepers were criminalized and internationalized in the 1994 Convention on the Safety of United Nations and Associated Personnel. In circumscribing the scope of the Convention, the question of the relationship between IHL and the Convention, inevitably arose. Thus, whereas, under the Convention UN personnel cannot be made the object of attack, under IHL, when UN personnel are engaged as combatants, they are not, as such, protected from attack, but rather protected and indeed bound by the IHL rules applicable to the conduct of military operations.

While the 1994 Convention implicitly recognized the applicability of IHL in peacekeeping operations, the fine line between the applicability of the protective regime of the Convention – under which any attack against peacekeepers is an international crime – and that of IHL remained undefined. When in 1998 the Rome Statute of the International Criminal Court defined war crimes to include attacks against peacekeepers "as long as they are entitled to the protection given to civilians or civilian objects" under international law of armed conflict, the line between the protected status of peacekeepers "as civilians" and their status otherwise as combatants, was finally drawn. In Rule 33 of its Study, the ICRC has recognized that the prohibition on attacks against peacekeepers, within the meaning of the Rome Statute, is now part of customary IHL.

Rule 159 of the ICRC Study and its most important contribution to the debate on accountability for crimes of genocide, crimes against humanity and war crimes, provides that amnesty for war crimes is the exception to the customary international law principle encouraging the grant of amnesty at the end of a civil war or non-international armed conflicts. It would have been our preference, though, that the scope of the exception be explicitly broadened to include genocide and crimes against humanity as well, to conform to the UN well-established policy and practice of non-recognition of amnesty for genocide, crimes against humanity and war crimes, or not at least as a bar to prosecution before a UN based international or internationalized tribunal. In places and

situations as diverse as Sierra Leone, Angola, Burundi, the Sudan and Timor Leste, the UN has consistently refused to cooperate with judicial or non-judicial accountability mechanisms which recognized amnesty in respect of any one of the so-called “trilogy” of crimes.

In conclusion, therefore, a determination that many of the IHL principles have by now acquired a customary international law nature is the UN strongest argument yet against the allegation that in applying a core principles and rules of IHL to UN forces in fine disregard of their customary international law character, the Secretary-General has exceeded his powers and legislated for States.

IMPLICATIONS FOR NON-INTERNATIONAL ARMED CONFLICTS

Zhu Wenqi*

Ladies and Gentlemen, distinguished guests, it is really a great pleasure and an honour to address in this audience. I take this as a good opportunity to share with you some of my thoughts on certain important issues on the customary international humanitarian law.

The subject of my talk is about non-international armed conflicts. Before me, quite a few panelists have mentioned about non-international armed conflicts. But in my speech, I will particularly address that issue. And my talk will be divided into three following parts:

- Firstly, why should the IHL rules be respected and implemented in non-international armed conflict?
- Secondly, what is the concern of states in this particular question, and
- Thirdly, how should such concern of the states be understood?

I. The Necessity to Protect War Victims in Non-International Armed Conflicts and the Concern of States

As we all know, the core concept and basic philosophy of rules of humanitarian law is protection of war victims. It is intended to protect all those who do not or no longer actively participate in armed conflicts, regardless of the nature of the armed conflict. Actually, in our world as it is now, because of historical, political, religious and many other reasons, internal armed conflict have the tendency to take place more and more frequently. However, the application of the rules of humanitarian law faces the problem created by the distinction between international and non-international armed conflicts.

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When I was in China to teach my students about IHL applicable in non-international armed conflict, I always recall my confusion when I firstly had about the distinction between international armed conflict and non-international armed conflict. That confusion happened long ago, it was actually back in 1983 when I was a student in France. I still remember the day when Mr. Christophe Swinarski, the former senior legal advisor of ICRC to come to our university to give a lecture as a general introduction of IHL. At half way in that lecture, he explained about the basic principles and the contents of the IHL and what is the problem. He also mentioned about the distinction between international armed conflict and the non-international armed conflict. That was actually the first time that I learnt about the IHL. Of course, I was confused by the distinction between international and non-international armed conflict. I thought that if you speak of the effect of the pillage, if you speak of the effect of a machine gun or of bombing, it must be the same in the international armed conflict as in the non-international armed conflict. When you speak of IHL, if you speak that the civilians and those soldiers who could no longer participate in armed conflict because they are sick or wounded and they need protection, then actually the civilians and those people *hors de combat* also need protection in non-international armed conflict, just as they do in international armed conflict. So, why is there such a distinction between these two kinds of armed conflicts? For me, the distinction between international armed conflicts and non-international armed conflicts is meaningless and artificial.

But after knowing more and more about the historical development of IHL, I began to see that if there is such a distinction, it is just because of the concern of states. If you look into the concern of states and then, you see that the concern of states is about care over their sovereignty. states are sovereign. They are very much afraid that their sovereignty would get harmed if the rebel group is legally recognized by other States or by the international community. Certainly, states did not want that happen. As a matter of fact, the states would like to show that if their own people dare to fight against them, then the states should have the control or rights to punish them by themselves.

Then, as we know, IHL is a part of the international law. When you speak of international law, everyone is aware about the subjects of international law. In other words, states are the main subjects of

international law; states are the actors in international relations; states are those who make the rules. Since states have this kind of concerns, they do not want to work out regulations for the non-international armed conflicts. For example, if you look into the four Geneva Conventions of 1949, you will find that there are more than 400 articles in these Conventions; but out of 400 articles, there is only one about non-international armed conflicts, namely Common Article 3. Therefore, the scope and number of humanitarian law treaty rules relating to non-international armed conflicts are far less extensive than those applicable to international armed conflicts. Why only one provision about non-international armed conflicts while there are so many to regulate behaviours in international armed conflict? It is because states have concerns. States have shown reluctance in their efforts to expand the humanitarian rules to the scope of internal armed conflict, on the assumption that such expansion might enhance the role of rebels and restrain their own sovereign authority.

The states have such concerns where it is evident. Actually, it is the same situation everywhere in the world. Just to take something as example, let us look into the situation in my own country, China, where we also had experience in the civil war between 1945 and 1949. In that civil war, there were fighting between Chiang Kai-Shek and Mao Tse-Tung. The Government of Chiang Kai-Shek represented China in the world at that time. It was the legitimate government in the international community before 1949. Therefore, Chiang Kai-Shek never recognized the Mao's troops as rebels in the sense of international law. Chiang Kai-Shek simply labelled Mao as "bandits". This kind of attitude or position could be found in many other countries in the world.

States have concerns, and such concerns continue and remain in international relations. Even 50 years after the adoption of 1949 Geneva Conventions, in 1998 and in Rome Statute, when it was decided that an article about war crimes should be included in the Statute of International Criminal Court (ICC), namely Article 8. This article includes the violation of IHL occurred in both international and non-international armed conflicts. Such inclusion, however, was opposed by a few countries. The very reason for them to oppose is because they did not like the war crimes to include unlawful acts committed in non-international armed conflicts. So, you can see the attitude of a few states remains the same; their concern over the sovereignty issue is still there.

II. The Development of IHL regarding Non-International Armed Conflicts

A few states opposed inclusion of non-international armed conflicts into Article 8 of the Roma Statute. This is a big surprise for me. In 1998, I was working in the International Criminal Tribunal for former Yugoslavia (ICTY) as a member in the Appeals Section in the Office of the Prosecutor. When states discussed about the establishment of the ICC, I was there. I was in New York and also in Rome, just to provide assistance delegations in the drafting process because states wanted to know the practice in the ICTY. So, when I saw the attitude and position of these states, I was obviously surprised.

Why such a surprise? This is because I think that by the time of the Roma Statute in 1998 the issue of non-international armed conflicts had been much changed.

The basic rules governing the conducts in warfare Article 3 common to the four Geneva Conventions is generally considered as a sort of treaty in miniature. Significant developments took place and it is required that individual criminal responsibility is to be held for war crimes committed not only in international armed conflict, but also in non-international armed conflicts. For example, in 1986 in *Nicaragua* vs. *US* Case, the International Court of Justice (ICJ) considered Common Article 3 as the fundamental principle of IHL. That means, by that time, the significance and the importance of Common Article 3 had been accepted by the international community. If you are looking at the wording of Article 3, you will find that the contents or the rules of Common Article 3 should and must be regarded as minimal standards to be applied in any kind of armed conflicts.

The Common Article 3 was the only rule of law applying to non-international armed conflicts until 1977. But in 1977, however, the two Additional Protocols were adopted, of which we have, for the first time, a total separated legal instruments to deal exclusively with non-international armed conflicts. That changed quite a lot. After that, the two ad-hoc tribunals were established by the UN Security Council. As we know, ICTY is the first judicial organ that the UN established by itself since its founding in 1945.

Actually, the UN decided to do it in two steps – first, to adopt Resolution No. 808 in 22 February 1993 and to request the UN

Secretary-General to draft the Statute in order to prosecute those who committed serious violation of IHL in the territory of the Former Yugoslavia. So, the Security Council decided to have the Statute of the ICTY drafted in 60 days by the Secretary-General. When the Secretary-General of the UN finished the drafting of the Statute, the Security Council of the UN adopted another resolution, namely Resolution No. 827 on 25 May 1993 for establishment of a tribunal for the former Yugoslavia. On these two occasions, if you had looked into the discussions and negotiations among all the members of the Council, you will find that the crimes which the Security Council discussed and should be included within the jurisdiction of the ICTY, took place not only in international armed conflicts, but also in non-international armed conflicts, and you may also find that actually during the discussions and negotiations, among all the 15 members, no one has ever mentioned about the distinction between the international armed conflicts and international armed conflicts. That means, for the Security Council of the UN, it is clear that those who commit the crimes both in international armed conflicts and in non-international armed conflicts must be held liable and be punished. Also, if you look at the backdrop of the adoption of these two resolutions, Resolutions 808 and 827, you will find that these two resolutions were adopted unanimously. That means, no member of the Security Council has ever challenged it because of the distinction between international armed conflicts and non-international armed conflicts.

If this is not clear enough, you may look into the jurisprudence of ICTY. For instance, in the *Tadic* Case, the first case before the ICTY in The Hague, the Appeals Chamber of the Tribunal ruled that "Principles and rules of humanitarian law reflect elementary considerations of humanity"[1]. Thus, "… customary international law imposes criminal liability for serious violations of Common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife".[2] The Appeals Chamber has explicitly confirmed that under current rules of customary international law, violations of Common Article 3 in internal

[1] *Prosecutor* vs. *Tadic* judgment on Jurisdiction, paras. 129.

[2] *Prosecutor* vs. *Tadic* judgment on Jurisdiction, paras. 134.

armed conflicts entail the individual criminal responsibility of the persons who committed such acts.

The judges of the ICTY are quite right. If you are looking into Article 3 of ICTY Statute as well as the crimes commit by the accused in non-international armed conflicts, you would agree that those who committed crimes in non-international armed conflicts must be held liable for what they did. The ruling by the judges has confirmed that the laws in relation to the war crimes committed in the non-international armed conflicts have already become a part of the customary international law.

To give you another example. In the following year of the establishment of the ICTY, in November 1994, the UN Security Council adopted another resolution, Resolution No. 955 to establish one more ad hoc tribunal, namely the International Criminal Tribunal for Rwanda (ICTR). The criminalization of serious violations of Common Article 3 was confirmed by Article 4 of the Statute of ICTR.

In 1994 in Rwanda, from the 6 April to the end of July 1994, more than 8 millions people got killed. If you are looking into the nature of the armed conflict, it is exactly of non-international armed conflicts. With this in mind, then, we see that Article 4 of the ICTR Statute is related to acts charged under Common Article 3 of Geneva Convention and Additional Protocol II of 1977. As a matter of fact, with creation and development of ICTR, another international tribunal also dealing with non-international armed conflicts was established, that is the Special Tribunal for Sierra Leone. The Rules of Procedure and Evidence of that Special Tribunal has been adopted following the example of that of the ICTR.

So, all I said is just to show that I was surprised when quite a few States in the Rome Diplomatic Conference strongly opposed inclusion of non-international armed conflicts into Article 8 of the ICC Statute. I was surprised, because by that time, the rules of law, such as Common Article 3, had no doubt become part of international customary law. Even at the moment of the establishment of ICTR in 1994, no one in the UN Security Council ever opposed to the inclusion of Article 4 in the ICTR Statute, namely Common Article 3 of Geneva Conventions and Additional Protocol II. Of course, during that proceeding, Rwanda which happened to be one of the members in the Council at the moment, voted against Resolution No. 955. However, if you look

at the reason why Rwanda opposed it, it is not because of Common Article 3, but rather of the issue of death penalty. The Statute of the ICTR does not provide for death penalty. The government of Rwanda thought that it was unfair. According to the Statute of the ICTR, both the national jurisdiction and the international criminal court will have jurisdiction. That means both the ICTR and Rwanda are entitled to prosecute and try the suspects. However, the ICTR has primacy. So, for the Government of Rwanda, you have primacy and so, you will have all these big fishes. But for all these big fishes, who are actually the real motors of genocide, the maximum penalty will be life imprisonment while the small fish who got tried before the national court might face death penalty. In the eyes of Rwandan Government, this is not fair. So, this is the reason why Rwanda was against adoption of Resolution No. 955, but not because of Common Article 3 of Additional Protocol II.

III. The Government Position and Attitude *vis-à-vis* Non-International Armed Conflicts

If you ask me whether states should have concern over their sovereignty because of the IHL rules of non-international armed conflicts, I would say no. By this Study of the ICRC, we can see clearly that quite a few basic principles such as the principle of distinction, the definition of military objectives and prohibition of indiscriminate attack and the duty to take precautions in military attacks – all these basic laws must be applied and must be respected not only in international armed conflicts, but also in non-international armed conflicts.

All these customary rules are there and I do not want to repeat, as it is really very well done in this Study. Here, I must say that I appreciated very much the efforts of the ICRC for this Study, and for organizing this Conference to mark the publication of the Study. I think, actually, that "mark" is not the right word; we should use terms like "congratulate" or "celebrate" because I do think that this Study is really very well done. So, we should "celebrate" it.

Sometimes, I ask myself whether states should have concern over the sovereignty issue. I ask this because I have doubt about whether to show respect to rules applicable in non-international armed conflicts

would really constitute a major danger for state sovereignty. As we all know, IHL body of rules has an exclusively humanitarian scope and purpose. They are to aim at protecting all civilians who do not take part in hostilities, or the wounded and sick who are no longer in a position to continue fighting. Therefore, the IHL rules are exclusively geared to protecting the victims of armed conflicts.

For all the soldiers or the military troops who are fighting in the field, their purpose is simple: to win in the battle. Of course, nothing is wrong with this aim itself, as St. Petersburg Declaration of 1868 declared long ago that "the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy." Therefore, it is all right for troops to fight; and it is all right too for them to achieve the purpose of winning in the battle. Fighting itself is not a crime. The rules of IHL do not require to eliminate fighting, but to request that you fight appropriately.

The logic of the above arguments is that what a military troop should try to do is to achieve its goal without doing harm to those who are *hors de combat*. Moreover, in non-international armed conflict, although each of them tends to consider the civilians under the control of the counterpart as "enemies", they in fact belong to the same sovereign State. So, if you render them some protection, it is actually good for you. If you respect the rules of humanitarian law in non-international armed conflicts, it can even give you some advantage. Then, how to explain this?

In China's old history, we have quite a lot of philosophers. In the field of war, Mr. Sun Tzu is famous for his The Art of War, which was written more than 2,000 years ago and in which Mr. Sun Tzu advocated that if you wish to win the war, you should firstly win the heart of your enemy. Mao Tse-Tung had been strongly influenced by Sun Tzu's thoughts. During the Chinese civil war in 1945-1949, Mao Tse-Tung issued instructions that his troops must be strictly prohibited to "kill or humiliate any one who lay down their arms". The troops were also prohibited to, among other things, "ill-treat captives", "damage crops" or "take liberties with women." [3] These instructions by Mao were mentioned in the *Tadic* Case before the ICTY. [4] Actually, such

[3] *Prosecutor* vs. *Tadic* judgment on Jurisdiction, paras. 102.

[4] Manifesto of the Chinese People's Liberation Army, in *Mao Tse-Tung, 4 Selected Works* (1961), 147, at p. 151.

rules or we may say, respect to IHL rules, assisted Mao to defeat Chiang Kai-Shek in the civil war. It is also interesting to note that Mao was only a non-state actor at that time. His instructions to respect IHL rules certainly helped him to win the heart of people and, consequently, to finally win the war over the powerful government troops.

As a matter of fact, I believe that it is not necessary for states to be worried that their sovereignty would get harmed by respecting the rules of IHL. By looking into the specific provision of the rules, you will see that respect for the rules does not equal to that the rebel group is legally recognized by the international community. The rules do not grant rebels any international status whatsoever. Common Article 3, for example, advisedly refrains from legitimizing rebels internationally.

Article 3 of Protocol II indeed provides as follows:

- Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
- Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatsoever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

Therefore, this provision clearly stipulates that states are entitled to take all the requisite measures to put down rebellions breaking out on their territory, provided they remain within the humanitarian bounds set by Common Article 3 and Protocol II.

That the application of IHL rules cannot therefore entail the acquisition of an international standing by insurgents is also true to the situation of the ICC. While Article 8, para.2(c) and (e) of Roma Statute are about the war crimes committed in non-international armed conflicts, it is clearly stated in the same Article that "[n]othing" in these paragraphs "shall affect the responsibility of a government to maintain or re-establish law and order in the state or to defend the unity and territorial integrity of the state, by all legitimate means."

Therefore, it shows that '"safeguard" provisions for states are there indeed. Since the safeguard provisions are there, there is no need to worry about application of the IHL rules in non-international armed conflicts.

The rules applicable in non-international armed conflicts merely aim at protecting civilians, children, women, the wounded, sick and ship-wrecked, and that it does not go beyond this humanitarian purpose. It should also be stressed in this regard that the persons mentioned above are after all nationals of the state where the civil society is in progress and that similarly the works and installations, the cultural objects or places or worship that IHL rules protect are part and parcel of the national assets of the state.

With all the above argument, I would like to say that the states have more reasons to respect the rules of IHL. In the modern society, we cannot avoid armed conflicts. Fighting itself is not a crime, so long as you fight appropriately. While no government, no state could tolerate rebels in its own country; we all have to respect IHL rules in non-international armed conflicts, which as shown by the Study, have been accepted by the whole international community. Furthermore, as Sun Tzu said, if you want to win war, you must firstly win over the heart of your enemy. Therefore, respect for IHL rules is one of the ways to win in the war. The conclusion is the rules of the IHL must be applied not only in international armed conflicts, but also in non-international armed conflicts.

With that, I end my speech. Thank you for your attention.

INTRODUCTORY REMARKS OF THE SESSION

Ali Reza Deihim*

I have the honour to chair for this very important part of the panel discussion. As we have a paucity of time, it is my humble request to the very prominent and eminent panelists, professors, the members of the dais to restrict themselves, if possible, to fifteen minutes. The subjects under discussion are, to some extent, very controversial. The principles, for example, concerning the protection of the rights of the Prisoner of War (POWs) and fundamental guarantees, etc for detainees are very complex and controversial. So, it is a humble request to the panelists to confine themselves to fifteen minutes. Then, we will go over to the audience to pose the questions. In doing so they should avoid comments.

I am very honoured to introduce the members of the dais – a person who possess a lot of experience in the field of IHL with the ICRC, Ms Jelena Pejic; she will be followed by Professor Penna; and then, Madam Nurhalida Mohamed Khalil. We also have the pleasure of Mr Vincent Nicod, ICRC Regional Delegate on the dias. I am sure that we are going to take advantage of his knowledge and expertise when it comes to the comments.

We will begin this panel with Professor Penna who will be speaking on "Fundamental Guarantees in International Humanitarian law". So, you have the floor Professor Penna.

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FUNDAMENTAL GUARANTEES IN INTERNATIONAL HUMANITARIAN LAW

L.R. Penna*

I. Introduction

At the very outset I place on record my cordial congratulations to the ICRC on the publication of *the magnum opus* Customary International Humanitarian Law[1] (the Study), our friends Dr. Jean-Marie Henckaerts and Prof. Louise Doswald-Beck deserve rich felicitations on being the main authors of the first volume and for their efficient arduous editorial work on the second and third volumes.

In 1973, I wrote a dissertation at The Hague Academy of International Law on "Humanitarian Law and Human Rights: Two Approaches to the Regulation of Armed Conflicts not of an International Character". In 1984 when the ICRC published the "Melange" Jean Pictet,[2] I was the only contributor, to write on "Customary International Law and Protocol I: An analysis of Some Provisions." When the ICRC invited me for this conference and Dr Henckaerts suggested that I write a paper on the "Fundamental Liberties," I felt gratified for they were proposing a subject which is right in my alley. I place on record my gratefulness to them.

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[1] J-M Henckaerts and L Doswald-Beck, eds., vols.3 (Cambridge: Cambridge University Press, 2005).

[2] C. Swinarski, ed., *Studies and Essays on International Humanitarian Law and Red Cross Principles* (Dordrecht: Martinus Nijhof, 1984).

II. International Humanitarian Law

International Humanitarian Law (IHL) consists of international rules, whether conventional or customary, those are specifically designed to resolve humanitarian problems resulting from armed conflicts. These rules limit, for humanitarian reasons, the right of the parties to the armed conflict to use methods and means of warfare purely of their own choice, and protect the persons and objects that are affected or may be affected by the armed conflict. Even though some norms of IHL are incorporated in the local laws and military manuals of various countries the term "humanitarian Law" is not used in military jargon.

IHL is a relatively new term in international law. In the early nineteen fifties (1950s), the ICRC first used the phrase to denote the Law of the Geneva Conventions which were until then considered as a part of the law of war. The law of war, in a broad sense, meant to regulate hostilities and attenuate their hardships. IHL consists of The Hague Law and the Geneva Law. The former determines the rights and duties of belligerents in the conduct of hostile operations and limits the choice of the means of doing harm to the enemy. The latter safeguards the civilians and military personnel placed *hors de combat* (out of combat -persons who cease to take part in hostilities due to capture, surrender, or injury).

III. Human Rights Law

Even though the evolution of human rights is traceable to the *Magna Carta* of 1215, the international community has been concerned with the promotion and protection of human rights only after the Second World War. Before 1945, international law classified human persons as aliens and nationals. Some protection was given to aliens, but the treatment of nationals was a matter of domestic jurisdiction of the sovereign states. The atrocities of the Nazi regime, which argued that its actions could not be questioned as it was the government of a sovereign state, necessitated remedial action that would not be subject to the plea of domestic jurisdiction. Consequently, we find the development of human rights law in the provisions of the United Nations (UN) Charter, the Universal Declaration of Human Rights (UDHR) and the multitude of international instruments relating to human rights.

IV. Correlation between Humanitarian Law and Human Rights

The correlation between humanitarian law and human rights has been source of some doctrinaire disagreement. Prof. A. H. Robertson, a former Director of Human Rights at the Council of Europe considered humanitarian law to be the species of the genus of human rights when he described "humanitarian law" as "one branch of the law of human rights" and concluded that "human rights afford the basis of humanitarian law".[3] He argued that "human rights law relates to the basic rights of all human beings everywhere, at all times; humanitarian law relates to the rights of particular categories of human beings - principally, the sick, the wounded, prisoners of war - in particular circumstances, i.e. during periods of armed conflicts". [4]

He supported his argument by referring to certain provisions of the human rights conventions which must be respected at all times without any derogation.

Jean S. Pictet, a legendry scholar of humanitarian law and a former Director General of ICRC who had presided over the experts conferences in charge of the negotiation of the two Additional Protocols to the Geneva Conventions observed that "for some years it has been customary to call "humanitarian law" that considerable portion of international law which owes its inspiration to a feeling for humanity and which is centered on the protection of the individual".[5] For him "humanitarian law comprises of two branches: the law of war and human rights". [6]

The efforts of the international community to alleviate human sufferings during armed conflicts predate the endeavours for safeguarding certain universal rights for the well being and development of the human personality. There exists today a set of two codes: (a) a body of law, which is applicable during armed conflicts, and (b) a code which is applicable at all times during peace as well armed conflicts. The former regulates the relationship between the states whereby the states are

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[3] A. H. Robertson and J. G. MerrilIs (later edition 1996), *Human Rights in the world: An introduction to the Study of Human Rights* (1978).

[4] *Ibid.*

[5] Jean S. Pictet, *The Principles of International Humanitarian Law* (1966), p.9.

[6] *Ibid. p.10.*

obligated to assuage the suffering of victims of armed conflicts. The latter regulates the relationship between states whereby they are obligated to vouchsafe certain rights in their relationship with persons under their jurisdiction.

If "humanitarian law" is understood as the discipline which is geared to alleviate the suffering of human beings in times of armed conflicts, and "human rights" are considered as the discipline whereby minimum rights are guaranteed, there are certain provisions in the laws of armed conflict which provide for basic rights in times of armed conflicts, and in the human rights there are provisions which must be respected at all times including during armed conflicts. Humanitarian law and human rights are complementary. The ultimate beneficiaries of humanitarian law and human rights are the human persons whose protection is their concern.

The rationale of the humanitarian law and human rights norms are identical even though the formulations are different. "Wilful killing" of protected persons is proscribed by the four Geneva Conventions, and "murder" is forbidden by the two Additional Protocols. The human rights instruments require statutory protection of the "right to life".[7] The rationale behind all these prohibitions and enjoinments is the recognition of the sanctity of life of the human person and their aim is to safeguard human lives.

Since the establishment of the International Criminal Court (ICC) in June 2002 there is a third set, the code of sanctions for war crimes and other international crimes of genocide and crimes against humanity referred to as international criminal law.

V. International Criminal Law

Criminal law is closely associated with the concept of state sovereignty embodied in Article 2, paragraph 1 of the Charter of the UN.[8] It is within the exclusive province of a state to apply criminal

[7] Article 2 of the European Convention on Human Rights 1950, Article 6 of the International Covenant on Civil and Political Rights 1966 and Article 4 of the American Convention on Human Rights 1969.

[8] Case *Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua* vs. *United States of America)*, hereinafter referred to as *The Nicaragua* Case (1986) *ICJ Reports*, para. 212.

law within its territory and in relation to persons and activities within its jurisdiction. National courts do apply foreign private or civil law. Criminal law, however, is a subject of national policy within the exclusive province of the *lex fori.* International law recognises five bases for assuming criminal jurisdiction.

A. The Territoriality Principle

This theory is a concomitant of sovereignty and is universally recognised, whereby a state prescribes and enforces rules of conduct within its physical boundaries, because *qui in territorio meo est, etiam meus subditus est* (who is in my territory, is also subject to me).[9] Territorial sovereignty extends over internal waters, territorial sea and the superjacent airspace.[10] The territoriality of jurisdiction also extends over crimes committed on board ships,[11] aircrafts,[12] and spacecraft.[13]

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[9] In the *Schooner Exchange* v *Mc Faddon (*1812) 7 Cranch 116 Chief Justice John Marshall reasoned:

(t)he jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute. It is susceptible of no limitations not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. *Ibid*., p.136. In The *S.S. Lotus (France* v *Turkey),* PCIJ Ser. A. No. 10 (1927) the Permanent Court of International Justice held : ... the first and foremost restriction imposed by international law upon a state is that – failing the existence of a permissive role to the contrary - it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive role derived from custom or from a convention.

Ibid., pp.18-19.

[10] *The Nicaragua* Case, at para. 212.

[11] *The Lotus* Case also enunciated that "vessels on the high seas are subject to no authority except that or the state whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no state may exercise any kind of jurisdiction over foreign vessels upon them."

This principle is confirmed in Article 6 of the Convention on the High Seas 1958 and Article 94 of the United Nations Convention on the Law of the Sea (UNCLOS)

B. The Nationality Principle

Nationality is the bond which unites a person to a given state, constitutes his membership in the particular state, gives him a claim to the protection of the state, and subjects him to the obligations created by the laws of that state. Issues of nationality, such as those relating to acquisition or loss of nationality are matters which are within the exclusive domestic jurisdiction of each state.[14] In cases of dual or multiple nationalities, espousal of claims, or matters vis-a-vis third states, jurisdiction is established on the basis of a "genuine link".[15] corporations,[16] ships,[17] and aircrafts[18] and spacecraft[19] also have nationality under international law.

-III 1982, in Ian BrownIie, *Basic Documents in International Law,* 4th edition (1995), at pp.100 and 188.

[12] Article I of the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963, in *Blackstone's International Law Documents* (1991) (hereinafter referred to as "BIL Documents") at 92, and Article 4 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970, confer jurisdiction on the State of registration of an aircraft for offences committed on board an aircraft, *Ibid.,* p.183.

[13] Article 8, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the *Moon* and other Celestial Bodies 1967 (hereinafter referred to as "the Space Treaty"), *Ibid, at p.145*.

[14] *Nationality Decrees issued in Tunis and Morocco* Case, Advisory Opinion of the Permanent Court of International Justice (1923), *PCIJ Rep*., Ser. B. No. 4, at 24. Also Article 1 of the Hague Convention on Certain questions relating to the Conflict of Nationality Laws. This position is endorsed by the International Law Commission (1952) *Year Book of International Law Commission,* vol. ii. p.3.

[15] *Nottebohm* Case (*Liechtstein v Guatemala*) (1955) *ICJ Reports,* p.3.

[16] *Barcelona Traction, Light and Power Co.* Case *(Belgium* vs. *Spain)* (1970) *ICJ Reports*. 3: *lnterhandel* Case *(Switzerland* vs. *USA)* (1959) ICJ Rep. 6. In *Daimler Company* vs. *Consolidated Tyre and Rubber Company* (1916), AC 307, the House of Lords held that a company incorporated in England might take the character of an enemy national if the persons in control reside in an enemy country or act under instructions from enemy share holders.

[17] Article 5, Geneva Convention on the High Seas 1958, and Article 91(1) of the UNCLOS-III, 1982, in *Basic Documents,* pp. 100 and 187.

[18] Article 17, *Chicago Convention on International Civil Aviation 1944*, TIAS No. 1591.

The right to the protection of one's own state has a corresponding duty to obey national laws having extraterritorial effect. Consequently, a state is competent to prosecute and punish its nationals for crimes committed outside its territory on the sole reason that their nationality is based upon allegiance which the accused owes to the state of his nationality.

C. The Passive Personality / Nationality Principle

In contrast with the nationality principle, a state may exercise jurisdiction over an alien for an act committed outside its territory where such an act is directly injurious to that state, its nationals, or has a deleterious effect within its territory.[20]

D. The Protective Principle

This is in effect a long arm theory under which a state may overreach its territorial boundaries to safeguard its interests from harmful acts engaged abroad. A state can assert jurisdiction over an alien, individual or juridical entity, for acts outside its boundaries, which have an adverse effect on its interests.[21]

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[19] The Space Treaty does not use the concept of nationality. However, the 1959 Report of the United Nations Ad Hoc Committee (UN Doc. *A*/4141 of 14 July 1959) and the General Assembly Resolution 1721 (XVI) of 20 December 1961 suggest the competence of the states to attribute their nationality to a spacecraft. Note: Unless otherwise indicated resolutions of the General Assembly are cited from D.J. Djonovick (ed)., *United Nations Resolutions* (1974).

[20] A famous application of this principle is in *the Lotus*, note 11, where the Permanent Court of International Justice upheld Article 6 of the Turkish Penal Code that gave Turkey jurisdiction over a foreigner for offences committed abroad against it or its nationals.

[21] *Joyce* vs. *DPP* (1946) AC 347; *Rocha* vs. *United States* (1960) 182 F Supp 479 (1961) 288 F 2d 545. The American Omnibus Diplomatic Security and Anti-Terrorism Act 1984 (18 USC 2331) gives jurisdiction to courts over any killing of an American national if it was intended thereby to coerce, intimidate or retaliate against a government or civilian population. See also the American Anti-torture criminal law, 18 USCA ss2340 (1997).

[22] "Grave breaches" in the four Geneva Conventions and the various United Nations sponsored multilateral anti-terrorist conventions are based on universal jurisdiction.

F. The Universality Principle

An offence subject to universal jurisdiction is one which comes under the jurisdiction of all States wherever it may be committed. Such an offence is a *delict jure gentium* and contrary to the interests of the international community.[22]

The universality principle is the jurisdictional base for nations to prosecute human rights offenders. Violations of certain human rights are so outrageous wrongs that they concern every nation.[23]

VI. The International Criminal Court

National criminal laws deal only with the crimes committed by individuals or legal entities. In the absence of any international criminal court, after the Second World War the victorious states established in 1945 the International Military Tribunal (IMT) for the prosecution and punishment of the major war criminals of the European Axis.[24] A parallel tribunal, the International Military Tribunal for the Far East, similar to IMT was established for the trial of the Japanese war criminals.[25] The Security Council of the UN, acting under Chapter VII of the UN Charter had established two *ad hoc* tribunals for the prosecution of persons

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[23] See H M Osofsky, "Domesticating International Criminal Law: Bringing Human Rights Violators to Justice", *Yale Law Journal*, vol. 107 (1997), at p. 191.

[24] London Agreement in B. Frencz, *International Criminal Court*, 2 volumes vol.I (1980), at pp. 454-455. The Charter of the IMT is annexed to the Agreement, text of the Charter and Rules of Procedure in *Ibid.* at pp. 456 -468.
In Nuremberg, on 18 October 1945, twenty-four major Nazi Criminals were indicted for conspiracy to commit Crimes against Peace, War Crimes and Crimes against Humanity. A year later on I October 1946 three defendants were acquitted of all charges, several others were partially acquitted and sentenced to various terms of imprisonment, and ten of the principal criminals were condemned to death by hanging.

[25] Twenty-eight war criminals were charged for offences identical to the IMT indictments. After two-and-half years of trial all of them were convicted, seven were sentenced to death by hanging, and a majority received life imprisonment, *ibid*, at p. 77.

[26] Resolution S/RES/827, *25* May 1993 (1993) 32 *ILM* 1192, text of the Statute of the Tribunal in [1993] 32 ILM 1159 or visit the Tribunal's website *http://*

responsible for serious violations of IHL in former Yugoslavia[26] and Rwanda.[27]

After years of negotiations in the UN on 17 July 1998,160 member states enthusiastically and overwhelmingly voted in favour of the Rome Statutes creating the treaty establishing the first permanent international court capable of apprehending, prosecuting and punishing individuals accused of genocide, war crimes, and crimes against humanity. After the required ratification, the ICC is now operational. War crimes include grave breaches of the four Geneva Conventions, serious violations of certain provisions of their common Article 3, and laws and customs applicable in international and non international armed conflicts.[28]

The provisions of the humanitarian law, human rights, and international criminal law as envisaged in the Rome Statute are complementary to each other. It is therefore befitting that the Study has examined and concluded that some of the norms of these different codes have crystallized into customary law.

VII. Fundamental Guarantees

A. Ratione Personae

Chapter 32 of the Study is titled as "Fundamental Guarantees". The heading of Article 75 of Protocol I and Article 4 of Protocol II is also "Fundamental Guarantees". At the outset it may appear that Chapter

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www.un.org/icty/ (6 December 2005) Statute at *http://www.un.ong.icty/legaldoc-e/index.htm* (6 December 2005) For comments on the tribunal see T Meron, "Internationalization of Internal Atrocities," *American Journal of International Law*, vol. 89 (1995), at p. 554: T Meron, "War Crimes in Yugoslavia and the Development of International Law", *American Journal of International Law* , vol. 88 (1994), at p. 78: and JC O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia," *American Journal of International Law*, vol.87 (1993), at p. 639.

[27] Resolution S/RES/955, 8 November 1994, text of the resolution and the Statute of the Tribunal in 1994 33 ILM 1598 or the Tribunal's website at *http://65.18.216.88/default.htm* (December 2005) Statute at *http://65.18.216.88/ENGLISH/basicdocs/statute.html* (6 December *2005).*

[28]Text of the statute visit *http://www.icc-cpi.int/librarv/about/officialjournal/Rome Statute 120704—EN.pdf_(5* December 2005) in the ICC website *http://www.icc-*

32 is an elaboration of these articles of the Protocols. On a closer scrutiny, however, it is found that the scope of Chapter 32 is much wider than Article 75, *rationae personae.* Article 75 is a residual clause in relationship to persons who are not otherwise protected by other provisions of the Conventions or the Protocol I.

Rationae personae Article 75 is applicable to "persons who are in the power of a party to the conflict who do not benefit from more favourable treatment under the Conventions or under this Protocol" (Emphasis). *Ipso jure* the wounded and sick combatants under Conventions I and II, the prisoners of war (POWs) under Convention Ill, and the civilians under Convention IV except those falling under Article 5 derogations, are excluded from the protection of Article 75.

The ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949[29] after stating that "not benefiting from more favourable treatment under the Conventions or under this Protocol"[30] is a condition precedent for the application of Article 75, enumerates the persons covered by Article 75. They are:

(a) Nationals of states not parties to the Conventions
(b) Nationals of states not parties to the conflict,
(c) Nationals of allied states,
(d) Refugees and stateless persons,
(e) Persons who are denied POW status, and
(f) Persons who under Article 5 of Convention IV are deprived of certain rights laid down by the Convention.

The introduction to Chapter 32 states that "(t)he fundamental guarantees identified in this chapter apply to all civilians in the power of a party to the conflict and who do not take a direct part in hostilities, as well as to all persons who are *hors de combat*" [31] (emphasis). The categories of persons covered under Article 75 are very limited whereas those covered in Chapter 32 are many. For example the fundamental guarantees envisaged in Article 75 do not extend to the protected persons under Convention IV unless they come within the derogations under

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cpi.int/(5 December 2005).

[29] C. Swinarski, note. 2

[30] *Ibid.*.

[31] J-M Henckaerts and L Doswald-Beck (eds.), 3 vols. *Customary International Humanitarian Law* (Cambridge, Cambridge University Press, 2005), vol.I, at p.299.

Article 5, but the guarantees referred to in Chapter 32 are applicable to them.

B. Jurisdiction and Effective Control

On the territorial application of human rights law, the Study points out that while most of the treaties require state parties to apply the human rights wherever they have "jurisdiction", treaty bodies and state practice require "effective control".[32] Referring to Article 2 of the International Covenant on Civil and Political Rights (ICCPR) requiring state parties to "respect and ensure to all individuals with in its territory and subject to its jurisdiction the rights recognized in the Covenant" the Study concludes that "State practice has interpreted this widely". The Study gives the example of the UN Special Rapporteur being instructed to report on the violations of human rights in Kuwait occupied by Iraq "even though Kuwait could not be considered to be its "territory" and recognition of any formal jurisdiction did not occur".[33] Other examples are two cases decided by the European Court of Human Rights (ECHR) and one by the Inter-American Commission on Human Rights (IACHR).

The terms "jurisdiction" and "effective control" are technical connotations in international law. Jurisdiction denotes the competence of states to prescribe and enforce rules of law.[34] Effective control relates to the enforceability of these rules of law. A state may have jurisdiction in criminalizing conduct outside its territorial limits, but that state will have effective control to prosecute the offender only when the offender is within the physical control of that State.

The obligation to respect human rights within the "territories" of the state parties is not limited to the territories under sovereignty but extends to territories under administrative control. "Capitulatory regimes," where one state confers on another the right to exercise all or some of the functions of sovereignty, are known in international law. A good example is that of the 1903 agreements[35] under which Cuba had leased an area at Guantanamo for a naval base under an agreement providing:

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[32] *Ibid.* at p. 305

[33] *Ibid*.

[34] For exercising such competence see the bases of jurisdiction, *ibid.*

> "while on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas" (emphasis).

It may also be noted that the mandate and trusteeship territories were not within the sovereignty but under administration and thus effective control of the trust administering states.

C. Belligerent Occupation

In Kuwait, it was a situation of belligerent occupation governed by the Hague Convention (IV) and the Regulations annexed there to Respecting the Laws and Customs of War on Land recognized as customary international law. These regulations apply as soon as a territory is occupied by adversary forces, that is, when the government of the occupied territory is no longer capable of exercising its authority, and the occupier is in a position to impose its control over that area. The entire country need not be conquered before an occupation comes into effect as a matter of law, and a state of occupation need not be formally proclaimed or recognised.

D. Enumeration of Fundamental Guarantees

The Study does not elaborate the notion of "fundamental guarantees". In constitutional law the term "fundamental rights" is a juridical concept distinguishing them from ordinary rights. Fundamental rights are restraints on state action, which can not be taken away by ordinary legislation or excessive taxation, and which are enforceable in a court of law. Obviously the term "fundamental guarantees" in the Study means that they are norms which must be respected by all the parties in all circumstances and situations of armed conflict, international or non-international as the case may be, without any exceptions.

The Study identifies 19 rules as "fundamental guarantees" under customary international law in relation to civilians and *hors de combat*

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[35] T. S. Nos. 418 and 426.

in international and non international armed conflicts. The Study does not discuss the scope of international and non-international armed conflicts. The distinction between the two types of armed conflicts is significant particularly because of the enlargement of the scope of the international armed conflicts by Article 1.4 of Protocol I whereby "armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of the right of self determination…" are included within the definition of international armed conflicts.

In relation to states which have ratified Protocol I, international armed conflicts include armed conflicts described in Article 1.4. In relation to states that have not ratified Protocol I, international armed conflicts do not include armed conflicts described in Article 1.4 unless it is established that Article 1.4 itself had become a rule of customary international law.

For the purpose of Chapter 32, however, the distinction between international and non-international armed conflicts appears to be superfluous because the Study concludes that all the guarantees therein discussed are applicable in both the conflicts.

E. Rules of Fundamental Guarantees

The following rules are identified as the fundamental guarantees in international and non-international conflicts.

- Rule 87: Requirement of humane treatment of civilians and *hors de combat.*
- Rule 88: Requirement of non-discrimination on any invidious grounds like race, colour, sex, languages, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or similar criteria.
- Rule 89: Prohibition of murder or wilful killing
- Rule 90: Prohibition of torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment.
- Rule 91: Prohibition of corporal punishment.
- Rule 92: Prohibition of mutilation or medical, scientific experiments.
- Rule 93: Prohibition of rape and other forms of sexual violence.

- Rule 94: Prohibition of slavery and slave trade.
- Rule 95: Prohibition of unpaid or abusive forced labour.
- Rule 96: Prohibition of hostage taking.
- Rule 97: Prohibition of using human persons as shields.
- Rule 98: Prohibition of enforced disappearance.
- Rule 99: Prohibition of arbitrary deprivation of liberty.
- Rule 100: Requirement of fair trial ensuring all essential judicial guarantees consisting of the presumption of innocence, right to defence including right to counsel, public hearings, and freedom from testimonial compulsion and double jeopardy.
- Rule 101: Prohibition of *ex post facto* laws.
- Rule 102: Requirement of individual criminal responsibility.
- Rule 103: Prohibition of collective punishments.
- Rule 104: Requirement of freedom of religion.
- Rule 105: Requirement for respecting family right.

A comparison of ratification or accession shows that most of the states that have ratified or acceded to the Geneva Conventions have also ratified the International Covenant on Civil and Political Rights (ICCPR). Article 4 allows derogations from the Covenant obligations "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed... to the extent strictly required by the exigencies of the situations" subject to certain limitation prohibits derogations from certain human rights. Derogations, however, are not allowed for the present purposes in relation to:

- Article 6: Right to life including the prohibition of arbitrary deprivation of life.
- Article 7: Prohibition of torture, cruel, inhuman or degrading treatment or punishment.
- Article 8: (1) Prohibition of servitude; (2) Prohibition of slavery and slave trade.
- Article 15: Prohibition of *ex post facto* laws except universal offences under international law.
- Article 16: Right to recognition as a human person.
- Article 18: Freedom of thought, conscience and religion.

To that extent the guarantees enunciated in Rules 89, 90, 94, 99, 101, and 104 are not amenable to derogations, and hence fundamental.

The Study goes through the laborious process of establishing that

the rules are fundamental guarantees as customary international law. In the process the Study evaluates treaties and other instruments; national practice consisting of military manuals, legislations, case law, and other practice; practice of international and other organizations and conferences; practice of international judicial and quasi-judicial bodies; practice of the International Red Cross and Red Crescent Movement; and other practice.

VIII. Evolution of Customary International Law

The century old judgment of the American Supreme Court in *The Paquete Habana*[36] illustrates the classical understanding of Customary International Law. During the Spanish American war two Cuban coastal fishing boats, *The Paquete Habana* and *The Lola* were seized for breaking the American blockade of Cuba and sold as prizes of war. The issue before Supreme Court was whether the boats were immune from seizure and sale under American law. The court held that "by an ancient usage among civilized nations, beginning centuries ago and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prizes of war."[37] The court also held:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as question so fright depending upon it is duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative action or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labour, research and experience, have made themselves peculiarly well acquainted with the subject of which they treat. Such works are resorted by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really

[36] (1900) 175 US 677.

[37] *Ibid,* at p. 686.

is.[38]

At the beginning of the 20th century the world community creating international law was relatively small and cohesive. The court looked into the state practice of a relatively small number of countries mostly from Western Europe and Japan the "last State admitted into the ranks of civilized nations." References were made to the orders issued in the early fifteenth century by King Henry IV to his admirals, treaties between England and France, France and Holland, and Japanese Ordinance promulgated at the beginning of the war with China, the US-Prussia treaties, works of jurists and consults and the like. The court concluded:

> This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and dependently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from and capture as prize of war.[39]

A treaty may incorporate a norm of customary international law as positive law or a norm of customary international law may emerge from a provision of a treaty. In the *North Sea Continental Shelf* Case[40] Denmark and the Netherlands had attempted to establish that the then Federal Republic of Germany, though not a party to the 1958 Geneva Convention on the Continental Shelf, was bound by Article 6, because the equidistance principle of demarcation therein envisaged had eventually become a rule of customary international law. It was argued that even if there was no such customary rule at the advent of the Convention, or no customary rule was incorporated in Article 6, such a customary rule had come into existence from the time of the Convention "partly because of its own impact (and) partly on the basis of the subsequent

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[38] *Ibid,* at p. 700.

[39] *Ibid,* at p. 708.

[40] *ICJ Reports* (1969), at p. 3.

State practice". The court rejected the arguments because in not allowing reservations to Articles 1, 2, and 3 but allowing reservations to Article 6, the International Law Commission (ILC) had not proposed Article 6 as an emerging customary rule. Article 6 was so framed, however, as to put the obligation to make use of the equidistance method after a primary obligation to effect delimitation by agreement. Furthermore, the part played by the notion of special circumstances in relation to the principle of equidistance, the controversies as to the exact meaning and scope of that notion, and the faculty of making reservations to Article 6 must all raise doubts the potentially norm-creating character of that article.

In the formulation of customary international law there are two essential elements: (a) the objective one of general practice and (b) the subjective one, accepting as law, or the *opinio juris.* In the *North Sea Continental Shelf* Cases[41] the Court explained:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates.* The States concerned must therefore feel that they are conforming to what amount to a legal obligation. The frequency or even habitual character of the acts is not in itself enough. There are many international acts, e. g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated by considerations of courtesy, convenience or tradition, and not by a sense of legal duty.[42]

Judge Tanaka explained in a dissenting opinion the difficulties in establishing the *opinio juris:*

> … so far as ...*opinio juris sive necessitas* is concerned, it is extremely difficult to get evidence of its existence in concrete cases. This factor, relating to international motivation and being of a psychological nature, can not be ascertained very easily, particularly when diverse legislative and executive organs of a government participate in internal process of decision-making in respect of

[41] *Ibid.*

[42] Para 77

[43] *Ibid.*

ratification or other State acts. There is no other way than to ascertain the existence of *opinio juris* from the fact of external existence of a certain custom and its necessity felt in the international community, rather than to seek evidence as to the subjective motives for each example of State practice, which is something which is impossible of achievement. [43]

For a norm to crystallize into customary international law there must be evidence that state have been following the norm believing it to be obligatory under international law. *Opinio juris* is a belief that some norm is already a law before it can become law. Mere uniformity in the laws of states does not make it customary international law.

A distinction has to be made between uniform national laws and the emergence of customary international law. Bigamy is illegal under laws of many countries, yet it does not mean that bigamy is forbidden by customary international law.

Accordingly, norms in national laws as incorporated in the Armed forces acts or the military manuals may metamorphose into customary international law only on evidence of *opinio juris* that the states have promulgated them believing them to be obligatory under international law. Armed forces laws and military manuals are promulgated not under an international obligation but for the governance and discipline of the armed forces.[44]

A. Convenience and Customary Rule

Commenting on the *opinio juris* the Study observes:

> It appears that international courts and tribunals on occasion conclude that a rule of customary exists when the rule is desirable one for international peace and security or for the protection of human person, provided that there is no important contrary *opinio juris*. Examples of such conclusions are the findings by the International Military Tribunal at Nuremberg that the Hague Conventions of 1907 had hardened into customary international law, and the finding by the International Court of Justice in the *Nicaragua* Case that the rule of non-intervention in the internal and external of other States was a part of customary international law.[45]

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[44] See the American Supreme Court decision in *Dynes v Hoover* (1857), 20 How., at p. 65.

This observation appears to be speculative in view of the *raison d' etre* of the two decisions.

Before the Nuremberg Tribunal, it was argued that the Hague Convention 1907 was not applicable because of the "general participation" clause in Article 2 limiting the Convention only to the state parties.[46] Tribunal having considered that the crimes defined in Article 6(b) of the Charter were already recognized as war crimes under international law and covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3,4,46 and 51 of the Geneva Convention of 1929 felt that it was not necessary to decide this question. The Tribunal, therefore, held that

> the rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt "to revise the general laws and customs of war,"[47] which it thus recognised to be then existing, but by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter.[48]

In the *Nicaragua* Case the Court held the non-intervention in the internal and external affairs of another state to be a customary principle of international law because of the General Assembly Declaration on the Inadmissibility of Intervention in the Domestic Affairs of states and the Protection of their Independence and Sovereignty, Resolution 2131 (XX), and Resolution 2625 (XXV) setting out principles declared to be "basic principles of international law."[49]

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[45] *Ibid,* at p. xiii.

[46] Article 2 of the Hague Convention 1907: The provisions contained in the regulations referred to in Article 1 as well as in the present Convention do not apply except between contracting powers, and then only if all the belligerents are parties to the Convention.

[47] The quotation from the Convention is in paragraph 3 of "Purposes of Convention" in the 1907 Hague Convention.

[48] From the Yale Law School Avalon Project *http://www.yale.edu/lawweb/avalon/imt/proc/iudlawre.htm*_visited on 02.*12.05*.

[49] The Court held: "The principle (of non-intervention) has since been reflected

The observation in the Study implies that international courts and tribunals improvise the law as customary international law in the interest of peace, security, and protection of human person. It may be noted that the international courts and tribunals unlike the courts in the common law countries do not have competence to enunciate legal norms on the pretension of customary law under the *non-liquet* rule.[50]

IX. Appraisal

On 11 December 1946 the UN General Assembly unanimously adopted a resolution in which it "affirm(ed) the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal" and directed the Committee on the codification of international law which later became the ILC to formulate those principles.[51]

In its report of 3 May 1993 presented pursuant to paragraph 2 of the Security Council Resolution 808 (1993)[52] the Secretary-General in proposing Article 2 consisting of "grave breaches of the Geneva Conventions of 1949" and Article 3 composed of "Violations of the Laws and Customs of War" of the Statute of the International Criminal

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in numerous declarations adopted by international organizations and conferences, in which the United States and Nicaragua have participated, e.g., General Assembly Resolution 2131 (XX), the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. It is true that the United States, while it voted in favour of General Assembly Resolution 2131 (XX), also declared at the time of its adoption in the First Committee that it considered the declaration in that resolution to be "only a statement of political intention and not a formulation of law" *(Official Records of the General Assembly, Twentieth Session,* First Committee, A/C.l/SR.l423, at p. 436). However, the essentials of resolution 2131 (XX) are repeated in the Declaration approved by resolution 2625 (XXV), which set out principles [*225) which the General Assembly declared to be "basic principles" of international law, and on the adoption of which no analogous statement was made by the United States representative." At para. 203.

[50] See J. Stone, "*Non Liquet* and the Function of Law in the International Community", *British Year Book of International Law* (1959), at p. 145; H.

Tribunal for Former Yugoslavia (ICTY) traced the customary nature of the Geneva Conventions and Hague Regulations:[53]

A. Grave Breach of the 1949 Geneva Conventions

The Geneva Conventions constitute rules of international humanitarian law and provide the core of customary international law applicable in international armed conflicts.

B. Violations of the Laws or Customs of War

The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto comprise a second important area of conventional humanitarian international law which has become part of the body of international customary law.

The Nuremberg Tribunal recognized that many of the provisions contained in the Hague Regulations, although innovative at the time of their adoption were, by 1939, recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war. The Nuremberg Tribunal also recognized that war crimes defined in Article 6(b) of the Nuremberg Charter were already recognized as war crimes under international law, and covered in the Hague Regulations, for which guilty individuals were punishable.

The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions. However, the Hague Regulations also recognize that the right of belligerents to conduct warfare is not unlimited and that resort to certain methods of waging war is prohibited under the rules of land warfare."

These rules of customary law, as interpreted and applied by the Nuremberg Tribunal, provide the basis of for the corresponding of the statute which would read as…." [54]

Lauterpacht, *The Development of International Law by the' International Court* (reprint) (1982), at p. 152 and the Declaration of Judge Vireshchetin in the *Nuclear Weapons* Case, 1996 *ICJ Reports*, at p.8.

[51] Resolution 95(1).

[52] 22 February 1993.

[53] S/25704.

[54] Charter of Nuremberg Tribunal, at pp.10 - 11.

It may accordingly be concluded that all the norms of humanitarian law traceable to The Hague Regulations and the Geneva Conventions are customary principles of international law.

THE TREATMENT OF PERSONS IN ARMED CONFLICT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Nurhalida Mohamed Khalil*

There has been a growing convergence between human rights law and International Humanitarian Law (IHL) as the frequency in acts of violence promulgates the need for the better protection of victims of armed conflicts. The two branches of law complement one another as both shares the common objective of protecting lives while ensuring respect for the dignity of human beings is shielded from all aspects of abuse of power.[1] This phenomenon is strongly reflected in steps taken to reconceptualise violence against persons, particularly in armed conflict, as a human rights violation.[2]

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[1] See generally, E. Aide, "The Laws of War and Human Rights: Differences and Convergences", in Christophe Swinarski, ed., *Studies and Essays in International Humanitarian Law and Red Cross Principles in honour of Jean Pictet* (Dordrecht: Martinus Nijhoff, 1984).

[2] The link between human rights and humanitarian law was recently addressed by the International Court of Justice in its Advisory Opinion. The Court observed : "the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law, as *lex specialis*. International humanitarian law".
See. *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, *ICJ Reports*, *2004* judgement delivered on 9 July *2004*, para. 106.

The purpose of this paper is to explore how human rights could further help develop rules and principles of IHL in terms of the treatment of persons in armed conflict, particularly of those who are seen as new emerging participants of "armed conflict", described as "an unconventional enemy that is not a state, but a most amorphous kind of non-State actor with its tentacles spread all over the world, and which does not hesitate to use unlawful means of attack".[3]

Guantanamo and the prolonged arbitrary detention of so-called unlawful enemy combatants, raises numerous issues, which includes the following: What is the significance of the determination by a state that a particular group is a "terrorist" group whose members do not qualify as Prisoners of War (POWs)? Is it open to a state to deny all the members of a group, combatant status, if that group does not "enforce compliance with the rules of international law applicable to armed conflict"? What factors are applied to establish non-compliance? What is the standard of treatment for personnel who do not attain "combatant status"? Whether acts of terrorism and the War on Terror, actually triggers the application of IHL? What is the protection provided under IHL to civilians who take a direct part in hostilities? What is the scope of "direct participation" and what types of activities may be carried out by civilians without making them lawful targets? Is there a requirement, to be carrying a weapon, in order to fall within the category of "unprivileged belligerents" who may be targeted?

I. Who is a Combatant and Prisoner of War?

Humanitarian rules are the result of a value judgement, bearing in mind the intrinsic tensions between humanity and military necessity.[4] International Humanitarian Law (IHL) builds upon the distinction between combatants, on the one hand, and persons *hors de combat* and non combatants (civilians), on the other hand, to achieve its objective, which, is to reduce suffering to a minimum and to limit destruction.[5]

A combatant has the right to use violence and, if necessary, to kill (crime under normal circumstances), and to whom may also, lawfully,

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[4] Hans-Peter Gasser, *International Humanitarian Law: An Introduction* (International Institute of Human Rights-Strasbourg, 1993), at P6.

[5] *Ibid*, at p.10.

be attacked. An important related issue is the destiny of a combatant who has fallen into the power of the adversary.[6]

Traditionally, under the 1907 Hague Regulations, Geneva Conventions of 1929 and 1949, combatants, and if they have fallen into the power of the adversary, POWs, are:

- members of the armed forces, and
- members of militias or other volunteer corps, including in particular, members of resistance movements, who belong to a party to the armed conflict and comply with the following criteria:
  - Commanded by a person responsible for his subordinates;
  - Bear a distinctive sign;
  - Carry arms openly;
  - Respect the laws and customs of war in their operations.[7]

However, under Article 43 of Protocol 1, all members of the armed forces of a party to a conflict (other than medical personnel and chaplains) are combatants. In this context, armed forces are all organised armed forces, groups and units:

- which belong to any given party to an international armed conflict;
- Which are organized as military units;
- Which are under effective control by a command responsible for the conduct of its subordinates;
- Which are subject to a disciplinary system enforcing compliance with IHL.[8]

The criteria, for acceptance as a combatant, are individual as well as "group" or collectively based. Although there seems to be no firm consensus as to which of the conditions are collective and which are individual, it is pointed out that all six criteria (organisation, association with a party to the conflict and military command, distinctive sign, open arms and adhering to the laws and customs of war) are group based, with the last three criteria mandatory requirements to be met by both the group and individuals.[9]

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[6] *Ibid*.

[7] *Ibid,* at p.11.

[8] *Ibid.*

[9] Col.Ken Watkins "Combatants, Unprivileged Belligerents and Conflicts in the 21st Century", IHL Research Initiative Internet Portal, HPCR Policy Brief, January

In this regard, a group ban is easily applied in relation to terrorist organisations where there is consistent disregard of the basic distinction between combatants and civilians in their actions.[10] However, the view that IHL should be based on an assessment of the "justness" of the cause of a group runs counter to the policy consideration behind IHL; that the obligations under IHL are independent of the cause of the armed conflict; and that the reasons for resorting to force or any claims as well as the notion of equality among parties to an armed conflict with respect to humanitarian obligations[11] are succinctly expressed in the following words: "while one party may be a sinner and the other a saint under *jus ad bellum, the jus in bello* must and does bind the aggressor and the aggressed equally".[12]

The further exclusion of Guantanamo detainees from not only their combatant and therefore POWs status under Geneva Convention Ill but also excludes their status as civilians under Geneva Convention IV, ultimately deprives these detainees of the right to recognition before the law, a basic, non-derogable human right.[13]

2003.Available at *http://www. ihlresearch .org/ihl/pdfs/Session2.pdf*), citing W.T.Mallison and S.V. Mallison, "The Juridical Status of Irregular Combatants under International Humanitarian Law", *Case W. Res. J. Int'Law,* vol. 9 (1977), at pp. 39 and 49-65.

[10] *Ibid, at. p. 10.*

[11] Hans Peter Gasser, note, 4, at. p. 6-7.

[12] Gabor Rona, "Interesting Times for International Humanitarian Law: Challenges from the War on Terror." *The Fletcher Forum of World Affairs,* Summer/Fall 2003, available at *http://fletcher.tufts.edu /forum/27-27pdfs/Rona.pdf*. See also Col. Ken Watkins, note. 10 ("A decision to exclude a group from combatant and therefore POW status should not be based on an assessment of the ''justness" of that group's cause. The application of ''just war" thinking to combatant status is fraught with difficulty. Under that approach the state lawfully using forces claims a right to combatant and ultimately has POW status, while the party acting unlawfully "would be subject to the obligations, but could not benefit from the rights conferred by the law of war, including the Geneva Conventions of 1949. It is a fundamental principle of international humanitarian law that the treatment of captured personnel is based on their meeting appropriate objective criteria and not the justness of the cause they serve.")

[13] Gabor Rona, *ibid,* at p. 66.

II. The Protection of all Civilians against the Dangers of Military Operations

The ability of modem nation states to use manned and unmanned aerial vehicles to locate and attack terrorist leaders have raised significant debate about the parameters of Article 51 (2) and (3) of Additional Protocol I which states as follows:

- 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 of which is to spread terror among the civilian population, are prohibited.
- Civilians shall enjoy the protection afforded by this Section, unless and such time as they take a direct part in hostilities. (emphasis added)

There is a continuing debate concerning the interpretation of the phrase "unless and such time as they take a direct part in hostilities".[14] The ICRC commentaries on the Additional Protocols define the words to mean "a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place". In addition it encompasses acts that are "intended by their nature or their purpose to target specifically the personnel and the "material" of the armed forces of the adverse party".[15]

This lead to a number of issues regarding the scope of IHL and specifically the protection that is provided to civilians. For example, is it legal for a state under IHL to attack and subsequently kill terrorist

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[14] Taking a direct part in hostilities is not the only wording in IHL that conveys such participation. Other terms include "take no active part" in hostilities (Common Article 3 of the 1949 Geneva Conventions), "a person who takes part in hostilities" (Article 45(1), AP I) "abstains from any hostile act" (Article 41(2), AP I) "acts harmful to the enemy" (Article 45(3), 65 and 67(1)(e), AP I, Article 21, GC I, Article 34, GC II and Article 19, GC IV) "any act of hostility " (Article 8(1), AP I) and "persons who have ceased to take part in hostilities" (Article 4, AP II).

[15] International Committee of the Red Cross Commentary, Additional Protocol I, Article 43, at para. 1679 available at *http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/Ocdb7170225811aOcl* 2563 cdOO433 725? Open Document.

suspects by unmanned aerial vehicles?[16] The targeted killing is seen as of "dubious legality" under IHL for several reasons, as elaborated in the following words:

> ... First, unless the event is part of an armed conflict, humanitarian law does not apply, and its provisions recognising a privilege to kill may not be invoked. The event must then be analysed under other applicable legal regimes. Second, even if humanitarian law applies, the legality of the attack is questionable because the targets were not directly participating in hostilities at the time they were killed and because the attacker's right to engage in combat is doubtful.[17]

III. The Applicability of IHL

IHL is applicable from the outset of an armed conflict. The ICRC commentary to Common Article 2 of the Four Geneva Conventions 1949, which refers to the notion of "armed conflict" in international armed conflicts, states as follows:

It remains to ascertain what is meant by armed conflict. The substitution of this much more general expression for the word "war" was deliberate. One may argue almost endlessly about the legal definition of "war". A state can always pretend, when it commits a hostile act against another state that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression "armed conflict" makes such arguments less easy. Any difference arising between two states and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims.[18]

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[16] See Gabor Rona, note.12, at p. 64 where the author referred to the targeted killing of suspected terrorists in Yemen in November 2002 by a CIA-launched, unmanned drone missile.

[17] *Ibid*, at pp. 64-65.

[18] Hans Peter Gasser, note 4 at p.8.

The armed conflict may be in the form of an international or non-international armed conflict.

The Four Geneva Conventions and Additional Protocol 1 mainly include rules concerning conflicts between states although under the latter instrument, the following conflicts are also regarded as international conflicts and protected by the rules therein: "armed conflicts in which "peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination".[19]

Under IHL, there are two types of internal armed conflict: the non international armed conflict of high intensity, to which Common Article 3 of the Four Geneva Conventions 1949 and Additional Protocol II 1977 are cumulatively applicable and other internal armed conflicts, which are subject only to Common Article 3.[20]

Common Article 3 covers armed conflict within the territory of a state and if the following criteria are met:

- Hostilities by force of arms;
- Deployment of armed forces by the government (instead of police only);
- Collective character of hostilities on the insurgents' side, with at least a minimum degree of organization and a responsible command capable of discharging humanitarian obligations. [21]

A minimum level of organized violence is an important criteria to trigger the application of IHL. Hence internal disturbances, tensions, riots or isolated and sporadic acts of violence are excluded from the purview of IHL.[22]

Additional Protocol II is limited in its application and this is due to its high threshold of applicability, as elaborated below:

Protocol II applies to non-international armed conflicts, but not to all those covered by Article 3 of the Conventions. Article 1 (1) applies Protocol II "to all armed conflicts which are not covered by Article 1 (of Protocol I)" but then imposes several additional conditions that make Protocol II apply to a narrower range of phenomena than does

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[19] *Ibid.,* at p. *7.*

[20] *Ibid.,* at p. 25-*26.*

[21] *Ibid.,* at p. 25.

[22] *Ibid*., at p. 24.

Article 3 of the 1949 Conventions. Its application depends on the control of territory by the group opposing the established government and on the group's ability to apply the Protocol. Furthermore, it only applies to conflicts between the government and insurgents.[23]

All of the four Geneva Conventions in Common Article 3, lay down a series of principles relating to internal conflicts which affirm fundamental human rights guarantees in internal situations.

Against this backdrop, can the struggle to eliminate an amorphous threat that is constantly in flux, amount to an armed conflict sufficient to trigger the application of IHL?

Despite the assertion by the US officials and other analysts that terrorism and the "Global War on Terror" is an international armed conflict, a viewpoint that maintains that terrorism and the "Global War on Terror" when those phenomena do not amount to armed conflict, is neither an international nor a non-international armed conflict since it is not a conflict between states, where the territorial boundaries of the conflict are undefined, where the beginnings are amorphous and the end indefinable and, most importantly, where the non-State parties are unspecified and unidentifiable entities that terrorism and the "War on Terror" do not comply with the criteria for armed conflict. [24]

IV. The Case for the Fusion of International Human Rights Law and IHL

Coming to the conclusion that IHL does not accommodate terrorism and the "War on Terror" when they are not manifested in armed conflict as defined in IHL, it is necessary to explore whether international human rights law provide an adequate bedrock of principles to guide the treatment of persons, participating in such conflicts of hostilities and falling into the hands of either parties to the conflicts.

Hence the issue, of whether international human rights law is up to the task when terrorism and the "War on Terror" do not rise to the level of armed conflict.

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[23] See remarks by W.M. Riesman at a panel discussion on "Application of Humanitarian Law in Non-international Armed Conflicts", *Proceedings of the 85th Annual Meeting of the American Society of International Law* (1991), at p. 87.

[24] Gabor Rona, note 12, at pp.60-64.

V. Human Rights and the Universal Declaration of Human Rights

Fifty-six years ago, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR).[25] Its undeniable strength resides in the international recognition that all human beings inherently and equally possess rights which are universal because they are after all, human beings.

The UDHR consists of a preamble and 30 articles. The Preamble states, the recognition of the inherent dignity and of the equal and inalienable rights of all individuals, are the foundation of freedom, justice and peace in the world.

The UDHR proclaims two broad categories of rights: civil and political rights on the one hand, and economic, social and cultural rights, on the other hand. Article 1, which lays down the philosophy upon which the UDHR is based, reads: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".

The Article thus defines the basic assumptions of the UDHR:

- That the right to liberty and equality is man's birthright and cannot be alienated; and
- That because man is a rational and moral being, he is different from other creatures on earth and is therefore entitled to certain rights and freedoms which other creatures do not enjoy.

Article 2, which sets out the basic principle of equality and non-discrimination as regards the enjoyment of human rights and fundamental freedoms, forbids: "… the distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Article 3, the first corner stone of the declaration, proclaims the right to life, liberty and security of person - a right essential to the enjoyment of all other rights. This article introduces Articles 4 to 21, in which other civil and political rights are set out. The rights dealt with includes freedom from slavery and servitude; freedom from torture or from cruel, inhumane or degrading treatment or punishment; the right to recognition everywhere as a person before the law; the right to an

[25] GA Res 217A, UN Doc A/81O, at p. 71 (1948).

effective judicial remedy; freedom from arbitrary arrest; detention or exile; the right to a fair trial and public hearing by an independent and impartial tribunal; the right to be presumed innocent until proven guilty; freedom from arbitrary interference upon privacy, family, home or correspondence; freedom of movement and residence; the right to seek asylum, the right to nationality, the right to marry and to found a family; the right to own property; the right to freedom of thought, conscience and religion; the right to freedom of opinion and expression; the right to peaceful assembly and association; the right to take part in the government of one's country and the right to equal access to public service in one's country.

Article 22, the second cornerstone of the UDHR, introduces Articles 23 to 27, in which economic, social and cultural rights - the rights to which everyone is entitled "as a member of society", are set out. The article characterizes these rights as indispensable for human dignity and for the free development of personality and indicates that these rights are to be realized "through national effort and international co-operation". At the same time, it points out the limitations, the extent of which depends upon the resources of each state.

The economic, social and cultural rights recognised in Articles 22-27 include the right to social security, the right to work, the right to equal pay for equal work, the right to rest and leisure, the right to a standard of living adequate for health and well-being, the right to education and the right to participate in the cultural life of the community.

VI. Evolution of Human Rights and the Occident

Human rights did not evolve in a vacuum nor could it be applied in one. The UDHR, in its origin and *raison d'etre*, has an institutional context, namely that of the Occident, which influenced not only the meaning and nature of human rights therein but also the exercise of the same. The contemporary idea of human rights traces its ancestry to the philosophical and intellectual development in the Occident[26], starting from the moral theories of natural law of the ancient Greeks and Stoics, to the divinely appointed natural law of Aquinas and the

[26] See generally J.M. Kelly, *A Short History of Western Legal Theory* (1992).

medieval Catholic. Natural law was perceived as a set of legal norms which applied *per se* and was believed to have universal application and can be discovered by means of reasonable understanding. Aristotle identified natural law with the principle of justice and enunciated .the distinction between what is naturally just and that which is just only as a result of having been prescribed by man-made laws. What is by nature just, according to Aristotle, has the same force everywhere.[27] St. Thomas Aquinas derived from Aristotle the notion of God as the author of the law of nature.[28]

However, the Renaissance period saw the transitional movement in Europe from the Middle Ages to the modem world and saw two major events which influenced intellectual life, namely, the revival of the Greco-Roman tradition in art and literature which influenced the disintegration of the old Catholic unity of Western Europe and the Protestant Reformation. Both events led to factors which led to the creation of the modem world: the secularization of public life and the emancipation of the individual from spiritual control.[29] Hence, the

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[27] *Ibid.* at p.*20,* citing *Nicomachean*, Ethics 5.7.1. See also B.N. Mani Tripathi, *Jurisprudence Legal Theory* (1999), at p. 88.

[28] St Thomas Aquinas divided law into four classifications: God's Law, Divine Law *(lex divina),* Natural Law *(lex naturalis)* and Human Law. Natural law forms part of divine law. It is that part which reveals itself in natural reason. Thus natural law is seen as the law of right reason, which coincides with biblical law but is not derived from it. Natural law is identified with "reason" of the Catholic Church. In this way St. Thomas blended the ancient philosophy of Aristotle with that of the Christian Church. Natural law precepts embrace natural human inclination to good including the primary precept to do good and avoid evil. See J.M. Kelly, note 2, at pp.142-144.

[29] See P.Sieghart, *The International Law of Human Rights* (1983), at p. 7. (Religious institutions derive their ultimate standards from "divine law", as revealed by God to man in some Holy Scriptures. In Western Europe during the middle ages, that standard was widely applied, and served to confer legitimacy upon many secular rulers, as well as upon the opponents of some others. But a single uncritical Christian faith began to be questioned by the Renaissance in the fifteenth century, became fragmented by the reformation in the sixteenth and seventeenth, and was openly challenged by the Enlightenment in the eighteen and the rapid advances of natural science in the nineteenth. As a result, other grounds had to be found to support standards against which to judge a ruler's laws).

Renaissance period saw the development of modem theories of natural law which detached natural law from religion, constituting the foundation for the secular and rationalistic notion of natural law.[30]

The modem theories of natural law which unhooked natural law from religion, laid the foundation for the secular and rationalistic version of natural law. It was seen, starting with Grotius, that the notion of a transcendent system of values with which human law ought to conform, was gradually detached from the medieval theology which had given it shape and thus acquired a secular existence of its own based simply on reason.[31]

The 17th and 18th centuries saw the emergence and ascendance of the theory of several influential thinkers of the European enlightenment, such as Locke, Montesquieu, Grotius, Rousseau and Kant.

Most of these contributors in the realm of political philosophy during this period, acknowledged a law of nature in terms essentially of reason, with its occasional ascription to God, appearing purely perfunctory. Their collective work both mirrors the development of the theory of legitimacy of state power, which in turn, had its impact upon real politics and political theory.[32]

During the modem period, the doctrine of natural law was replaced by the theory of natural rights with greater emphasis on individualism. The shift from the term law to that of rights signalled a change in political and social values. There was a reduced stress on confronting

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[30] J .M. Kelly, note. 26, at pp. 145 and 188-189.

[31] Natural law was defined as "dictate of right reason which points out that an act, according as it is or is in conformity with rational nature, has in it a quality of moral baseness or moral necessity". See H. Grotius, *De Jure Belli as Pacis*, Bk. I, ch. I, cited by J.J. Shestack, "The Jurisprudence of Human Rights", in T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (1984), at p. 77.

[32] P.Sieghart, note. 29, at pp. 7-8 (Quite apart from the economic interests involved, and the tensions *of* religious sectarianism, the challenge to the legitimacy *of* the Stuart monarchs in Great Britain the last in that country to claim "the divine right of Kings" was one of the major causes of both the Civil war *of* 164241, and the "bloodless revolution" in 1688." In that year of the revolution the British Parliament enacted a "Bill of Rights". That statute, like *Magna Carta*, is widely regarded as an early human rights instrument).

the new state with universal religious or moral norms but heightened the emphasis on confronting the state with the freedoms of the individual.[33] The central theme is that all people have certain inherent natural rights such as "life, liberty and happiness" which are not dependent upon sovereign grant or legislative action.

The so-called inherent or natural rights, found legal expression in many historic documents of the 17th and 18th centuries, such as, in the American Declaration of Independence (1776), the Constitution of the United States of America (1787), the French Declaration of the Rights and Duties of Man and Citizen *(declaration des droits de l 'homme et du citoyen)* (1789), the French Constitution (1791) and the American Bill of Rights (1791). Thus the concept of natural rights was institutionalised in the domestic context in the occident during the seventeenth to the nineteenth centuries.

Alongside the doctrine of the individual's natural rights was found the theory of social contract. Closely related to these ideas were the ideas of the development of the modem state and democracy.

According to the theory of social contract, rulers derive their authority only from some notional agreement under which their peoples have delegated to them the power of government during those peoples' pleasure, subject to", implied but ascertainable conditions i.e. the preservation of inalienable rights that every ruler was obliged to respect. As for the origin of these rights, however, there are various differences to be found in the way in which the conception of the foundation of natural law is set forth.[34] These contracts are seen as preserving certain rights for men while preventing the state from interfering in the exercise of these rights.

Freedom of expression was seen as pivotal to any discussions of rights, liberties and the nature of a democratic society.

John Stuart Mill's essay "On Liberty", an analysis of the nature and limits of the powers which can be legitimately exercised by society

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[33] D. Sidorsky, "Contemporary Reinterpretations of the Concept of Human Rights",in D. Sidorsky (ed.), *Essays on Human Rights* (1979), at p. 88.

[34] Rousseau, for example, formulated natural rights of every individual by referring to the idea of man's condition in an idyllic state of nature, although admitting that the state of nature was not a historical fact but merely a reasonable hypothesis for the purpose of identifying rights. See "Sevilla Colloquy" (1985), 6 No. 2-4 *Human Rights Journal*, at p. 387.

over the individual, relies upon Milton's argument. Mill said:

> . . . the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[35]

The theory of natural rights helped to shape the legal and political institutions of democracy which symbolised a change in the economic, political and social values in the Occident. A capitalist system emerged and a new industrial class demanded political freedom while claiming the ethics of social contract. It was evident in the Occident, the idea of a transcendent system of values was gradually disassociated from Christianity, which had previously given its shape and acquired a secular existence of its own, based upon reason. While the medieval Christian knew a theory of natural law in which the main stress was on man's duties to his sovereign or to his fellow men, the system of values based upon reason in the Occident gave a new turn to the doctrine of natural law by encompassing man's rights independent of his sovereign. Hence the stress on the unique importance of the individual, led not only to a change of emphasis from natural law to natural rights but also from man's duties to man's rights.[36]

The enlightenment doctrine of "rights of man" fell into desuetude during much of the 19th century and into the early 20th century.

Major criticisms included philosophical criticism of the meaning and derivation of natural rights, pragmatic criticism of the application of these rights in a social context and historical criticism of the origin and function of the declaration of natural rights[37].

The rise of positivism during the early part of the 19th century led to the decline of natural law and rights theories; for positivism and the idea of natural law and rights are essentially contradictory. For the positivist, the only laws which may properly be called by that name

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[35] *On Liberty* (1859) *Everyman's Library* ed., 75 cited by "SeviIla Colloquy" (1985), at 6 No. 2-4, *Human Rights Journal,* at p. 391.

[36] J.M. Kelly, note.26, at p. 227.

[37] D.Sidorsky, note.33, at p. 88.

are those which can demonstrably be enforced: if a rule of conduct cannot be enforced, it is, to him, meaningless to describe it as a law. All laws are of equal status, and valid only to the extent to which they can be enforced. Consequently, no meaningful distinction can be drawn between good and bad laws, or just and unjust ones.[38] Jermy Bentham considered natural rights as "nonsense upon stilts"[39] while the Marxist held that natural rights were created to provide an ideological basis for the bourgeois classes in Europe and America.

The cumulative impact of these criticisms of the theory of natural rights was the erosion of belief in the theory.

During this period also, what a state did to its own individual nationals was entirely its own affair and did not involve the question of international law or concern of the international community. However, this does not mean that traditional international law and the international community were completely indifferent to the fate of individuals. Some individuals at some particular time were recognised as having rights and duties under international law and this can be observed from what actually occurred in practice. However, these early international efforts to protect the rights of individuals were limited in focus and were concentrated on slavery, the treatment of prisoners and the wounded in war or on specific atrocities that were attracting widespread publicity.[40]

The First World War marked the collapse of the European order and its political and social structures. When the war ended, it led not only to changes of the world political map but the transformation of Europe's political structure.

The League of Nations, constituted at the Versailles Conference at the end of the First World War, saw the first attempts to provide individuals, both a right and a remedy under international law. The Covenant of the League of Nations, even though the expression "human rights" did not appear in it, contained two particular provisions which would foreshadow the further development of human rights:

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[38] P. Sieghart, note.29, at p.12.

[39] J.J. Shestack, note. 31, at p.79.

[40] See generally L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) and J. Humphrey, *No Distant Millennium - The International Law of Human Rights* (1989), at pp. 62-70.

- Article 22 which provides for the mandate system in which territories were to be administered as Trust Territories by victorious powers with a view of development of the people who live in the Trust Territories and
- Article 23 in which the member states were to, *inter alia* "endeavour to secure and maintain fair and humane working conditions of the workers."

Although the Covenant did not contain any article protecting the rights of minorities within a state dominated by another nationality, the League made other arrangements for their protection and that only of certain racial minorities.

The League of Nations was, however, short lived. The period between 1919-1939 saw the emergence of a great diversity of systems - the rise of Fascism, the creation of the first totalitarian state and the rise of Japanese imperialism and their collision with Western liberal movements.

The atrocities perpetrated on their own citizens by the regimes of Hitler in the Second World War led to recurrent efforts to reinterpret and to reconstitute the theory of natural rights. There emerged a realisation as to how horrible the Holocaust was and the need to reaffirm human rights. The United Nations (UN) Charter was drafted in San Francisco in May 1945 before the end of the Second World War. The Holocaust was the impetus for the promotion of human rights and the inclusion of seven references to human rights in addition to using the term "fundamental freedoms" in the UN Charter of 1945.

Only in 1946 was there an attempt to define human rights and fundamental freedoms as embodied in the UN Charter.

In 1948, the General Assembly of the UN adopted the Universal Declaration of Human Rights (UDHR) as "a common standard for achievement for all peoples".

The UDHR is, in essence, not a treaty but a resolution emerging from the UN General Assembly. Thus, although it may have moral and (to a certain degree, by operation of customary international law) legal authority,[41] the declaration does not legally bind states in a way a treaty

[41] Such resolution is recommendatory only but it can well develop into sufficient evidence of both state practice and *opinion juris* to generate customary laws. Several factors play a role in this respect, not least the voting patterns on the resolution

would. It was due to this that the norms embodied in the UDHR were later reaffirmed in two legally binding agreements upon ratifying states: The International Covenant on Civil and Political Rights (ICCPR)[42] and the International Covenant on Economic, Social and Cultural Rights (ICESR),[43] both of which were formally adopted by the General Assembly in 1966 and entered into force in 1976.

The coming into force of the Covenants, in which state parties accepted a legal as well as a moral obligation to promote and protect human rights and fundamental freedoms, obliged greater strength to the Declaration. The UDHR is regarded as the core instrument, and preserves its validity for every member of the human family, everywhere, regardless of whether or not governments have formally accepted its principles or ratified the Covenants.

Many important resolutions and decisions adopted by the UN bodies, including the General Assembly and the Security Council, cite the UDHR. Nearly all of the international human rights instruments adopted by the UN bodies since 1948 elaborate on principles set out in the UDHR.[44]

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and the degree of international consensus indicated in the adoption of, and ongoing reference to, such resolution. While there is ongoing controversy concerning the extent to which the various provisions of the Declaration have acquired such a status, it is generally stated, at least, specific in the Declaration prohibiting slavery, torture, arbitrary detention and systematic racial discrimination such as apartheid, have acquired the status of customary law. As such this is binding on all States. Some commentators however, argue that the entire Universal Declaration has now attained the status of customary law. See e.g., E. Schwabel, "The Influence of the Universal Declaration of Human Rights on International Law and National Law", *Proceeding of American Society International Law*, vol. 53 (1959), at pp. 217-229, J. Humphrey, "The Universal Declaration of Human Rights: Its History, Impact and Juridical Character", in B. Ramcharan (ed.), *Thirty Years After the Universal Declaration* (1979), at pp. 30-36 and L. Sohn, "The New International Law : Protection of the Rights of Individuals rather than States" vol.32 (I 982), *American University Law Review*, at pp.16-17.

[42] GA Res 2200, 21 UN GAOR, Supp (No 16) 52, UN Doc A/6316 (1966).

[43] GA Res 2200, 21 UN GAOR, Supp (No 16) 49, UN Doc A/6316 (1966).

[44] See N. Khalil, "The International Bill of Rights", in S. Sothi Rachagan and R. Tikamdas (ed.), *Human Rights and the National Commission* (1999), at pp.18-21.

VII. Contemporary Concept of Human Rights

It is fundamental to the contemporary idea of human rights that, while states should be perceived as independent and sovereign political entities vis-à-vis other nations, they must also be restricted in certain ways with regard to the organization of their domestic civil societies. Most particularly is the internal constraint concerning the protection of religious, linguistic, ethnic and other minorities within their sovereign borders. States must provide equal protection to all their citizens, regardless of the racial, linguistic, ethnic, or religious differences among them. In the contemporary notion of human rights, the principles of political equality and non-discrimination are set forth as an international benchmark with which all states ought to comply especially with regard to the organisation within their domestic societies.[45]

The canon has also been widened to encompass protection for collective rights, such as the right to self-determination, the rights of indigenous peoples and the rights of groups that are especially vulnerable, e.g. women, children, the disabled and refugees.[46]

The UDHR was the first major human rights document to explicitly recognise economic, social and cultural rights,[47] although they consist of five out of thirty articles in the same. Thus contemporary catalogues of rights are no longer confirmed to freedom from state intervention, but include economic, social and cultural rights that can be realised

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[45] See M.E. Winston, "Philosophical Conceptions of Human Rights", in the *Collection of Lectures: Text and Summaries*, 24th study session, Strasbourg, 2-30 July 1993, International Institute of Human Rights, 4-5 and P. Sieghart, note 29, at pp.17-18 (That policy is soundly based on experience. The pretext for many of the worst violations of human rights which have been perpetrated in the world's history has been discrimination, directed at different times, places against groups as disparate as slaves, serfs, women or races differing in skin colour from a dominant group, ethnic, or linguistic minorities such as Christians, Jews, Armenians, Muslims, and Hindus; or the members of hereditary castes or social classes not to mention those holding unorthodox political or other opinions. All such discriminations are therefore now expressly forbidden in major instruments, and many of the subsidiary instruments are devoted to particular aspects of them).

[46] *Ibid*., at p.5.

[47] *Ibid.*

through positive action by the state. The inclusion of a number of "second generation" of human rights is a point of difference between that classic theory of natural rights. The expansion owes much to the development in the early 19th century of the political theory of socialism.

The subsequent development of the contemporary canon has further been expanded to include rights to development, rights to a just and fair international economic order and recently, some environmental rights[48] although these "third generation" of rights are largely embodied in non-binding declarations.

The basic notion which is carried over from the enlightenment doctrine is that of individual claims and entitlements which impose restrictions and constraints as well as duties and responsibilities upon the state.

Contemporary use of the phrase "universal human rights" is utilised to assert that universal norms or standards are applicable to all human societies. This assertion has its origin in the ancient ideas of universal justice and in medieval notions of natural law.

The notion of human rights is used to recognise that all individuals, solely by virtue of being human, have moral rights which no society or state should violate. This idea has its roots in the classic 17th and 18th century theories of natural rights.

The tradition of theorists of natural rights, enumerating a list of specific rights, has been adopted in the theory of human rights and has resulted, for example, in the articulation of the more extended list of thirty rights that mark the UDHR.[49]

The term human rights is derived from the phraseology of natural rights since having natural rights was intrinsically connected to being a human being.[50]

In the contemporary conception of human rights, the distinction between human rights and citizen's rights are blurred as all of these rights are being placed together in the category of human rights.[51]

The concept of human rights has a deep-rooted link with political modernity, initially created upon the premise of philosophical principles

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[48] *Ibid*.

[49] D. Sidorsky, note 33, at p.88.

[50] *Ibid.*

[51] *Ibid.*

proper to the Occident in the 18th century. Political modernity, in turn, rests on the secularisation of the state and the law. If Islam continues to identify in God the creator of law, the Occident, in inventing secularism, has substituted the state for the will of God. Hence the necessity for the state to guarantee individual rights by declaring them.

It is in secularism, the social contract theory of the state that the idea of man as an autonomous being possessed of inalienable rights and more importantly, the emphasis on rights rather than human duties would form the basic premise of the UDHR whereby the position of the individual is set forth almost exclusively in terms of rights.

VIII. Parameters of Human Rights

The recognition of universal human rights, which all human beings possess inherently because they are human beings, must also involve a recognition of a universal consensus which specifies the depth and width of humans i.e. the scope of application of human rights or how one exercises one's human right, that is to say, how the human right is actionably performed or practised.

The assumption is based on recognition that human rights imply a social dimension that human beings can only unfold in relation to other human beings. The description of the ideal individual does not mean that the individual is completely unrestrained and devoid of any duties towards his fellow man or toward society.

D.M. Mackinnon observes:

> An ethical teaching which takes it for granted that individuals will have an orderly social background against which to work out their destinies and make moral decisions is, however coherent and valid in itself, incomplete. Further, an ethical teaching which deals only with problems which confront an individual who has no personal and immediate responsibility for the lives and welfare of others is incomplete. Men and women do not usually exist as solitary individuals unless they artificially create the conditions to do so by a deliberate withdrawal from society.[52]

[52] D.M. Mackinnon, *Making Moral Decisions* (SPCK), at pp. 77-79, cited in the Reverend Canon Sydney Hall Evans, Dean of King's College, "Christianity and Human Rights". In *An Introduction to the Study of Human Rights: Based on a Series of Lectures Delivered at King's College,* London in the autumn of 1970, at p. 3.

The issue of the exercise of human rights is essential in order to determine the scope and depth of human rights or the parameters of human rights.

Although the UDHR cites the inherent dignity of all human beings as the basis for human rights[53], it does not indicate what theory and philosophical tendency to justify human dignity as the source of human rights, or more importantly, how human rights are to be explicitly exercised or practised.

Numerous jurisprudential analysts in the Occident have proposed a variety of specific formulations for the *raison d'etre* or philosophical foundations of human rights. Such foundations include "nature of man", "pure reason", common historical social interest, social justice, "general will", the fulfilment of man's potential, equal respect and concern for all by government and the promotion of essential human needs.[54]

All of these theories involve the questions: What is the source of authority for human rights or how can they be established or justified? What are the sources, if any, of moral (human rights) claims? How compelling are these justifications that can be urged for or against them? Any in-depth study would reveal, however, that most of these theories do not see the need to delineate the scope of human rights although the modem theories recognise and try to reconcile the tensions between liberty and equality.

Although the various posited theories differ in detail and approach, nearly all of these theories contend that human rights are ultimately based upon essential human needs and interests possessed by all people equally as prerequisites to human dignity. Nonetheless, generally speaking, human rights theories have often also left unanswered important questions relating to human rights, in particular: Are human rights inalienable? Ought human rights to be applied absolutely that are

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[53] The Preamble of the Universal Declaration states:

(In) recognition of the *inherent dignity* and of the *equal* and *inalienable* rights of all members of the human family... (and) promotion of universal respect for and observance of human rights.. .the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievements for all peoples...to secure their universal and effective recognition...among the peoples of Member state...(emphasis added).

[54] See generally J.J. Shestack, note. 31, at pp.74-88.

without any restrictions or exceptions? In other words, these theories exhibit a significant degree of vagueness and indeterminacy regarding the precise scope of application of human rights.

The UDHR lacks a clear philosophical foundation upon which to promote a uniform exercise or practice of human rights. In the UDHR, the exercise of the same is subjected to the notion of duties, restrictions or "clawback clauses" and derogations. The UDHR enumerates many rights, while finding it sufficient to refer in Article 29(1) to duties, without any elaboration on the meaning and nature of these duties or without any indication of the responsibility that arises from neglecting these duties. With the exception of a short paragraph 1 in Article 29 of the UDHR, there is no reference in the UDHR to the counterpart of the rights of man, namely, the duties of man.[55]

In this respect, international human rights, it is claimed, may influence and relate to a society's general and common moral order but they do not purport to guide people's conduct and behaviour in their everyday affairs nor distinguish between what is morally right or wrong in the comprehensive sense of a domestic ethical order. C. Tomuschat wrote:

> It was the conviction of the drafters that it should be left to the discretion of each State party to fix in an autonomous way those duties of the individual felt to be essential for the common welfare. In fact, it still remains true that the relationship between a State and its citizens falls essentially under domestic jurisdiction. The recognition of human rights has altered this state of affairs to the extent that vital needs of the' individual are at stake. But it was never felt necessary also to grant the international community authority over the determination of individual duties…. Human rights at the international level were conceived as an ultimate

[55] "Neither the ICCPR and the ICESR contains an equivalent of Article 29(1) UDHR. There is a general reference on duties in the Preamble, which is identical for both Covenants. The fifth paragraph of both the ICCPR and ICESR provides :

Realising that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.

In the substantive paragraphs of the ICCPR, duties are mentioned once, in the limitation clause of the freedom of expression in article 19(3) of the same.

safeguard and bulwark for instances in which a government might violate its sacred duty to act as trustee of the interests of its people. On the other hand, there was never any doubt that governments would be able to assert their authority *vis-à-vis* their peoples, imposing the duties necessary for the attainment of the common weal, so that the whole issue should simply be left to the appropriate decision of national authorities. It was acknowledged, too, that to enact legislation for that purpose was perfectly legitimate…. Consequently, it is the task of each nation to strike an adequate balance between rights and duties. Duties should certainly not to be ignored when one speaks of human rights, but they are misplaced in an international context. Concerning this aspect of the status of the individual, sovereign states need no guidance from the community of nations, nor is there any need to subject them to international review.[56]

Article 29, Para. I of the UDHR declare:

Everyone has duties to the community in which alone the free and full development of his personality is possible.

As duty-bearer, Article 29(1) UDHR refers to "everyone", which is the formulation used throughout the UDHR to indicate right-holders.

Article 29(1) declares that the individual has duties toward the community in which alone, the free and full development of the human personality is possible but fails to specify which community in question. Is the community based on the family, other social groups, society, the state, the international community or mankind? Is the development of the human personality to be applied in one specific manner for all communities? [57]

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[56] C. Tomuschat, "International Standards and Cultural Diversity", *Bulletin of Human Rights* (1985), at pp. 29-30.

[57] An earlier version of the text mentioned a duty of loyalty towards the state, the United Nations and society. The duty towards the United Nations has been preserved indirectly in Article 29(3) UDHR. It is not clear why state and society were replaced by the community, or whether state and/or society can be read into "community". It is an open question, however, as to whether "community", equals "state". What is clear however is that duties of the individual towards other individuals are not included.

The recognition of limitations or restrictions on the exercise of human rights and fundamental freedoms is contained in Article 29(2) of the UDHR, which stipulates:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.[58]

The reference to "respect for the rights and freedoms of others" is a phrase which political philosophers will recognise as pure John Stuart Mill i.e. your liberty to swing your arms ends where my nose begins.

One's individual right or freedom may not be exercised to the detriment of others. Events since the Second World War have forced upon the attention of the international community, that the protection of the individual *vis-à-vis* his fellow man, is no less important to the enjoyment of his human rights and freedoms than his protection against the arbitrary power of the state.

The UDHR does not indicate the link between the notion of duties and restrictions or limitations on human rights. The link may be subject to different views, depending upon the system of governance of states. One view may insist that duties of individuals to respect the rights and freedoms of other individuals and groups may lead to limitations upon the real meaning of human rights and are incompatible with the spirit

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[58]Such limitations and restrictions phrased in general terms which seek to impose legitimate limitations and restrictions on the scope of the specific rights embodied in a particular document are also reflected in Article 4 of the ICESR. Specific limitations on the extent to which individuals can be permitted to enjoy human rights are illustrated in Article 12, para. 3; Article 14, para.1; Article 18, para. 3; Article 19, para. 3; Article 21, Article 22, para. 2 of the ICCPR.

[59] E. Daes, Freedom of the Individual under Law: A Study on the Individual Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights (1990), at p. 23, for comments by the Federal Republic of Germany relating to individual's duties to the community.

[60] *Ibid, at* p. 86 for comments of Morocco relating to individual's duties to the community.

of human rights.[59] Another view may see restrictions or limitations on the exercise of human rights as in Article 29(2) UDHR reflected to some extent in duties as embodied in Article 29(1).[60]

In relation to the nature and scope of restrictions and limitations, as permitted in the penultimate Article of the UDHR, it is to be noted that the interest of society which can give grounds for restrictions on the exercise of human rights in the UDHR, is based on the protection of rights of others and considerations such as morality, public order and the general welfare in a democratic society. It is highlighted that these notions of "morality", "public order", "general welfare" and "democratic society" are abstract words for which the UDHR provide no definition.[61]

In addition, restrictions are placed not only on the exercise of certain rights of individuals but also on the power of the state to restrict rights arbitrarily in any manner it might choose. The state may not perform any act aimed at limiting human rights and fundamental freedoms to a greater extent than that which is allowed by the relevant document.

Article 29(3) of the UDHR provides:

These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

The purposes and principles of the United Nations may be found in the Preamble and Articles 1 and 2 of the United Nations Charter.

Lastly, Article 30 of the UDHR provides:

> Nothing in this Declaration. may be interpreted as implying for any State, group or persons any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth therein.

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[61] This lack of definitions becomes more problematic, when, as in the case of the United Nations instruments relating to human rights, there is no judicial apparatus for their interpretation and application although interpretative guidance as to the meaning of the provisions can be obtained from the practice of the Human Rights Committee.

[62] E. Daes, note. 59 and 130, where the author explained the spirit and idea of Article 30 by referring to the experience of Germany in the inter war years. (Thus, the aim of the Weimar Constitution of Germany of 1919 was to establish a pure democracy with extensive freedom of political expression. Sheltered by the

Article 30, as mentioned above, provides that nobody may invoke the rights and freedoms in support of an activity aimed at the destruction of any of the declared rights and freedoms. In short no freedom for the enemies of freedom.[62]

The fundamental provision is designed to prohibit not only the state but also groups or individuals from using the provisions of the UDHR as a shield for activities that will undermine the basic free and democratic order and destroy the rights as recognised in the said declaration. In other words, its aim is to safeguard the rights protected by the UDHR by protecting the free operation of democratic institutions.[63]

Thus in the UDHR, the scope of application or exercise of human rights are often termed in a manner sufficiently ambiguous so as to encompass different and contradictory interpretations, causing the possibility of incomprehension, ineffectiveness and conflicts.

Given the inevitable conflict which results from interpretative variations of indeterminate standards among diverse states, it remains highly debatable whether the UDHR can reflect any significant understanding about the exercise of human rights.

To start with, the issue of terrorism and its root cause as well as counterterrorism puts a test to human rights in the sense that the notion of human rights becomes fragile from the moment when one examines the exercise or practice of these norms.

IX.Terrorism and Human Rights

Terrorism defies definition. Who exactly is a terrorist? What is a terrorist act? Do terrorists include state actors? There are numerous

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provisions of this Constitution, the extremist parties in Germany in the inter war years were able to engage in violent agitation against the existing republican and democratic constitutional system. During those years, the German courts were often very lenient, especially in their reaction to acts of violence and to antidemocratic inflammatory agitation directed against the republic by right-wing extremist groups. In particular, the National Socialists were allowed to engage in quite unrestrained agitation, which was fully instrumental in bringing about the downfall of the democratic regime in Germany).

[63] *Ibid*., at p.129.

conventions and other authorities that treat these questions, but none provides a definition of "terrorism" or "terrorist acts."

Nonetheless, the direct linkage between terrorism and human rights violations was recognised by the World Conference on Human Rights in 1993. The Vienna Declaration and Programme of Action,[64] in its Paragraph 17 stipulate:

> The acts, methods and practices of terrorism in all its forms and manifestations as well as linkage in some countries to drug trafficking aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilising legitimately constituted Governments (emphasis added).

This link is underlined in Article 30 UDHR. To reiterate, Article 30 UDHR is designed to prohibit not only groups of individuals but also to the State, from using the provisions of the UDHR as a shield for activities that will undermine the basic free and democratic order and destroy the rights recognised in the said declaration. In other words, its aim is to safeguard the rights protected by the UDHR by protecting the free operation of democratic institutions.

Thus, terrorism and its clear threat to the life and dignity of the individual pose a severe test for the exercise and application of human rights and fundamental freedoms in two aspects.

- Firstly, it follows that no group or individual, whether as a rebel, secessionist or even a person acting for humanitarian ends, is allowed to attack the foundations of a system if the system itself recognises and embodies human rights.
- Secondly, it follows that any state, in counteracting the activities of those who are making use of the UDHR in order to destroy it, it may not perform any act aimed at limiting human rights and fundamental freedoms to an extent greater than that allowed by the UDHR.

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[64] A two-part Vienna Declaration consisting of 16 Preambular paragraphs and 39 operative paragraphs and a six-part Programme of Action was adopted by way of consensus by the United Nations Conference on Human Rights in Vienna. See generally UN Chronicle, September 1993, Vol. XXX, no. 3.

A. Roots of Terrorism

Article 30, as mentioned above, provides that nobody may invoke the rights .and freedoms in support of an activity aimed at the destruction of any of the declared rights and freedoms.

A question arises as to the legal effect of Article 30 on the means as well as on the activities allowed, to any groups or individuals resisting against a state which has not only violated their human rights on such a massive scale but routinely ignores the mandates of democracy.

B. Counterterrorism and Human Rights

A state confronted by terrorist attacks may find it difficult to respond appropriately. Are there good reasons for acting against terrorists, which extend beyond the need to ordinarily deal with the threats and crimes against public order? A state in such a predicament may presuppose that the undoubted dangers of international terrorism permit a degraded *albeit* substandard level of protection for anyone who is thought to be connected to terrorism - a substandard level of protection for anyone who is thought to be connected to terrorism - a sub-standard that allows, among others, mass preventive detention, general invasions of the right to counsel, an indifference towards privacy and for the obvious contempt for the Geneva Conventions.

A state may be attempted to merge the ordinary methods of law enforcement with that of military security and extending the role of the military may include the maintenance of internal security.[65]

Stringent regimes of criminal procedure are established and new offences are identified to deal with those suspected of terrorist actions. Limiting access to lawyers for terrorist suspects and executing detention are explained by the difficulty of effectively demonstrating to a court of law, evidence, adequate to justify detention under normal circumstances or even of obtaining sufficient evidence to secure convictions through the criminal process.[66]

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[65] C. Warbrick, "Terrorism and Human Rights", in J. Symonides (ed.), *Human Rights: New Dimensions and Challenges (*UNESCO, 1998), 224.

[66] *Ibid* at p. 231.

[67]M.Allen and Susan Schmidt, "Bush Defends Secret Tribunals for Terrorism Suspects," *The Washington Post*. 30 November, 2001, A28, cited in R. Dworkin, "The Threat to Patriotism", *The New York Review of Books*, 28 February, 2002.Available at *http://www.nybooks.com/articles/15145*, at p. 4.

These measures have the effects of shifting power from the legislature to the executive, reducing accountability for the use of power and curtailing the ambit of judicial review. These are some of the common features of counterterrorism.

It is often argued, for example, that terrorists do not deserve the traditional protection we afford other ordinary criminals because of the terrorist's own rejection of the norms of human rights, of the rule of law and democracy and of the brunt of the damage their activities bear or will bear on others, such as the case may be.[67]

The state will argue that an insistence on too strict an interpretation of its human rights obligations will inhibit the fight against terrorism and put at risk any prospect for the enjoyment of human rights in the future.

The argument was succinctly put in this way: it may be right to permit a hundred guilty defendants to go free rather than convict one innocent person, but we must reconsider the arithmetic should one of the guilty cause massive and irreparable destruction to mankind.[68] This argument is based on the premise that fairness to criminal suspects requires only that we strike an appropriate trade-off or balance between these two values, namely, freedom and security, each of which, unfortunately, can sometimes seemingly be served only at the cost of the other. As terrorism poses a horrific threat to security, the State is justified in striking the balance differently for that crime and consequently it becomes not unfair to subject suspected terrorists to a higher risk of unjust treatment.[69]

However, this "trade-off" argument is argued by some to be deeply misleading because such measures are used only against those the state suspects of terrorism while the rest pay almost nothing in personal freedom. Accordingly the state must decide not where its interest lies on balance, but what justice demands, even at the expense of its security, out of fairness to other people who might very well be caught in the less protective legal system the state might be constructing for. If the state is treating some people unfairly, the state must show that unfair treatment is necessary, not for some widely defined class of persons

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[68] *Tribe*, Trial bv Jurv, cited by R. Dworkin, *Ibid,* at p. 6.

[69] R. Dworkin note. 67, at p. 7.

[70] *Ibid.* at p. 6.

but so far as this is practical for these individual suspects or detainees, each individual by each individual. When the state treats individual people unfairly for the sake of its security, the state owes them as much individual consideration as is consistent with that security.[70]

In the context of limitations imposed on individual rights, it is claimed on the one hand that there is danger of such limitations undermining or even destroying democracy on the grounds of defending it, while on the other hand, it is maintained that a democratic society faced with subversive activities must be able to impose such limitations in order to counter such threat as effectively so that in the end, democracy will continue to prevail. Is there any possibility of a compromise between the requirements of defending a democratic society with the requirements of defending the individual right?

In this respect, the elaboration of international human rights law has provided a mechanism for assessing the legality of the way in which states maintain their authority. This is as much the case for the democratic state, which ordinarily respects human rights, as it is for the non-democratic state.

To reiterate, the recognition of limitations or restrictions on the exercise of human rights and fundamental freedoms is contained in Article 29(2) UDHR. Limitations are placed not only on the exercise of certain rights of the individual but also on the power of the state to restrict the rights arbitrarily in any manner it might choose. The state may not perform any act aimed at limiting human rights and fundamental freedoms to a greater extent than which is allowed by the UDHR.

A basic criterion for evaluating the legitimacy and legality of a limitation can be derived from Article 29(2) that is the principle of proportionality. This principle implies that the extent of any limitation should be proportionate to the need or to the higher interest protected by the limitation. It is to some extent a safeguard against ineffective or disproportionate measures.

The principle of proportionality requires that any special measures are prescribed by a law which must determine under what conditions

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[71] The doctrine was introduced by the Human Rights Committee in the case of *Hertzberg and Others* v. *Finland.* See Doc. *A/* 37 / *40,* p. 161; SD p. 124 and D. McGoldridrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1991), at p. 160.

or on what grounds and for which purpose a state is permitted to restrict the exercise of human rights. It entails a sufficient degree of precision on the parameter of powers which is not so wide as to amount to unbridled discretion while it insists on alternative measures of control to the exercise of any power if judicial review is effectively excluded.

Related to the preceding point, is the issue of the degree of discretion accorded to the states in determining the actual scope of many of these rights, of which, the doctrine of "margin of appreciation" is relevant.[71]

The issue of proportionality came before the International Court of Justice (ICJ) for an Advisory Opinion sought by the United Nations General Assembly regarding *"Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory"*.[72]

With regard to the purpose of the wall, Israel's contention was that it was needed to effectively combat terrorist attacks launched from the West Bank. Furthermore, Israel contended that the barrier was a temporary measure emphasising that it did not annex territories to the State or Israel and that it "was ready and able at tremendous cost to adjust or dismantle if so required as part of a political settlement".[73]

The ICJ was not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. It observed:

> The wall, along the route chosen, and its associated regime greatly infringe a number of rights of Palestinians residing in the territory occupied by Israel and the infringements resulting from the route cannot be justified by military exigencies or by the requirement of national security or public order. The construction of such a wall accordingly breached by Israel of several of its obligations under the applicable international humanitarian law and human rights instruments. [74]

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[72] *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory,* ICJ Reports 2004, cited by Dato' Param Cumaraswamy, note 3, at p. 6.

[73] *Ibid*, at pp. 5-6.

[74] *Ibid*., at p. 6.

[75] *Ibid*., at p. 7.

[76] *Ibid.*

Hence, the security feared by Israel was disproportionate to the huge civilian damage to the Palestine inhabitants.[75]

The Court further stated:

> The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty to respond in order to protect the life of its citizens. The measures taken are bound nevertheless to remain in conformity with applicable international law.[76]

Applying the principle of proportionality to counterterrorist measures the definition of suspects of terrorist offences for example must not be broad but should insist on a more discriminating test of the actual danger a suspect poses. Decisions of the executive that some special dangers require the circumventing of human rights would require in the name of fairness a further independent judicial scrutiny on decisions perhaps in examples such as these: to require that no suspect be detained for extended periods without trial unless a judge is convinced without doubt, in a private hearing in chambers if necessary that no conversations between a detainee and their lawyer be monitored in any way less an independent judge has been thoroughly satisfied and that by permitting such conversations to take place in private, would not in any circumstances, put at risk the lives and safety of others.[77]

Although human rights insist that the burden of demonstrating the necessity of counter terrorist measures should rest on the state, it does not allow total subjugation to what the state deems necessary. It would be imperative to permit only the smallest limitation of the exercise or practice of individual rights that could reasonably be thought of as necessary while attempting to mitigate the unfairness of those measures so far as security allows. On top of that, no matter what the necessity may be, some measures are absolutely prohibited by the state, whatever the threat, such as the obligations upon the state never to resort to torture and murder. The State may need to incarcerate suspected terrorists to avoid the potential of an even greater danger to the state, but the state cannot murder suspects either such as targeting un-manned-aerial vehicles such as missiles of indiscriminate accuracy blasting suspects out of the sand a description indicative of what should be an abhorred terrorist act in itself.

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[77] R. Dworkin, note 67, at p. 9.

In the name of fairness, the rights such as the requirements of "due process" must not only apply to anyone who is accused of a serious crime and who is subsequently tried within the auspices of the criminal system but to everyone brought into that system, particularly those who are politically vulnerable, such as aliens or those identifiable racially or by religious or ethnic distinction. Access to lawyers for persons suspected of terrorist offences who are in detention, for example, is an important safeguard against injustice.

In addition to the negative obligation of the state not to interfere with the rights of individuals, the state has a series of positive duties to ensure that its security forces are trained to exercise their power in ways solely commensurate with human rights.

The importance of the human rights ideal is to prevent the state from declaring open season on the terrorist. In practice, human rights law serves as a shield against counter-terrorist measures getting out of control. Convicted terrorist enjoy rights, terrorist suspects invariably enjoy more rights while those who support the terrorist ends but not their means would obviously, and in practice, enjoy even more rights.[78]

X. Conclusion

Human rights are, as one would agree, the rights derived from the inherent dignity of human persons. These are rights one has simply because he is a human being. All human beings thus have the same human rights. As these rights are rooted in nothing other than one's nature as a human being, they are not only "natural" and equal rights but also inalienable rights, for one's nature as a human being cannot be alienated.

However, human rights remain as inherently abstract ideals until they are demanded, asserted, pressed or claimed by the right-holder against those in relation to whom the rights are held. In sum, human rights remain as abstract notions until they are actually exercised as a performed action.

Although in 1948, the General Assembly of the UN adopted the UDHR as "a common standard for achievement for all peoples", the standard of process, application or conduct of the UDHR has yet to be defined. Acceptance of such a standard of practice, would need to

[78] C. Warbrick, note. 65, at p. 235.

be acceptable and subscribed to, by all as a common benchmark of prescribed actions, leading in intent towards human dignity,

Life is simply an endearing custom of meandering problem solving where societies and civilisations learn to understand and appreciate with the efforts and revelation of solutions.

With each revelation, civilisations march through progress and evolve until the next obstacle of encounter. We further hone and enhance until we are finally laid to rest. The transition of development then, continues for others.

As civilisations grow and prosper all over the world, the needs and demands of each society scrutinise ostensibly, the ability for these provisions to be met.

Considering the demography, the geography and the capacity of society to provide, rectification becomes a marathon race that has been progressing well up to this point.

The differing economic and political restitution conjures up disequilibrium of values of which universal practice and acceptance constitutes, instead, a common bane. “One man’s meat is another’s poison”, exemplifies the state of transition civilisation has, for the moment, conscripted itself to.

As we enter the ever challenging laps in the race to permeate various tolerances into a magnanimously structured understanding of each other’s infrastructural, economic and political diversities, we can ill afford a lapse in concentration or tolerate a loss of momentum.

In order to endure the pace and to win the race for all societies and their civilisations, the stamina of altruistic perseverance must be of pristine conviction.

Let us stay focused and encouraged as a responsibility to all humanity.

Only then can an empathetic understanding of peace among each other be entrusted and shared by all societies and their civilisations.

After all, the epitome of human dignity would be the universal standard of process, application or conduct of human rights.

PROCEDURAL PRINCIPLES AND SAFEGUARDS FOR INTERNMENT/ ADMINISTRATIVE DETENTION IN ARMED CONFL ICT AND OTHER SITUATIONS OF VIOLENCE

Jelena Pejic*

Abstract

Deprivation of liberty for security reasons is an exceptional measure of control that may be taken in armed conflict, whether international or non-international. Administrative detention of persons believed to represent a threat to state security is also being more and more widely practised outside of armed conflict situations. This paper argues that both internment and administrative detention are insufficiently elaborated from the point of the view of the protection of the rights of the persons affected. Drawing on international humanitarian law and on human rights law and standards, the paper proposes a set of procedural principles and safeguards that should — as a matter of law and policy — be applied as a minimum to all cases of deprivation of liberty for security reasons.

I. Introduction

Internment or administrative detention is defined as the deprivation of liberty of a person that has been initiated/ordered by the executive

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[1] See *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, "Commentary on Protocol I relative to international armed conflicts", Art. 75 (3), para. 3063.

branch — not the judiciary — without criminal charges being brought against the internee/administrative detainee.[1] Internment is an exceptional measure of control that may be ordered for security reasons in armed conflict, or for the purpose of protecting state security or public order in non-conflict situations provided the requisite criteria have been met.[2] The purpose of this text is to outline procedural principles and safeguards that govern internment/administrative detention in armed conflict and in other situations of violence as a matter both of law and of policy.[3]

In the text, the terms "internment" and "administrative detention" are interchangeably used.[4] The definition of internment therefore does not include the lawful pre-trial detention of a person held on criminal charges, whether in or outside armed conflict. Also, for the purposes of this text, it does not include the internment of prisoners of war (POWs) in international armed conflicts, which is a specific and separate regime of deprivation of liberty. In so far as armed groups involved in non-international armed conflicts deprive persons of liberty in practice — regardless of the lawfulness of such conduct — they are bound by the applicable treaty-based and customary rules of international humanitarian law governing non-international armed conflicts summarized in this text. Where practically feasible, the other principles and safeguards set forth below should also be applied as a means of ensuring the protection of persons deprived of their liberty.[5]

The reason for outlining the procedural principles and safeguards that govern internment/administrative detention is that although this type of deprivation of liberty is often practised in both international and non-international armed conflicts and other situations of violence, the

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[2] The relevant criteria, which are explained in greater detail below, are laid down in Article 4 of the International Covenant on Civil and Political Rights (ICCPR).

[3] The term "other situations of violence" refers to situations below the threshold of armed conflict and includes situations of "internal disturbances or tensions" as specifi ed in Article 1 (2) of Additional Protocol II.

[4] Th e term "internment" is also intended to cover the notion of "assigned residence," to which identical provisions of the Fourth Geneva Convention apply.

[5] This should in no way be read as referring to (or legitimizing) the practice of hostage-taking, which is strictly prohibited by international humanitarian law. The ICRC's position is that hostages must be immediately and unconditionally released.

[6] For differences in the legal regulation of internment in international and non-international armed confl icts and in other situations of violence see section I, "Legal sources," below.

protection of the rights of the persons affected by it is insufficiently elaborated.[6]

Furthermore, it is fairly common that in practice people interned or held in administrative detention are not or are only vaguely informed of the reasons for their deprivation of liberty. There is often no mechanism in place to review, initially and periodically, the lawfulness of internment/administrative detention or, if there is one, its lack of independence prevents it from effectively examining cases. The question of legal assistance to internees/administrative detainees in challenging the lawfulness of their internment/administrative detention remains contentious, as do other issues, such as contact for internees/ administrative detainees with their families, family visits to them, etc.

II Legal Sources

The legal sources on which the present standards are based are the Fourth Geneva Convention; Article 75 of Additional Protocol I to the Geneva Conventions, which is considered to reflect customary international law; Article 3 common to the Geneva Conventions; Additional Protocol II thereto; and customary rules of international humanitarian law.

Even though internment in international armed conflicts is regulated by the Fourth Geneva Convention and Additional Protocol I,[7] these treaties do not sufficiently elaborate on the procedural rights of internees, nor do they specify the details of the legal framework that a detaining authority must implement. In non-international armed conflicts there is even less clarity as to how administrative detention is to be organized. Article 3 common to the Geneva Conventions, which is applicable as a minimum standard to all non-international armed conflicts, contains no provisions regulating internment, i.e. administrative detention for security reasons, apart from the requirement of humane treatment. Internment is, however, clearly a measure that can be taken in non-international armed conflict, as evidenced by the language of Additional Protocol II, which mentions internment in Articles 5 and 6 respectively,

[7] GC IV, Arts. 43 and 78; AP I, Art. 75 (3).

[8] The *Martens clause* is, *inter alia*, included in Article 1 (2) of Additional Protocol I which reads: "In cases not covered by this Protocol or by other international instruments, civilians and combatants remain under the protection and authority of the principles of

but likewise does not give details of how it is to be organized. Bearing in mind the principles of humanity and the dictates of public conscience (the *Martens clause*),[8] the principles and rules of the Fourth Geneva Convention may, in practice, serve as guidance in non-international armed conflicts in resolving some of the procedural issues mentioned in this text.

In addition to humanitarian law, the present analysis draws on human rights law, of both a binding and a non-binding nature ("soft law"), as a complementary source of law in situations of armed conflict or as an autonomous source of law outside of armed conflict. The complementary relationship between humanitarian and human rights law has most recently been confirmed by the International Court of Justice, the UN's principal legal body. In a July 2004 Advisory Opinion, the Court stated that humanitarian and human rights law are by no means mutually exclusive. According to the Court, some rights are protected only by human rights law, some are protected only by humanitarian law, and "yet others may be matters of both these branches of international law."[9]

The rights of persons interned for security reasons in armed conflict — whether international or non-international — may be said to fall into the category of rights that, in the ICJ's wording, are "matters" of both branches of law. Given the aforesaid absence of rules for the internment of individuals in non-international armed conflicts, it is necessary to draw on human rights law in devising a list of procedural principles and safeguards to govern internment in such conflicts. To a large extent the same may be said with regard to any effort to clarify the rights, and therefore the legal protection, that should be accorded to persons covered by the Fourth Geneva Convention or Additional Protocol I in international armed conflicts.

Recourse to human rights law as a legal regime complementary to humanitarian law is expressly recognized in both Additional Protocols to the Geneva Conventions. According to Article 72 of Additional Protocol I: "The provisions of this Section ["Treatment of persons in the power of a party to the conflict"] are additional to the rules

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international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

[9] ICJ Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 106.

concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, *as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict*" (emphasis added). This article allows recourse to human rights law as an additional frame of reference in regulating the rights of internees, who belong to "persons in the power of a party to the conflict."[10]

There are two further indications — in Article 75 of Additional Protocol I, which is considered to reflect customary law — that human rights law may be drawn on to fill the gaps. First, and this must be stressed, Article 75 (1) states that persons falling within its scope shall enjoy the protection provided for by this article "*as a minimum*" (emphasis added). Given that Article 75 is a "safety net" meant to cover all persons who do not enjoy more favourable treatment under the Geneva Conventions or Protocol I, and when it is read in conjunction with Article 72, it necessarily follows that the "minimum" mentioned is supplemented by other provisions of humanitarian and human rights law. Secondly, any possible doubt that Article 75 constitutes a minimum benchmark of protection is dispelled by the final clause thereof: "No provision of this article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1."[11] The applicable rules of international law include human rights law.

In non-international armed conflicts the provisions of common Article 3 and of Additional Protocol II articulate minimum standards that must be applied in internment. Where the parties to a non-international armed conflict bring into force, by means of special agreements, all or part of the provisions of the Fourth Geneva Convention, the provisions of such an agreement prevail.[12] It must be noted that preambular paragraph 2 of Additional Protocol II establishes the link between the Protocol and human rights law by stating that

[10] See "Commentary on AP I", note 1, paras. 2927– 2935.

[11] AP I, Art. 75 (8).

[12] See Article 3 common to the Geneva Conventions, which also specifies that the conclusion of a special agreement "shall not affect the legal status of Parties to the confl ict." Special agreements can be effective particularly in high-intensity non-international armed conflicts which resemble inter-State armed conflict.

"international instruments relating to human rights offer a basic protection to the human person." The Commentary on that Protocol specifies that the reference to international instruments includes treaties adopted by the UN, such as the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture, as well as the regional human rights treaties.[13]

The right to liberty of person, which is the primary focus of this text, is *inter alia* provided for in Article 9 (1) of the ICCPR. A state party may derogate from (suspend) its obligations under that treaty under very strict conditions, one of which is the existence of a public emergency threatening the life of the nation.[14] Non-international armed conflict is an example of a public emergency in which measures of derogation — necessary for enabling internment — would be lawful under the Covenant provided the other requisite conditions have been met. In non-conflict situations states parties to the ICCPR must likewise comply with the derogation clauses of the Covenant in order to institute measures affecting the right to liberty of person, such as administrative detention. The present analysis is based on the assumption that internment in non-international armed conflict and administrative detention implemented in non-conflict situations comply with the derogation criteria specified in the ICCPR.[15]

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[13] "Commentary on P II", note 1, paras. 4428 – 4430.

[14] Th e full text of Article 4 of the ICCPR reads: "1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the states parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. No derogation from Articles 6, 7, 8 (paras. 1 and 2), 11, 15, 16 and 18 may be made under this provision. 3. Any state party to the present Covenant availing itself of the right of derogation shall immediately inform the other states parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."

[15] In cases where a state is not a party to the ICCPR or similar regional human rights treaties, it is submitted that the procedural principles and safeguards listed below should be followed as a matter of policy.

However, even in emergency situations the so-called "hard core" of human rights, which includes the right to life and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, cannot be derogated from under any circumstances.[16] The jurisprudence of international and regional human rights bodies has determined which other human rights, apart from those expressly listed in the treaties, should also be considered non-derogable. Among them is the right of a person deprived of liberty to challenge the lawfulness of his or her detention (Habeas Corpus), which is an essential element of the right to liberty of person.[17]

Human rights soft law instruments and jurisprudence provide further standards that, it is submitted, should as a matter of policy and good practice be applied with respect to internment/administrative detention.

The commentary to the procedural principles and safeguards outlined in this text mentions the different legal sources governing deprivation of liberty for security reasons in international armed conflicts, non-international armed conflicts and other situations of violence. It is precisely the similarity in content of the various legal sources reviewed that guided the specific formulation of the procedural principles and safeguards listed, and which allows the conclusion that they can be considered a minimum applicable in all cases of deprivation of liberty for security reasons.[18]

III General Principles Applicable to Internment/ Administrative Detention

A. Internment/administrative detention is an exceptional measure

The Fourth Geneva Convention makes it explicitly clear that internment (and assigned residence) are the most severe measures of control that a detaining authority or Occupying Power may take with respect to protected persons against whom no criminal proceedings have

[16] ICCPR, Art. 4 (2).

[17] ICCPR, Art. 9 (4).

[18] It should again be noted that this text does not deal with the internment of prisoners of war in international armed conflicts, which is governed by the Third Geneva Convention. As already mentioned, it is assumed that the right to liberty of person has been derogated from in keeping with Article 4 of the ICCPR.

been initiated. In both cases it is stipulated that recourse to these measures may be had only if the security of the state makes it "absolutely necessary" (GC IV, Article 42) or for "imperative reasons of security" (GC IV, Article 78). The exceptional nature of internment lies in the fact that it allows the detaining authority to deprive persons of liberty who are not subject to criminal process, but are nevertheless considered to represent a real threat to its security in the present or in the future. As the commentary on the Fourth Geneva Convention explains, "It did not seem possible to define the expression "security of the state" in a more concrete fashion. It is thus left very largely to governments to decide the measure of activity prejudicial to the internal or external security of the state which justifies internment or assigned residence."[19] While this may be the case it is clear, for example, that internment or administrative detention for the sole purpose of intelligence gathering, without the person involved otherwise presenting a real threat to State security, cannot be justified.[20]

That internment is an exceptional measure is also true in non-international armed conflicts and other situations of violence, based on the general principle that personal liberty is the rule, and on the assumption that the criminal justice system is able to deal with persons suspected of representing a danger to state security.

B. Internment/administrative detention is not an alternative to criminal proceedings

Internment/administrative detention is a measure of control aimed at dealing with persons who pose a real threat to state security, currently or in the future, in situations of armed conflict, or to state security or public order in non-conflict situations; it is not a measure that is meant to replace criminal proceedings. A person who is suspected of having

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[19] See *commentary on the Geneva Conventions of 12 August 1949*, Vol. 1V, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Art. 42, at p. 257. See also the commentary on Article 78, at page 368, which reiterates that: "In any case such measures can only be ordered for real and imperative reasons of security; their exceptional character must be preserved."

[20] Similarly, interning or administratively detaining persons for the purpose of using them as "bargaining chips" is also not justifiable as a reason for internment. Such deprivation of liberty would in fact amount to hostage-taking, which is prohibited.

committed a criminal offence, whether in armed conflict or other situations of violence, has the right to benefit from the additional stringent judicial guarantees provided for in humanitarian and/or human rights law for criminal suspects, which include the right to be tried by a regularly constituted, independent and impartial court. Unless internment/ administrative detention and penal repression are organized as strictly separate regimes there is a danger that internment might be used as a substandard system of penal repression in the hands of the executive power, bypassing the one sanctioned by a country's legislature and courts. The rights of criminal suspects would thus be gravely undermined.[21]

C. Internment/administrative detention can only be ordered on an individual case-by-case basis, without discrimination of any kind

A civilian can be interned in international armed conflict only on the basis of an individual decision taken in every specific case. The notion that internment cannot be a collective measure is established under the Fourth Geneva Convention in situations of occupation.[22] *En bloc* internment of enemy nationals in a state's own territory is also prohibited, as it would amount to, and violate the general prohibition of, "collective punishments" under Article 75 (2) (d) of Additional Protocol I. This does not mean that a detaining authority cannot intern a large number of persons, but that both the initial decision on

[21] Th e argument that administrative and criminal detention are two distinct regimes is — at fi rst glance — undermined by Article 68 of the Fourth Geneva Convention which deals with petty off ences committed by protected persons in occupied territory. The Commentary on Article 68, however, rectifies any possible perception of overlap between the regimes of administrative and criminal detention that the wording of the provision suggests. It reads: "Internment is a preventive administrative measure and cannot be considered a penal sanction. It is nevertheless mentioned here under the same head[ing] as simple imprisonment, because the authors of the Convention wished to make it possible for the military courts of the Occupying Power to give persons guilty of minor offences the *benefit of conditions of internment* (emphasis added) provided for in Article 79 *et seq.* Th e provision was a humane one and was intended to draw a distinction between such off enders and common criminals." *commentary* on GC IV, note 19, at pp. 343–344.

[22] *Ibid*., Art. 78, at p. 367.

[23] AP II, Art. 4 (2) (b).

internment and any subsequent decision to maintain it, including the reasons for internment, must be taken with respect to each individual involved.

In non-international armed conflicts — in which collective punishments are also prohibited[23] — and in other situations of violence, both the initial decision on internment/administrative detention and any subsequent decision to maintain it must be taken on an individual basis. Even though humanitarian law governing non-international armed conflicts is silent as to the procedural rights of internees, under human rights law any measure derogating from the right to liberty of person must be "strictly required by the exigencies of the situation" of public emergency necessitating the derogation;[24] it may be taken only to the extent required thereby, and must thus be in accordance with the principle of proportionality.

A state's *en bloc*, non-individual detention of a whole category of persons could in no way be considered a proportional response, regardless of what the circumstances of the emergency concerned might be. The idea of collective measures of any kind is antithetical to the rules, spirit and purpose of human rights law.

Decisions on internment/administrative detention must also not be taken on a discriminatory basis. The principle of non-discrimination is a basic tenet of both humanitarian and human rights law.

D. Internment/administrative detention must cease as soon as the reasons for it cease to exist

One of the most important principles governing internment/administrative detention is that this form of deprivation of liberty must cease as soon as the individual ceases to pose a real threat to state security, meaning that deprivation of liberty on such grounds cannot be indefinite. In view of the rapid progression of events in armed confl ict, a person considered to be a threat today might not pose the same threat after a change of circumstances on the ground. In other words, the longer internment lasts, the greater the onus on a detaining authority to prove that the reasons for it remain valid. The rationale of the

[24] ICCPR, Art. 4 (1).

principle is thus to facilitate the release of a person as soon as the reasons justifying the curtailment of liberty no longer exist. The principle that internment must cease as soon as the reasons for it cease to exist is clearly enunciated in the Fourth Geneva Convention (Article 132) and in Article 75 (3) of Additional Protocol I, which is considered to reflect customary international law in international armed conflicts.

In non-international armed conflicts and other situations of violence this principle must, if anything, be even more stringently observed, particularly as human rights jurisprudence rejects the notion of indefinite detention.[25] In order to ensure that a deprivation of liberty is not arbitrary, which would be the case if the reasons for it do not or no longer exist, the ICCPR (Article 9 (4)) provides that anyone deprived of liberty has the right to challenge the lawfulness of his or her detention — file a petition for Habeas Corpus or the equivalent — in order that a court may decide "without delay" whether he or she is being held lawfully or not. While the right to liberty is not among the non-derogable rights listed in the ICCPR,[26] the jurisprudence of both universal and regional human rights bodies has confirmed that the right to Habeas Corpus must in fact be considered non-derogable.

E. Internment/administrative detention must conform to the principle of legality

In the context of internment/administrative detention, the principle of legality means that a person may be deprived of liberty only for reasons (substantive aspect) and in accordance with procedures (procedural aspect) that are provided for by domestic and international law.

The Geneva Conventions and their Additional Protocols, as well as human rights law, provide the international legal standards that are

[25] See e.g. Report of the Working Group on Arbitrary Detention, UN Doc. E/CN. 4/ 2004/3, 15 December 2003, para. 60 ("in no event may an arrest based on emergency legislation last indefinitely"), and Inter- American Commission on Human Rights — Annual Report, 1976, OAS Doc. OEA/Ser.L/V/II.40, Doc. 5 corr. 1 of 7 June 1977, Section II, Part I ("the declaration of a state of emergency or a state of siege cannot serve as a pretext for the indefi nite detention of individuals, without any charge whatever. It is obvious that when these security measures are extended beyond a reasonable time they become true and serious violations of the right to freedom").

[26] ICCPR, Art. 4 (2).

to be applied to internment/administrative detention in armed conflict and other situations of violence. In terms of reasons for internment, the Fourth Convention specifies that a protected person may be interned or placed in assigned residence only if "the security of the Detaining Power makes it absolutely necessary" (Article 42) or, in occupied territory, for "imperative reasons of security" (Article 78). In addition to specifying the reasons for internment, the Fourth Convention lays down certain procedures that must be followed for internment to be lawful both in the territory of a party to conflict and in occupied territory. In the latter case, for example, Article 78 of the Fourth Convention stipulates that decisions regarding assigned residence or internment "shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention." Deprivation of liberty that is not in conformity with the various rules provided for in the Convention may constitute "unlawful confinement."[27]

Human rights standards applicable in non-international armed conflicts and other situations of violence provide even more detailed provisions aimed at ensuring respect for the principle of legality. Under the ICCPR (Article 9 (1)), for example, persons may not be deprived of their liberty "except on such grounds and in accordance with such procedure as are established by law." Where a state decides to derogate from the right to liberty, such a decision must, *inter alia*, be officially proclaimed[28] so as to enable the affected population to know the exact material, territorial and temporal scope of application of that emergency measure.

IV. Procedural Safeguards

A. Right to information about the reasons for internment/ administrative detention

Any person interned/administratively detained must be informed promptly, in a language he or she understands, of the reasons why that measure has been taken so as to enable the person concerned to

[27] GC IV, Art. 147.
[28] ICCPR, Art. 4 (1).

challenge the lawfulness of his or her detention. The right of a person to know why he or she has been deprived of liberty may be said to constitute an element of the obligation of human treatment, as a person's uncertainty about the reasons for his or her detention is known in practice to constitute a source of acute psychological stress.

Neither the Fourth Geneva Convention nor humanitarian law applicable in non-international armed conflicts contain explicit provisions on the duty to provide information about the reasons for which a person has been deprived of liberty. The foregoing procedural safeguard is, however, one of the "Fundamental Guarantees" laid down in Article 75 (3) of Additional Protocol I. It is moreover provided for in most of the relevant human rights treaties and is spelt out in soft law instruments as well.[29]

The information given must also be sufficiently detailed for the detained person to take immediate steps to challenge, and request a decision, on the lawfulness of the internment/administrative detention (see below). Information on the reasons for internment/administrative detention must be conveyed promptly,[30] so as to enable the person in question to also promptly request a decision on the lawfulness of detention, and must be conveyed in a language he or she understands. Where an initial decision on detention is maintained on review, the reasons for continued detention must be provided as well.

B. Right to be registered and held in a recognized place of internment/administrative detention

Any person interned/administratively detained must be registered and held in an officially recognized place of internment/administrative detention. Information that a person has been taken into such custody

[29] ICCPR, Art. 9 (2); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 10; 11 (2); 12 (1) (a) and (2); 14; UN General Assembly resolution 43/173 of 9 December 1988 (hereinafter "Body of Principles").
[30] AP I, Art. 75 (3), Body of Principles, Principle 14.
[31] GC IV, Arts. 106 and 138.
[32] *Ibid*., Art. 136.
[33] *Ibid*., Art. 143.
[34] *Ibid*., Arts. 106, 107, 137 and 138.

and on any transfers between places of detention must be available to that person's family within a reasonable time,[31] unless he or she has expressed a wish to the contrary; the family should also be notified of the place of custody. The same information must be supplied to the ICRC when humanitarian law or specific agreements so require.

Humanitarian law applicable to international armed conflicts contains numerous provisions and extensive requirements concerning the registration of protected persons deprived of their liberty and notification of their own country's authorities,[32] visits to places of detention[33] and the transmission of information about such persons to their next of kin, among others.[34] The entire system of detention laid down by the Conventions, and in which the ICRC plays a supervisory role, is based on the idea that detainees must be registered and held in officially recognized places of detention accessible, in particular, to the ICRC. Human rights jurisprudence and soft law instruments contain similar explicit provisions on the obligation to register detainees and the prohibition of unacknowledged detention[35] which are relevant in non-international armed conflicts and other situations of violence.[36]

C. Foreign nationals in internment/administrative detention

The national authorities of a person interned/administratively detained must be informed thereof unless a wish to the contrary has been expressed by the person concerned. The relevant diplomatic or consular authorities — provided diplomatic or consular relations exist — must be allowed to communicate with and visit their nationals. This is a rule of public international law that remains applicable in armed conflicts and other situations of violence.[37]

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[35] Body of Principles, note 29, Principles 12 and 16 (1).

[36] See also UN Declaration on the Protection of All Persons from Enforced Disappearance, Art. 10 (1), and Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by UN Economic and Social Council, Principle 6.

[37] See Art. 36 of the Vienna Convention on Consular Relations. In international armed conflicts, the official Information Bureaux and the Central Tracing Agency are mechanisms through which the adverse party is informed of the internment of its nationals (GC IV, Arts. 136–141). In non-international armed confl icts the ICRC is also available to facilitate contact between a person deprived of liberty and the State of which he or she is a national, provided that person consents to such notification.

D. A person subject to internment/administrative detention has the right to challenge, with the least possible delay, the lawfulness of his or her detention

With regard to international armed conflicts the Fourth Geneva Convention, in Article 43 applicable to the internment of persons in the territory of a party to the conflict, stipulates that any protected person interned or placed in assigned residence is "entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose." Under Article 78 of the Fourth Convention, applicable to the internment of persons in occupied territory, decisions regarding assigned residence or internment "shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay."

While the Convention does not specifically speak of these actions as challenges to the lawfulness of detention, that is what they essentially are. The purpose of the "reconsideration" or "appeal" is to enable the competent body to determine whether the person was deprived of liberty for valid reasons and to order his or her release if that was not the case. The authority that initially deprived a person of liberty and the body authorized to conduct the review on appeal must not be the same if the right of petition is to be effective. The characteristics of the latter body and the existence of other procedural safeguards, mentioned below, are the crucial factor.

The right of a person to challenge the lawfulness of his or her detention in non-international armed conflicts and in other situations of violence is a key component of the right to liberty of person under human rights law. Even though the right to liberty may be derogated from in situations of emergency, human rights soft law and jurisprudence have established that the right to challenge the lawfulness of one's detention before a judicial body must be preserved in all circumstances.[38] It may in particular not be diminished where the challenge to lawfulness

[38] Body of Principles, note 29, Principle 32. See also Human Rights Committee, General Comment No. 29, para. 11.

of detention serves, *inter alia*, to protect non-derogable rights, such as the right to life or freedom from torture and other cruel, inhuman or degrading treatment or punishment.[39]

As may be concluded from the sources above, a review of the lawfulness of internment/administrative detention within a short time is required by both humanitarian and human rights law.

E. Review of the lawfulness of internment/administrative detention must be carried out by an independent and impartial body

Article 43 of the Fourth Geneva Convention stipulates that an "appropriate court or administrative board" shall be charged with reconsidering the initial decision on the internment of a civilian in the territory of a party to the conflict. According to Article 78 applicable in occupied territory, a decision on internment must be made pursuant to a "regular procedure" prescribed by the Occupying Power in accordance with the Convention. Article 78 adds that the periodic review envisaged must be undertaken by a "competent body set up" by the Occupying Power. Despite the difference in language — "court or administrative board" in Article 43 versus "regular procedure" in Article 78 — the commentary on the latter article states that the Occupying Power "must observe the stipulations in Article 43" and that it is up to the Occupying Power "to entrust the consideration of appeals either to a "court" or a "board"."[40]

A State's freedom to choose between a "court or administrative board" as provided for in Article 43 (and Article 78 by analogy) is explained in the Commentary as allowing "sufficient flexibility to take into account the usage in different States." The Commentary adds that "where the decision is an administrative one, it must not be made by one official but by an administrative board offering the necessary guarantees of independence and impartiality."[41] It may be presumed that judicial supervision of internment would more likely comply with the requirements of independence and impartiality. It is therefore submitted that judicial supervision would be preferable to an administrative board

[39] Human Rights Committee, *ibid*., para. 15.
[40] *Commentary* on GC IV, note 19, Art. 78, at pp. 368–369.
[41] *Ibid*., Art. 43, at p. 260.

and should be organized whenever possible. The reviewing body must at the very least, as stated in the Commentary, be constituted and function in a way that allows it to be independent and impartial. An element of the required independence of such a body is that it must have the authority to render final decisions on internment or release.

While the Fourth Geneva Convention allows the state to choose between a court and an administrative board in international armed conflicts, human rights law and jurisprudence applicable to situations of non-international armed conflict or other situations of violence unequivocally require that challenges to the lawfulness of internment/ administrative detention be heard by a court. Under the ICCPR, anyone deprived of liberty is entitled to "take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[42]

As has already been stressed above, even though the right to liberty of person may be derogated from in situations of emergency, such as non-international armed conflict, human rights soft law and jurisprudence have established that the right to challenge the lawfulness of one's detention before a judicial body must be preserved in all circumstances.[43] It may in particular not be diminished where the challenge to lawfulness of detention serves, *inter alia*, to protect non-derogable rights, such as the right to life or freedom from torture and other cruel, inhuman or degrading treatment or punishment.[44]

It should be reiterated that the reason for challenges to the lawfulness of internment/administrative detention is to put an end to the deprivation of liberty if it is not justified. This means that an internee must be informed without delay of any decision taken on appeal and be immediately released if the petition is upheld. Even though the obligation of speedy information and release is not explicitly mentioned in either humanitarian or human rights law, any deprivation of liberty without a legal basis is considered to be a violation of the general legal principle prohibiting arbitrary detention. If a person is kept in internment/ administrative detention despite a final release order, that is a clear case of arbitrary detention.

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[42] ICCPR, Art. 9 (4).

[43] Body of Principles, *op. cit*. (note 29), Principle 32. See also Human Rights Committee, General Comment No. 29, para. 11.

[44] Human Rights Committee, *ibid*., para. 15.

F. An internee/administrative detainee should be allowed to have legal assistance

Neither humanitarian nor human rights treaty law explicitly provide for the right to legal assistance for persons interned or administratively detained (that right is guaranteed to persons subject to criminal charges).

It must be noted, however, that legal assistance to internees in international armed conflicts is not prohibited. The Commentary on Article 43 of the Fourth Geneva Convention in fact states that the "procedure provided for in the Convention is a minimum"[45] and that "it will be an advantage, therefore, if States Parties to the Convention afford better safeguards."[46] It may be said that nowadays the right to effective legal assistance is not just an "advantage", but a basic procedural safeguard.

Human rights soft law and the jurisprudence of human rights bodies provide extensive standards that fill the gaps in treaty law applicable in noninternational armed conflicts and other situations of violence.[47] The right to effective legal assistance is thus considered to be an essential component of the right to liberty of person. The relevant soft law standards provide for the right of persons in custody to legal counsel regardless of the type of detention involved. They also contain provisions on the modalities of communication with a lawyer.[48]

Where necessary, reasonable security arrangements may be made, such as requiring security clearance for an internee's/administrative detainee's legal counsel.

G. An internee/administrative detainee has the right to periodical review of the lawfulness of continued detention

Periodical review of administrative detention if the initial decision on detention is confirmed after "reconsideration" (Article 43), or on "appeal" (Article 78), is a basic component of the procedure laid down in the Fourth Geneva Convention. Article 43 specifies that periodical review shall take place "at least twice yearly," while Article 78 provides that such review shall take place "if possible every six months."

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[45] *Commentary* on GC IV, note 19, at p. 261.
[46] *Ibid*.
[47] See, Body of Principles, note 29, Principles 17 and 18.
[48] *Ibid*., Principle 18.

The purpose of the periodical review is to ascertain whether the detainee continues to pose a real threat to the security of the detaining power and to order release if that is not the case. All the safeguards that apply to the initial review must apply to the periodical review(s) as well, which, among other things, means that the review has to be effective and must be conducted by an independent and impartial body.

There is no specified periodicity of review available to persons detained in non-international armed conflicts or other situations of violence, because human rights law does not limit the frequency of challenges that may be submitted by an interned/administratively detained person to the lawfulness of detention (Habeas Corpus petitions).[49] Internment/administrative detention will in practice be regulated by the domestic law of the state involved in a non-international armed conflict or other situation of violence, meaning that a person's ability to challenge the lawfulness of his or her internment/administrative detention will be regulated by those norms.

If the relevant domestic law makes no such provision, it is submitted that at least six-monthly reviews of internment/administrative detention should be provided for, similar to the rules applicable in international armed conflicts.

H. An internee/administrative detainee and his or her legal representative should be able to attend the proceedings in person

An internee/administrative detainee and his or her legal representative should, as a general rule, be able to be present at the initial review of the lawfulness of internment, as well as at periodical reviews, in order to be able to present the internee's/administrative detainee's position and contest the claims made against him or her. Where necessary, reasonable arrangements for the preservation of classified information may be made, such as requiring security clearance for the internee's/administrative detainee's legal representative.

While neither humanitarian nor human rights treaty law expressly mention the right of internees/administrative detainees and of their legal representative to be present at proceedings related to internment/ administrative detention, it has been observed in practice that their absence often leads to hearings in which their case is given inadequate

[49] *Ibid*., Principle 32.

attention. Because such proceedings result in decisions on the continuation of internment/administrative detention, it is submitted that the internee/administrative detainee and his or her legal representative should be allowed to be present at the proceedings. If they do not understand the language of the court, they will need to be provided with an interpreter.

I. An internee/administrative detainee must be allowed to have contacts with — to correspond with and be visited by — members of his or her family

The preservation of family life and contacts is one of the basic aims of international humanitarian law and may be said to constitute an element of the broader obligation that persons deprived of their liberty in both international and non-international armed conflicts must be treated humanely. This safeguard, as well as the two listed immediately below, belong to those aimed at ensuring proper conditions and treatment in detention, which is not the subject of this text. They have been included here because of their importance for enabling the other procedural safeguards dealt with in this text to be implemented.

The Fourth Geneva Convention contains provisions facilitating contact between internees and their families that are too numerous to repeat here. In brief, the general presumption is that family contacts — correspondence and visits — must be allowed within a reasonable time frame[50] in all but very exceptional circumstances.[51] In no case may a detainee's contact with his or her family be made dependent on his or her "cooperativeness" with the detaining authority or be used as a form of incentive or reward for other behaviour.

Additional Protocol II also contains provisions designed to maintain family contacts[52] and numerous non-treaty human rights standards have the same aim.[53]

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[50] See, GC IV, Arts. 106, 107 and 116.
[51] See GC IV, Art. 5, and *Commentary* on GC IV, note 19, at p. 56.

J. An internee/administrative detainee has the right to the medical care and attention required by his or her condition

The right to medical care and attention is a component of the essential obligation that all persons deprived of their liberty must be treated humanely. Medical care and attention serve among other things to prevent ill-treatment and also to refute the admissibility of evidence against a person that has been obtained by torture or other forms of ill-treatment. They are mentioned in this context because a person's health is obviously a prerequisite for his or her ability to claim most of the procedural rights outlined in this text.

The general rule laid down in the Fourth Geneva Convention (Article 81) stipulates that: "Parties to the conflict who intern protected persons shall be bound to provide free of charge for their maintenance, and to grant them also the medical attention required by their state of health." More specific rules on hygiene and medical attention are contained in Articles 91 and 92.

In non-international armed conflicts, Article 5 (1) (b) of Additional Protocol II stipulates that internees "shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict." Provisions on access to a doctor and medical attention are also contained in the relevant human rights non-treaty instruments (Body of Principles, Principles 24 and 26).

It must be stressed that access to medical care that might be required by a person's condition cannot in any circumstances be made dependent on his or her "cooperativeness" with the detaining authority or be used as a form of incentive or reward for other behaviour.

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[52] AP II, Art. 5 (2) (b).
[53] Body of Principles, note 29, Principle 19.

K. An internee/administrative detainee must be allowed to make submissions relating to his or her treatment and conditions of detention

Both international humanitarian law (Article 101 of the Fourth Convention)[54] and human rights soft law stipulate that internees/persons subject to administrative detention have the right to make submissions to the detaining authority regarding their treatment and conditions of detention.[55] The purpose of this safeguard is to enable the detaining authority to prevent and stop possible violations of the law. The authorities are thus obliged to put in place a procedure that allows the submission and speedy as well as effective examination of petitions or complaints. The submission of such representations must not have any adverse consequences for the petitioner.

L. Access to persons interned/administratively detained

ICRC access to persons interned in international armed conflicts is provided for in the Fourth Geneva Convention (Article 143), which also lays down the conditions and procedure for ICRC visits and establishes the duty of a detaining authority to grant access and to respect the said conditions and procedure.

In non-international armed conflicts[56] and in other situations of violence[57], the ICRC may offer its services and conclude agreements with the detaining authority on visits to persons deprived of their liberty for security reasons, and to other persons. The ICRC's right of access in these situations is widely recognized.

By means of visits to persons deprived of their liberty the ICRC, which is an independent, impartial and neutral humanitarian organization,

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[54] Under Art. 102 of the Fourth Geneva Convention, Internee Committees also have the right to make representations to, the ICRC.

[55] It should be noted that under human rights soft law the legal counsel, a family member or another person who has knowledge of the case may also make submissions regarding the treatment of a person in administrative detention. See Body of Principles, note 29, Principle 33 (1) and (2).

[56] See Art. 3 common to the four Geneva Conventions.

[57] See Art. 5 (3) of the Statutes of the International Red Cross and Red Crescent Movement (1986).

seeks to ensure that they are treated humanely in all circumstances and that their fundamental rights are respected. It is thus concerned essentially with their conditions of detention and their treatment, including respect for fundamental procedural guarantees at all stages of detention.

Certain international and regional human rights treaties, too, provide for on-site visits to such persons by visiting mechanisms established under those treaties.[58] There are likewise a number of non-treaty mechanisms created under the auspices of the UN Commission on Human Rights that may carry out visits to places of detention.[59]

[58] E.g. the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment set up by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

[59] E.g. the UN Commission on Human Rights Working Group on Arbitrary Detention.

CLOSING REMARKS

Judge C.G Weeramantry *

Distinguished participants, I think you will all agree with me that we have come to the end of a memorable Conference, dealing with a memorable publication. The publication is one of the most outstanding in the field of international law and this Conference has done it justice because, as you know, we have been treated to very rich and enlightening discussions on all the matters that are pertinent to the subject.

We have had two days of illuminating discussions on Custom as a Source of Humanitarian Law. All those who have attended this Conference will go away enriched in knowledge and their perspectives greatly enhanced as a result of what they have heard here.

Now, customary law is an extremely rich and a powerful source of law as we have heard over the last two days. It gives us a reservoir of principles, which illustrate, illuminate and clarify provisions of all other branches of law, including treaty law. So, it is a source of nearly all the principles we have been trying to discuss. We have, in these last two days, explored the strengths of both treaty law and customary law, as well as the respective weaknesses, and all present here have acknowledged the tremendous value of the ICRC publication which we are celebrating at these proceedings.

Questions were raised about the status of this publication. It is not a source of law in itself; it merely illustrates, identifies and points to the content of one of the sources of law, namely customary international law. This study does not claim to be a source of law; it does not claim to be binding. It only shows what is binding in customary international law and its value is that it is a very useful and compendious tool for discussing and

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discovering the relevant items of customary law. That is the status of this study.

We have considered numerous aspects of the inter-relationship between customary law and treaty law. The Conference has examined the growing jurisdiction of international criminal tribunals, how they contribute to the ongoing development of international criminal law, the potential for the future to draw upon customary international law, to develop this growing and vitally important body of international criminal law – for all of these, this book is an invaluable source of reference and of enlightenment.

We have also discussed state responsibility – how it is the responsibility of the state to prevent crimes against humanity, to bring offenders to book, to protect human rights, to give restitution and rehabilitation and also guarantees of non-reputation. That in fact applies to all crimes because it is the duty of the State to protect its citizens. That is a part of the old social contract theory. If a citizen suffers through deprivation of protection that the State should offer to it, whether it is in the field of ordinary civil protection or in the case of war - whatever is the situation - the State is under an obligation to make restitution and to give protection.

One important area of value of the Customary Law Study is that Judges will benefit from it as, increasingly, judges in domestic jurisdictions will be called upon to turn their minds to matters which involve questions of international crimes. And this gives rise to a thought in my mind. Judges very often - I speak here of domestic judges - are quite unaware of international law and its basic principles and the on-going developments in international law. This is a weakness in our judicial systems in all countries because judges have been trained to concentrate on domestic law, and through that concentration they have lost their perspectives on international law, which they might have studied. There are even judges who may have studied international law in their law-student days, but that is all that they know about it. But they have lost touch completely with the ongoing development of international law.

This was brought to my attention very forcibly when recently the US Environmental Programme asked me to structure a judicial book - a hand book for judges on international environmental law. Their philosophy was that the questions of international environmental law are coming up increasingly before domestic judiciaries and judges are making vital decisions, sometimes without knowing the basic principles, sometimes without knowing the basic documents. And so they asked me to structure

a little handbook, of about 150-200 pages, on international environmental law. I structured the book, the scholars have written that book and the book is now ready to be published, for distribution to judiciaries throughout the world.

The thought occurred to me that in regard to the topic of this great book that we are celebrating, it might be useful to have a little bench-book prepared as a further endeavour, consequent to this book, so that the judges who are increasingly likely to have matters of this sort coming before them, will know the rudiments if international humanitarian law. This would enable judges to know the basic documents; some of them may not even know the Geneva Conventions or their Additional Protocols and what are the obligations contained in them. It could be just a little bench-book, which domestic Judges could have on the bench, which would give them some guidance and some direction on the necessary sources and rules of law, if a question of an international crime should come up before them. I would commend this to the ICRC as a project that you might consider.

It is of course not only judges for whom the ICRC Customary Law Study will be useful, it will prove essential for military commanders and others. It is necessary for military training, and university training, because university training itself must now concentrate on military law too. It is useful for diplomats, national legislators and staff of Parliament, etc. There is also an increasing prospect of the incorporation of these customary law rules into the criminal law of countries.

The purposes of this book may be manifold. It is not merely a set of volumes that should remain in a library. It should be circulated around various key-stations in every jurisdiction so that lawyers, legislators, public servants, law professors, law students, informed citizens, etc. can have an access to it. This study has also shown how even the specifications of war crimes in the Rome Statute might have to be reconsidered and perhaps enlarged, because this study has shown that there are more categories of such crimes than are contained in the Rome Statute and some day, when the time comes for review of the Statute, this Study will be very useful.

The incorporation of these principles into domestic law will need to occur. How can a State incorporate the results of this study? We were told how different countries – South Africa, Canada, Kenya, and Germany – have all adopted different ways of incorporating some of these materials into their domestic legal systems. It is most important that domestic legal

systems should reflect this body of learning because this is going to be increasingly important in the future.

The study has already been referred to in the ICTY and it has already been referred to in some national jurisdictions. It may soon be referred to in domestic judgments. There will probably be the need for an advisory service of the ICRC to be set up to inform lawyers and those who might be involved in getting more information on these matters, to give them a more detailed appreciation of the problem.

During this Conference we have also had a comparison between human rights law and humanitarian law. Human rights law has attained a certain level of recognition, but IHL has not yet reached that level of recognition. IHL needs to be promoted to achieve that level of recognition. The most important thing is this: the civilian populations throughout the world are grossly ignorant of the fundamentals of international law and human rights, and of course, IHL. A tremendous campaign needs to be mounted to educate the general public about the basic matters of international law because it is for the reason that the general public does not know these things that rulers of countries can get away with violations of international law. If the general public is better aware of the fundamentals of international law, this is not likely to happen. I believe that the time has come for a massive educational programme in regard to the basics of international laws because the general public in most countries is concerned only with their domestic systems; they do not look beyond that.

I have, in my small way, set up a small study centre for this purpose; to try to propagate knowledge of human rights and international law among the general population, starting with the school children. And I must tell you incidentally that the day after tomorrow I am going to Lucknow to address a group at the Lucknow Montessori School, which was started by a gentleman called Mr. Jagdish Gandhi. He started the school in 1980 with just a few students and it has now grown into a school of 1000 students, right up to the university entrance level. What Mr. Gandhi specialises in is teaching students about peace and about international affairs. He injects an element of peace studies into every subject – be it history or geography or chemistry or physics. Now that school has grown into 20 such schools, with a total student population of about 30,000 students, making it is the biggest school in the world. Every year Mr. Gandhi convenes a meeting of Chief Justices of the world to come there and observe how he teaches peace to school children. There is a dialogue between the judges and the

school children. Last year, they have had about 30 such judges. The idea is to show how, at the level of the child's impressionable age, you can instill in the child, knowledge of, and respect for international law and the way the world is governed. That is what we need. This is an example of the possible ways in which I think we can make the general principles of international humanitarian law, including the customary law rules, relevant to, and bring them to the attention of, the general public in various countries.

I now come to my second suggestion. You will remember that in my opening address I outlined the richness of traditional customary rules relating to the laws of war. I spoke of the richness of the ancient rules of Hinduism, of Islam, the rules of Buddhism, about the peaceful settlement of disputes, the rules of Christianity, etc. Likewise, there are rules in Judaism. In all the great religions, you will find a tremendous repository of basic principles of how wars are to be conducted. Wars of course are to be condemned as they are the utmost form of barbarism. But within this barbarism, let us see at least a few rays of sunshine, some basic principles and rules so that if there is a war, these basic principles of humanity will be respected.

So, to that end, I would suggest that a detailed study be made of the writings in these different religions. The literature of Hinduism is vast; the literature of Buddhism is vast; the literature of Islam is vast. You need a group of scholars to sit down, comb through all that literature and pick out all the references to the principles of good conduct in time of warfare, if there be a war. You will find an enormously rich crop of information and precedents that you will get out of it. This is something that the Western law did not recognise till recently because Western law grew up as a purely Euro-centric, mono-cultural concept. But now they are realising the richness of these traditional inheritances that you will find all over the world. For example, in my Nuclear Weapons Judgment I drew attention to the fact that the ancient Hindu law-givers had pointed out that hyper destructive weapons go beyond the purposes of war and cannot be used. Likewise there are so many detailed rules relating to the ways in which war can be conducted and you find them in the literature of all these religions.

This is my idea or suggestion, and I would ask ICRC, with much respect, to give it some consideration. If you can set up a team of scholars in each religion to comb the scriptures or writings of that religion on a massive scale, maybe for one year or two years, they will come up with an enormously rich crop of material in regard to all of these matters, which will greatly enrich the whole world in its perception of IHL.

We must not stop there. There are customs of various traditional people all across the world. Today, from the Brigadier from Africa, we had some details of the way in which their customary law had indicated various restraints on the unqualified use of force in wartime, and how they had tribunals having ways of adjudicating upon wrong conduct in warfare – this type of thing could be included in this study.

I referred to the African system of looking not only to humanity – but those who are alive here and now, those who are before us and those who are yet to come – before you take any great decision. The aboriginal people of Australia have got this tremendous reverence and respect for the environment and they do all they can, with reference to the environment, to protect and preserve it. I have done this work on Nauru and studied customs in the Pacific. There too, I saw tremendous respect for the environment by those Pacific people. They have clearly defined rules – perhaps not written rules – but very clearly defined rules nonetheless, which indicate to every person, what exactly his position in society is and what exactly is expected of him by way of duty.

The American Indians do not do anything unless they think in terms of seven generations yet to come. It is only our modern, short-sighted legal systems that lose sight of the generations yet to come. So, all of these are matters on which a tremendous amount of research is possible, which has a bearing on the topic of IHL because humanitarian law, the environment, the future generations, the preservation of resources are all intimately interconnected.

We must make use of this landmark ICRC Study as a platform from which we take off into these other areas. So, I am making these two suggestions today. I have other suggestions that I could make, but I will confine myself to these two.

In closing, I would like to once more congratulate the pioneers of the ICRC Customary Law Study, those who conceived it, those who worked hard on it, and particularly the two editors who have done a masterly work in bringing it to fruition. We celebrate this as one of the great achievements of IHL and we look at this as only the beginning and from this beginning there will be greater fruition and wonderful results that will follow.

Thank you.

MR. LARRY MAYBEE

Thank you, Judge Weeramantry for those thought-provoking comments and particularly for your suggestions for further study, research and action, and for reminding us that this is really not the end of the story, but merely the beginning. I am sure we will all agree with your comments that the Study should served as a platform for all of us and the challenge now is for all of us to further the work that has been done over the past nearly 10 years, to develop IHL further with the aim of enhancing its acceptance, application, implementation, and compliance with its rules and principles.

I suppose it is for me to have the last word. On behalf of the ICRC and AALCO as co-organisers for this event, I would like to extend my heartfelt thanks to everybody who has taken the time to come here to Delhi, for your attendance, for your obvious interest in the subject of IHL and for your kind words about the ICRC Customary Law Study. My thanks also for your interest in the presentations and active participation throughout the Conference. You all clearly appreciated the high level of the presenters and the quality of their presentations, which were without exception, top notch.

With that, let us conclude the Conference. Thank you very much.

PANEL I

QUESTION & ANSWERS

Mr. Tharchen, **Royal Kingdom of Bhutan, Thimpu:** Thank you. Why is it that the study on Customary International Humanitarian Law took place only in 1995 and not before?

Mr. Chairman (Prof Amitabh Matoo): We will take these questions together and ask Dr. Henckaerts to respond at the end. We have interventions from two very distinguished experts from India, Prof. Mani and then Prof. Tyagi. Prof. Mani.

Prof. V.S. Mani: I just wanted to get a clarification as to whether or to what extent, if at all; did the current war against terrorism get any focus in this study? I am particularly worried about the so-called distinction between detainees and POWs.

Prof. Yogesh Tyagi: Thank you. After listening to the brilliant presentations, I would like to ask three questions. First, has the ICRC adopted an appropriate methodology for the identification of customary rules of IHL? Second, what are the implications of this study, including its legal significance? Third, what should be the follow-up action, because a study cannot be an end in itself?

Firstly, after listening to the first speaker, I get an impression that the ICRC focused on certain evidence of customary rules of IHL like military manuals, official statements, reservations, etc. These are a very comprehensive list of indicators of evidence of customary rules of IHL. Unfortunately, very narrow, state centric things were there and in the process, the ICRC appears to have lost an opportunity to evolve a better, much more elaborate methodology for the identification of customary rules of international law.

Secondly, what is the legal significance of this study? You call them rules of customary international law; the report contains rules. So, the status of the report is different from the status of rules. Rules may fall within the category of sources of international law; the report may not fall in any category of sources of international law. How do you distinguish between these two?

Thirdly, there are implications to the Study. After reading these reports, one gets an impression that we have three International Law Commissions in the world. One is the International Law Commission, another is the International Trade Law Commission and the third is International Humanitarian Law Commission – that is, the International Committee of the Red Cross. Are you sure that the ICRC wants to assume that role and that responsibility in international affairs? And here there are implications. I have no doubt that a number of States will object to your Study and I can tell you the names of the states also because they are habitual objectors to such studies and you know them very well.

At a time when we are trying to build consensus, and mobilising support in favour of IHL, do you think that it is a wise strategy to expose ICRC to widespread criticism in one part of the world? Secondly, if you think that this study is going to make a difference – I think, it is going to make difference – have you devised a strategy for follow up action?

Lastly, my proposal for follow-up action is as follows. Do not expect any encouragement from the governments. Target those societies which have been supporters of the ICRC and ICRC movements over the years – educational institutions, civil society, courts, law bodies and quasi-law bodies; and here is an appeal to all those who are present in this audience. Please take cognisance of the 161 rules; bring them to the notice of judges, legislators, parliamentarians, educationists, policy-makers, and make them believe that, even if their governments do not respect them, these rules are binding on them.

Mr. Jayaraj: My question is something similar to what Prof. Tyagi raised very correctly, about the legal status of the whole study and the legal significance of it. I would like to put this question to Dr. Jean-Marie, and I have had the benefit of reading his article also. Do you call this a kind of re-statement of law in the American tradition that all judicial divisions are put in one place, all customary precedents are put in one place and then

that itself is a source of law, and how do you relate this whole study in terms of Article 38(1) of the Statute of the ICJ, that is, the publications of jurists, etc.?

Secondly, I have a feeling that there is a stage in which we see the return of custom, whatever may be the difficulty of customary law, precisely because the treaty law making is becoming not only difficult, but is encountering outright rejection from powerful States which may claim persistent objections, etc. Connected to this is, how do you, in terms of study and overall scope of finding the customary rules in relation to humanitarian law, that you put consistent proclamation of two veto powers – that we will not be the first one to strike with nuclear weapons and what is its significance to us in the context of persistent proclamation that we will not be the first one to strike? I think that should be taken care of in the context of trying to make customary international law, regarding humanitarian law? These are my observations. Thank you, Mr. Chairman.

Ms. Sonia Khan: I was wondering if somebody could tell me about the principle of compensation in customary international humanitarian law. History tells us that there is a very rich record even during the medieval times, where compensation in the customary international humanitarian law was a very important ingredient. Somehow, treaty law seems to have overtaken it and diluted it or ignored it altogether. So, what are we going to do about it? How are we going to address this victimisation or the people who really suffer due to violation of humanitarian law, either in treaty law or in customary law or in the area of environmental degradation, as a consequence of military intervention, domestically or internationally?

Prof. Hingorani: I would like to know how the ICRC considers the war against terrorism – whether it is a fight against terrorism like we have fight against piracy, illicit drugs, AIDS, etc. Is it really a war or is it a misnomer?

Secondly, it haunts me quite a bit, now that we have been hearing about POWs, and enemy combatants. I would like to know what the position of the ICRC is. How does the ICRC categorise persons detained in times of war, whether as POWs or as enemy combatants? I was told that the government has the power to nominate any person as an enemy combatant.

Thank you.

Mr. Chairman: We are running into serious time management problems. We have three more interventions on Jean-Marie's presentation and then we will switch gears. We should be extremely brief.

Prof. Lakshmi Jambolkar: Thank you. After having had the feast of presentations in the afternoon, I wonder whether it is possible for us to add to the effectiveness of customary international humanitarian law – the habitual obedience that forms part and parcel of the customary international humanitarian law.

Gen. Mansingh: I have been partly pre-empted by Prof. Hingorani. What I would like to say is that we have had excellent presentations in the afternoon. But not once from any of the panelists, did I find any reference to the war on terror. Was that accidental, was it deliberate or do you think that it is unnecessary and is covered under the rules?

Mr. S.S. Bhakri, **Institute of UN and UNESCO Studies**: Dr. Jean-Marie listed some of the instruments and Protocols, involved in the helm of human rights from 1864. I would like to know, in the long history of humanity towards progressive attainment of human rights, do you find something before 1864, some Protocols, some instruments in the domain of human rights?

Mr. Chairman: We will now ask Dr. Henckaerts to respond to this, but in no more than five minutes! I am sorry about this – the minimalist Chair is also very tough.

Dr. Jean-Marie Henckaerts: The first question is why we did this Study in 1995. The problem arose particularly at that time when the conflict in the former Yugoslavia was ongoing. Yugoslavia had ratified both the Protocols, but certain aspects of the conflict appeared to be internal and issues were not addressed by Protocol II. So, that was the first problem. We have already heard that the principle of proportionality was not provided in Protocol II on indiscriminate attacks. These apply and the internal conflicts were not addressed.

The second problem was the conflict in Bosnia for example, was it internal or international? This was, at times, difficult to determine and it was difficult to see which body of IHL rules would apply. So, there were

problems which focused the international community on mandating the ICRC to do this Study. You are quite right that this should have been done much earlier. This has been said in Mr. François Bugnion's book on the *History of the ICRC and Protection of War Victims*. In the past the ICRC also made the mistake that Judge Weeramantry also referred to; that is, if a rule is not in the treaty, then there is nothing. In certain conflicts before 1995, on certain issues, the ICRC was not outspoken enough in legal terms because it appeared that nothing in the Geneva Conventions or the Additional Protocols were applicable. But actually there were customary rules that could have been invoked. So, in 1995, we were forced by the facts to undertake this Study, yet indeed it could have been done earlier.

I will not speak on the questions relating to the war on terrorism and detainees. First of all, we have a panel tomorrow dealing with detainee issues. Secondly, my colleague Ms. Jelena Pejic may want to add something on this now. I do not know whether she wants to address this, but in terms of practice, I have to say that we cut off practice at the end of 2003, so most of what has happened in Afghanistan and Iraq did not appear in Volume II. I have to say, however, that I am not sure it would have changed any of the conclusions. We have a Chapter on Detainees – persons deprived of their liberty. It has been welcomed that this Chapter sets out fundamental basic guarantees available to all detainees. Whether they are labeled "enemy combatants", "POWs", "terrorists", or "civilians taking part in hostilities" or captured personnel of any category they are entitled to certain basic guarantees. Then of course, there are additional and more elaborate rules for POWs, but that is a separate issue.

Prof. Tyagi referred to the methodology and queried whether we have followed an appropriate methodology. He said that maybe we have been too narrow and state-centric in our approach. I do not know whether he says that we should have looked at non-state sources of practice, including that of armed opposition groups. This has been raised by others. The argument is that because we have examined the rules applicable to non international armed conflicts (NIAC) we should also give weight to the practice of non-state actors. It is not clear of course what weight should give to this practice. So, we have included it in a category called "other practices" and we have left the issue open as to what weight is to be given to the practice of non-state actors. I think if we had done the opposite and given them weight in the formation of customary international law we would

have been equally criticised for having done so. So, since this issue is not clear really, we decided to be on the safe side.

The legal significance of the report is that it is the ICRC's assessment of the content of customary international law. It has been described by some as an unofficial codification or re-statement of the customary international humanitarian law applicable in armed conflicts. Finally, the reason we exposed ourselves to do this is that the ICRC was mandated to undertake the Study. Unfortunately I have to leave it here because we are out of time.

Mr. Chairman: Could we now have some interventions or questions on the other two presentations?

Participant: I have listened patiently to the two speakers. I am of the view that customary international humanitarian law is the law for all the human kind. The problem is that this customary international humanitarian law is not properly practiced and enforced. What is your expert opinion on it?

Mr. M. Bahavand, **Head of Legal Department, Iranian Foreign Ministry:** My question to Prof. Momtaz is how much, in terms of individual criminal responsibility, the criminalisation in internal armed conflict may contribute to combating impunity in reference to the violation of human rights? Because this is a turning point in the individual criminal responsibility in internal armed conflict and why, when in armed conflict, some acts are prohibited by law, then in non-armed conflicts, and in time of peace that those principles may also prevail?

As a second question, I may also refer to the principle of *nullum crimen sine lege*. We know that in many countries, and in particular the Asian region, the courts follow the positivistic approach; they follow the rules of law and the law of course is not of the personality to recognise customary international humanitarian law in proceedings. When we say again in terms of criminal responsibility of individuals and we recognise the criminal responsibility for the individuals then these rules may not break the principle of *nullum crimen sine lege.* It is because if we take it that all individuals are responsible in accordance with customary international humanitarian law then we should say that all soldiers should be lawyers to recognise customary

international humanitarian law in order not to break those rules. If we refer to many countries in Asian region, the courts follow the written law and not customary international humanitarian law, but this may contradict that principle.

Prof. Penna, **Singapore**: I have a comment for Prof. Momtaz. He was mentioning about subjecting IHL to universal jurisdiction. There was such an opportunity when the Rome Statute was adopted. But this principle was not adopted and the Rome Statute is founded on the basis of territoriality and nationality principle. I think today the States are not yet prepared to surrender their sovereignty and jurisdiction over criminal matters because even today, criminal law remains a matter of *lexus fori*. In the area of human rights, however, we do see the application of universality principle, particularly in the context of anti-torture and anti-terrorist laws in the US and in other parts of the world. So, in human rights, we do see an emergence of the universality of jurisdiction, but I think, in humanitarian law, it is basically remaining at the same stage.

Prof. Djamchid Momtaz: If I am correct, there are three questions addressed to me – two have been addressed by my good friend Mr. Bahavand. His first question relates to the problem of impunity during NIAC. There is a very good rule in the study, regarding the question of impunity. I think there is also a very good commentary in the Study regarding Article 6 of Protocol II. I understand that during NIAC, amnesty can be given only to combatants who respect the rules of IHL during this kind of conflict.

Regarding his second question relating to the principle of *nullum crimen sine lege*, I want to refer to the decision of the International Nuremberg Tribunal of the Second World War. It is very clear that for the Tribunal, although there is no provision in The Hague Convention of 1907 regarding the violation of the rules of this Convention, the Nuremberg Tribunal stated very clearly that the absence of criminal provisions in the Convention cannot be considered as an obstacle to exercise the jurisdiction.

Regarding the last question, I agree with what has been said. But I want to draw the attention of our colleague to the fact that there is a very good practice regarding the exercise of universal jurisdiction regarding NIAC. I want to refer to some decisions taken by the judicial persons in Switzerland, in Belgium, in Denmark and also in USA. I agree with my

colleague that we have to find the political will to exercise this universal jurisdiction. But the exercise of universal jurisdiction regarding these kinds of crimes in NIAC will be a very good tool to ensure that these kinds of rules are applicable.

Dr P.S.Rao: On the implementation of IHL, there are a number of strategies that would have to be pursued, both simultaneously and in an integral way. This is the most difficult part of the exercise. One of the point l hand over the microphone to Mr. Maybee.

Mr. Larry Maybee: I would like to express my appreciation to all the speakers and panelists for an excellent session. I would also like to thank the Chair, Prof. Mattoo for doing such a wonderful job chairing this session.

Finally, I commend the active participation of all the attendees at this session and I would like to urge you all to come tomorrow so that we can pick up on some of these themes and questions that were raised today. I would now like to invite everybody outside for cocktails and I look forward to continuing the discussions outside.

PANEL II

QUESTIONS & ANSWERS

Prof. V.S. Mani: After the three brilliant, devastating presentations, I am sorry to raise some parochial issues. I think, in India, we have two kinds of problems in this field of IHL. One is the absence of domestic law. For example, we are a party to the Genocide Convention, but we do not have a domestic law for implementation. The National Human Rights Commission of India did make this point in the Kashmiri Pundits' case, but no follow-up action has yet been taken by the legislature. The second problem that we have is with regard to the single case that we have ever had under the Geneva Convention Act 1960. This is the Monteiro Case - that is the Goa case - of 1971. The Supreme Court found in that case that the trigger mechanism for the jurisdiction was highly inadequate. No further action has been taken. I have a feeling that the ICRC would do well by looking at trigger mechanisms of various national laws as well in its further collection of national laws of implementation. Thank you.

Mr. Tharchen, Royal Kingdom of Bhutan: I have one question each to our eminent speakers. The first question is to Justice Verma. I am of the view that under the pretext of justice, equity and conscience, our courts might exercise excessive jurisdiction. In such a scenario, what will be such excessive actions, and how will it be compatible under the principles of separation of power?

My second question to Mr. Christopher Harland is that suppose an individual is prosecuted on the grounds of his commissions or omissions under customary international humanitarian law, what if such acts of commissions and omissions are not punishable under the penal laws of the country. In this case I am sure that this person might charge the state on grounds of violations of human rights.

Lastly to Prof. Hampson. What could be the case, if the suspect or an accused prefers recourse at that country law, that he be transferred to his own country and be tried according to his own country's laws? Can that country still exercise universal jurisdiction?

Justice J. S. Verma: The question that was addressed to me is a repetition of question very often asked to me. Prof. Mani knows it very well. In all those orders where we have done something which falls in the category which we have mentioned, we have always indicated the basis on which we have done it. In the first place, it is the result of inaction by some other institution of governance which has brought that situation before the court. But we have done it in a cavalier fashion. What we have done is that we have always to find some central legal issue, by answering which the solution to the problem posed has been found. So, what we have really done is to answer a legal issue which emerges from that problem and that takes care of it. Most often the procedure that we have adopted, and that is the expression that I have used, is what is known as the *Hawala* Case, continuing Mandamus. That is, we would direct the authority whose job it is to look into the grievance and report progress on what they are doing. Most often, we would end the proceedings by saying that needful has been done. So, nothing more is required to be done. Now, no order requiring implementation is required to be made. You must have seen the extent to which this is done. I wonder when you came to Delhi last, you had observed the pollution. The pollution you see now is less than half of what it was earlier. But then the judicial intervention was based on Article 21, Right to Life, so that pollution of any kind was detrimental to human life.

The power of the Supreme Court under Article 142 read along with Article 32 of the Indian Constitution. Article 32 is the constitutional remedy for enforcement of fundamental rights. So, right to life is enforceable there under and Article 142 is the residuary provision in the Constitution which enables the Supreme Court to make any order which is necessary for doing complete justice in the case. So, it all depends on how you see and how you visualise and how can justice be done? Then, there is also one of the fundamental duties of citizens which is protection of environment, ecology, etc. which is Article 51(a)(g). Reading all of them together and together with the Directive Principles, which have been the principles of fundamental governance - which the Government is required to do - they

are not justiciable by themselves. But they have been read into the fundamental rights, which are justiciable. This is how combining all of them, you will see that in all those orders the basis of judicial intervention has been indicated. Most often, the inertia of the concerned institution has been shaken off and they have been made to do it. Thank you.

Mr. Christopher Harland: It is all-possible to use the human rights provisions and seeking reparation, etc. But I would perhaps mention Rule 150 of the Customary Law Study which says that the state responsible for violations of IHL is required to make reparation for the loss or injury caused and you will also find that in The Hague Regulations and in Additional Protocol I, there are similar obligations to make reparations. So, on that side, it is not just human rights which should provide an outlet for redress, but I would also refer to IHL in that regard.

Prof. Francoise Hampson: If I can also comment on the first question. It also occurred in the Russian Federation where the Russian Constitutional Court announced the first Chechen war has crossed the threshold of Protocol II, but that adequate means had not been adopted to give effect to that, within the internal order, including within the armed forces. Of course, the attitude of the Russian Foreign Ministry is that it is not applicable; it is merely a criminal incident. But it is interesting that the Constitutional Court found that it crossed threshold, but there is nothing that they could do to deliberate.

On the question of, can a suspect ask for a transfer to his own state rather than being tried in a foreign state, I see no problem with the request being made. One has got to consider the obligations of that state. If it is willing to transfer then lawfully for it to be able to transfer, it has to assure itself of at least three things. First, that there is no risk to that person, even if he is asking to be transferred; you are not allowed to volunteer torture or inhuman treatment. So, if there is any risk of that kind of treatment, he should not be transferred. Secondly, if there is a risk that a trial would not occur, if he wants to go home, so, he would not be tried or it would be a sham trial, then the state will not be discharging its own obligations to secure a trial. And linked to that, my guess is that they will also be required to ensure that any trial would be fair to all parties. So, I do not think that it is enough that someone simply wants to go to his own country and that should be a basis for the transfer, but provided the other concerns were

satisfied and there is no objection in principle, but the transferring state particularly for any one actually protected by the Geneva Conventions retains certain responsibilities. And they would be useful if certain governments, including European Governments would remember when the transferring people protected by the Geneva Conventions to the custody of other states, that they retain certain legal responsibilities.

Thank you.

Prof. Yogesh Tyagi: I have about 500 questions, but I will ask only two today – one addressed to President Kirsch and another to Mr. Harland.

The ICC is a very popular institution among civil society activists. It is also an acceptable institution among some states. I am not sure how popular it is among Asian States. What is your prescription for making it politically acceptable to those Asian States which matter a lot in international affairs and also in matters of compliance with IHL? This is to Mr. Kirsch.

Mr. Harland, during his presentation he referred to the duty to investigate and duty to prosecute. You cited Rule 158. Rule 158 – I rely on the slide that was shown referring to a duty to prosecute, if appropriate. Could you kindly tell us what is "if appropriate"? If "if appropriate" is so indispensable in your rule, then does it allow you to consider the duty to prosecute as a part of customary law? If you consider that the duty to prosecute has become a part of customary law, is it appropriate to prosecute Sharon in Israel or Bush in the US or people like those who are in seats of power who do not allow prosecution in normal circumstances?

Judge Philippe Kirsch: I was always convinced since the world was engaged in this exercise of creation of the ICC, that it is absolutely indispensable that the ICC over time becomes universal. It is a matter of principle and it is a practical matter also. It is a matter of principle because it is the only international criminal tribunal that was created by treaty. The Rome Conference was attended by 160 States and 120 voted in favour; two years later, 129 States signed the Statute and now, we have fully 100 states parties. The practical matter is that the jurisdiction of the court is – unless the Security Council refers a matter to it – limited by its own jurisdiction. It does not have universal jurisdiction. To exercise its jurisdiction, it has to have the approval and consent of the state of the nationality of the accused or the state of the territory where the crime was committed, which is in itself is a serious limitation to the capacity of the

court to fulfil the role which it is called upon to fulfil.

The court has been widely accepted in all continents except Asia. In Western and Eastern Europe, in Africa and in South America and even now, to some extent in North America. I cannot comment on the reasons why Asian States have not become parties to this Statute to a larger extent. But what is very clear to me is that the worst enemy of the court is ignorance. In the past couple of years since the court was created, there has been tremendous amount of misinformation, disinformation and wrong information about the court. I have had the experience many times of going into a legislative assembly and being met with cold stairs and leaving the assembly in a warm and fuzzy atmosphere! Basically, the more you know about the court, the more you like it and then, eventually fall in love when ratified! Now, the role of the court is – my role – is not to promote the court; it is to expand the court. I attach enormous importance to Asia's participation. In the past couple of months, I have been in 3 Asian States, which are not exactly close to home, precisely because I think this is a priority, when the court is invited to explain what it is, to do so. But the court will never have either the mandate or the capacity to promote itself. "The mandate" - because it is a court of law and promotion is a political matter - we can explain but we cannot promote the court. "The capacity" – because the court is very busy with the four situations that have been referred to it and we cannot spend too much time on external relations. Therefore, this is really an implicit and now an explicit thing on civil society, NGOs, the ICRC and government representatives who do understand the court to explain as much as possible to achieve the universal acceptance. Thank you.

Mr. Christopher Harland: I understand that the mark of a good student is knowing when to bow to the master! And I see Jean-Marie suggesting that he might be able to answer the question. So, I throw it over to him!

Dr. Jean-Marie Henckaerts: "If appropriate" was added to Rule 158 to say that prosecution only has to take place if the investigation has given sufficient elements to prosecute. It is a normal procedure of even domestic criminal law that after an investigation, there may not be sufficient elements established for and the prosecution to be seized. In this case there is no prosecution. It has nothing to do with the political viability or other considerations of whether someone should be prosecuted. It is only that.

But there is no absolute obligation after an investigation to prosecute, as there is not under national criminal law. Thank you.

Prof. Francoise Hampson: Can I say something on the point of investigation? Interesting information is emerging over time about the problem of investigations within armed forces. They usually have special people whose job it is to investigate; in the case of the UK, it is Royal Military Police and the branch within it is called the Special Investigations Branch. But evidence has emerged in the case of *Oscania.* In the first instance, we are waiting for the appeal judgment – to determine exactly what the investigation meant for them. As a result of that, in the legislation currently before Parliament, they have completely to overhaul the system of investigation within the military; they are taking it out of the chain of command because it is thought that it does not affect. It has not suggested that it is corrupt. If you read the *Oscanian* judgment of the High Court, one will uphold the past investigation and I think this does raise a question of whether the investigation was in compliance with the UK's obligations under the Geneva Conventions. It might be interesting if – I do not know if this is an ICRC job – one could find out how states investigate the conduct of forces under their command. It seems to me that if this is not done effectively, I do not see how you can be monitoring compliance and preventing violations. It needs an investigation and that is really important.

Mr. Chairman: Now, I think, it is time for closure. I would thank finally all the three speakers in our panel who made very interesting and stimulating presentations, which of course led to an equally interesting discussion in the house. Now, may I thank all the participants, the speakers and Judge Philippe Kirsch, not only for setting the backdrop to our discussion this morning, but also staying behind and also volunteering to answer very interesting questions that have been posed from the floor? I thank you very much and I close this session now.

Mr. Larry Maybee: Before we adjourn for tea, I can say that my reputation is in tatters. It took only one session and we are already half an hour behind schedule, but I think it is well worth it, given the quality of the speakers in the panel. Coffee and tea will be served in the room across the hall.

PANEL III

QUESTIONS & ANSWERS

COL. Krisna, Ministry of Defence, Thailand: I would like to ask our distinguished guest speaker from the UN, about the Secretary-General's Bulletin. I would like to know about the status of the bulletin. I was told by a representative of the ICRC that more or less this bulletin is like a policy. I am wondering why it was not adopted as an order or as a UN Security Council Resolution, which would mean that we have to comply with it 100 per cent. If it is considered as mere policy, it depends on the sending country whether to comply with it or to follow it or not.

Participant: My first question is to Prof. Zhu. I am of the view that the primary objective of IHL is to mitigate the sufferings of the persons involved in the conflict- civilians, non-combatants and many others. I think, the distinction between international armed conflict and non-international armed conflict is not vital. What is your opinion on this?

Another general question; I am of the view that the conference on the ICRC Study of Customary International Law seems to be incomplete. So far, our speakers have made excellent presentations on the obligations of states, but what about the non-state actors? To me, the non-state actors cause a lot of suffering. Any of the panelists could respond to this.

Participant: My question to Ms Daphna Shraga is with regard to amnesty. She referred to the agreement in which the representative of the UN made a reservation regarding war crimes and crimes against humanity. Actually, I am familiar with the legal basis of that. But I have a question. Are there any other crimes which, after the hostilities, we can grant amnesty for. If they are ordinary crimes against domestic law then the peace agreements and all other things are meaningless. So, when we grant amnesty to the parties to the hostilities, then perhaps most of them are relevant to crimes against humanity and genocide. If we argue like that then may be

the question of amnesty as is reflected in Protocol II Additional to the Geneva Conventions also has no legal effect.

You may be kind enough to answer whether the international community and the state parties to Additional Protocol II are now ready to amend these Additional Protocols in order to bring them into line with customary international law. If not, it needs a little bit more work to address this.

Mr. Chairman: Now, the extra 30 minutes of time given to this panel is almost over, so I request each person to put the question sharply and then we will have the answers.

Mr. S.S. Bhakri: Ms. Shraga dealt very profusely on UN peacekeeping operations. Even today, this world is visited by a number of conflicts. According to the SIPRI Yearbook, we have about 30-35 conflicts ongoing in the modern world. Another university gives a list of about 85 conflicts going on in the world. The Ford Foundation lists about 100 conflicts going on in the world today. I would like to know why this is - despite the existence of the department of UN Peacekeeping Operations, which currently has 14 peacekeeping operations ongoing around the world?

Wing Commander Bhakshi: The first question is to Brigadier Githiora. He mentioned about nuclear weapons and the difficulties with the question of nuclear weapons. He also knew that regarding tactical weapons, there has been a lot of news now and the recent news about the nuclear bunker buster which came out. In this light, where do we stand, regarding nuclear weapons, especially tactical nuclear weapons?

I have another question for Ms. Shraga. She mentioned about laser weapons. We are not very clear about the latest position on these. What did she mean by laser weapons? Because we all know about laser blinding weapons, but the latest laser weapons which are now coming out, including anti-satellite laser weapons, laser weapons against aircraft, etc. Does she mean laser target designator, etc.? Where do we stand on these?

Prof. Nirmal: I have a doubt in my mind. My remark will be general in nature. Custom is a very important source of international law. But determination of whether a use has become a rule of custom or not is a complex one. If I go by Article 38(1)(b) of the Statute of the ICJ, customs as an evidence of state practice is accepted. This is a source which must

have been accepted, before it becomes a binding source of international law. The problem is with *opinio juris.* For example, ICRC has conducted this Study and come out with a number of proposed rules. What is the status of these rules? Who will decide? From where do we derive *opinio juris*? Whether it is a part of state practice or something else? If it is something else, then from where will one get it? This is a very important and a complex issue which I wanted to point out.

As regards Prof. Zhu's paper, in the *Tadic* and *Furundica* Cases, the court relied on Common Article 3 of Geneva Conventions and two General Assembly Resolutions. I want to know from the panelists, is there any case in which a domestic or international court has declared that the provisions of Protocol II have become a part of Customary International Law? Rules of international law are not made by academicians, but by the states.

Participant: My question is to the third speaker. It concerns rules applicable in non-international armed conflicts. I understand that he was emphasising that states have nothing to fear about the rules, and so on. But the key problem is in persuading the non-state fighters, about the need to respect the rules. In that regard, it seems to me that there is a necessary inequality between the belligerents. I do not think that is a reason for not having rules, but it gives rise to very great difficulties. I will be interested in his comments on how it would be possible to persuade non-state fighters who are not going to have the status of POWs, when captured. How could we persuade them to respect the rules?

Participant: My question is to Ms. Shraga. She mentioned the UN Secretary-General's Bulletin, which covers peacekeeping operations under the gamut of Chapter 6 and 7 of the UN Charter. But with the increased involvement of various regional organisations today, is the UN thinking of bringing them into the fold and considering the fact that many peacekeeping operations are hybrid in nature. A lot of transition is involved where the regional organisations take on the missions initially and, subsequently, they have been taken over by the UN. Are you thinking about extending the law to the regional organisations as well?

Brigadier Titus K Githiora: There was only one direct question for me and it had to do with nuclear weapons. The remark that I had made was that IHL applies to the use of nuclear weapons. What one draws from that

is that the IHL rules on distinction and proportionality will apply, as will the whole issue of the use of weapons causing superfluous injury and unnecessary suffering. I think even regarding the development of tactical weapons with nuclear capacity that may be now in use or in the future, as long as they comply with the restrictions that IHL prescribes, then it seems to me that the weapon can be used. As long as those rules are observed and as long as it does not violate any of those that I think would be how to approach the use of such a weapon.

On peacekeeping, I would like to just say something here because the trend or tone of the message that we are getting here is that the UN is probably failing, and what is it that can be done to improve the situation. Just speaking as the member of a country whose armed forces are extensively engaged in peacekeeping, what we say back home is that if your neighbour's house is up in flames, you had better step up and douse them, otherwise, they will spread. Now, regionally, the effort has to do with – this is what the international community really is saying certainly about Africa – is that to do something about your own backyard. Institutionally, a lot of societies cannot function because there are no functioning national institutions. Some of those states are collapsed states. Then, there are issues of poor governance; those have to be addressed. The best people to handle that situation are the neighbouring countries. Now, regionally that is the effort that is being encouraged; you need the UN because of the international order, authority and for permission, at least legally, to step up and engage in peacekeeping. It seems to me that this is one way of assuming that responsibility and saying that we are a part of the international community and this is the way forward, not so much blaming the UN or saying that we are failing somewhere.

Ms. Daphna Shraga: I will try perhaps to summarise the questions before I answer. I think, the first question was what the status of the Secretary-General's Bulletin is; and what are the legal effect and the force on States.

First of all, I would underscore that it was promulgated by the Secretary-General. It was not doctored by the Security Council or by the General Assembly or by any of the Committees. So, it was not intended nor is it designed to be adopted by any intergovernmental body of the UN. This is as far as the promulgation is concerned. The Secretary-General's Bulletin is a sort of administrative instruction. This is the message which the

Secretary-General has chosen, mainly in the 1960s, to promulgate regulations for peacekeeping forces. It was chosen again in the 1990s in the same way. The Secretary- General, who is according to the Charter, the first Executive Officer of the UN, and the Chief of Staff of Peacekeeping Operations, is considered to be the person who is beyond the Force Commander and the link between the Security Council, the Force Commander, the National Commanders and down the chain of command. So, in his capacity as the Chief of Staff he instructs the forces under his command. So, that is the notion of instructing peace-keeping operations.

Now, as far as the legally binding force of these instructions are concerned. As with all other instructions, promulgated by the Secretary-General, they are binding. They are binding not because they are instructions in any formal way, but because they reflect customary international law. In that sense, they are binding, not because the Secretary- General has said, but because they are in any case binding on all these forces. So, all states are bound by that, but as I have said, not because it is binding only upon states, but because it is a codifying or indicative instrument.

I would also suggest that you look very carefully at the Bulletin itself because it does include the reservation, that it obviously is not exhaustive. It is not intended to replace any of the national instruments that are equally binding on all such forces and this is perhaps an answer to countries who say that in devising the Secretary-General's Bulletin, the Secretary- General did not include all the reservations that are equally applicable to the states. So, all of that - I hope - will answer all the questions of legally binding force of the Bulletin.

The second question was not entirely clear to me, but if I understood it somehow, it related to the scope of amnesty; is it applied and what was the legal basis for taking these three crimes and not including them? It is not necessary because we thought that it represents customary international law, but it was a statement of position that in 1999, the Secretary-General of UN would not accept this kind of amnesty. I would also say that the decade of the 1990s was particularly important for the UN. It was 5-6 years after the two international tribunals were adopted by the same Secretary-General. Therefore, it would not be conceivable for the UN, after establishing two international tribunals precisely to convey the message of accountability and eradication of impunity, to say that in Yugoslavia and Rwanda, we of course established international tribunals, but early on, it is okay to commit violations because you would accept amnesty. So, there

was something to be said about consistency of positions. Otherwise, it would have probably applied to criminal acts and others.

On the question of why is it that with so many peacekeeping operations deployed throughout the world, we still have many more wars. If that was the question, obviously peacekeeping operations are not designed to prevent war. They are like fire brigades, to ensure that war does not continue or, if peace is achieved, that it will not relapse into a situation of conflict again.

As far as the fourth question, what was the laser weapon that I referred to? I was referring to Protocol II of the 1980 Convention on Conventional Weapons and only as a blinding legal instrument.

The fifth question was on the UN Secretary-General's Bulletin and whether we intend to extend its scope of application. The answer is no, first of all because it is applicable only to UN operations under UN command and control; it excludes UN operations authorised by the Security Council and under national command and control. It does not extend to national or other international organisations. I would only like to say that we are very happy with the status of the Secretary-General's Bulletin and we certainly do not think it necessary to expand it at this stage.

Prof. Zhu Wenqi: Firstly, I would like to say that the questions are very good and very inspiring and I will respond as briefly as possible. All these questions can be grouped; firstly, it was about the importance or distinction between non-international armed conflicts and international armed conflicts. It may be of no importance in theory, but in practice, this is very important. Why? It is simply because of some basic principles in criminal law. You have to punish people with the law which was applicable when the act was committed. That is very evident. Then in the ICTY for instance, in the first case of *Tadic* they have to decide to apply Article 2. That means, violations of the Geneva Conventions of 1949 – is it the document applicable in international armed conflict or non-international armed conflict? The judges concluded that the document which should only be applicable in international armed conflict and then, afterwards every time the prosecutor wanted to judge someone with common Article 3 the prosecutor has the duty to prove that the crimes were committed in non-international armed conflicts. Why? It is just because of the principle of *nullum crimen sine lege*.

Talking about Additional Protocol of 1977, these were Additional Protocols which have not become a part of international customary law.

Why? Because when you speak of customary international law, you have to speak about state practice. Since a quite a few states, including some big states has not ratified the Additional Protocols of 1977, so, they have not become a part of the international customary law.

On the third point about persuading the non-state fighting troops to respect the rules of IHL, actually if you want to adjust to this, you have many ways. Today, when I address in this audience, I chose to address it from a psychological way because as you know I come from China, a country with long history. For me, it is very clear that if you want to win the war, you should first win the hearts. Also, in many novels in China - for instance, Desan Novels are very famous in China. Everyone knows in the Suli Kingdom there was a general, whose name was Mao. Since he wanted to win the hearts of civilians, he said, whoever damages the civilians, must be punished. Then since his horse got shocked and also touched upon the civilians property he wanted to punish himself. Why? The reason is very clear. For any rival groups, if they fight, they want to become the King of the country. If you want to succeed, then you have to think how to win the hearts of the civilian population.

In China, there are many such laws and practices. Today, I mentioned the practice of the troops led by Mao. You know, actually between 1945 and 1949, where we spoke about POWs, and actually during that period for those troops, there were no POWs Why? When they captured the soldiers, they simply asked them: do you want to join us or do you want to go home? If you want to go home, we will give you some money and you can just go home. In that case, Mao succeeded in defeating him. So, today, I just spoke from the psychological way, to persuade the non-state actors in other parts of the world; I must say that it is beyond my knowledge; I will finish with that.

Mr. Chairman: The discussions on this theme are over now; I thank the panelists and you would have noticed from the information given to you, that this panel is very interesting. There is a Brigadier, an international civil servant and a teacher – it is a very interesting combination in the panel. I also thank the organisers for asking me to chair this session. I thank you all so much for the patient hearing and intense questions.

PANEL IV

QUESTIONS & ANSWERS

Participant: As you know, after 9/11 in the USA, the international legal framework regarding armed conflict was totally confusing, especially regarding US military action in Iraq. How would you justify legally the US military action against Iraq, from the international legal point of view? Would you find a detailed difference between a terrorist act and armed conflict? Accordingly, how do you justify the US military action on Iraq? As you know, the United Nations did not pass any resolutions on the US military action.

Participant: For two days now, we have been listening to an ideal and wonderful set of international law rules. These ideal rules of IHL have failed to stop the daily violations against the Palestinians fundamental rights that include torture, genocide, detention, etc. My question is how the international law mechanisms can effectively protect the basic human rights of the Palestinians and how to stop the continuous ignorance of this international law by some states?

Participant: Is there an authority which will determine the quality of the parties in an armed conflict – an authority who will decide whether an armed group meets the requirements of combatants in line with the 1977 Additional Protocols, or whether they are what you say, an unlawful group, unlawful combatants or terrorists? Is there an authority to decide on this? It is important because, after this, the authority could also decide whether there is a non-international conflict in a country or not. Is there any authority to make such a decision?

Participant: Ms. Jelena talked about the criminalisation of participation of civilians in hostilities. I am not aware of any provision of IHL which criminalises the mere participation of civilians for taking part in hostilities.

They could be prosecuted for the violations of IHL, but there is no provision in IHL for prosecution for mere participation.

Mr. Tharchean: **Royal Kingdom of Bhutan**: I have two questions – one to Ms. Pejic and another to Prof. Khalil. Firstly, under IHL the status of POW is a kind of punishment isn't it? To Prof. Khalil, at what stage of violence or conflict, does the application of IHL start and at what stage does it end? Will a minor child in uniform carrying arms openly be termed as a combatant or not?

Prof. Hampson: This question is to Prof. Khalil. I am puzzled that you have used the Universal Declaration on Human Rights. I wonder if you could clarify, because for states that have ratified the Covenants, those are the legal obligations. The Universal Declaration is not legally binding. If you are referring to customary human rights law, that now goes considerably beyond the Universal Declaration. So, could you explain your reliance on the Universal Declaration?

Ms. Jelena Pejic: Thank you very much, I will be very brief. In terms of the first question which is the legal basis for US action in Iraq, to be honest with you, this is not an IHL issue. It is a *jus ad bellum* issue. It is an issue that revolves around the right to use force in international relations and is regulated by the UN Charter. We had the whole debate about Article 51 and we now have an interpretation; some people agree and some people do not agree. Those who agree with the interpretation base themselves of course on the Security Council Resolution that declares 9/11 to be an act of war. There is now an evolving notion that the right of self-defence under international law can be exercised *vis-à-vis* non-state actors. But this is not a question of international humanitarian law. To be honest, this is not a question that the ICRC would ever speak on. This is a very political matter and the ICRC does not opine on the justification for war. We talk about war, once a conflict has begun factually and legally. So, maybe, we could discuss this privately, later. That is really all I can say by way of a public response.

In terms of the Palestinian question, what has to be distinguished – I know you know this extremely well – between rules and their implementation. I think the applicable rules are fine. I think that in the bulk, the prohibitions that would prevent violations are all there. Now, the

question of implementation is a totally separate issue. That is not a question of law, but it is a question of policy and political will. It is not that international law differs in its method of implementation from national law and to a large extent it depends on the international community, whether it wants to be efficient to put into practice, the rules that it has drafted. Now, we do have the individual criminal responsibility mechanisms; of course, under international law; these were spoken about this morning. But in the sense that you are talking about - forcing a state to cease violations, whichever state that may be - is an issue not of law; it is an issue of policy and politics. It goes to the heart of the different implementation regimes that international law has and it is not, therefore, specific to IHL. Any body of international law comes up against the same implementation problems if states do not have a collective willingness to enforce them. That is really the best answer I can give. The law is okay in my view, but it is the implementation that does not work.

To respond to the next question, there is no authority as we know in international politics or anywhere that will determine the legal qualification of a conflict – when it is international and when it is non-international. The most important and the most troubling issue is the situation where one cannot determine whether a situation of violence is a non-international conflict or is below the threshold of armed conflict entirely. We are completely clear on that; it is a highly political issue. That does not mean to say that every actor in violence does not do it for himself. The ICRC is clearly mandated to supervise IHL implementation and compliance. Accordingly, we have to do our own internal legal qualification in order to be able to approach parties to a conflict. Clearly, our legal qualification is for the most part, for bilateral use - we hardly ever go public with it. Nevertheless, we need to do it because, if it is not an armed conflict, we cannot talk to the parties about international humanitarian law applying to the situation.

The second aspect that you raised, which is when do you have a lawful combatant, is I think, far more clear. The legal qualification of a situation of violence is unresolved as a preliminary matter, but once you get into the "status" question, you have quite a lot of guidance under IHL. The legal rules actually say who is a "combatant" under Geneva Convention III and Additional Protocol I, who is a "protected civilian" under Geneva Convention IV, and who will be "covered" by the Additional Protocol I - so I do not think those two issues are the same. I would like to stress in relation

to your question that once the level of armed conflict has been reached - whether international or non-international - the designation "terrorist" is irrelevant. What is relevant is whether that party abides by the laws of war and, if captured, what is the right of the individual. That is what the law tries to do; it avoids the political designations. That is what I was trying to say.

To respond to the last two questions very quickly, I think I said, and I perfectly agree with you, that under international humanitarian law direct participation in hostilities by civilians is not a war crime. That is clear. War crimes are acts that are unlawful - violations of IHL. What I said is that civilian persons can be prosecuted under domestic laws for direct participation in hostilities, subject to very limited exceptions. You will not find this in the Geneva Conventions or Additional Protocols as such. It is a customary understanding of the consequences of civilians taking a direct part in hostilities, that they can be prosecuted under the domestic law of the detaining state. That is the case and there is no question about it; however, you are right to point out that direct participation is not a war crime. Even though some are now trying to say that it is, that is not the case and you would not find it written anywhere, neither in the ICC Statute nor the GC or AP.

Finally, I am not sure I understood your comment, but POW status is actually not a punishment at all. It simply means, as I mentioned, that persons who are detained are interned for the duration of hostilities. The assumption is, however, that they will go back to fighting, should they be released. On the contrary, however, nowadays you have the distinction being made between civilians and POWs – one category can be tortured and the other cannot, because people are claiming that POW status is a privilege. It is not. POW is a status; it is not a punishment; it is not a privilege. It is a fact of international law in war that states have agreed to give this type of protection to captured combatants. But that does not mean you can torture captured civilians (however you classify them), even though you cannot torture POWs. Sometimes it is underplayed and sometimes it is overplayed, but it is not a punishment. I also do not think that it puts you into the white elephant category.

Mr. Chairman: Thank you for a very excellent explanation. We have another three minutes and now Prof. Khalil may respond. The last question was raised by the distinguished delegate from Bhutan - where does the

application of IHL begin and where does it end? It is a very elaborate question.

Prof. Kahlil: For the purposes of defining armed conflicts, when we talk about the Geneva Conventions, we have got two Articles to consider – Articles 1 and 3 Common to the Geneva Conventions. Under Article 1, it is an exchange of hostilities between two or more sovereign states, so the parties are sovereign states. Under Article 3, it applies to an armed conflict not of an international character, but occurring on the territory of one of the state parties. When does Article 3 apply – this is the most important issue.

For the application of Article 3, humanitarian law makes a distinction between an armed conflict, a situation of internal disturbance and a third category, a situation of internal tension. So, in the process of development of an armed conflict, under Article 3, the first stage is the situation of internal tension. In this internal tension, there may be some detentions; there may be very rarely some activities of exchange of hostilities. Then, it matures into a situation of internal disturbance. Then, it becomes an armed conflict. For the purposes of becoming an armed conflict, the ICRC commentary on the Geneva Conventions requires certain criteria. One of the criteria is that the dissident group must be in position of controlling some territory. Secondly, they are fighting an armed conflict openly - carrying on arms openly. Lastly, they carry on hostilities under the supervision of a person who is responsible. So, in these circumstances, if these criteria are satisfied then, Article 3 applies.

For the other provisions of the Geneva Convention to apply, it basically becomes a different context. In today's context, particularly in the context of the post - 9/11 world, an interesting issue that is arising is whether IHL applies in the context of a terrorist attack. There is only one reference that I found in the executive order of President Bush issued as the Commander-in-Chief of the American Armed Forces. In establishing the military commissions for persons involved in terrorist activities anywhere in the world, there is a provision which recognises the terrorist attack as an armed conflict. That article says that in view of the armed conflict, the terrorist acts have to be confronted almost in that status. So, there is today a different situation. An entirely different issue is whether the characteristics and technology of the armed conflict have completely changed. One of the criteria for recognising an armed conflict is that sporadic attacks or sporadic

exchanges of violence do not constitute an armed conflict. But today have these sporadic attacks of the terrorists given rise to a situation of armed conflict? I do not have the answer because I have not done research as to whether there are identical executive orders issued by other countries, on the lines that was issued by the Commander-in-Chief of the American Armed Forces, President Bush.

I think, that is the only way in which I could answer that question.

Mr. Chairman: Thank you. With this, we will conclude Panel IV, with a very big round of applause for our panelists. We are going to express our deepest gratitude to all the panelists and also to those participants raising these very interesting questions.

Mr. Larry Maybee: Thank you Mr Chairman. With that, let's break for the afternoon tea. We will re-convene at five o'clock for the closing remarks by Judge Weeramantry.

STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW:A CONTRIBUTION TO THE UNDERSTANDING AND RESPECT FOR THE RULE OF LAW IN ARMED CONFLICT**

Jean-Marie Henckaerts*

Abstract

This article explains the rationale behind a study on customary international humanitarian law recently undertaken by the ICRC at the request of the International Conference of the Red Cross and Red Crescent. It describes the methodology used and how the study was organized and summarizes some major findings. It does not, however, purport to provide a complete overview or analysis of these findings.

I. Introduction

In the 50 years or so since the adoption of the Geneva Conventions of 1949, mankind has experienced an alarming number of armed conflicts affecting almost every continent. During this time, the four Geneva Conventions and their Additional Protocols of 1977 have provided legal

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protection to persons not or no longer participating directly in hostilities (the wounded, sick and shipwrecked, persons deprived of their liberty for reasons related to an armed conflict, and civilians). Even so, there have been numerous violations of these treaties, resulting in suffering and death which might have been avoided had international humanitarian law been better respected.

The general opinion is that violations of international humanitarian law are not due to the inadequacy of its rules. Rather, they stem from an unwillingness to respect the rules, from insufficient means to enforce them, from uncertainty as to their application in some circumstances and from a lack of awareness of them on the part of political leaders, commanders, combatants and the general public.

The International Conference for the Protection of War Victims, convened in Geneva in August–September 1993, discussed in particular ways to address violations of international humanitarian law but did not propose the adoption of new treaty provisions. Instead, in its Final Declaration adopted by consensus, the Conference reaffirmed "the necessity to make the implementation of humanitarian law more effective" and called upon the Swiss government "to convene an open-ended intergovernmental group of experts to study practical means of promoting full respect for and compliance with that law, and to prepare a report for submission to the States and to the next session of the International Conference of the Red Cross and Red Crescent."[1]

The Intergovernmental Group of Experts for the Protection of War Victims met in Geneva in January 1995 and adopted a series of recommendations aimed at enhancing respect for international humanitarian law, in particular by means of preventive measures that would ensure better knowledge and more effective implementation of the law. Recommendation II of the Intergovernmental Group of Experts proposed that:

The ICRC be invited to prepare, with the assistance of experts in IHL [international humanitarian law] representing various geographical regions and different legal systems, and in consultation with experts from

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[1] International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, *International Review of the Red Cross*, No. 296, 1993, p. 381.2 Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva,

[2]23–27 January 1995, Recommendation II, *International Review of the Red Cross*, No. 310, 1996, p. 84.

governments and international organizations, a report on customary rules of IHL applicable in international and non-international armed conflicts, and to circulate the report to States and competent international bodies.[2]

In December 1995, the 26th International Conference of the Red Cross and Red Crescent endorsed this recommendation and officially mandated the ICRC to prepare a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts.[3] Nearly ten years later, in 2005, after extensive research and widespread consultation with experts, this report, now referred to as the study on customary international humanitarian law, has been published.[4]

II. Purpose

The purpose of the study on customary international humanitarian law was to overcome some of the problems related to the application of international humanitarian treaty law. Treaty law is well developed and covers many aspects of warfare, affording protection to a range of persons during wartime and limiting permissible means and methods of warfare. The Geneva Conventions and their Additional Protocols provide an extensive regime for the protection of persons not or no longer participating directly in hostilities. The regulation of means and methods of warfare in treaty law goes back to the 1868 St. Petersburg Declaration, the 1899 and 1907 Hague Regulations and the 1925 Geneva Gas Protocol and has most recently been addressed in the 1972 Biological Weapons Convention, the 1977 Additional Protocols, the 1980 Convention on Certain Conventional Weapons and its five Protocols, the 1993 Chemical Weapons Convention and the 1997 Ottawa Convention on the Prohibition of Anti-personnel Mines. The protection of cultural property in the event of armed conflict is regulated in detail in the 1954 Hague Convention and its two Protocols. The 1998 Statute of the International Criminal Court contains, *inter alia*, a list of war crimes subject to the jurisdiction of the Court.

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[3] 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Resolution 1, International humanitarian law: From law to action; Report on the follow-up to the International Conference for the Protection of War Victims, *International Review of the Red Cross*, No. 310, 1996, p. 58.

[4] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, 2 volumes, Volume I. Rules, Volume II. Practice (2 Parts), Cambridge University Press, 2005.

There are, however, two serious impediments to the application of these treaties in current armed conflicts which explain why a study on customary international humanitarian law is necessary and useful. First, treaties apply only to the States that have ratified them. This means that different treaties of international humanitarian law apply in different armed conflicts depending on which treaties the States involved have ratified. While the four Geneva Conventions of 1949 have been universally ratified, the same is not true for other treaties of humanitarian law, for example the Additional Protocols. Even though Additional Protocol I has been ratified by more than 160 States, its efficacy today is limited because several States that have been involved in international armed conflicts are not party to it. Similarly, while nearly 160 States have ratified

Additional Protocol II, several States in which non-international armed conflicts are taking place have not done so. In these non-international armed conflicts, common Article 3 of the four Geneva Conventions often remains the only applicable humanitarian treaty provision. The first purpose of the study was therefore to determine which rules of international humanitarian law are part of customary international law and therefore applicable to all parties to a conflict, regardless of whether or not they have ratified the treaties containing the same or similar rules.

Second, humanitarian treaty law does not regulate in sufficient detail a large proportion of today's armed conflicts, that is non-international armed conflicts, because these conflicts are subject to far fewer treaty rules than are international conflicts. Only a limited number of treaties apply to non-international armed conflicts, namely the Convention on Certain Conventional Weapons as amended, the Statute of the International Criminal Court, the Ottawa Convention on the Prohibition of Anti-personnel Mines, the Chemical Weapons Convention, the Hague Convention for the Protection of Cultural Property and its Second Protocol and, as already mentioned, Additional Protocol II and Article 3 common to the four Geneva Conventions. While common Article 3 is of fundamental importance, it only provides a rudimentary framework of minimum standards. Additional Protocol II usefully supplements common Article 3, but it is still less detailed than the rules governing international armed conflicts in the Geneva Conventions and Additional Protocol I.

Additional Protocol II contains a mere 15 substantive articles, whereas Additional Protocol I has more than 80. While numbers alone do not tell the full story, they are an indication of a significant disparity in regulation

by treaty law between international and non-international armed conflicts, particularly when it comes to detailed rules and definitions. The second purpose of the study was therefore to determine whether customary international law regulates non-international armed conflict in more detail than does treaty law and if so, to what extent.

III. Methodology

The Statute of the International Court of Justice describes customary international law as "a general practice accepted as law."[5] It is widely agreed that the existence of a rule of customary international law requires the presence of two elements, namely State practice (*usus*) and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (*opinio juris sive necessitatis*). As the International Court of Justice stated in the *Continental Shelf case*: "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States."[6] The exact meaning and content of these two elements have been the subject of much academic writing. The approach taken in the study to determine whether a rule of general customary international law exists was a classic one, set out by the International Court of Justice, in particular in the *North Sea Continental Shelf cases*.[7]

State practiceState practice must be looked at from two angles: firstly, what practice contributes to the creation of customary international law (selection of State practice); and secondly whether this practice establishes a rule of customary international law (assessment of State practice).

IV. Selection of State Practice

Both physical and verbal acts of States constitute practice that contributes to the creation of customary international law. Physical acts

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[5] Statute of the International Court of Justice, Article 38(1)(b).6 International Court of Justice, *Continental Shelf case (Libyan Arab Jamahiriya* v. *Malta*), Judgment,

[3] June 1985, *ICJ Reports 1985*, at pp. 29–30, 27.

[7] International Court of Justice, *North Sea Continental Shelf Cases*, Judgment, 20 February 1969, *ICJ Reports 1969*, at p. 3.

include, for example, battlefield behaviour, the use of certain weapons and the treatment afforded to different categories of persons. Verbal acts include military manuals, national legislation, national case-law, instructions to armed and security forces, military communiqués during war, diplomatic protests, opinions of official legal advisers, comments by governments on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international fora, and government positions on resolutions adopted by international organizations. This list shows that the practice of the executive, legislative and judicial organs of a State can contribute to the formation of customary international law.

The negotiation and adoption of resolutions by international organizations or conferences, together with the explanations of vote, are acts of the States involved. It is recognized that, with a few exceptions, resolutions are normally not binding in themselves and therefore the value accorded to any particular resolution in the assessment of the formation of a rule of customary international law depends on its content, its degree of acceptance and the consistency of related State practice.[8] The greater the support for the resolution, the more importance it is to be accorded.

Although decisions of international courts are subsidiary sources of international law,[9] they do not constitute State practice. This is because, unlike national courts, international courts are not State organs. Decisions of international courts are nevertheless significant because a finding by an international court that a rule of customary international law exists constitutes persuasive evidence to that effect. In addition, because of the precedential value of their decisions, international courts can also contribute to the emergence of a rule of customary international law by influencing the subsequent practice of States and international organizations.

The practice of armed opposition groups, such as codes of conduct, commitments made to observe certain rules of international humanitarian law and other statements, does not constitute State practice as such. While such practice may contain evidence of the acceptance of certain rules in non-international armed conflicts, its legal significance is unclear and, as a result, was not relied upon to prove the existence of customary international law. Examples of such practice were listed under "other practice" in Volume II of the study.

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[8] The importance of these conditions was stressed by the International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports 1996*, at pp. 254–255, 70–73.

[9] Statute of the International Court of Justice, Article 38(1)(d).

V. Assessment of State Practice

State practice has to be weighed to assess whether it is sufficiently "dense" to create a rule of customary international law.[10] To establish a rule of customary international law, State practice has to be virtually uniform, extensive and representative.[11] Let us look more closely at what this means.

First, for State practice to create a rule of customary international law, it must be *virtually uniform*. Different States must not have engaged in substantially different conduct. The jurisprudence of the International Court of Justice shows that contrary practice which, at first sight, appears to undermine the uniformity of the practice concerned, does not prevent the formation of a rule of customary international law as long as this contrary practice is condemned by other States or denied by the government itself. Through such condemnation or denial, the rule in question is actually confirmed.[12]

This is particularly relevant for a number of rules of international humanitarian law for which there is overwhelming evidence of State practice in support of a rule, alongside repeated evidence of violations of that rule. Where violations have been accompanied by excuses or justifications by the party concerned and/or condemnation by other States, they are not of a nature to challenge the existence of the rule in question. States wishing to change an existing rule of customary international law have to do so through their official practice and claim to be acting as of right.

Second, for a rule of general customary international law to come into existence, the State practice concerned must be both *extensive and representative*. It does not, however, need to be universal; a "general" practice suffices.[13] No precise number or percentage of States is required. One reason it is impossible to put an exact figure on the extent of participation required is that the criterion is in a sense *qualitative* rather

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[10]The expression "dense" in this context comes from Sir Humphrey Waldock, "General Course on Public International Law", *Collected Courses of the Hague Academy of International Law*, Vol. 106, 1962, at p. 44.

[11] International Court of Justice, *North Sea Continental Shelf cases*, note 7, at pp. 43, – 74.

[12] See International Court of Justice, *Case concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States*), Merits, Judgment, 27 June 1986, ICJ Reports 1986, at pp. 98, – 186.

[13] International Law Association, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the

than quantitative. That is to say, it is not simply a question of how many States participate in the practice, but also which States.[14] In the words of the International Court of Justice in the *North Sea Continental Shelf cases*, the practice must "include that of States whose interests are specially affected."[15]

This consideration has two implications: (1) if all "specially affected States" are represented, it is not essential for a majority of States to have actively participated, but they must have at least acquiesced in the practice of "specially affected States"; and (2) if "specially affected States" do not accept the practice, it cannot mature into a rule of customary international law, even though unanimity is not required as explained.[16] Who is "specially affected" under international humanitarian law may vary according to circumstances. Concerning the legality of the use of blinding laser weapons, for example, "specially affected States" include those identified as having been in the process of developing such weapons, even though other States could potentially suffer from their use. Similarly, States whose population is in need of humanitarian aid are "specially affected" just as are States which frequently provide such aid. With respect to any rule of international humanitarian law, countries that participated in an armed conflict are "specially affected" when their practice examined for a certain rule was relevant to that armed conflict. Although there may be specially affected States in certain areas of international humanitarian law, it is also true that all States have a legal interest in requiring respect for international humanitarian law by other States, even if they are not a party to the conflict.[17] In addition, all States can suffer from means or methods of warfare deployed by other States. As a result, the practice of all States must be considered, whether or not they are "specially affected" in the strict sense of that term.

The study took no view on whether it is legally possible to be a

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Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London, 2000, Principle 14, at p. 734 (hereinafter "ILA Report").

[14] *Ibid*., commentary (d) and (e) to Principle 14, at pp. 736–737.

[15] *International Court of Justice*, *North Sea Continental Shelf cases*, note 7, at pp. 43,–74.

[16] ILA Report, note 13, commentary (e) to Principle 14, p. 737.

[17] See *Customary International Humanitarian Law*, note 4, Vol. I, commentary to Rule 144.

"persistent objector" in relation to customary rules of international humanitarian law. While many commentators believe that it is not possible to be a persistent objector in the case of rules of *jus cogens*, there are others who doubt the continued validity of the persistent objector concept altogether.[18] If one accepts that it is legally possible to be a persistent objector, the State concerned must have objected to the emergence of a new norm during its formation and continue to object persistently afterwards; it is not possible to be a "subsequent objector."[19]

While some time will normally elapse before a rule of customary international law emerges, there is no specified timeframe. Rather, it is the accumulation of a practice of sufficient density, in terms of uniformity, extent and representativeness, which is the determining factor.[20]

VI. Opinio Juris

The requirement of *opinio juris* in establishing the existence of a rule of customary international law refers to the legal conviction that a particular practice is carried out "as of right". The form in which the practice and the legal conviction are expressed may well differ depending on whether the rule concerned contains a prohibition, an obligation or merely a right to behave in a certain manner.

During work on the study, it proved very difficult and largely theoretical to strictly separate elements of practice and legal conviction. Often, the same act reflects both practice and legal conviction. As the International Law Association pointed out, the International Court of Justice "has not in fact said in so many words that just because there are (allegedly) distinct elements in customary law the same conduct cannot manifest both. It is in fact often difficult or even impossible to disentangle the two elements."[21] This is particularly so because verbal acts, such as military manuals, count

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[18] For an in-depth discussion of this issue, see Maurice H. Mendelson, "The Formation of Customary International Law", *Collected Courses of the Hague Academy of International Law*, Vol. 272, 1998, at pp. 227–244.

[19] ILA Report, *op. cit.* (note 13), commentary (b) to Principle 15, p. 738. 20 *Ibid*., commentary (b) to Principle 12, at p.731.

[21] *Ibid*., p. 718, 10(c). For an in-depth analysis of this question, see Peter Haggenmacher, "La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale", *Revue générale de droit international public*, vol. 90, 1986, at p. 5.

as State practice and often reflect the legal conviction of the State involved at the same time.

When there is sufficiently dense practice, an *opinio juris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio juris*. In situations where practice is ambiguous, however, *opinio juris* plays an important role in determining whether or not that practice counts towards the formation of custom. This is often the case with omissions, when States do not act or react but it is not clear why. It is in such cases that both the International Court of Justice and its predecessor, the Permanent Court of International Justice, have sought to establish the separate existence of an *opinio juris* in order to determine whether instances of ambiguous practice counted towards the establishment of customary international law.[22]

In the area of international humanitarian law, where many rules require abstention from certain conduct, omissions pose a particular problem in the assessment of *opinio juris* because it has to be proved that the abstention is not a coincidence but based on a legitimate expectation. When such a requirement of abstention is indicated in international instruments and official statements, the existence of a legal requirement to abstain from the conduct in question can usually be proved. In addition, such abstentions may occur after the behaviour in question created a certain controversy, which also helps to show that the abstention was not coincidental, although it is not always easy to prove that the abstention occurred out of a sense of legal obligation.

VII. Impact of Treaty Law

Treaties are also relevant in determining the existence of customary international law because they help shed light on how States view certain rules of international law. Hence, the ratification, interpretation and

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[22] See, e.g., Permanent Court of International Justice, *Lotus case* (*France* v. *Turkey*), Judgment, 7 September 1927, *PCIJ Ser*. A, No. 10, at p. 28 (the Court found that States had not abstained from prosecuting wrongful acts aboard ships because they felt prohibited from doing so); International Court of Justice, *North Sea Continental Shelf cases*, note 7, pp. 43–44, 76–77 (the Court found that States that had delimited their continental shelf on the basis of the equidistance principle had not done so because they felt obliged to); ILA Report, note 13, Principle 17(iv) and commentary.

implementation of a treaty, including reservations and statements of interpretation made upon ratification, were included in the study. In the *North Sea Continental Shelf* cases, the International Court of Justice clearly considered the degree of ratification of a treaty to be relevant to the assessment of customary international law. In that case, the Court stated that "the number of ratifications and accessions so far secured [39] is, though respectable, hardly sufficient", especially in a context where practice outside the treaty was contradictory.[23] Conversely, in the *Nicaragua case*, the Court placed a great deal of weight, when assessing the customary status of the non-intervention rule, on the fact that the Charter of the United Nations was almost universally ratified.[24] It can even be the case that a treaty provision reflects customary law, even though the treaty is not yet in force, provided that there is sufficiently similar practice, including by specially affected States, so that there remains little likelihood of significant opposition to the rule in question.[25]

In practice, the drafting of treaty norms helps to focus world legal opinion and has an undeniable influence on the subsequent behaviour and legal conviction of States. The International Court of Justice recognized this in its judgment in the *Continental Shelf* case in which it stated that "multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them."[26] The Court thus confirmed that treaties may codify pre-existing customary international law but may also lay the foundation for the development of new customs based on the norms contained in those treaties. The Court has even gone so far as to state that "it might be that… a very widespread and

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[23] International Court of Justice, *North Sea Continental Shelf cases*, note 7, at p. 42, –73.

[24] International Court of Justice, *Case concerning Military and Paramilitary Activities in and against Nicaragua*, note 12, at pp. 99–100, 188. Another important factor in the decision of the Court was that relevant UN General Assembly resolutions had been widely approved, in particular Resolution 2625 (XXV) on friendly relations between States, which was adopted without a vote.

[25] International Court of Justice, *Continental Shelf case*, note 6, at p. 33, –34. (The Court considered that the concept of an exclusive economic zone had become part of customary international law, even though the United Nations Convention on the Law of the Sea had not yet entered into force, because the number of claims to an exclusive economic zone had risen to 56, which included several specially affected States.)

[26] International Court of Justice, *Continental Shelf Case*, note 6, at pp. 29–30, –27.

representative participation in [a] convention might suffice of itself, provided it included that of States whose interests were specially affected."[27]

The study took the cautious approach that widespread ratification is only an indication and has to be assessed in relation to other elements of practice, in particular the practice of States not party to the treaty in question. Consistent practice of States not party was considered as important positive evidence. Contrary practice of States not party, however, was considered as important negative evidence. The practice of States party to a treaty vis-à-vis States not party is also particularly relevant.

Thus, the study did not limit itself to the practice of States not party to the relevant treaties of international humanitarian law. To limit the study to a consideration of the practice of only the 30-odd States that have not ratified the Additional Protocols, for example, would not comply with the requirement that customary international law be based on widespread and representative practice. Therefore, the assessment of the existence of customary law took into account that, at the time the study was published, Additional Protocol I had been ratified by 162 States and Additional Protocol II by 157 States.

It should be stressed that the study did not seek to determine the customary nature of each treaty rule of international humanitarian law and, as a result, did not necessarily follow the structure of existing treaties. Rather, it sought to analyse issues in order to establish what rules of customary international law can be found inductively on the basis of State practice in relation to these issues. As the approach chosen does not analyse each treaty provision with a view to establishing whether or not it is customary, it cannot be concluded that any particular treaty rule is not customary merely because it does not appear as such in the study.

VII. Organization of the Study

To determine the best way of fulfilling the mandate entrusted to the ICRC, the authors consulted a group of academic experts in international humanitarian law, who formed the Steering Committee of the study.[28] The

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[27] International Court of Justice, *North Sea Continental Shelf cases*, note 7, at pp. 42, – 73; see also ILA Report, note 13, Principles 20–21, 24, 26 and 27, at pp. 754–765.

Steering Committee adopted a plan of action in June 1996, and research started the following October. Research was conducted using both national and international sources reflecting State practice and focused on the six parts of the study identified in the plan of action:

- Principle of distinction
- Specifically protected persons and objects
- Specific methods of warfare
- Weapons
- Treatment of civilians and persons *hors de combat*
- Implementation

IX. Research in National Sources

Since national sources are more easily accessible from within a country, it was decided to seek the cooperation of national researchers. To this end, a researcher or group of researchers was identified in nearly 50 States (9 in Africa, 11 in the Americas, 15 in Asia, 1 in Australasia and 11 in Europe) and asked to produce a report on their respective State's practice.[29] Countries were selected on the basis of geographic representation, as well as recent experience of different kinds of armed conflict in which a variety of methods of warfare had been used.

The military manuals and national legislation of countries not covered by the reports on State practice were also researched and collected. This work was facilitated by the network of ICRC delegations around the world and the extensive collection of national legislation gathered by the ICRC Advisory Service on International Humanitarian Law.

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[28] The Steering Committee consisted of Professors Georges Abi-Saab, Salah El-Din Amer, Ove Bring, Eric David, John Dugard, Florentino Feliciano, Horst Fischer, Françoise Hampson, Theodor Meron, Djamchid Momtaz, Milan Šahoviæ and Raúl Emilio Vinuesa.

[29] Africa: Algeria, Angola, Botswana, Egypt, Ethiopia, Nigeria, Rwanda, South Africa and Zimbabwe; Americas: Argentina, Brazil, Canada, Chile, Colombia, Cuba, El Salvador, Nicaragua, Peru, United States of America and Uruguay; Asia: China, India, Indonesia, Iran, Iraq, Israel, Japan, Jordan, Republic of Korea, Kuwait, Lebanon, Malaysia, Pakistan, Philippines and Syria; Australasia: Australia; Europe: Belgium, Bosnia and Herzegovina, Croatia, France, Germany, Italy, Netherlands, Russian Federation, Spain, United Kingdom and Yugoslavia.

X. Research in International Sources

State practice gleaned from international sources was collected by six teams, each of which concentrated on one part of the study.[30] These teams researched practice in the framework of the United Nations and other international organizations, including the African Union (formerly the Organization of African Unity), the Council of Europe, the Gulf Cooperation Council, the European Union, the League of Arab States, the Organization of American States, the Organization of the Islamic Conference and the Organization for Security and Co-operation in Europe. International case-law was also collected to the extent that it provides evidence of the existence of rules of customary international law.

XI. Research in International Committee of the Red Cross Archives

To complement the research carried out in national and international sources, the ICRC looked into its own archives relating to nearly 40 recent armed conflicts (21 in Africa, 2 in the Americas, 8 in Asia and 8 in Europe).[31] In general, these conflicts were selected so that countries and conflicts not dealt with by a report on State practice would also be covered.

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[30] Principle of distinction : Professor Georges Abi-Saab (rapporteur) and Jean-François Quéguiner (researcher); Specifically protected persons and objects: Professor Horst Fischer (rapporteur) and Gregor Schotten and Heike Spieker (researchers); Specific methods of warfare: Professor Theodor Meron (rapporteur) and Richard Desgagné (researcher); Weapons: Professor Ove Bring (rapporteur) and Gustaf Lind (researcher); Treatment of civilians and persons *hors de combat*: Françoise Hampson (rapporteur) and Camille Giffard (researcher); Implementation: Eric David (rapporteur) and Richard Desgagné (researcher).

[31] Africa: Angola, Burundi, Chad, Chad–Libya, Democratic Republic of the Congo, Djibouti, Eritrea–Yemen, Ethiopia (1973–1994), Liberia, Mozambique, Namibia, Nigeria–Cameroon, Rwanda, Senegal, Senegal–Mauritania, Sierra Leone, Somalia, Somalia–Ethiopia, Sudan, Uganda and Western Sahara; Americas: Guatemala and Mexico; Asia: Afghanistan, Cambodia, India (Jammu and Kashmir), Papua New Guinea, Sri Lanka, Tajikistan, Yemen and Yemen–Eritrea (also under Africa); Europe: Armenia–Azerbaijan (Nagorno-Karabakh), Cyprus, Former Yugoslavia (conflict in Yugoslavia (1991–1992), conflict in Bosnia and Herzegovina (1992–1996), conflict in Croatia (Krajinas) (1992–1995)), Georgia (Abkhazia), Russian Federation (Chechnya) and Turkey.

The result of this three-pronged approach — research in national, international and ICRC sources — is that practice from all parts of the world is cited. In the nature of things, however, this research cannot purport to be complete. The study focused in particular on practice from the last 30 years to ensure that the result would be a restatement of contemporary customary international law, but, where still relevant, older practice was also cited.

XII. Expert Consultations

In a first round of consultations, the ICRC invited the international research teams to produce an executive summary containing a preliminary assessment of customary international humanitarian law on the basis of the practice collected. These executive summaries were discussed within the Steering Committee at three meetings in Geneva in 1998. The executive summaries were duly revised and, during a second round of consultations, submitted to a group of academic and governmental experts from all regions of the world. These experts were invited in their personal capacity by the ICRC to attend two meetings with the Steering Committee in Geneva in 1999, during which they helped to evaluate the practice collected and indicated particular practice that had been missed.[32]

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[32] The following academic and governmental experts participated in their personal capacity in this consultation: Abdallah Ad-Douri (Iraq), Paul Berman (United Kingdom), Sadi Çaycý (Turkey), Michael Cowling (South Africa), Edward Cummings (United States of America), Antonio de Icaza (Mexico), Yoram Dinstein (Israel), Jean-Michel Favre (France), William Fenrick (Canada), Dieter Fleck (Germany), Juan Carlos Gómez Ramírez (Colombia), Jamshed A. Hamid (Pakistan), Arturo Hernández-Basave (Mexico), Ibrahim Idriss (Ethiopia), Hassan Kassem Jouni (Lebanon), Kenneth Keith (New Zealand), Githu Muigai (Kenya), Rein Müllerson (Estonia), Bara Niang (Senegal), Mohamed Olwan (Jordan), Raul C. Pangalangan (Philippines), Stelios Perrakis (Greece), Paulo Sergio Pinheiro (Brazil), Arpád Prandler (Hungary), Pemmaraju Sreenivasa Rao (India), Camilo Reyes Rodríguez (Colombia), Itse E. Sagay (Nigeria), Harold Sandoval (Colombia), Somboon Sangianbut (Thailand), Marat A. Sarsembayev (Kazakhstan), Muhammad Aziz Shukri (Syria), Parlaungan Sihombing (Indonesia), Geoffrey James Skillen (Australia), Guoshun Sun (China), Bakhtyar Tuzmukhamedov (Russia) and Karol Wolfke (Poland).

XIII. Writing of the Report

The assessment by the Steering Committee, as reviewed by the group of academic and governmental experts, served as a basis for the writing of the final report. The authors of the study re-examined the practice, reassessed the existence of custom, reviewed the formulation and the order of the rules and drafted the commentaries. These draft texts were submitted to the Steering Committee, the group of academic and governmental experts and the ICRC Legal Division for comment. The text was further updated and finalized, taking into account the comments received.

XIV. Summary of Findings

The great majority of the provisions of the Geneva Conventions, including common Article 3, are considered to be part of customary international law.[33] Furthermore, given that there are now 192 parties to the Geneva Conventions, they are binding on nearly all States as a matter of treaty law. Therefore, the customary nature of the provisions of the Conventions was not the subject as such of the study. Rather, the study focused on issues regulated by treaties that have not been universally ratified, in particular the Additional Protocols, the Hague Convention for the Protection of Cultural Property and a number of specific conventions regulating the use of weapons.

The description below of rules of customary international law does not seek to explain why these rules were found to be customary, nor does it present the practice on the basis of which this conclusion was reached. The explanation of why a rule is considered customary can be found in Volume I of the study, while the corresponding practice can be found in Volume II.

XV. International armed Conflicts

Additional Protocol I codified pre-existing rules of customary international law but also laid the foundation for the formation of new customary rules. The practice collected in the framework of the study bears

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[33] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, note 8, at pp. 257–258, 79 and 82 (with respect to the Geneva Conventions) and *Case concerning Military and Paramilitary Activities in and against Nicaragua*, note12, at pp. 114, – 218 (with respect to common Article 3).

witness to the profound impact of Additional Protocol I on the practice of States, not only in international but also in non-international armed conflicts (see below). In particular, the study found that the basic principles of Additional Protocol I have been very widely accepted, more widely than the ratification record of Additional Protocol I would suggest.

Even though the study did not seek to determine the customary nature of specific treaty provisions, in the end it became clear that there are many customary rules which are identical or similar to those found in treaty law. Examples of rules found to be customary and which have corresponding provisions in Additional Protocol I include: the principle of distinction between civilians and combatants and between civilian objects and military objectives;[34] the prohibition of indiscriminate attacks;[35] the principle of proportionality in attack;[36] the obligation to take feasible precautions in attack and against the effects of attack;[37] the obligation to respect and protect medical and religious personnel, medical units and transports,[38] humanitarian relief personnel and objects,[39] and civilian journalists;[40] the obligation to protect medical duties;[41] the prohibition of attacks on non-defended localities and demilitarized zones;[42] the obligation to provide quarter and to safeguard an enemy *hors de combat*;[43] the prohibition of starvation;[44] the prohibition of attacks on objects indispens-able to the survival of the civilian population;[45] the prohibition of improper use of emblems and perfidy;[46] the obligation to respect the fundamental guarantees of civilians and persons *hors de combat*;[47] the obligation to account for

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[34] See *Customary International Humanitarian Law*, note 4, Vol. I, Rules 1 and 7.

[35] *Ibid*., Rules 11–13.

[36] *Ibid*., Rule 14.

[37] *Ibid*., Rules 15–24.

[38] *Ibid*., Rules 25 and 27–30.

[39] *Ibid*., Rules 31–32.

[40] *Ibid*., Rule 34.

[41] *Ibid*., Rule 26.

[42] *Ibid*., Rules 36–37.

[43] *Ibid*., Rules 46–48.

[44] *Ibid*., Rule 53.

[45] *Ibid*., Rule 54.

[46] *Ibid*., Rules 57–65.

missing persons;[48] and the specific protections afforded to women and children.[49]

XVI. Non-international Armed Conflicts

Over the last few decades, there has been a considerable amount of practice insisting on the protection of international humanitarian law in this type of conflicts. This body of practice has had a significant influence on the formation of custom-ary law applicable in non-international armed conflicts. Like Additional Protocol I, Additional Protocol II has had a far-reaching effect on this practice and, as a result, many of its provisions are now considered to be part of customary international law. Examples of rules found to be customary and which have corresponding provisions in Additional Protocol II include: the prohibition of attacks on civilians;[50] the obligation to respect and protect medical and religious personnel, medical units and transports;[51] the obligation to protect medical duties;[52] the prohibition of starvation;[53] the prohibition of attacks on objects indispensable to the survival of the civilian population;[54] the obligation to respect the fundamental guarantees of civilians and persons *hors de combat*;[55] the obligation to search for and respect and protect the wounded, sick and shipwrecked;[56] the obligation to search for and protect the dead;[57] the obligation to protect persons deprived of their liberty;[58] the prohibition of forced movement of civilians;[59] and the specific protections afforded to women and children.[60]

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[47] *Ibid*., Rules 87–105.
[48] *Ibid*., Rule 117.
[49] *Ibid*., Rules 134–137.
[50] *Ibid*., Rule 1.
[51] *Ibid*., Rules 25 and 27–30.
[52] *Ibid*., Rule 26.
[53] *Ibid*., Rule 53.
[54] *Ibid*., Rule 54.
[55] *Ibid*., Rules 87–105.
[56] *Ibid*., Rules 109–111.57 *Ibid*.,Rules 112–113.
[58] *Ibid*., Rules 118–119, 121 and 125.
[59] *Ibid*., Rule 129.
[60] *Ibid*., Rules 134–137.

However, the most significant contribution of customary international humanitarian law to the regulation of internal armed conflicts is that it goes beyond the provisions of Additional Protocol II. Indeed, practice has created a substantial number of customary rules that are more detailed than the often rudimentary provisions in Additional Protocol II and has thus filled important gaps in the regulation of internal conflicts.

For example, Additional Protocol II contains only a rudimentary regulation of the conduct of hostilities. Article 13 provides that "the civilian population as such, as well as individual civilians, shall not be the object of attack … unless and for such time as they take a direct part in hostilities". Unlike Additional Protocol I, Additional Protocol II does not contain specific rules and definitions with respect to the principles of distinction and proportionality.

The gaps in the regulation of the conduct of hostilities in Additional Protocol II have, however, largely been filled through State practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to non-international armed conflicts. This covers the basic principles on the conduct of hostilities and includes rules on specifically protected persons and objects and specific methods of warfare.[61]

Similarly, Additional Protocol II contains only a very general provision on humanitarian relief for civilian populations in need. Article 18(2) provides that "if the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival … relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken". Unlike Additional Protocol I, Additional Protocol II does not contain specific provisions requiring respect for and protection of humanitarian relief personnel and objects and obliging parties to the conflict to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need and to ensure the freedom of movement of authorized humanitarian relief personnel, although it can be argued that such

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[61] See, e.g., *ibid*., Rules 7–10 (distinction between civilian objects and military objectives), Rules 11–13 (indiscriminate attacks), Rule 14 (proportionality in attack), Rules 15–21 (precautions in attack); Rules 22–24 (precautions against the effects of attack); Rules 31–32 (humanitarian relief personnel and objects); Rule 34 (civilian journalists); Rules 35–37 (protected zones); Rules 46–48 (denial of quarter); Rules 55–56 (access to humanitarian relief) and Rules 57–65 (deception).

requirements are implicit in Article 18 (2) of the Protocol. These requirements have crystallized, however, into customary international law applicable in both international and non-international armed conflicts as a result of widespread, representative and virtually uniform practice to that effect.

In this respect it should be noted that while both Additional Proto-cols I and II require the consent of the parties concerned for relief actions to take place,[62] most of the practice collected does not mention this requirement. It is nonetheless self-evident that a humanitarian organization cannot operate without the consent of the party concerned. However, such consent must not be refused on arbitrary grounds. If it is established that a civilian population is threatened with starvation and a humanitarian organization which provides relief on an impartial and non-discriminatory basis is able to remedy the situation, a party is obliged to give consent.[63] While consent may not be withheld for arbitrary reasons, practice recognizes that the party concerned may exercise control over the relief action and that humanitarian relief personnel must respect domestic law on access to territory and security requirements in force.

XVII. Issues Requiring Further Clarification

The study also revealed a number of areas where practice is not clear. For example, while the terms "combatants" and "civilians" are clearly defined in international armed conflicts,[64] in non-international armed conflicts practice is ambiguous as to whether, for purposes of the conduct of hostilities, members of armed opposition groups are considered members of armed forces or civilians. In particular, it is not clear whether members of armed opposition groups are civilians who lose their protection from attack when directly participating in hostilities or whether members of such groups are liable to attack as such. This lack of clarity is also reflected in treaty law. Additional Protocol II, for example, does not contain a definition

[62] See Additional Protocol I, Article 70(1) and Additional Protocol II, Article 18(2).
[63] See Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 4885; see also § 2805.
[64] See *Customary International Humanitarian Law*, note 4, Vol. I, Rule 3 (combatants), Rule 4 (armed forces) and Rule 5 (civilians and civilian population).

of civilians or of the civilian population even though these terms are used in several provisions.[65] Subsequent treaties, applicable in non-international armed conflicts, similarly use the terms civilians and civilian population without defining them.[66]

A related area of uncertainty affecting the regulation of both international and non-international armed conflicts is the absence of a precise definition of the term "direct participation in hostilities". Loss of protection against attack is clear and uncontested when a civilian uses weapons or other means to commit acts of violence against human or material enemy forces. But there is also considerable practice which gives little or no guidance on the interpretation of the term "direct participation", stating, for example, that an assessment has to be made on a case-by-case basis or simply repeating the general rule that direct participation in hostilities causes civilians to lose protection against attack. Related to this issue is the question of how to qualify a person in case of doubt. Because of these uncertainties, the ICRC is seeking to clarify the notion of direct participation by means of a series of expert meetings that began in 2003.[67]

Another issue still open to question is the exact scope and application of the principle of proportionality in attack. While the study revealed widespread support for this principle, it does not provide more clarification than that contained in treaty law as to how to balance military advantage against incidental civilian losses.

XVIII. Selected Issues on the Conduct of Hostilities

Additional Protocols I and II introduced a new rule prohibiting attacks on works and installations containing dangerous forces, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian

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[65] Additional Protocol II, Articles 13–15 and 17–18.

[66] See, e.g., Amended Protocol II to the Convention on Certain Conventional Weapons, Article 3(7)–(11); Protocol III to the Convention on Certain Conventional Weapons, Article 2; Ottawa Convention on the Prohibition of Anti-personnel Mines, preamble; Statute of the International Criminal Court, Article 8(2)(e)(i), (iii) and (viii).

[67] See, e.g., Direct Participation in Hostilities under International Humanitarian Law, Report prepared by the International Committee of the Red Cross, Geneva, September 2003, available on *www.icrc.org.*

population.[68] While it is not clear whether these specific rules have become part of customary law, practice shows that States are conscious of the high risk of severe incidental losses which can result from attacks against such works and installations when they constitute military objectives. Consequently, they recognize that in any armed conflict particular care must be taken in case of attack in order to avoid the release of dangerous forces and consequent severe losses among the civilian population, and this requirement was found to be part of customary international law applicable in any armed conflict.Another new rule introduced in Additional Protocol I is the prohibition of the use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. Since the adoption of Additional Protocol I, this prohibition has received such extensive support in State practice that it has crystallized into customary law, even though some States have persistently maintained that the rule does not apply to nuclear weapons and that they may, therefore, not be bound by it in respect of nuclear weapons.[69] Beyond this specific rule, the study found that the natural environment is considered to be a civilian object and as such it is protected by the same principles and rules that protect other civilian objects, in particular the principles of distinction and proportionality and the requirement to take precautions in attack. This means that no part of the natural environment may be made the object of attack, unless it is a military objective, and that an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited. In its advisory opinion in the *Nuclear Weapons case*, for example, the International Court of Justice stated that "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives."[70] In addition, parties to a conflict are required to take all feasible precautions in the conduct of hostilities to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on

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[68] Additional Protocol I, Article 56(1) (followed, however, by exceptions in paragraph 2) and Additional Protocol II, Article 15 (with no exceptions).

[69] See *Customary International Humanitarian Law,* note 4, Vol. I, Rule 45.

[70] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, note 8, at p 30.

the environment of certain military operations does not absolve a party to the conflict from taking such precautions.[71]

There are also issues that are not as such addressed in the Additional Protocols. For example, the Additional Protocols do not contain any specific provision concerning the protection of personnel and objects involved in a peacekeeping mission. In practice, however, such personnel and objects were given protection against attack equivalent to that of civilians and civilian objects respectively. As a result, a rule prohibiting attacks against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, developed in State practice and was included in the Statute of the International Criminal Court. It is now part of customary international law applicable in any type of armed conflict.[72]

A number of issues related to the conduct of hostilities are regulated by the Hague Regulations. These regulations have long been considered customary in international armed conflict.[73] Some of their rules, however, are now also accepted as customary in non-international armed conflict. For example, the long-standing rules of customary international law that prohibit (1) destruction or seizure of the property of an adversary, unless required by imperative military necessity, and (2) pillage apply equally in non-international armed conflicts. Pillage is the forcible taking of private property from the enemy's subjects for private or personal use.[74] Both prohibitions do not affect the customary practice of seizing as war booty military equipment belonging to an adverse party.Under customary international law, commanders may enter into non-hostile contact through any means of communication, but such contact must be based on good faith. Practice indicates that communication may be carried out via intermediaries known as *parlementaires* but also by various other means, such as telephone and radio. A *parlementaire* is a person belonging to a party to the conflict who has been authorized to enter into communication

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[71] See *Customary International Humanitarian Law*, note 4, Vol. I, Rule 44.

[72] *Ibid*., Rule 33.

[73] See, e.g., International Military Tribunal at Nuremberg, *Case of the Major War Criminals*, Judgment, 1 October 1946, *Official Documents*, vol. I, at pp. 253–254.

[74] See Elements of Crimes for the International Criminal Court, Pillage as a war crime (Article 8(2)(b)(xvi) and (e)(v) of the Statute of the International Criminal Court).

with another party to the conflict and who is, as a result, inviolable. The traditional method of making oneself known as a *parlementaire* by advancing bearing a white flag has been found to be still valid. In addition, it is recognized practice that the parties may appeal to a third party to facilitate communication, for example a protecting power or an impartial and neutral humanitarian organization acting as a substitute, in particular the ICRC, but also an international organization or a peacekeeping force. Collected practice shows that various institutions and organizations have acted as intermediaries in negotiations in both international and non-international armed conflicts, and that this is generally accepted. The rules governing *parlementaires* go back to the Hague Regulations and have long been considered customary in international armed conflict. On the basis of practice in the last 50 years or so, they have become customary in non-international armed conflicts as well.[75]

Practice reveals two strains of law that protect cultural property. A first strain dates back to the Hague Regulations and requires that special care be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments, unless they are military objectives. It also prohibits seizure of or destruction or wilful damage to such buildings and monuments. While these rules have long been considered customary in international armed conflicts, they are now also accepted as customary in non-international armed conflicts.

A second strain is based on the specific provisions of the 1954 Hague Convention for the Protection of Cultural Property, which protects "property of great importance to the cultural heritage of every people" and introduces a specific distinctive sign to identify such property. Customary law today requires that such objects not be attacked nor used for purposes which are likely to expose them to destruction or damage, unless imperatively required by military necessity. It also prohibits any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, such property. These prohibitions correspond to provisions set forth in the Hague Convention and are evidence of the influence the Convention has had on State practice concerning the protection of important cultural property.

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[75] See *Customary International Humanitarian Law*, note 4, vol. I, Rules 67–69.

XIX. Weapons

The general principles prohibiting the use of weapons that cause superfluous injury or unnecessary suffering and weapons that are by nature indiscriminate were found to be customary in any armed conflict. In addition, and largely on the basis of these principles, State practice has prohibited the use (or certain types of use) of a number of specific weapons under customary international law: poison or poisoned weapons; biological weapons; chemical weapons; riot-control agents as a method of warfare; herbicides as a method of warfare;[76] bullets which expand or flatten easily in the human body; anti-personnel use of bullets which explode within the human body; weapons the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body; booby-traps which are in any way attached to or associated with objectsor persons entitled to special protection under international humanitarian law or objects that are likely to attract civilians; and laser weapons that are specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision.

Some weapons which are not prohibited as such by customary law are nevertheless subject to restrictions. This is the case, for example, for landmines and incendiary weapons.

Particular care must be taken to minimize the indiscriminate effects of landmines. This includes, for example, the principle that a party to the conflict using landmines must record their placement, as far as possible. Also, at the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal.

With over 140 ratifications of the Ottawa Convention, and others on the way, the majority of States are treaty-bound no longer to use, produce, stockpile and transfer anti-personnel landmines. While this prohibition is not currently part of customary international law because of significant contrary practice of States not party to the Convention, almost all States,

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[76] This rule incorporates a reference to a number of other rules of customary international law, namely the prohibition of biological and chemical weapons; the prohibition of attacks against vegetation that is not a military objective; the prohibition of attacks that would cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which may be expected to be excessive in relation to the concrete and direct military advantage anticipated; and the prohibition on causing widespread, long-term and severe damage to the natural environment. See *ibid*., Rule 76.

including those that are not party to the Ottawa Convention and are not in favour of their immediate ban, have recognized the need to work towards the eventual elimination of anti-personnel landmines.

The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person *hors de combat*. In addition, if they are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.

Most of these rules correspond to treaty provisions that originally applied only to international armed conflicts. That trend has gradually been reversed, for example by the amendment of Protocol II to the Convention on Certain Conventional Weapons in 1996, which also applies to non-international armed conflicts and, most recently, by the amendment of the Convention on Certain Conventional Weapons in 2001 to extend the scope of application of Protocols I–IV to non-international armed conflicts. The customary prohibitions and restrictions referred to above apply in any armed conflict.

When the ICRC received the mandate to undertake the study on customary international humanitarian law, the International Court of Justice was considering the legality of the threat or use of nuclear weapons, following a request for an advisory opinion on the issue from the UN General Assembly. The ICRC decided therefore not to embark on its own analysis of this question. In its advisory opinion, the International Court of Justice held unanimously that "a threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law."[77]

This finding is significant given that a number of States undertook the negotiation of Additional Protocol I on the understanding that the Protocol would not apply to the use of nuclear weapons. The opinion of the Court, however, means that the rules on the conduct of hostilities and the general principles on the use of weapons apply to the use of nuclear weapons. In application of these principles and rules, the Court concluded that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law."[78]

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[77] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, note 8, at p. 226

78 *Ibid*.; see also United Nations General Assembly, 51st session, First Committee, Statement by the *International Committee of the Red Cross*, UN Doc. A/C.1/51/PV.8, 18 October 1996, p. 10, reproduced in International Review of the Red Cross, No. 316,

XX. Fundamental Guarantees

Fundamental guarantees apply to all civilians in the power of a party to the conflict and who do not or have ceased to take a direct part in hostilities, as well as to all persons who are *hors de combat*. Because fundamental guarantees are overarching rules that apply to all persons, they were not sub-divided in the study into specific rules relating to different types of persons.

These fundamental guarantees all have a firm basis in international humanitarian law applicable in both international and non-international armed conflicts. In the study, most of the rules relating to fundamental guarantees are couched in traditional humanitarian law language, because this best reflected the substance of the corresponding customary rule.[79] Some rules, however, were drafted so as to capture the essence of a range of detailed provisions relating to a specific subject, in particular the rules prohibiting uncompensated or abusive forced labour, enforced disappearances and arbitrary detention and the rule requiring respect for family life.[80]

Where relevant, practice under international human rights law was included in the study and in particular in the chapter on fundamental guarantees. This was done because international human rights law continues to apply during armed conflicts, as expressly stated in the human rights treaties themselves, although some provisions may, subject to certain conditions, be derogated from in time of public emergency. The continued applicability of human rights law during armed conflict has been confirmed on numerous occasions in State practice and by human rights bodies and the

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1997, at pp. 118–119 ("the ICRC finds it difficult to envisage how a use of nuclear weapons could be compatible with the rules of international law").

[79] These rules include the fundamental guarantees that civilians and persons *hors de combat* be treated humanely and without adverse distinction; the prohibition of murder; the prohibition of torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment; the prohibition of corporal punishment; the prohibition of mutilation, medical or scientific experiments; the prohibition of rape and other forms of sexual violence; the prohibition of slavery and the slave trade in all their forms; the prohibition of hostage-taking; the prohibition of the use of human shields; fair trial guarantees; the prohibition of collective punishments; and the requirement to respect the convictions and religious practices of civilians and persons *hors de combat*. See *Customary International Humanitarian Law*, note 4, vol. I, Rules 87–94, 96–97 and 100–104.

[80] *Ibid*., Rules 95, 98–99 and 105.

International Court of Justice.[81] Most recently, the Court, in its advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territories, confirmed that "the protection offered by human rights conventions does not cease in case of armed conflict" and that while there may be rights that are exclusively matters of international humanitarian law or of human rights law, there are others that "may be matters of both these branches of international law."[82] The study does not set out, however, to provide an assessment of customary human rights law. Instead, practice under human rights law has been included in order to support, strengthen and clarify analogous principles of international humanitarian law.

XXI. Implementation

A number of rules on the implementation of international humanitarian law have become part of customary international law. In particular, each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions or under its direction or control. As a result, each party to the conflict, including armed opposition groups, must provide instruction in international humanitarian law to its armed forces. Beyond these general obligations, it is less clear to what extent other specific implementation mechanisms that are binding upon States are also binding upon armed opposition groups. For example, the obligation to issue orders and instructions to the armed forces which ensure respect for international humanitarian law is clearly set forth in international law for States but not so for armed opposition groups. Similarly, there is an obligation on States to make legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of international humanitarian law, but not on armed opposition groups.

Furthermore, a State is responsible for violations of international humanitarian law attributable to it and is required to make full reparation for the loss or injury caused by such violations. It is unclear whether armed opposition groups incur an equivalent responsibility for violations committed by their members and what the consequences of such responsibility

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[81] See *ibid*., Introduction to Chapter 32, Fundamental Guarantees.

[82] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, at p 106.

would be. As stated above, armed opposition groups must respect international humanitarian law and they must operate under a "responsible command."[83] As a result, it can be argued that armed opposition groups incur responsibility for acts committed by persons forming part of such groups. The consequences of such responsibility, however, are not clear. In particular, it is unclear to what extent armed opposition groups are under an obligation to make full reparation, even though in many countries victims can bring a civil suit for damages against the offenders.

When it comes to individual responsibility, customary international humanitarian law places criminal responsibility on all persons who commit, who order the commission of or who are otherwise responsible as commanders or superiors for the commission of war crimes. The implementation of the war crimes regime, that is, the investigation of war crimes and the prosecution of the suspects, is an obligation incumbent upon States. States may discharge this obligation by setting up international or mixed tribunals to that effect.

XXII. Conclusion

The study did not attempt to determine the customary nature of each treaty rule of international humanitarian law but sought to analyse issues in order to establish what rules of customary international law can be found inductively on the basis of State practice in relation to these issues. A brief overview of some of the findings of the study nevertheless shows that the principles and rules contained in treaty law have received widespread acceptance in practice and have greatly influenced the formation of customary international law. Many of these principles and rules are now part of customary international law. As such, they are binding on all States regardless of ratification of treaties and also on armed opposition groups in case of rules applicable to all parties to a non-international armed conflict.

The study also indicates that many rules of customary international law apply in both international and non-international armed conflicts and shows the extent to which State practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts. The regulation of the conduct of hostilities and the treatment of persons in internal armed conflicts is thus more detailed and complete than that which

[83] Additional Protocol II, Article 1(1)

exists under treaty law. It remains to be explored to what extent, from a humanitarian and military perspective, this more detailed and complete regulation is sufficient or whether further developments in the law are required.

As is the case for treaty law, effective implementation of the rules of customary international humanitarian law is required through dissemination, training and enforcement. These rules should be incorporated into military manuals and national legislation, wherever this is not already the case.

The study also reveals areas where the law is not clear and points to issues which require further clarification, such as the definition of civilians in non-international armed conflicts, the concept of direct participation in hostilities and the scope and application of the principle of proportionality.

In the light of the achievements to date and the work that remains to be done, the study should not be seen as the end but rather as the beginning of a new process aimed at improving understanding of and agreement on the principles and rules of international humanitarian law. In this process, the study can form the basis of a rich discussion and dialogue on the implementation, clarification and possible development of the law.

ANNEX. LIST OF CUSTOMARY RULES OF INTERNATIONAL HUMANITARIAN LAW

This list is based on the conclusions set out in Volume I of the study on customary international humanitarian law. As the study did not seek to determine the customary nature of each treaty rule of international humanitarian law, it does not necessarily follow the structure of existing treaties. The scope of application of the rules is indicated in square brackets. The abbreviation IAC refers to customary rules applicable in international armed conflicts and the abbreviation NIAC to customary rules applicable in non-international armed conflicts. In the latter case, some rules are indicated as being "arguably" applicable because practice generally pointed in that direction but was less extensive.

The Principle of Distinction

Distinction between Civilians and Combatants

Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians. [IAC/NIAC]

Rule 2. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. [IAC/NIAC]

Rule 3. All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel. [IAC]

Rule 4. The armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates. [IAC]

Rule 5. Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians. [IAC/NIAC]

Rule 6. Civilians are protected against attack, unless and for such time as they take a direct part in hostilities. [IAC/NIAC]

Distinction between Civilian Objects and Military Objectives

Rule 7. The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.

[IAC/NIAC]

Rule 8. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. [IAC/NIAC]

Rule 9. Civilian objects are all objects that are not military objectives. [IAC/NIAC]

Rule 10. Civilian objects are protected against attack, unless and for such time as they are military objectives. [IAC/NIAC]

Indiscriminate Attacks

Rule 11. Indiscriminate attacks are prohibited. [IAC/NIAC]

Rule 12. Indiscriminate attacks are those:

(a) which are not directed at a specific military objective;
(b) which employ a method or means of combat which cannot be directed at a specific military objective; or
(c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction. [IAC/NIAC]

Rule 13. Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited. [IAC/NIAC]

Proportionality in Attack

Rule 14. Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited. [IAC/NIAC]

Precautions in Attack

Rule 15. In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]

Rule 16. Each party to the conflict must do everything feasible to verify that targets are military objectives. [IAC/NIAC]

Rule 17. Each party to the conflict must take all feasible precautions in the

choice of means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]

Rule 18. Each party to the conflict must do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. [IAC/NIAC]

Rule 19. Each party to the conflict must do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. [IAC/NIAC]

Rule 20. Each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit. [IAC/NIAC]

Rule 21. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects. [IAC/arguably NIAC]

Precautions against the Effects of Attacks

Rule 22. The parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks. [IAC/NIAC]

Rule 23. Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas. [IAC/arguably NIAC]

Rule 24. Each party to the conflict must, to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives. [IAC/arguably NIAC]

Specifically Protected Persons and Objects

Medical and Religious Personnel and Objects

Rule 25. Medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy. [IAC/NIAC]

Rule 26. Punishing a person for performing medical duties compatible with medical ethics or compelling a person engaged in medical activities to perform acts contrary to medical ethics is prohibited. [IAC/NIAC]

Rule 27. Religious personnel exclusively assigned to religious duties must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy. [IAC/NIAC]

Rule 28. Medical units exclusively assigned to medical purposes must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy. [IAC/NIAC]

Rule 29. Medical transports assigned exclusively to medical transportation must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy. [IAC/NIAC]

Rule 30. Attacks directed against medical and religious personnel and objects displaying the distinctive emblems of the Geneva Conventions in conformity with international law are prohibited. [IAC/NIAC]

Humanitarian Relief Personnel and Objects

Rule 31. Humanitarian relief personnel must be respected and protected. [IAC/NIAC]

Rule 32. Objects used for humanitarian relief operations must be respected and protected. [IAC/NIAC]

Personnel and Objects Involved in a Peacekeeping Mission

Rule 33. Directing an attack against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, is prohibited. [IAC/NIAC]

Journalists

Rule 34. Civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities. [IAC/NIAC]

Protected Zones

Rule 35. Directing an attack against a zone established to shelter the wounded, the sick and civilians from the effects of hostilities is prohibited. [IAC/NIAC]

Rule 36. Directing an attack against a demilitarized zone agreed upon between the parties to the conflict is prohibited. [IAC/NIAC]

Rule 37. Directing an attack against a non-defended locality is prohibited. [IAC/NIAC]

Cultural Property

Rule 38. Each party to the conflict must respect cultural property:

A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives.

B. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.

[IAC/NIAC]

Rule 39. The use of property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage is prohibited, unless imperatively required by military necessity. [IAC/NIAC]

Rule 40. Each party to the conflict must protect cultural property:

A. All seizure of or destruction or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited.

B. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited.

[IAC/NIAC]

Rule 41. The occupying power must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory. [IAC]

Works and Installations Containing Dangerous Forces

Rule 42. Particular care must be taken if works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, and other installations located at or in their vicinity are attacked, in order to avoid the release of dangerous forces and consequent severe losses among the civilian population. [IAC/NIAC]

The Natural Environment

Rule 43. The general principles on the conduct of hostilities apply to the natural environment:

A. No part of the natural environment may be attacked, unless it is a military objective.

B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.

C. Launching an attack against a military objective which may be

expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.

[IAC/NIAC]

Rule 44. Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions. [IAC/arguably NIAC]

Rule 45. The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon. [IAC/arguably NIAC]

Specific Methods of Warfare

Denial of Quarter

Rule 46. Ordering that no quarter will be given, threatening an adversary therewith or conducting hostilities on this basis is prohibited. [IAC/NIAC]

Rule 47. Attacking persons who are recognized as *hors de combat* is prohibited. A person *hors de combat* is:

(a) anyone who is in the power of an adverse party;

(b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or

(c) anyone who clearly expresses an intention to surrender;

provided he or she abstains from any hostile act and does not attempt to escape. [IAC/NIAC]

Rule 48. Making persons parachuting from an aircraft in distress the object of attack during their descent is prohibited. [IAC/NIAC]

Destruction and Seizure of Property

Rule 49. The parties to the conflict may seize military equipment belonging to an adverse party as war booty. [IAC]

Rule 50. The destruction or seizure of the property of an adversary is prohibited, unless required by imperative military necessity. [IAC/NIAC]

Rule 51. In occupied territory:

(a) movable public property that can be used for military operations may be confiscated;

(b) immovable public property must be administered according to the rule of usufruct; and

(c) private property must be respected and may not be confiscated except where destruction or seizure of such property is required by imperative military necessity. [IAC]

Rule 52. Pillage is prohibited. [IAC/NIAC]

Starvation and Access to Humanitarian Relief

Rule 53. The use of starvation of the civilian population as a method of warfare is prohibited. [IAC/NIAC]

Rule 54. Attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population is prohibited. [IAC/NIAC]

Rule 55. The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control. [IAC/NIAC]

Rule 56. The parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted. [IAC/NIAC]

Deception

Rule 57. Ruses of war are not prohibited as long as they do not infringe a rule of international humanitarian law. [IAC/NIAC]

Rule 58. The improper use of the white flag of truce is prohibited. [IAC/NIAC]

Rule 59. The improper use of the distinctive emblems of the Geneva Conventions is prohibited. [IAC/NIAC]

Rule 60. The use of the United Nations emblem and uniform is prohibited, except as authorized by the organization. [IAC/NIAC]

Rule 61. The improper use of other internationally recognized emblems is prohibited. [IAC/NIAC]

Rule 62. Improper use of the flags or military emblems, insignia or uniforms of the adversary is prohibited. [IAC/arguably NIAC]

Rule 63. Use of the flags or military emblems, insignia or uniforms of neutral or other States not party to the conflict is prohibited. [IAC/arguably NIAC]

Rule 64. Concluding an agreement to suspend combat with the intention of attacking by surprise the enemy relying on that agreement is prohibited. [IAC/NIAC]

Rule 65. Killing, injuring or capturing an adversary by resort to perfidy is prohibited. [IAC/NIAC]

Communication with the Enemy

Rule 66. Commanders may enter into non-hostile contact through any means of communication. Such contact must be based on good faith. [IAC/NIAC]
Rule 67. *Parlementaires* are inviolable. [IAC/NIAC]
Rule 68. Commanders may take the necessary precautions to prevent the presence of a *parlementaire* from being prejudicial. [IAC/NIAC]
Rule 69. *Parlementaires* taking advantage of their privileged position to commit an act contrary to international law and detrimental to the adversary lose their inviolability. [IAC/NIAC]

Weapons

General Principles on the Use of Weapons

Rule 70. The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited. [IAC/NIAC]
Rule 71. The use of weapons which are by nature indiscriminate is prohibited. [IAC/NIAC]
Poison**Rule 72**. The use of poison or poisoned weapons is prohibited. [IAC/NIAC]Biological Weapons**Rule 73**. The use of biological weapons is prohibited. [IAC/NIAC]Chemical Weapons**Rule 74**. The use of chemical weapons is prohibited. [IAC/NIAC]**Rule 75**. The use of riot-control agents as a method of warfare is prohibited. [IAC/NIAC]**Rule 76**. The use of herbicides as a method of warfare is prohibited if they:(a) are of a nature to be prohibited chemical weapons;(b) are of a nature to be prohibited biological weapons;(c) are aimed at vegetation that is not a military objective;(d) would cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which may be expected to be excessive in relation to the concrete and direct military advantage anticipated; or(e) would cause widespread, long-term and severe damage to the natural environment.[IAC/NIAC]Expanding Bullets**Rule 77**. The use of bullets which expand or flatten easily in the human body is prohibited. [IAC/NIAC]Exploding Bullets**Rule 78**. The anti-personnel use of bullets which explode within the human body is prohibited. [IAC/NIAC]Weapons Primarily Injuring by Non-detectable Fragments**Rule 79**. The use of weapons the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body is prohibited. [IAC/NIAC]Booby-traps**Rule 80**. The use of booby-traps which are in any way attached to or associated with objects or persons entitled to special protection under international humanitarian law or with objects that are likely to attract civilians is prohibited. [IAC/NIAC]

Landmines

Rule 81. When landmines are used, particular care must be taken to minimize their indiscriminate effects. [IAC/NIAC]
Rule 82. A party to the conflict using landmines must record their placement, as far as possible. [IAC/arguably NIAC]
Rule 83. At the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal. [IAC/NIAC]

Incendiary Weapons

Rule 84. If incendiary weapons are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]
Rule 85. The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person *hors de combat*. [IAC/NIAC]

Blinding Laser Weapons

Rule 86. The use of laser weapons that are specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited. [IAC/NIAC]

Treatment of Civilians and Persons Hors de Combat

Fundamental Guarantees

Rule 87. Civilians and persons *hors de combat* must be treated humanely. [IAC/NIAC]
Rule 88. Adverse distinction in the application of international humanitarian law based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria is prohibited. [IAC/NIAC]
Rule 89. Murder is prohibited. [IAC/NIAC]
Rule 90. Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited. [IAC/NIAC]
Rule 91. Corporal punishment is prohibited. [IAC/NIAC]
Rule 92. Mutilation, medical or scientific experiments or any other medical procedure not indicated by the state of health of the person concerned and not consistent with generally accepted medical standards are prohibited. [IAC/NIAC]
Rule 93. Rape and other forms of sexual violence are prohibited. [IAC/NIAC]
Rule 94. Slavery and the slave trade in all their forms are prohibited. [IAC/NIAC]
Rule 95. Uncompensated or abusive forced labour is prohibited. [IAC/

NIAC]
Rule 96. The taking of hostages is prohibited. [IAC/NIAC]
Rule 97. The use of human shields is prohibited. [IAC/NIAC]
Rule 98. Enforced disappearance is prohibited. [IAC/NIAC]
Rule 99. Arbitrary deprivation of liberty is prohibited. [IAC/NIAC]
Rule 100. No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees. [IAC/NIAC]
Rule 101. No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. [IAC/NIAC]
Rule 102. No one may be convicted of an offence except on the basis of individual criminal responsibility. [IAC/NIAC]
Rule 103. Collective punishments are prohibited. [IAC/NIAC]
Rule 104. The convictions and religious practices of civilians and persons *hors de combat* must be respected. [IAC/NIAC]
Rule 105. Family life must be respected as far as possible. [IAC/NIAC]
Combatants and Prisoner-of-War Status
Rule 106. Combatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. If they fail to do so, they do not have the right to prisoner-of-war status. [IAC]
Rule 107. Combatants who are captured while engaged in espionage do not have the right to prisoner-of-war status. They may not be convicted or sentenced without previous trial. [IAC]
Rule 108. Mercenaries, as defined in Additional Protocol I, do not have the right to combatant or prisoner-of-war status. They may not be convicted or sentenced without previous trial. [IAC]
The Wounded, Sick and Shipwrecked
Rule 109. Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction. [IAC/NIAC]
Rule 110. The wounded, sick and shipwrecked must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. No distinction may be made among them founded on any grounds other than medical ones. [IAC/NIAC]
Rule 111. Each party to the conflict must take all possible measures to

protect the wounded, sick and shipwrecked against ill-treatment and against pillage of their personal property. [IAC/NIAC]

The Dead

Rule 112. Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction. [IAC/NIAC]

Rule 113. Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited. [IAC/NIAC]

Rule 114. Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them. [IAC]

Rule 115. The dead must be disposed of in a respectful manner and their graves respected and properly maintained. [IAC/NIAC]

Rule 116. With a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves. [IAC/NIAC]

Missing Persons

Rule 117. Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate. [IAC/NIAC]

Persons Deprived of Their Liberty

Rule 118. Persons deprived of their liberty must be provided with adequate food, water, clothing, shelter and medical attention. [IAC/NIAC]

Rule 119. Women who are deprived of their liberty must be held in quarters separate from those of men, except where families are accommodated as family units, and must be under the immediate supervision of women. [IAC/NIAC]

Rule 120. Children who are deprived of their liberty must be held in quarters separate from those of adults, except where families are accommodated as family units. [IAC/NIAC]

Rule 121. Persons deprived of their liberty must be held in premises which are removed from the combat zone and which safeguard their health and hygiene. [IAC/NIAC]

Rule 122. Pillage of the personal belongings of persons deprived of their liberty is prohibited. [IAC/NIAC]

Rule 123. The personal details of persons deprived of their liberty must be

recorded. [IAC/NIAC]

Rule 124.

A. In international armed conflicts, the ICRC must be granted regular access to all persons deprived of their liberty in order to verify the conditions of their detention and to restore contacts between those persons and their families. [IAC]

B. In non-international armed conflicts, the ICRC may offer its services to the parties to the conflict with a view to visiting all persons deprived of their liberty for reasons related to the conflict in order to verify the conditions of their detention and to restore contacts between those persons and their families. [NIAC]

Rule 125. Persons deprived of their liberty must be allowed to correspond with their families, subject to reasonable conditions relating to frequency and the need for censorship by the authorities. [IAC/NIAC]

Rule 126. Civilian internees and persons deprived of their liberty in connection with a non-international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable.

Rule 127. The personal convictions and religious practices of persons deprived of their liberty must be respected. [IAC/NIAC]

Rule 128.

A. Prisoners of war must be released and repatriated without delay after the cessation of active hostilities. [IAC]

B. Civilian internees must be released as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities. [IAC]

C. Persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist. [NIAC]The persons referred to may continue to be deprived of their liberty if penal proceedings are pending against them or if they are serving a sentence lawfully imposed.Displacement and Displaced Persons

Rule 129.A. Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand. [IAC]B. Parties to a non-international armed conflict may not order the displacement

of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand. [NIAC]

Rule 130. States may not deport or transfer parts of their own civilian

population into a territory they occupy. [IAC]
Rule 131. In case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated. [IAC/NIAC]
Rule 132. Displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist. [IAC/NIAC]
Rule 133. The property rights of displaced persons must be respected. [IAC/NIAC]
Other Persons Afforded Specific Protection
Rule 134. The specific protection, health and assistance needs of women affected by armed conflict must be respected. [IAC/NIAC]
Rule 135. Children affected by armed conflict are entitled to special respect and protection. [IAC/NIAC]
Rule 136. Children must not be recruited into armed forces or armed groups. [IAC/NIAC]
Rule 137. Children must not be allowed to take part in hostilities. [IAC/NIAC]
Rule 138. The elderly, disabled and infirm affected by armed conflict are entitled to special respect and protection. [IAC/NIAC]
Implementation
Compliance with International Humanitarian Law
Rule 139. Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control. [IAC/NIAC]
Rule 140. The obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity. [IAC/NIAC]
Rule 141. Each State must make legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of international humanitarian law. [IAC/NIAC]
Rule 142. States and parties to the conflict must provide instruction in international humanitarian law to their armed forces. [IAC/NIAC]
Rule 143. States must encourage the teaching of international humanitarian law to the civilian population. [IAC/NIAC]
Enforcement of International Humanitarian Law
Rule 144. States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.

[IAC/NIAC]
Rule 145. Where not prohibited by international law, belligerent reprisals are subject to stringent conditions. [IAC]
Rule 146. Belligerent reprisals against persons protected by the Geneva Conventions are prohibited. [IAC]
Rule 147. Reprisals against objects protected under the Geneva Conventions and Hague Convention for the Protection of Cultural Property are prohibited. [IAC]
Rule 148. Parties to non-international armed conflicts do not have the right to resort to belligerent reprisals. Other countermeasures against persons who do not or who have ceased to take a direct part in hostilities are prohibited. [NIAC]
Responsibility and Reparation
Rule 149. A State is responsible for violations of international humanitarian law attributable to it, including:

(a) violations committed by its organs, including its armed forces;
(b) violations committed by persons or entities it empowered to exercise elements of governmental authority;
(c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and
(d) violations committed by private persons or groups which it acknowledges and adopts as its own conduct.

[IAC/NIAC]
Rule 150. A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused. [IAC/NIAC]
Individual Responsibility
Rule 151. Individuals are criminally responsible for war crimes they commit. [IAC/NIAC]
Rule 152. Commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders. [IAC/NIAC]
Rule 153. Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible. [IAC/NIAC]
Rule 154. Every combatant has a duty to disobey a manifestly unlawful order. [IAC/NIAC]
Rule 155. Obeying a superior order does not relieve a subordinate of crimi-

nal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act ordered. [IAC/NIAC]

War Crimes

Rule 156. Serious violations of international humanitarian law constitute war crimes. [IAC/NIAC]

Rule 157. States have the right to vest universal jurisdiction in their national courts over war crimes. [IAC/NIAC]

Rule 158. States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects. [IAC/NIAC]

Rule 159. At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes. [NIAC]

Rule 160. Statutes of limitation may not apply to war crimes. [IAC/NIAC]

Rule 161. States must make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects. [IAC/NIA]

CUSTOM AS A SOURCE OF INTERNATIONAL HUMANITARIAN LAW

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