Conference to Mark the Publication of the ICRC Study on "Customary International Humanitarian Law" (Cambridge University Press, 2005)

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Het Nederlandse Rode Kruis

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Buitenlandse Zaken

Netherlands Ministry of Foreign Affairs

The Hague, 30–31 May 2005
Ministry of Foreign Affairs
Van Kleffenszaal

30 May

12:30 - 14:00	**Registration, sandwich lunch and coffee**
14:00 - 14:15	**Welcome and Introductory Remarks** Frank Majoor, Secretary-General, Netherlads Ministry of Foreign Affairs Dr. Cees Breederveld, Director General, Netherlands Red Cross
14:15 - 15:00	**Opening Address**
	Chair: **Nicolas Michel**, Legal Counsel, United Nations
	Speaker: **Judge Theodor Meron**, President, ICTY *"The Revival of Customary International Humanitarian Law"*
Panel I	
15:15 - 17:00	**The ICRC Study on Customary International Humanitarian Law. An Assessment**
	Chair: **Judge Abdul Koroma**, International Court of Justice
	Speakers: **Dr. Jean-Marie Henckaerts**, Legal Adviser, ICRC **Professor Horst Fischer**, Leiden University and Bochum University
	Concluding Remarks: **Dr. Liesbeth Lijnzaad**, Deputy Head, International Law Department, Ministry of Foreign Affairs
17:00 - 18:30	**Welcome Reception**

31 May

9:00 - 9:30 **Keynote Address**

Chair: **Judge Pieter H. Kooijmans**, International Court of Justice

Speaker: **Judge Philippe Kirsch**, President, International Criminal Court

Panel II

9:30 - 11:00 **The Interplay Between International Humanitarian Law and Human Rights Law**

Chair: **Judge Rosalyn Higgins**, International Court of Justice

Speakers: **Professor Louise Doswald-Beck**, Graduate Institute of International Studies and University Centre for International Humanitarian Law
"*The Application of Fundamental Guarantees in Armed Conflict*"
Noam Lubell, Human Rights Centre, Essex University
"Challenges in Applying Human Rights Law to Armed Conflict"

11:00 - 11:30 **Coffee Break**

Panel III

11:30 - 13:00 **Conduct of Hostilities: Old Law, New Challenges?**

Chair: **Dr. Seerp Ybema**, Director of Legal Affairs, Netherlands Ministry of Defence

Speakers: **Professor Yoram Dinstein**, Tel Aviv University
"Conduct of Hostilities Issues in Contemporary Armed Conflict"
William Fenrick, former Senior Legal Adviser, Office of the Prosecutor, ICTY
"Prosecuting Conduct of Hostilities Violations"
Judge Georges Abi-Saab, President of the WTO Appellate Body
"Bridging the gaps between international humanitarian law applicable in international and non-international armed conflicts"

13:00 - 15:00 **Lunch Break**

Panel IV

15:00 - 16:30 **Assessing the Needs to Clarify and Develop International Humanitarian Law**

Chair: **Professor Yves Sandoz**, Member, ICRC

Speakers: **Judge George Aldrich**, Iran-US Claims Tribunal
"*The Continuing Importance of Customary International Law in International Armed Conflicts*"
Dr. Dieter Fleck, former Legal Adviser, German Ministry of Defence
"Improving Enforcement of International Humanitarian Law in Internal Armed Conflicts"

16:30–16:45 **Closing Remarks**
Professor Yves Sandoz, Member, ICRC

The Revival of Customary International Humanitarian Law
Judge Theodor Meron

As I started preparing for this Lecture, I wondered whether I was not foolish to propose such an upbeat title. Maybe I should at least have ended it with an interrogation mark? But I did not. Why? Why would I suggest that customary law is being revived?

To answer these questions, I look first at the customary law in light of the process of codification and note those chapters of international law which have not yet been extensively codified and in which customary law continues to play a primary role. Next, I consider the recognition and application of customary law by the International Court of Justice. I survey a range of cases – including the Fisheries Jurisdiction Cases (1973-1974), the Nicaragua Case (1986), the Nuclear Weapons Case (1996), and the Wall case (2004), among others – in which the ICJ invoked customary law in reaching its decision. This recitation of precedents makes clear that the ICJ continues to rely on customary law, as it does on treaties, as one of the two most important sources available to it.

Customary law continues to be applied also in national courts of many countries as the law of the land, particularly in interpreting treaties, as well as in the United States, especially through the Alien Tort Claims Act. It is also applied in ICSID arbitrations, the Erithrea Ethiopia Claims commission, the UN (Iraq) claims compensation commission and in other institutions such as the UN human rights bodies.

Next, I make some comments about the most significant aspects of the ICRC study. What makes the study unique is the seriousness and breadth of method for the identification of practice, with national studies of nearly 50 countries. While it is probable that the study will be challenged in some cases, especially as regards the formulation of the black letter rules, there is no question that any future discussion of customary law will have the study as its starting point. It may well be that in some cases, it will be the description of practice described in the study that will be drawn on by states and by courts, rather than the black letter rule.

Finally, I address the application of customary humanitarian rules by international criminal courts, beginning with the International Criminal Tribunal for the Former Yugoslavia, or ICTY. The ICRC study greatly benefited from the jurisprudence of the ICTY in the identification and application of customary rules of international humanitarian law. I review an array of cases in which the ICTY has relied on customary international law while adhering to the principle of *nullum crimen sine lege*. I pay particular attention to the interesting interlocutory appeal in *Prosecutor v. Hadžihasanovic.* I conclude by examining the modest contribution of the International Criminal Tribunal for Rwanda to the clarification of customary law, as well as the potential opportunities the International Criminal Court may have in the future to address and apply customary law. This survey leads me to the conclusion that customary law is not only holding its own, but it is in fact enjoying a period of extraordinary development in some international courts.

Jean-Marie Henckaerts

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. Th e protection of cultural property in the event of armed confl ict 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. 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 diff erent treaties of international humanitarian law apply in diff erent armed confl icts depending on which treaties the States involved have ratifi ed. 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 ratifi ed 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 noninternational
armed conflicts are taking place have not done so. In these noninternational armed conflicts, common Article 3 of the four Geneva Conventions oft
en 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 confl ict, regardless of whether or not they have ratifi ed 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. 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.

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. 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 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.
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 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 .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; the prohibition of indiscriminate attacks; the principle of proportionality in attack; the obligation to take feasible precautions in attack and against the effects of attack; the obligation to respect and protect medical and religious personnel, medical units and transports, humanitarian relief personnel and objects, and civilian journalists; the obligation to protect medical duties; the prohibition of attacks on non-defended localities and demilitarized zones; the obligation to provide quarter and to safeguard an enemy hors de combat; the prohibition of starvation; the prohibition of attacks on objects indispensable to the survival of the civilian population; the prohibition of improper use of emblems and perfidy;the obligation to respect the fundamental guarantees of civilians and persons hors de combat; the obligation to account for missing persons; and the specific protections afforded to women and children.

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 customary law applicable in non-international armed confl icts. Like Additional Protocol I, Additional Protocol II has had a far-reaching eff ect 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; the obligation to respect and protect medical and religious personnel, medical units and transports; the obligation to protect medical duties;the prohibition of starvation; the prohibition of attacks on objects indispensable to the survival of the civilian population;the obligation to respect the fundamental guarantees of civilians and persons hors de combat; the obligation to search for and respect and protect the wounded, sick and shipwrecked; the obligation to search for and protect the dead; the obligation to protect persons deprived of their liberty; the prohibition of forced movement of civilians;and the specific protections aff orded to women and children.
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.

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 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 Protocols I and II require the consent of the parties concerned for relief actions to take place, 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. 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.

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, 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 of civilians or of the civilian population even though these terms are used in several provisions. Subsequent treaties, applicable in non-international armed conflicts, similarly use the terms civilians and civilian population without defining them.

A related area of uncertainty aff ecting the regulation of both international and non-international armed confl icts is the absence of a precise defi nition 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.

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.

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 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. 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. 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. Some of their rules, however, are now also accepted as customary in noninternational 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. Both prohibitions do not affect the customary practice of seizing as war booty military equipment belonging to an adverse party.

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.

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; riotcontrol agents as a method of warfare; herbicides as a method of warfare; 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 objects or 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, 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 antipersonnel 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.

Conclusion

A brief overview of some of the findings of the study 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 exists under treaty law.

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.

(Text of article on the subject www.icrc.org/eng/customary-law)

Customary Humanitarian Law, Its Enforcement, and the Role of the International Criminal Court

Summary of keynote address at the Launch of the ICRC Study on Customary International Humanitarian Law

Philippe Kirsch
President of the International Criminal Court

International humanitarian law (IHL) is characterized by an interplay between customary law and treaty law. Sometimes norms which develop as customary law are subsequently codified in treaties. The Rome Statute is a good example of this process, as the crimes defined in the Rome Statute and elaborated in the Elements of Crimes were intended to reflect customary international law. Customary law also is important in binding States independent of their treaty obligations. The relative flexibility of customary law enables international law to keep pace with the dynamic and fast-paced world it regulates. Relying on customary law, however, involves a significant challenge in discerning the precise content of the law. The ICRC's important study on customary IHL should assist in this task. As well as the ICRC's assessment of the current rules of customary IHL, the study contains an impressive compendium of state practice which will be a valuable resource for practitioners.

Once identified, the customary rules of IHL must be enforced if they are to be effective. International criminal law is one of several means of enforcing IHL. As the study shows, two principles of customary law underlie recourse to international criminal law. First, individuals may be held criminally responsible for serious violations of IHL. Second, as also expressed in the preamble to the Rome Statute, "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." Where States are unwilling or unable to exercise this duty, international courts and tribunals may be necessary. The International Criminal Court has a special place among such institutions due to its broad geographical jurisdiction and permanent nature. The ICC is also designed to address several factors often cited as giving rise to non-compliance with IHL. First, state sovereignty is not a justification for non-compliance with IHL vis-à-vis the ICC. Rather, the ICC as a court of last resort is complementary to national jurisdictions. Second, the ICC does not allow accused persons to escape liability for grave crimes on the grounds of ignorance of the law. Third, the ICC Statute provides that State actors and non-State actors are equally liable for the commission of war crimes or other crimes within the Court's jurisdiction, thus dealing with an important challenge faced by traditional IHL.

The ICC is situated within the existing framework of conventional and customary IHL. The interrelationship between customary IHL and the Court is evident in a number of ways. The drafters of the Rome Statute drew heavily on customary law in defining the crimes within the Court's jurisdiction. In deciding cases, judges will apply established principles of the international law of armed conflict. Because of its complementary relationship with States, the ICC may also spur the further development of customary international law.

The ICC is already making visible contributions to the effective enforcement of IHL. As more States ratify or accede to the Rome Statute, the Court's potential role in the enforcement of IHL will become more pronounced. Together with all the other mechanisms undertaken by the ICRC, States, and others to ensure respect for IHL, the ICC will help to protect individuals from unnecessary death and suffering during armed conflict.

Challenges in Applying Human Rights Law to Armed Conflict

Noam Lubell[1]

The applicability of human rights law to armed conflict has been the subject of much discussion over the past two decades. Much of this debate centred upon the question of whether human rights law continues to apply once we enter the realm of armed conflict. While the International Court of Justice, in its Nuclear Weapons Advisory Opinion, did state the applicability of human rights law, the use of the term *lex specialis* gave some commentators support for the claim that while human rights law does not disappear, it nevertheless is in effect displaced by international humanitarian law (IHL).

The more recent Advisory Opinion on the Wall, together with the views of UN human rights bodies, have however clarified that human rights law is not entirely displaced and can at times be applied in situations of armed conflict. While there are still pockets of resistance to this notion, particularly amongst two certain states and a few IHL experts, I would suggest that that the resisters are fighting a losing battle and should lay down their arms and accept the applicability of human rights law.

Accepting applicability is however, not the end of the story. When in practice we actually come to apply human rights law to situations of armed conflict, certain difficulties can crop up. The road of joint applicability has a number of bumps and potholes, some small some large, that will need to be addressed if we are to have a smooth ride. It is some of these challenges that will be the focus of this paper.

In certain areas it is clear how and why IHL and human rights law could complement and reinforce each other – most notably on the issue of deprivation of liberty and judicial guarantees. This is the subject of the chapter on fundamental guarantees in the ICRC study. But problems do exist on a number of other fronts, and a few of them will be addressed in this paper.

The first difficulty lies in the question of whether there are not after all limitations to the scope of applicability of human rights law, and whether it applies to all situations of armed conflict. This revolves largely around the issue of extra-territorial applicability of human rights obligations.

The problem of extra-territorial obligations is primarily of relevance to international armed conflict. There may be similar arguments in Additional Protocol II type situations, where the armed opposition group controls territory. Focus is however international armed conflict. Whether in international armed conflict human rights obligations can extend to actions of state forces outside the state's recognised borders.

There is not space enough here to launch into a detailed analysis of all the cases on extra-territorial applicability, and therefore the following is a brief summary of where we stand at the moment.

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[1] Senior Researcher, Human Rights Centre, University of Essex, UK.

Case law stretching from the European case *Loizidou* to the recent UK case *Al-Skeini*, gives strong support for the contention that human rights obligations extend to areas under effective control of the state. Occupied territories in which authority has been clearly established can come within the ambit of the human rights obligations of the state. This was the case in Northern Cyprus and in the Occupied Palestinian Territories.

At the same time, occupied territories in which significant hostilities are occurring, and the recognised occupier has not established complete control, as was the case in parts of Iraq, remain controversial with regard to the human rights obligation of the state, as was evidenced in *Al-Skeini*. The essence of the extension of obligations to occupied territory, is based on the analogy to national territory, in that it is in effect territory under the authority and control of the state.

However, even in other situations, in which the state does not control the whole territory, there may be circumstances in which human rights obligations do extend extra-territorially, for instance when the state is running a detention facility outside its borders. The formula presented by the UN Human Rights Committee, speaks of protecting "anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party".

The former part of the phrase can be construed fairly widely, and could potentially include anyone in the hands of state agents abroad, even if only in a temporary capacity. The Human Rights Committee case of *Lopez Burgos* and the ECHR *Ocalan* case indicate that human rights obligations can be attached to extra-territorial actions of state agents, in which they have authority and control over an individual.

This all means that it can probably be safely said that human rights obligations can sometimes extend extra-territorially. There is however still disagreement on when the obligations actually come into play:

- firstly, with regard to 'effective control' in occupation there may be a problem in areas where hostilities continue;
- secondly, as was seen after the *Bankovic* decision, there are debates on what constitutes control (e.g. if there is a difference between ground troops or air power), and the particular difficulties of regional systems covering situations outside the region;
- and thirdly, with regard to the formulation of 'within the power' many would argue that the obligations probably do not extend to extra-territorial battlefield conduct, but do exist once people have been removed from the battlefield and placed in a detention facility run the by the state – where along the line between the two do the obligations begin is unclear.

All in all, it seems that HR obligations can extend extra-territorially and be relevant to international armed conflict, but it is still unclear exactly how far the extension can be stretched.

Another point to be made, is that recognition of certain elements of human rights law as part of customary international law might also advance the argument of human rights obligations

extending beyond the territory of the state. Support for this comes from the US Operational Law Handbook 2004, which clearly accepts that US forces in extra-territorial operations are bound by customary human rights law. Progress on this front would depend on the assessment of the customary status of human rights law both in content and rules of applicability. Seeing the amount of effort involved in the ICRC study on IHL, it is unlikely we'll have many volunteers for a comprehensive customary human rights law study in the near future.

From some of the above cases, it seems that human rights bodies are of the opinion that human rights law is not only relevant to armed conflict, but also that they are quite ready to actually be scrutinising military operations, at least so long as this occurs within the territory of the state or areas under effective control.

This brings us to the second challenge – whether human rights bodies have the mandate and necessary expertise to evaluate military operations.

Many of the human rights bodies have been established under a treaty. Their mandate would at first sight appear to be limited to monitoring the obligations contained in the relevant treaty. Thus the UN Human Rights Committee is mandated to discuss violations of obligations contained in the International Covenant on Civil and Political Rights, the European Court of Human Rights the European Convention, and so on.

This seems to mean that despite – as seen earlier – having the territorial jurisdiction to deal with factual situations of armed conflict, their pronouncements would seem to be generally limited to violations of human rights contained in the relevant treaty, as opposed to pronouncing on violations of IHL. Thus for example, in the recent Chechen case of *Isayeva* before the ECtHR, the Court dealt with a non-international armed conflict, but discussed only violations of human rights, not IHL. I will return to other aspects of this case shortly.

There are however certain possibilities for these bodies to discuss IHL, since most of the treaties do contain references to other applicable law, for instance in articles covering derogation.

The Inter-American system has had noteworthy experience in the use of IHL. In the *Tablada* (*Abella*) case, the Commission made direct use of IHL, in particular of Common Article 3, stating that human rights law did not give them enough tools to analyse the case at hand. This was repeated by the Commission in the *Las Palmeras* case, in which the Commission declared that Colombia had violated Common Article 3.

The IA-Court was however not pleased with this outcome, and ruled that neither the Commission nor the Court had the mandate to directly pronounce on violations of IHL. This though still left open the possibility of using IHL to interpret human rights law obligations in situations of armed conflict. This use of IHL as a legitimate tool of interpretation was repeated in a later case, *Bamaca Velasqez*.

The European system has been less ready to make overt use of IHL, and direct reference to IHL has rarely appeared since the *Cyprus-Turkey* case. The Court has however made use of IHL principles to interpret specific situations without referring to them by name, for instance in its assessment of a Turkish military operation in the case of *Ergi*.

Human rights bodies established through UN Charter mechanisms, do not have the same treaty restrictions, and are therefore able more easily to refer directly to violations of IHL. This can be seen in the reports of thematic procedures, such as the Special Rapporteur on Extra-Judicial Executions. Country-specific procedures, when dealing with countries involved in armed conflict, have also made extensive use of IHL, as can be seen in the reports of the Special Rapporteurs on Iraq, the Occupied Palestinian Territories and Sudan.

As for the expertise, the assessment of military operations by human rights bodies, with or without direct use of IHL terms, has been described as inconsistent and of varying quality. The primary requisite for sitting on a human rights body, would be proficiency in human rights law, rather than IHL. This may explain why some bodies, such as the ECtHR make little direct reference to IHL. Additionally, some of the cases in which IHL principles were relied upon, might be less attributed to any readiness by the court to use IHL, but rather the result of the fact that counsel for the applicants happened to be an IHL expert and made use of it in arguing the case, for example in the *Ergi* case.

An example, in which IHL principles could have perhaps been differently applied, is in the recent batch of Chechen cases. The *Isayeva* case, dealt with an attack by Russian airplanes on a convoy of vehicles, which led to the deaths and injuries of civilians. The Russian government contended that the pilots were targeting their missiles at trucks carried armed men, who had fired upon the planes, while according to the applicants and many witnesses, there were no trucks of such kind and the planes had not been fired upon. the Court states that:

"In particular, it is necessary to examine whether the operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force. The authorities must take appropriate care to ensure that any risk to life is minimised."

This assessment has strong foundations in human rights law, but perhaps is not exactly the same formulation used for military operations in an armed conflict. Risk to innocent civilian life and property must indeed be minimised also in armed conflict, but if the target is a legitimate military one, then at least in some circumstances, lethal force can be the first recourse, provided risks to surrounding people and objects is taken into account.

The Court did not seem to make direct use of the IHL rules on military objectives and targeting, despite this being an assessment of a military operation in the context of an armed conflict.

A possible reason for not using IHL, might have been the pervading notion that besides Common Article 3 and the few rules of Additional Protocol II, there are not many relevant rules applicable in non-international armed conflict, and therefore human rights principles are the only ones to be guided by. In this regard the ICRC customary law study can be of great benefit to human rights bodies, as has been the case-law of the ICTY and ICTR and the Rome statute. If until now these bodies relied predominantly on human rights law and in some cases Common Article 3, they now have a detailed collection of rules applicable in non-international armed conflict, which can serve them in the proper assessment of the conduct of states in such situations. As noted, even if the final pronouncements are limited to human rights law, IHL can and should be used at least as an interpretative aid.

It is worth noting that certain aspects of the relationship between IHL & human rights law in non-international armed conflict, particularly around the rules on the use of force, can lead to problematic situations. While it is not in the scope of this paper, it is clear that there are issues here that need addressing.

The example of the European Court's assessment on use of force brings me to the next challenge- that of different language of the two bodies of law.

One of the keys to successfully explaining IHL to human rights people, or vice versa, is to describe them as two separate languages. Whilst they may share certain common concepts, even the shared parts are often expressed in a different manner. Some terms need to be translated – e.g. some of the human rights law on right to privacy and protection from interference with the home, could be translated in fairly straightforward manner to IHL rules on destruction or seizure of private property.

The right to life and prohibition on arbitrary killings has similarities though is not exactly the same as the prohibition of targeting civilians.

Other terms, such as 'military objective' exist only in one language and cannot be translated. Then there are words that sound the same in both languages. Judicial guarantees and the prohibition of torture, not only sound the same, but share most of their substantive meaning in the two languages.

The greater difficulty is with a term that sounds the same but has different meanings. 'Proportionality' is cited as a fundamental principle in both languages. In both languages it denotes a balancing relationship – X in relation to Y. The substance however is not always the same and can indeed cause confusion.

For example, when a state agent is using force against an individual, under human rights law the proportionality principle measures the force used against the individual in an assessment that includes the effect on the individual himself, leading to a need to use the smallest amount of force necessary, and restricting the use of lethal force.

Under IHL however, if the individual is for instance a combatant that can be lawfully targeted, then the focus of the proportionality principle is on the effect to surrounding people and objects, and not as much on the targeted individual, against whom it might be lawful to use lethal force as first recourse.

It is therefore crucial that when applying both human rights law and IHL to a particular case, we bear in mind the differences between the languages and make sure the correct terms and definitions are used. While it is acceptable, and sometimes even necessary to assess a situation using both human rights law and IHL, it would be wise to clarify which language is being spoken, and not jump between them using terms from the different bodies of law within the same sentence, or perhaps not even on the same page.

In summary, once we have moved beyond the question of applicability of human rights law to armed conflict, there remain challenges which need addressing. In some areas, the joint applicability works well and the bodies of law positively reinforce each other. However, the

relationship is still evolving. Some issues, such as extra-territorial applicability, will likely remain debatable for a while.

When addressing situations of armed conflict, human rights bodies must become well-versed in the basics of IHL and when necessary, use these principles as an interpretative tool. As of now, the use of IHL by human rights bodies can be improved, and with regard to non-international armed conflict, it is hoped that the new customary study will provide a valuable interpretative tool for those bodies needing to asses the lawfulness of state actions in times of armed conflict.

However, when applying both bodies of law, care must be taken in the choice of terms, remembering that although they may share many goals, IHL and human rights law remain separate creatures.

PROSECUTING CONDUCT OF HOSTILITIES VIOLATIONS – OUTLINE
WILLIAM J FENRICK

1. Focus – Unlawful Attack Charges In Both International and International Conflicts Particularly the Handling of Such Charges Before the ICTY in the Galic and Strugar Cases

(a) Such cases are difficult to prosecute because, except in the most unusual circumstances, as the infliction of proportionate injury to civilians or damage to civilian objects in the course of an attack directed against a military objective is lawful, it is necessary to establish an accurate and adequate picture of surrounding circumstances in order to determine whether the infliction of death, injury or destruction is unlawful.

(b) For both practical and policy reasons the ICTY OTP has an interest in the chambers concluding that the law related to unlawful attacks is substantially identical for both international and internal conflicts.

2. Legal Basis for Unlawful Attack Charges

(a) By and large, incidents which are the subject of charges before the ICTY occurred before the ICC Statute was drafted (and before the CIL Study was undertaken).

(b) The Tadic Jursdiction Appeal has been extremely important for the OTP because it held that there was a body of customary law applicable to internal conflicts and because it held there was a common core of law applicable to all conflicts.

(c) Unlawful attacks must be charged as unenumerated offences under Art 3 of the ICTY Statute. To the extent practicable the OTP has tended to rely on applicable treaty law (when it exists) and on CIL (when it is necessary) to provide the legal underpinning for unlawful attack charges (Strugar Jurisdiction Appeal, Hadzihazanovic / Kabura Appeal from 98bis decision).

(d) OTP has argued, among other things, (i) evidence of indiscriminate or disproportionate attacks can provide the basis for a conclusion that an attack is, in

substance, directed against civilians or civilian objects, (ii) attacks directed against civilian objects are prohibited in internal conflicts as well as in international conflicts, (iii) concepts which are addressed in API , such as military objectives and attack precautions, but are not referred to in APII may be used to flesh out the law applicable in internal conflicts.

3. Relationship between Unlawful Attack Counts and Other Counts Rooted in the Same Facts – Unlawful Attack Charges are the foundation charges for most combat crimes. For example, if there is no unlawful attack on civilians then there is no basis for a crime against humanity count because the attack was not directed against the civilian population.

4. It Is Essential To Distinguish Between the Reason for Performing an Act and the Lawfulness of the Act if Mass Criminalization Is To Be Avoided.

5. The Importance of a Detailed and Comprehensive Prosecution Theory – Strugar Example –

Civilians and civilian objects were unlawfully attacked (directly or as a result of an indiscriminate or disproportionate attack) in the Old Town of Dubrovnik on 6 Dec 91 by forces under the command (effective control) of General Strugar and General Strugar was responsible for the attacks because he ordered them or aided and abetted those who committed them or was responsible on the basis of the doctrine of command responsibility.

6. It Can Be Expected That a Competent Defence Will Present an Equally

Comprehensive Defence Theory – Strugar Example –
(i) No injury or damage was caused to civilians or civilian objects during the attack;
(ii) If injury or damage was caused it was not inflicted by the JNA;
(iii) if the damage or injury was caused by the JNA it was proportionate to the advantage gained by an attack directed against military objectives;
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(iv) if the attack was unlawful, General Strugar was not responsible because he did not order it or aid and abet it and he did not exercise effective control over the perpetrators (the buck stopped at Admiral Jokic, General Strugar's immediate subordinate who had already submitted a guilty plea).
7. Presentation of the Case- Need for both crime base and linkage- the importance of military input and the need for the prosecution to create an adequate and honest picture (what happened, who did it, why was it done, could it be lawful/proportionate collateral damage, where did attacking forces fire from and with what, where were military objectives and how important were they, were the persons killed or injured combatants or civilians taking a direct part in hostilities, what did the accused have to do with what happened.
8. Use of Experts – weapons capabilities including range and accuracy, use of artillery, military doctrine, command and control, command climate, commander's intent.
9. General Issues – partial picture almost inevitable, moving from the micro to the macro level (Galic not Strugar).
10. General Comments-
(a) It is possible to prosecute unlawful attack cases although it is not easy and there is a need for military input (analogy to professional negligence cases ?).
(b) Litigation requires precise decisions concerning particular issues- generally speaking CIL possesses a degree of imprecision.
(c) The ICRC CIL study and the decided cases of the ICTY coexist in an uncomfortable but mutually beneficial relationship – the CIL study and CIL in general will not always provide the answers which those involved in litigation would like to see (and in some cases may need), similarly, it is unlikely that decided cases will provide all the answers which those involved in assessing CIL
4
or advising on military operations would like to see (eg – what is a military objective, was RTL in Belgrade a military objective).

Customary International Humanitarian Law and International Armed Conflicts

By
George H. Aldrich

[Comments made in The Hague on May 31, 2005]

In the Introduction to the new book by the International Committee of the Red Cross, the authors have clearly explained why customary international humanitarian law remains important for international armed conflicts despite the highly codified nature of that law, so I need not spend much time in further explanations. The problem, of course, is Geneva Protocol I. If that Protocol had by now obtained near universal acceptance, as have the four Geneva Conventions of 1949, there would be little interest in the question of what constitutes customary international humanitarian law in international armed conflicts. And I suspect that the massive research project that resulted in this book would either not have been undertaken or would have concentrated on internal armed conflicts. It is the failure of Protocol I to achieve the complete acceptance of States that makes the substance of customary law both important and sensitive.

It may be thought that the Protocol has done reasonably well in having now 163 Parties – and much credit is owed to the ICRC for that result – but reasonably well is not good enough, because some of the States that seem most likely to be involved in international armed conflicts are among the 29 States that have not become Parties.[1] That non-honor role includes, for example, India, Indonesia, Pakistan, Iraq, Iran, Israel, Turkey, and the United States. While a few of these missing Parties may simply have overlooked the Protocol, we know that is not the case with the ones I have just mentioned, particularly given their involvement in international armed conflicts in the years since 1977. Substantive dissent from certain provisions of the Protocol by at least some of those States makes it impossible to suggest that the Protocol should, like the 1949 Conventions, be considered to be, at present, a codification of customary law.

During the past several years, I have been a member of an arbitral tribunal where provisions of Protocol I have frequently been invoked by the Parties. That is the Eritrea – Ethiopia Claims Commission, which was established by the Peace Agreement of December 12, 2000,[2] which terminated the costly war between those two countries. The task of the Commission is to determine the claims of each Party against the other for loss, damage, or injury to it or its nationals that are related to the armed conflict and result from violations of applicable international law. During much of that war, which lasted from May 12, 1998 until December 12, 2000, Eritrea was not a Party to the Geneva Conventions of 1949. It acceded to them on August 14, 2000, but it has not yet become a Party to Protocol I. In view of those facts, I think that how the Commission has handled its decisions about the applicable law should be of interest to this meeting.

The Commission has rendered three sets of partial awards[3] – all limited to issues of liability – and presently has under deliberation the fourth and last award on liability. In those awards, the Commission understandably held that the law applicable to claims that arose prior to Eritrea's accession to the 1949 Conventions was customary international

[1] Afghanistan, Andorra, Azerbaijan, Bhutan, Eritrea, Fiji, Haiti, India Indonesia, Iran, Iraq, Israel, Kiribati, Malaysia, the Marshall Islands, Morocco, Myanmar, Nepal, Pakistan, Papua New Guinea, the Philippines, Singapore, Somalia, Sri Lanka, Sudan, Thailand, Turkey, Tuvalu, and the United States of America

[2] Article 5 of that Agreement

[3] On Prisoners of War, July 1, 2003, the Central Front, April 28, 2004, and Civilians, December 17, 2004.

humanitarian law. With respect to the Regulations annexed to the Hague Convention (IV) of 1907 and the 1949 Geneva Conventions, the Commission stated that they "have largely become expressions of customary international humanitarian law and, consequently, that the

law applicable to those claims was customary international humanitarian law as exemplified by the relevant parts of those Conventions."[4] And the Commission added that, if either Party asserted that a particular provision of them should not be considered part of customary international humanitarian law at the relevant time, the Commission would decide that question, "with the burden of proof on the asserting Party."[5] In fact, no such assertion was made by either Party.

With respect to Protocol I, many provisions of which were cited by the Parties, the Commission took a similar, but not identical position. I quote:

> Although portions of Protocol I involve elements of progressive development of the law, both Parties treated key provisions governing the conduct of attacks and other relevant matters in this Case as reflecting customary rules binding between them. The Commission agrees and further holds that, during the armed conflict between the Parties, most of the provisions of Protocol I were expressions of customary international humanitarian law.[6]

The Commission added that, if either Party asserted that a particular provision of the Protocol should not be considered part of customary international humanitarian law at the relevant time, the Commission would decide that question. However, the Commission did not say, as it did with respect to the 1949 Conventions, that the burden would be on the asserting Party. During the proceedings that led to the three sets of awards the Commission has rendered, no Party asserted that any provision of Protocol I that was relied on was not an expression of customary international humanitarian law. That experience certainly suggests that the Commission was correct to hold that "most" of the provisions of the Protocol express customary law.

During the most recent hearing, however, Eritrea claimed that Ethiopia had violated the provision found in Article 54, paragraph 2, of Protocol I that prohibits attacks on objects indispensable to the survival of the civilian population by carrying out aerial bombardment of a drinking water reservoir. In its defense, Ethiopia asserted that that provision of the Protocol should not be considered part of customary international humanitarian law during the armed conflict. So the Commission will have to decide that question in its next award. Obviously, as that award is now under deliberation, I cannot say what my view is or what the Commission will decide, but I can say that, as soon as I received my copy of the three ICRC volumes, I quickly looked up what the authors had to say about it. Unfortunately, the question seems to me not clearly answered, although the authors may think that their Rule 54 settles the issue by stating that "attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population are prohibited." That rule would seem to permit no exceptions.

As the principal author of Article 54 of Protocol I, I am compelled to point out that this Rule 54 is far broader than the relevant provisions of Article 54 of the Protocol. It was very difficult to obtain agreement to that article in 1977, and agreement was possible only by a rather complex form of words that limits its scope. I would point, in particular, to the words in paragraph 2 that limit the scope of the prohibition to actions taken "for the specific purpose of denying them [that is, these indispensable objects] for their sustenance value to the civilian population or to the adverse Party" and to the provisions of paragraph 3 that

[4] *See, e.g.,* the Central Front Award on Ethiopia's claims at paragraph 21.

[5] Ibid.

[6] Id. at paragraph 23.

permit the attack against and destruction of objects used "as sustenance solely for the members of its armed forces" and objects used, "if not as sustenance, then in direct support of military action". I have to question whether such a carefully conditioned rule of treaty law can fairly be considered to have morphed into a sweeping, unconditioned rule of customary

law in the years since 1977.

I want to make clear that I am not suggesting that the exceptions in Article 54 to which I refer are either applicable or inapplicable to the issue facing the Eritrea – Ethiopia Claims Commission, but I refer to those exceptions, because I believe they must raise doubts about the elegant simplicity of the authors' Rule 54. This example illustrates one hazard, that of oversimplification, that anyone faces in attempting to distill principles of customary law from complex, negotiated treaty provisions and in the absence of substantial state practice.

Let me turn briefly to another proposed rule in the ICRC book that relates, although only tangentially, to another issue that we have confronted in the Commission. That is the problem presented by armed combatants in civilian clothes. In the Commission's Award of April 28, 2004 on Ethiopia's claims on the Central Front, the Commission found Eritrea liable for permitting frequent physical abuse of civilians by means, *inter alia,* of intentional killings, which included incidents where the civilians were shot while fleeing invading Eritrean forces.[7] In the same Award, the Commission noted that the defending Ethiopian militia had only small arms and tended to flee with the civilians. In filing briefs relating to the Western and Eastern Fronts, which were part of our most recent hearing, Eritrea pointed out that the Ethiopian militia members had neither any uniforms nor any visible sign distinguishing them from civilians, although it did not assert that they failed to carry their arms openly[8]. I hasten to make clear that the issue to which this relates in our present deliberations is not the entitlement of those militia members to POW status. Claims concerning POWs were the subject of the Commission's first Award, and there was no claim that they were denied POW status. The claim before the Commission now, is similar to the claim in the Central Front claim – the liability of Eritrea for shooting at a group of fleeing people, some of whom were civilians and some of whom were armed militia – but that claim made me wonder how the ICRC study of customary law treats the complex rules of Article 44 of Protocol I.

If you look at the list of Rules in Volume I of the ICRC Study, you will think that you will find the answer to that question in Rule 106. That Rule says:

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.

Like Rule 54, Rule 106 is far simpler than the texts of the treaty law, which are found in Article 4 of the third Geneva Convention of 1949 and in Article 44 of Protocol I. Nevertheless, at first glance, that Rule seems defensible, as most of the objections that have been raised to Article 44 of Protocol I have been to that part of paragraph 3 of that Article that creates an exception for occupied territories, which is a situation that Rule 106 does not address. Upon further reflection, however, One is likely to be troubled by the apparent failure of Rule 106 to reflect the requirements of Article 43 of Protocol I. Those requirements, first, limit the category of combatants to members of the armed forces of a Party to the conflict, second, define the groups that are included in those armed forces as groups "under a command responsible to that Party for the conduct of its subordinates" and, third, require that "such armed forces shall be subject to an internal disciplinary system

[7] At paragraphs 44 and D (1) of Part V.

[8] At paragraph 43.

which, *inter alia,* shall enforce compliance with the rules of international law applicable to armed conflict". Without those requirements, any terrorist band could argue that they were combatants provide that they distinguish themselves from civilians in the limited circumstances stated in Rule 106.

For the first two of those requirements, the failure of Rule 106 is merely apparent,

because they are covered by Rule 3, which defines “combatant,” and Rule 4, which defines “the armed forces of a Party to the conflict”. However, the third requirement evidently has been omitted, I hope inadvertently, by its omission from Rule 4. Also, I would suggest that, if the rule set forth in Rule 106 cannot be kept together with those definitions, as it is in Protocol I, then there should be a cross-reference to them in the text of Rule 106. In addition, I note that confusion may result from the fact that the term “combatant” is used in a different sense in Rule 1 from the way the term is defined in Rule 3.

I realize that these two examples, which I chose only because they were suggested by the claims presently before the Eritrea-Ethiopia Claims Commission, are not typical of Protocol I as a whole, in that the provisions on combatants/POWs and objects indispensable to the survival of the civilian population are two of the most complex provisions in that treaty. Nevertheless, that small sample may serve to illustrate how difficult the task of determining customary law really is. Simple and clear rules are certainly desirable, but not if their simplicity makes them unacceptable to States. And mistakes of this type can undermine confidence in other rules proposed by the ICRC study. If only we could achieve nearly universal acceptance of the Protocol, the significance of the search for customary law would be much reduced. However, as we evidently cannot expect to achieve such acceptance in the near term, I fully agree with the ICRC that the task of finding customary international humanitarian law is well worth the effort.

In closing, I ask you to forgive me for addressing for a few moments the sad fact that the Government of my country has rejected Protocol I. Those of you who participated in the negotiations in Geneva from 1974 to 1977 will understand why the failure of the Protocol to achieve acceptance by the United States is a particularly bitter pill for me to swallow. As thehead of the delegation of my country and as the Rapporteur of the Committee that produced the texts of Articles 35 through 58, I cannot forget the arduous effort required to draft provisions and then redraft them many times in light of the negotiations until a result was obtained that both improved the law and could be adopted with few, if any, serious objections. That process resulted in some provisions, such as the ones I have just discussed, that may fairly be characterized as overly complex and others that are less clear than would seem desirable, but those unavoidable defects are certainly curable by appropriate statements of understanding or reservation. And we see that many Parties to the Protocol have made such statements. During the years immediately following the adoption of the Protocol by the Diplomatic Conference and its signature by the United States, I participated in NATO consultations to coordinate those statements among the members of the alliance, and I see the results of that effort in the statements made by a number of countries.

I want to make it clear that every position that my delegation took at the diplomatic conference that produced Protocol I was approved at that time by my Government, and I assumed, and I believe all of the members of my delegation assumed, that our President would request the Senate to give its consent to ratification, subject to those statements of understanding and possibly a reservation of a limited right of reprisal.

We recognized the political problem presented by the reference in Article 1 to wars of liberation, but we knew, correctly, that that provision was so written and qualified that it would almost certainly never be invoked. We did not foresee the arrival in power in Washington of neo-conservative ideologues to whom the Protocol would be seen as both an unnecessary compromise and a useful target at which they could hurl invective. We, of course, understood Israel’s political objections to Article 1, but they were not our objections. However, that was not, I gather, the view of our successors in office, and they were able to convince at least some military officers to change the position of the Defense Department, which, throughout the negotiations, had been one of firm support for the Protocol. That became possible, I believe, because the generation of military officers who had served as

junior officers in Vietnam was convinced that they could have succeeded in winning that war if they had not been restrained by political limitations. That conviction made them resistant to any new limitations on the use of force, so, when they became senior officers, it was relatively easy for the ideologues to convince them to oppose the Protocol on the grounds that it would impose new restraints, even though, compared to the political restraints they bitterly remember, the restraints made by the Protocol would be insignificant.

That said, I remain unwavering in my support of Protocol I, and I remain confident that it will eventually achieve the universality it deserves. Eventually, of course, can be a long time. So, in the indefinite interim, customary international humanitarian law will remain important for many international armed conflicts. Consequently, finding and articulating that law deserves our best efforts.

"Bridging the gap between IHL applicable in international and in non-international armed conflicts"

Georges Abi-Saab

I - A brief reminder of the efforts to bring non-international armed conflicts within the orbit (or ambit) of the law of war or IHL as we now call it

- Nothing until 1949 (except for the purely voluntary institution of recognition of belligerency)
- Common article 3 of the 1949 Geneva Conventions
- Additional Protocol II of 1977 (high threshold, compressed content)

II - Post 1977 Developments

- The changing environment
  - the propagation of non-international and "ambiguous" conflicts, particularly with the lifting of the cold-war cover over simmering internal tensions
  - greater exposure to world public opinion through media, NGOs, etc.
- Greater implication of the UN (GA, UNHCR, but mainly SC), particularly in scrutiny and legal protection, regardless of the nature of the armed conflict, through:
  - affirming the law, making determinations of its application to specific cases;
  - denouncing violations;
  - establishing fact-finding organs; and (most importantly)
  - establishing international criminal tribunals to prosecute violators
- These great advances on the institutional level could not but influence the development of substantive law, particularly through the jurisprudence of the International criminal tribunals
  - the tendency towards taking the edge off the distinction between international and non-international armed conflicts already visible in the *Nicaragua* judgement of the ICJ in 1986
  - but its *locus classicus* remains the *Tadic* interlocutory judgement of the Appeals Chamber of the ICTY in 1995.

III - The *Tadic* treatment of customary law

- the issue: applicability of war crimes in non-international armed conflicts
- the methodology of identifying custom
- the meaning of practice: what is the "legally significant" practice?
- the difficulty of observing conduct on the battle field, and of proving a negative (i.e. abstention), whence the greater importance of *opinio juris*
- two fundamental precedents (no recognition of belligerency, but insistent calls by the international community for application of IHL, including penal sanctions): the Spanish Civil War and Biafra
- other cases and other elements of proof
- the proof of custom has to cover not only the existence of the rule but also the criminalization of its violation.

IV - The findings of the ICRC study of customary IHL

- Having demonstrated the substantial parallelism between the rules applicable to the two types of conflict, the study *concludes* that, as far as non-international armed conflicts are concerned, customary law has had for effect:

- to extend the application of the rules figuring in conventional law, namely Protocol II, to non parties
- to extend protection beyond what is provided in conventional law, i.e. Protocol II

- The latter conclusion needs qualification, however. For, if custom has gone beyond Protocol II, it did not go beyond conventional law in general. Rather, it followed in many respects Protocol I, extending its norms to non-international armed conflicts; thus narrowing the gap between the two types of armed conflict.

V - Some theoretical comments on the nature of the particular species of custom we are dealing with here, i.e. "induced custom"

- The three modes of interaction between codification treaties and custom; such treaties having:

- a declaratory,
- a crystallizing, or
- a generating effect on custom

- The customary law we are dealing with here belongs to the second and third categories. I call it the "new custom", "green house" or "induced" custom, with special characteristics that distinguish it from "old custom" of the 19c variety.

VI - Politically speaking, it is interesting to note that the Western Powers, particularly the US, which are weary of custom as far as international armed conflicts are concerned (e.g. bombardments), promote it for non-internal armed conflicts. At the same time, Third World countries, whose attitude to custom is very positive as concerns conflicts of an international character, are weary of it when it comes to conflicts of a non-international character.

Improving Enforcement of International Humanitarian Law in Internal Armed Conflicts

Dieter Fleck*

The *ICRC Study on Customary International Humanitarian Law*[1] follows a practice oriented approach in identifying existing rules for the protection of victims of all armed conflict. Rules applicable in non-international armed conflicts may be much more relevant today than rules governing conduct in international wars. But practice shows that the law is widely violated and (what may be even more distressing for victims, international organisations and warring parties alike) means to enforce compliance with existing rules are often weak and sometimes not available. Hence the most important challenge is how to deal with the imperfect situation of compliance and enforcement in a realistic and convincing manner.

Fifteen years ago, the *German Manual on Humanitarian Law in Armed Conflicts*[2] had devoted its concluding chapter to the following factors that can induce parties to an armed conflict to counteract breaches of the law and to enforce observance of its rules: considerations for public opinion; reciprocal interests of the parties to the conflict; maintenance of discipline; fear of reprisals; penal and disciplinary measures; fear of payment of compensation; involvement of protecting powers; international fact-finding; the activities of the ICRC; diplomatic activities; national implementing measures; dissemination of humanitarian law; and personal responsibility of the individual.

The forthcoming *San Remo Manual on the Protection of Victims of Non-International Armed Conflicts*[3], which will be finalised during this summer right after the launch of the ICRC Study, will go into further details. Its Part III will address the existing range of implementing and enforcement measures under specific aspects of contemporary wars. It will explain practical aspects of individual criminal responsibility; of individual and collective liability; military, economic and political consequences of violations of international rules; and measures to secure and promote compliance, such as special arrangements, fact-finding and related measures, education and training.

* Formerly, Director International Agreements & Policy, Federal Ministry of Defence, Germany; Senior Vice-President, International Society for Military Law and the Law of War, Member of the Council of the International Institute of Humanitarian Law. The views and opinions expressed in this contribution are personal.

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2 Federal Ministry of Defence, Humanitarian Law in Armed Conflicts, Bonn 1992, commented version by D. Fleck (ed.) in collaboration with Michael Bothe, Horst Fischer, Hans-Peter Gasser, Christopher Greenwood, Wolff Heintschel von Heinegg, Knut Ipsen, Stefan Oeter, Karl Josef Partsch, Walter Rabus, and Rüdiger Wolfrum, *The Handbook of Humanitarian Law in Armed Conflicts,* Oxford, Oxford University
Press, 1995, paper back 1999.

3 San Remo Manual on the Protection of Victims of Non-International Armed Conflicts, Tentative Text, Part III, http://web.iihl.org/iihl/Documents/Tentative%20Text.doc.

The ICRC Study does not provide a comprehensive inventory of means and methods to enforce compliance with international humanitarian law. Its Chapters 40-44 rather focus on selected critical issues of compliance[4] and enforcement[5], as well as on consequences of violations[6]. Such approach has the advantage of providing a realistic picture of state practice which should be reviewed in a spirit to identify gaps and initiate new developments. In presenting each of its rules, the ICRC Study carefully distinguishes between international and non-international armed conflicts. Readers will realise that the latter rules by far exceed the contents of Article 3 common to the Geneva Conventions and the provisions of Additional Protocol II, but they will also conclude that in internal armed conflicts specific problems of compliance and enforcement remain unsolved. These problems require an in-depth reflection and forceful new efforts to improve protection of victims and ensure confidence in the law. A comprehensive analysis should identify those issues which are most urgent to implement international humanitarian law and it should include proposals to encourage its progressive development. I suggest to consider for this purpose (1) the responsibility of states for a **continuous review** of implementation activities; (2) the improvement of **fact-finding** mechanisms;
(3) the wide range of **preventive and repressive means** to ensure compliance; and (4) practical means to strengthen international and individual responsibility for providing **redress for victims**.

I.

Let us consider first the need for a continuous review of legal mechanisms to ensure compliance
with international humanitarian law. Severe gaps and deficiencies of its implementation call for such review which should comprise existing and prospective legal mechanisms. A multitude of human suffering and vital challenges for the rule of law in current conflicts require urgent action to be taken by governments and the civil society at both international and national levels.

[4] Chapter 40: the duty to respect and ensure respect (Rule 139); the issue of reciprocity (Rule 140); the role of legal advisers to military commanders (Rule 141); instruction on international humanitarian law (Rules 142 and 143).
[5] Chapter 41: the obligation to stop violations (Rule 144); and the far-reaching prohibition of reprisals (Rules 145-148).
[6] Chapters 42 - 44: responsibility for violations (Rule 149); the obligation to make full reparation (Rule 150); individual criminal responsibility (Rule 151); command responsibility (Rules 152-153); the duty to disobey a manifestly unlawful order (Rule 154); criminal responsibility for superior orders (Rule 155); war crimes (Rule 156); universal jurisdiction over war crimes (Rule 157); national prosecution of war crimes (Rule 158); amnesties at the end of non-international armed conflicts (Rule 159); non-applicablitiy of statutory limitations to war crimes (Rule 160); international cooperation in the investigation and prosecution of war crimes (Rule 161).

The responsibility of states, international organisations and civil society must be stressed and encouraged in this context. For successful efforts in this field much depends on the effectiveness of cooperation and exchange. In view of the nature and size of the problem, all available remedies to improve implementation and ensure enforcement of humanitarian protection must be implemented with the same high priority.

Ideally, the ICRC Study will initiate a broad discussion among governments, academic experts, and interested quarters of civil society. The purpose should be not only to highlight the advantages of this project, and to identify some open issues and controversies, but also to shape new policies for adoption at the forthcoming International Conference of the Red Cross and Red Crescent. Activities for better implementation of international humanitarian law, remedies for violations and enforcement of existing rules should be at the top of such activities.

The protection of victims of armed conflict is too important and the price of inaction towards state and non-state actors violating humanitarian principles and rules is too high than to allow for less than courageous attitudes of those few men and women who are actively committed to implementation and enforcement of international humanitarian law within the executive branches of states and civil society.

II.

Our second field of concern is how to improve fact-finding. An objective establishment of facts is essential for both implementation and enforcement of the law. Fact-finding activities in armed conflicts often serve humanitarian law and human rights purposes at the same time. While such activities need to be improved by institutional and other means, no undue difference as to the procedures and their institutional implementation should be made[7]. Not only state organs, but also civil society and international bodies must be considered in this respect:

- *Parties to the conflict* should use existing fact-finding mechanisms to allow for objective enquiries into any alleged violations of rules of the law. While it would hardly be possible, to make such mechanisms legally compulsory for parties to an armed conflict, governments should realise that it would be short-sighted to hide breaches committed by their armed forces and let them unexplored, or to downplay issues of command responsibility as the world has witnessed many times and even recently in some spectacular cases.

[7] See San Remo Manual, *supra,* n. 3, paras. 332 and 333.

- *Non-governmental organisations* can contribute to securing and promoting compliance with applicable rules. They may provide good offices and assist in monitoring, mediating and providing other assistance in this respect.
- *Human rights bodies*, although confined by their mandate and tradition to control compliance with human rights treaties[8], can provide appropriate means for investigating violations of international humanitarian law. Human rights bodies have, indeed, set already convincing examples for proactive participation in the application of humanitarian law and its progressive interpretation[9]. Where governments fail to cooperate with fact-finding missions mandated by competent international organs, the Security Council and a new Human Rights Council of the United Nations are challenged to secure these activities.
- The *International Humanitarian Fact-Finding Commission*, established under Article 90 of Additional Protocol I for investigating breaches of humanitarian law in international armed conflicts at the request of all parties concerned, should be used also in internal wars. The Commission should be encouraged to develop initiatives independently or in corporation with other institutions, even without having a treaty based right of doing so. States and insurgents should appreciate the advantage of seizing the Commission, as unlike other fact-finding bodies it shall not report its findings publicly, unless all the parties to the conflict have requested it to do so.
- The *ICRC*, as the guardian of international humanitarian law, may assist in factfinding within the principle of impartiality and existing ICRC practice[10].

Fact-finding is also highly relevant for post-conflict peace building. Its importance for executive bodies, courts, truth commissions and the civil society cannot be limited to criminal jurisdiction and aspects of reparation[11]. The effect of objective fact-finding which will remain the most significant is confidence-building and motivation of people to participate in reestablishing order and security.

[8] E.g. Human Rights Commission and its Sub-Commission on the Promotion and Protection of Human Rights, working groups and network of individual experts, representatives and special rapporteurs, reporting procedure under Art. 40 ICCPR, inter-state complaints under Art. 41-43 ICCPR, individual communications under the first Optional Protocol, Commission on the Prevention of Racial Discrimination and the Protection of Minorities; European Court on Human Rights; Inter-American Court of Human Rights; Inter-American Commission on Human Rights (IACHR); see Philip Alston, *The United Nations and Human Rights*, Oxford 1992; Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University press, Cambridge 2002, pp. 252-263 and 271-273.

[9] See IACHR, Tablada case, report No. 55/97, case No. 11.137, Argentina, OEA/Ser/L/V/II.97, Doc. 38 (October 30, 1997), see Liesbeth Zegveld, 'The Interamerican Commission on Human Rights and international humanitarian law: A comment on the Tablada case', IRRC No. 324 (September 1998) pp. 505-11; IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 22 October 2002, www.cidh.org/Terrorism/Eng.

[10] See *Report of the International Committee of the Red Cross on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation*, February 2004.

[11] See *Guatemala Memoria des Silencio (Informe de la Comisión para el Esclarecimiento Histórico*, 1999 (12 volumes); Lovell Fernandez, 'Reparation for Human Rights Violations Committed by the Apartheid Regime in South Africa', in: Albrecht Randelzhofer and Christian Tomuschat (eds.), *State Responsibility and the Individual: Reparation in instances of Grave Violations of Human Rights*, 1999, 173-87.

III.

The third and most important task is to ensure the use of effective remedies for violations of international humanitarian law. The application of that law and its progressive development are subject to a permanent test of effective remedies to ensure compliance. The fundamental character of humanitarian standards as obligations *erga omnes* underlines that all states have a responsibility for taking appropriate steps to ensure respect of humanitarian law, even if they are not directly involved in an armed conflict. The international community has given a dynamic interpretation to Article 1 common to the Geneva Conventions during the past years[12].

The relevance of that provision to non-international armed conflicts is clearer today than it was in 1949. Also the inventory of appropriate means to ensure respect has been enlarged:

a) **Preventive means** such as education and training, co-operation in fact-finding and special arrangements between parties to an armed conflict designed for ensuring implementation and supplementing existing rules would enhance compliance with the law and support understanding for reciprocal and long-term interests of the international community. The ICRC Study confirms that the obligation to respect and to ensure respect of humanitarian law is not only an obligation of states but also of armed opposition groups[13]. It also states that instruction on international humanitarian law must be provided not only by governments with respect to their armed forces and the civilian population, but also by groups fighting against the government[14]. The obligation to ensure respect of international humanitarian law vis-à-vis government and opposition forces alike has been confirmed not only by ICRC activities both in Geneva and in the field, but also by the Security Council and state practice.

The ICRC Study rightly underlines that the obligation to respect and ensure respect for international humanitarian law does not depend on **reciprocity**[15], although the expectation of compliance by the adversary is one of the driving forces to ensure compliance. As confirmed in Article 60 (5) of the Vienna Convention on the Law of Treaties, respect for treaties of a humanitarian nature cannot be dependant on respect by other states parties. The same applies to customary rules of a humanitarian nature. The application of this principle also in noninternational armed conflicts has been endorsed in important judgments and a number of military manuals.

[12] See F. Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit', in 2 *YIHL* (1999) pp. 1 et seq.; Birgit Kessler, 'The Duty to „Ensure Respect" Under Common Art. 1 of the Geneva Conventions: Its Implication in International and Non-International Armed Conflicts', in: GYIL 44 (2001) 498-516; Birgit Kessler, *Die Durchsetzung der Genfer Abkommen von 1949 in nicht-internationalen bewaffneten Konflikten auf Grundlage ihres gemeinsamen Art. 1*. Berlin 2001.

[13] *Supra,* n. 1, Vol. I, Rules 139 and 140, Vol. II, Part 2, pp. 3289-3302.

[14] *Supra,* n. 1, Vol. I, Rules 142 and 143.

[15] *Supra,* n. 1, Vol. I, Rule 140, Vol. II, Part 2, pp. 3195-3196.

It has been reinforced by human rights obligations governments are bound to and opposition forces have to respect as well[16]. An innovative look into third state roles and responsibilities remains necessary. Efforts to develop strategies for influencing parties to noninternational armed conflicts[17] deserve forceful endeavours and they require international support at regional and global scale. The civil society's role is essential not only for the success of educational programmes but also for the conclusion of special agreements under Article 3 common to the Geneva Conventions and for the granting of amnesties to members of armed opposition groups as an incentive for compliance with international humanitarian law.

b) **Repressive means** include political, economic and military measures. These measures depend on competent authorities who are fully aware of their responsibilities and ready to act. Confidential negotiations, together with appropriate forms of diplomatic pressure and coercive measures are required. But also external scrutiny and public support remains helpful and sometimes necessary in the process of decision-making. Coherent strategies for ensuring implementation must be developed. Measures taken may be highly controversial. Once being ordered, they require resolute action.

Humanitarian law treaties do not provide appropriate remedies for all circumstances. But this should not be considered as a stumbling block. The law of non-international armed conflict, as part of international law, is **not a "self-contained system"** which in the words of the International Court of Justice enumerates a limited number of possible reactions to violations, in the context of the law of diplomatic relations[18]. Reviewing this concept even for the law of diplomatic relations, the International Law Commission has convincingly limited it to the rule that a state taking countermeasures "is not relieved from fulfilling its obligation … to respect the inviolability of diplomatic or consular agents, premises, archives and documents"[19]. Indeed, international humanitarian law is to be implemented not only by using mechanisms expressly provided for by its particular rules. State responsibility and the individual responsibility of fighters in armed conflicts are based on a much broader concept[20].

[16] See D. Fleck, ‚Humanitarian Protection Against Non-State Actors', in: Jochen Abr. Frowein/Klaus Scharioth/Ingo Winkelmann/Rüdiger Wolfrum (eds.), *Verhandeln für den Frieden/ Negotiating for Peace. Liber Amicorum Tono Eitel*, Berlin, Springer, 2003, 69-94; Christian Tomuschat, ‚The Applicability of Human Rights Law to Insurgent Movements', in Horst Fischer *et al., Crisis Management and Humanitarian Protection, Festschrift für Dieter Fleck,* Berlin, Berliner Wissenschafts-Verlag, 2004, 573-591. The ICRC Study, *supra,* n. 1, Vol. I, Chapter 32, Introduction, p. 299 is unnecessarily reluctant to follow this view which has been confirmed by the Security Council in long-established practice.

[17] See ICRC, Improving Compliance with International Humanitarian Law, Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Löaw, Cambridge, Mass., June 25-27, 2004, http://www.ihlresearch.org.

[18] „... diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions." *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports 1980, p. 3, at p. 38 (para. 83) and p. 40 (para. 86).

[19] Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARS), Report of the International Law Commission on the work of its 53rd session (23 April – 1 June and 2 July – 10 August 2001), U.N.doc. A/56/10, General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/56/10), http://www.un.org/law/ilc/reports/2001/2001report.htm,; J. Crawford, *The International Law Commission's Articles on State Responsibility,* Cambridge University Press, Cambridge, 2002: Draft Article 50 (2) (b) and Commentary.

[20] Marco Sassòli, 'State responsibility for violations of international humanitarian law', in: 84 N° 846 *IRRC* (June 2002), 401-434 [403-4].

Yet human rights procedures are not always filling the gap. Their utility for reparation postconflict remains questionable. It may be most effective in Latin America (due to the IACHR and IACtHR), somewhat less effective in Europe (as exemplified by the ECtHR in judgments on Northern Cyprus and Chechnya), and much less elsewhere, where only the Human Rights Committee exerts its limited power.

IV.

Finally, individual and state responsibility for compliance with international humanitarian law must be strengthened, considering that individual and state responsibility alike are essential elements for good governance. In this context, some remarks on litigation, accountability, reparation, and an individual complaints procedure may be in order.

a) Litigation as an enforcement devise has become more prominent in recent years, due to the establishment of *ad hoc* tribunals and the International Criminal Court. This development has strongly underlined the **individual responsibility** for violations of international humanitarian law. The international justice system, however, is still selective and the level of expertise in military matters of those prosecuting, defending and adjudicating cases is often rather limited. It should also be borne in mind that the requirements of fair trial and the duration of criminal procedure both at national and international courts generally exclude the possibility of using prosecution as a tool for enforcing compliance. But **effective criminal jurisdiction can be used for dissuading from the performance of crimes in future conflicts**.

b) In current international law and practice the **international accountability** of states is even less developed than that of individual perpetrators. The ICRC Study confirms that a state responsible for violations of international humanitarian law 'is required to make full reparation for the loss or injury caused' and it describes an increasing trend in favour of enabling victims to seek reparation directly from the responsible state[21]. Forms of reparation include restitution, compensation, rehabilitation, satisfaction, and guarantees of nonrepetition[22].

[21] *Supra,* n. 1, Vol. I, Rule 150, pp. 537-550.

[22] Cf. UN Commission on Human Rights, *The right to Restitution, Compensation and Rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final Report of the Special Rapporteur Mr. M. Cherif Bassiouni,* E/CN.4/2000/62, 18 January 2000, pp. 5 et *seq.*; Commission on Human Rights, Draft resolution on Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, E/CN.4/2005/L.48 (13 April 2005).

While full reparation will be impossible in almost every case, **honest efforts to provide reparations are essential for an effective peace process and immaterial measures including recognition of facts and responsibilities are not less important than pay-ments and restitution**[23].

8

There is an encouraging practice of claims commissions established by states willing or persuaded by other states or ordered by the Security Council under Chapter VII to bring redress in specific situations. The ICRC Study has the merit of documenting the mandates and results of major compensation commissions and it explains that also victims of non-international armed conflicts have received reparation from states and even from armed opposition groups[24]. The Study points to 'some practice to the effect that armed opposition groups are required to provide appropriate reparation for the damage resulting from violations of international humanitarian law'[25].

International responsibility for violations of humanitarian principles in noninternational armed conflicts should be discussed more systematically today: states may be held responsible for violations of international humanitarian law committed in noninternational armed conflicts and attributable to these states. Such attributability is accepted for acts of regular armed forces, police and other state organs. It must also be confirmed for acts of insurgents taking over government powers post-conflict. But states may also be held responsible for omissions, if they have failed to protect the civilian population against violations committed by armed opposition groups.

c) The **right to individual reparation** mainly rests within municipal legal orders and, except for ad hoc solutions after certain armed conflicts, there are hardly any compensation procedures under international law today. Contemporary international law does not offer rights to individuals corresponding to the duties of states to comply with international humanitarian law and make full reparation for any violation of its norms. To expect a shift of attitude and even a general regulation of this complex issue within a foreseeable time would be less than realistic. Indeed, individual victims of violations are limited if not practically excluded by procedural and substantial problems. This issue marks the key question of the law of reparations and deserves an in-depth discussion.

[23] The International Law Association has established a new *Committee on Compensation for Victims of War* The Mandate is as follows: 'Innocent civilians are often casualties during armed conflicts, whether or not intentionally targeted. Deprived of effective protection, they are often left without any remedy if they are killed or wounded, or suffer property or other losses. It is time to systematically review the law of war and human rights with a view to focussing on the rights of victims of war to compensation – both to serve the end of justice and to inhibit wanton attack on civilian population by the military, whether or not under superior order. The proposed project would have as its goal the preparation and adoption of a Draft Declaration of International Law Principles on Compensation to Victims of War, as a logical sequel to three ILA declarations already adopted: namely, on Mass Expulsion (Seoul 1986), Compensation to Refugees (Cairo 1992), and Internally Displaced Persons (London 2000). Underlying all these declarations is the principle that compensation must, under international law, be paid to victims of human rights abuses.'

[24] *Supra,* n. 1, Vol. I, Rule 150.

[25] *Supra*, n. 1, Vol. I, pp. 549-550 with reference to practice by armed opposition groups in Colombia, and to SC Res 1071 (1996) with respect to 'the leaders of the factions' in Liberia' and a Resolution of the UN Commission on Human Rights with respect to 'all the Afghan parties' (UNCHR Res. 1998/70).

The traditional view, as expressed by the ICRC in its Commentaries to the Geneva Conventions[26] and the Additional Protocol I[27] and confirmed at the 1993 Geneva Conference on the Protection of War Victims, is that application for the reparation or compensation can be made only via the state, a fact which often makes the process and its outcome uncertain. It is for this reason that the ICRC has proposed to establish procedures to provide reparation for damage inflicted on the victims of violations of international humanitarian law and award compensation to them[28]. That proposal is still far from being implemented.

The new ICRC Study does not ignore that 'individual claimants before national courts have encountered a number of obstacles in trying to obtain compensation on the basis of Article 3 of Hague Convention (IV), although no court has explicitly ruled out such a possibility under contemporary international law'[29]. An international legal regime of individual reparations would strengthen democratic developments. It could have deterrent effects for some perpetrators. And it would be more comprehensive and more effective than Article 75 of the ICC Statute which enables the Court to adjudicate individual claims also in cases where no international responsibility exists.

d) **An individual complaints procedure for violations of international humanitarian law should be encouraged.** It might be developed either as a new mechanism[30] or using existing human rights procedures. International organisations may be denied access in certain states. Yet an opportunity for individual victims to apply to such organisations is essential for ensuring monitoring and providing remedies against violations.

Remedies to ensure compliance with the law widely depend on individual initiatives. Such initiatives are mostly located in the executive branches of states and civil society. To be successful, they should follow a generalist approach and refrain from developing too sophisticated proposals. It could make a convincing case if the next International Red Cross and Red Crescent Conference would use the ICRC Study as a point of departure for launching a few general initiatives to foster continuous review, encourage fact-finding and support realistic means to strengthen international accountability.

[26] J.S. Pictet, *Commentary*, *III*, *Geneva Convention Relative to the Treatment of Prisoners of War*, Geneva, ICRC, 1960, p. 630.
[27] Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols,* Geneva, ICRC/Nijhoff, 1987, p. 1056.
[28] ICRC, *Report on the Protection of War Victims,* Geneva, June 1993, para. 4.3, reproduced in M. Sassòli and A. Bouvier, *How Does Law Protect in War?*, Geneva, ICRC, 1999, 444-458 [457].
[29] *Supra,* n. 1, Vol. I, Rule 150, pp. 544.
[30] See *Hague Appeal for Peace*. Draft Additional Protocol to the Geneva Conventions Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law [http://www.haguepeace.org]; J. Kleffner, 'Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law', in 3 Yearbook of International Humanitarian Law (2000), 384-401; J. Kleffner, 'Improving
Compliance with International Humanitarian Law through the Establishment of an Individual Complaints Procedure', in: 15 Leiden Journal of International Law (2002), 237-250.