INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW
INSTITUT INTERNATIONAL DE DROIT HUMANITAIRE
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CURRENT PROBLEMS

OF INTERNATIONAL HUMANITARIAN LAW

26th Round Table, Sanremo, 5-7 September 2002

THE TWO ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS: 25 YEARS LATER

- CHALLENGES AND PROSPECTS -

~ PROCEEDINGS ~

PREFACE

Thanks to the generosity and friendship of the Dragan European Foundation, particularly of its founder, Professor Costantino Dragan, we have had the opportunity to publish the proceedings of our *26th Round Table on Current Problems of Humanitarian Law* held from 5 to 7 September 2003 in Sanremo.

We would also like to thank all rapporteurs and chairmen of sessions for their contributions. The participants benefited from the well-prepared reports and discussion papers presented at the Round Table. Moreover, the Chairmanship of the Round Table very much appreciated the interventions and constructive discussions of the participants, who contributed to the successful results and well-elaborated conclusions and recommendations which they then adopted. The participants particularly appreciated the keynote address of Dr. Jakob Kellenberger, President of the International Committee of the Red Cross, on *"International Humanitarian Law at the Beginning of the 21st Century"*.

The open and friendly humanitarian dialogue, which is a great tradition of our Institute, was fully respected during the meeting.

It is our sincere wish that this publication be a useful document and tool for all concerned for and involved in international humanitarian law, in respect and implementation of international conventions and instruments protecting human beings in different conflict situations, particularly the Four Geneva Conventions of 1949 and their Two Additional Protocols of 1977.

This publication has been supervised by Dr. Stefania Baldini, Secretary-General of the International Institute of Humanitarian Law, Dr. Guido Ravasi, Secretary General of the Dragan European Foundation and Dr. Gian Luca Beruto, Research & Project Officer of the Institute. Special thanks should be given to Mrs Shirley Morren, Librarian of the Institute, who checked the final proof.

Prof. Jovan Patrnogic
President, IIHL

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TABLE OF CONTENTS / TABLE DES MATIÈRES / INDICE

26th Round Table

5-7 September 2002, Sanremo

Distinction between Civilians and Combatants, Dr. Knut DÖRMANN, Legal Adviser, International Committee of the Red Cross

Targeting in Present Day Conflicts – Challenges to the Principle of Distinction, Prof. Michel BOURBONNIÈRE, Royal Military College of Canada

Protection of the Civilian Population in Non-International Armed Conflicts, Dr. Heike SPIEKER, Ruhr-Universität, Bochum, Germany

The New Sanremo Manual on the Protection of Victims of Non-International Armed Conflicts, Dr. Dieter FLECK, Director, International Institute of Humanitarian Law Research Project

Summing up by the moderator

Panel II: Threats caused by Old and New Weapons

Moderator: Dr. Marie G. Jacobsson, Deputy Director, Division for International Law, Ministry for Foreign Affairs, Sweden

New Weapons and Methods of Warfare, Dr. Robin M. COUPLAND, Medical Adviser, International Committee of the Red Cross

Review of Developments regarding Conventional Weapons, Mr. Steve SOLOMON, Deputy Legal Adviser, US Permanent Mission at the UN Office, Geneva

Weapons of Mass Destruction, Col. Giuseppe CORNACCHIA, Head of the Office for Armament Control, Italian Ministry of Defense

Arms Proliferation and International Humanitarian Law, Mr. Peter HERBY, Co-ordinator, Mines-Arms Unit, International Committee of the Red Cross

Panel III: Repression of War Crimes

Moderator: Judge Fausto POCAR, Appeals Chamber, International Criminal Tribinual for the former Yugoslavia and International Criminal Tribunal for Rwanda

Lessons from the ad hoc Tribunals, Prof. Horst FISCHER, Academic Director, Institute of International Law of Peace and Armed Conflict, Ruhr-Universität, Bochum,

The Relevance of the International Criminal Court: How to make it Effective, Mr. Adriaan BOS, Former Legal Adviser, Ministry of Foreign Affairs, the Netherlands

The Relevance of the International Criminal Court: How to make it effective? Prof. L. R. PENNA, Faculty of Law, National University of Singapore

Panel IV: Looking at the Future of International Humanitarian Law

Moderator: Dr. Mohammed AL-HADID, Vice-Chairman, Standing Commission of the Red Cross and Red Crescent, President of the Jordan National Red Crescent Society

25 Years of the Two Additional Protocols: their Impact on the Waging of War; Challenges from New Types of Armed Conflicts, Col. Charles GARRAWAY, Army Legal Services, United Kingdom

The African Perspective, Brigadier T.K. GITHIORA, Kenyan Armed Forces

International Humanitarian Law after 11th September 2001, Prof. Marco SASSOLI, Professor of International Law, University of Quebec in Montreal, Canada

L'interêt des Protocoles Additionnels aujourd'hui, Dr. François BUGNION, Directeur du Droit International Humanitaire au sein du Mouvement , Comité International de la Croix-Rouge

Interventions:

Prof. Eun-Bum CHOE, Visiting Professor at Keio University, Tokyo, Republic of Korea National Red Cross

International Criminal Court – Triumph or Dream? Prof. Michael HERMAN, Member of the International Institute of Humanitarian Law

Protection of the Civilian Population in Non-International Armed Conflicts – some reflections, Dr. Bosko JAKOVLJEVIC, Member of the International Institute of Humanitarian Law

The Legal Binding Force of the Red Cross Principles in the Geneva Conventions of 1949 and the Additional Protocols of 1977, Prof. Myung-Ki KIM, Republic of Korea National Red Cross

L'importanza dei Protocolli di Ginevra del '77 sulle sanzioni riguardanti i crimini di guerra contro i beni culturali, Maggior Gen. Arturo MARCHEGGIANO, Presidente della Lega Internazionale delle Società Nazionali per la Protezione dei Beni Culturali in Guerra

Additional Protocol I and the Principle of Proportionality, Prof. Dr. Miodrag STARČEVIĆ, Yugoslav Red Cross, Senior Adviser on International Humanitarian Law

Intervention (Summary), Amb. Mounir ZAHRAN, Council Member of the International Institute of Humanitarian Law

Les Protocoles additionnels et l'Afrique, M. François NDAGIJIMANA, Fondation de l'Institut International de Recherches pour la Paix, Genève

Problème actuel du Droit International Humanitaire, Mme Graciela ROBERT, Médecins du Monde

The Concern of International Humanitarian Law for Legal Issues, Prof. John CRABB, Member of the International Institute of Humanitarian Law

The awarding of the Gift of the Korean Bell to the International Institute of Humanitarian Law, Prof. Eun-Bum CHOE,

Awarding of the IIHL 2002 Prize for the "Promotion, Dissemination and Teaching of International Humanitarian Law" to the British Red Cross

Awarding of the XIIIth "International Princess Mafalda of Savoy-Assia Prize for Peace " to the IIHL by the Queen Helena International Association

Closing Session

Concluding Statement, Prof. Jovan PATRNOGIC, President of the International Institute of Humanitarian Law

OPENING SESSION

WELCOME ADDRESS

Prof. Jovan PATRNOGIC
President of the International Institute of Humanitarian Law

Ladies and Gentlemen,
Excellencies,
Dear old and new Friends,
Dear President Kellenberger,

Welcome to the International Institute of Humanitarian Law which has been active on the Italian soil for 32 years now. We are very proud with our work, with our efforts, with our fight for the humanitarian cause. We are very proud to have so many friends, goodwill people who are with us and follow our efforts in the promotion, dissemination and teaching of International Humanitarian Law, Refugee Law and fundamental Human Rights. We are very proud to have with us, since the very foundation of the Institute, the International Committee of the Red Cross which supports and actively participates in our humanitarian work together with other international organisations and governments, in particular, the United Nations High Commissioner for Refugees, the International Federation of Red Cross and Red Crescent Societies, the Swiss Government, the Italian Government, the Norwegian Government, the Swedish Government, the Swiss Federal Office for Refugees, and the International Organzation for Migration.

Friends,

It is not easy today to fight for the respect and the implementation of humanitarian law in conflict situations. There are opposing ideas concerning the interpretation of International Humanitarian Law, and there is no respect for fundamental human rights and humanitarian rules in armed conflict situations. The basic international treaties - the four Geneva Conventions with their two Additional Protocols - are in danger. What can we do if reality sometimes imposes flagrant violations of basic humanitarian rules upon us?

At a time when humanitarian issues are increasingly complex, when the link between military intervention and humanitarian assistance in armed conflicts becomes a common feature, when the protection of victims in armed conflict situations, asylum, irregular migration and refugee protection issues constitute growing challenges for governments and institutions alike and, in short, when human security and state security are considered a priority on all political and humanitarian agendas, the Institute's humanitarian role

and potential remain considerable. Also, recent tragic developments relating to the war against terrorism and the consequent difficulty of considering organised terrorist groups as parties will pose new and highly intricate legal and other challenges particularly related to International Humanitarian Law. The Institute's role as a forum for informal analysis and discussion becomes important thereto.

The issues and preoccupations of today's international community often present fundamentally different types of challenges from those that the world had to face in 1945 when the United Nations was founded. It is evident that new realities and challenges have generated new expectations and necessities for action and new standards of conduct in national and international affairs.

Since, for example, the terrorist attacks of September 11, 2001 against the World Trade Center and the Pentagon, it has become more than evident that for the war against terrorism, a war unlike any other war before it - one with no contested frontiers and an almost invisible enemy - the world must now fight and be united.

Another example is the current debate on intervention for human purposes, for the protection of innocent civilian population, in situations in which grave and systematic violations of human rights and humanitarian rules offend every precept of our common humanity. This very challenging debate is a product and reflection of how much the world has changed since the United Nations was established.

It is evident that we urgently need a great debate on International Humanitarian Law, particularly the most important aspects, which concern the conduct of hostilities and protection of the civilian population. I am sure that during our debates at this Round Table we could take initiatives to open a very sincere humanitarian dialogue on the respect and implementation of International Humanitarian Law.

Chers Amis,

Raison et passion, deux pôles de notre Institut, mais aussi de la politique humanitaire elle-même. La raison pourrait être cette studieuse concentration sur l'ordre des choses, dont on veut affiner le décryptage, dont on veut trouver la logique de l'aboutissement. Il y a aussi bien sûr toute la volonté d'inscrire, de formuler le projet de la politique humanitaire dans des normes du droit international humanitaire. La passion, quant à elle, a souvent, hélas, été vue comme indigne, comme trop humaine, comme trop sentimentale, trop individuelle, pour être clairement revendiquée. Et pourtant! Que serait notre petite histoire, l'histoire de notre Institut sans la révolte? Les vingt-six Tables Rondes sur les problèmes actuels du droit humanitaire organisées par notre Institut depuis 1974, avec la participation de 2.500 diplomates, politiciens, experts des organisations gouvernementales et non gouvernementales, experts individuels, représentent en vérité notre

révolte contre les violations graves des droits de l'homme et du droit humanitaire, le non respect de la dignité humaine, le non respect des souffrances des victimes. Que serait la révolte sans la passion? Comment développer les moyens nécessaires pour que cette révolte, notre passion, soit inscrite dans l'ordre des choses, pour qu'elle trouve la logique, qu'elle aboutisse à la formation d'une politique humanitaire, à la fois réaliste et efficace?

Je citerai ici le grand humaniste, pionnier du droit international humanitaire et fidèle ami de notre Institut, Jean Pictet, qui nous a malheureusement quitté cette année et qui, à l'occasion du 25ème anniversaire de notre Institut, dans son message adressé à tous les participants *inter alia*, nous a dit quelques grandes vérités qui n'ont pas perdu de leur actualité: *"Mais il est un phénomène plus grave. Si le droit s'est largement développé, il est loin d'être appliqué partout de façon satisfaisante, dans les temps troublés que nous vivons et dans un monde de plus en plus implacable. On constate maintenant une inquiétante escalade de la violence et du fanatisme et le retour d'une néo-barbarie que l'on croyait résolue.*

Or, je suis persuadé que la primauté du droit sur la force est le plus ferme espoir qu'a notre civilisation de survivre. Alors, Mesdames et Messieurs, ce droit est entre vos mains, chacun dans la sphère qui lui appartient. Faites qu'il vive, qu'il sauve, qu'il triomphe!"

Let us be together and united in our fight for the humanitarian cause, for the respect of human values.

INTERNATIONAL HUMANITARIAN LAW AT THE BEGINNING OF THE 21st CENTURY

Keynote Address

Dr. Jakob KELLENBERGER

President of the International Committee of the Red Cross

International Humanitarian Law at the beginning of the 21st Century

Mr. President, Your Excellencies, Ladies and Gentlemen,

I thank the International Institute of Humanitarian Law for having organised this Round Table, and the President of the Italian Republic for kindly extending his high patronage to our meeting. It is a pleasure to be with you today to discuss the first twenty-five years of the two Additional Protocols to the Geneva Conventions of 1949. This event gives us the opportunity to look ahead with a critical eye and assess the role of international humanitarian law at the beginning of the 21st century, as well as the challenges it faces.

Twenty-five years ago, the "*Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts"* adopted the two Additional Protocols to the Geneva Conventions. The first relates to the protection of victims of international armed conflicts and the second to the protection of victims of non-international armed conflicts.

The adoption of the Protocols constituted an important stage in the codification of humanitarian law. The Protocols complemented the provisions of the Geneva Conventions and adapted then evolving humanitarian standards to present-day realities. They secured better protection for the individual in armed conflicts by taking into account new developments in the waging of war. I refer, in particular, to the emergence of guerrilla warfare as well as technical advances in weapons technology, which made it possible to extend the battlefield *ad infinitum*, thus engendering tremendous risks for the civilian population.

The major breakthrough of the First Additional Protocol was the substantial progress achieved in the codification of rules on the conduct of hostilities. Unlike the rules regulating the treatment of civilians in enemy hands - which had been considerably developed by the Fourth Geneva Convention - the rules on lawful methods and means of warfare and the protection of the civilian population against the effects of hostilities had remained more or less untouched since the Hague Conventions of 1907.

The cornerstone of the Protocol are the provisions codifying and elaborating the principle of distinction. This principle requires Parties to an armed conflict to distinguish at all times between the civilian population and combatants and between civilian objects and military objectives. This principle is crucial, as lawful attacks may only be directed at combatants and military objectives.

In addition, the First Additional Protocol reaffirms and clearly codifies for the first time the customary requirement of proportionality in the conduct of hostilities. Pursuant to this principle attacks on lawful targets only remain lawful if the incidental civilian casualties or damages are not excessive. The Protocol also reaffirms and supplements other rules relating to methods and means of warfare, such as the prohibition of weapons and methods of warfare of a nature causing superfluous injury or unnecessary suffering, which not only protect the civilian population but also combatants.

The Second Additional Protocol is the first treaty devoted exclusively to the protection of the individual and the regulation of certain methods of warfare in non-international armed conflicts, which constitute the majority of today's conflicts. This instrument is an important complement to Article 3 common to the four Geneva Conventions, which was, until 1977, the only conventional provision expressly applicable in such conflicts.

The Second Additional Protocol represents a step forward in the protection of victims of civil wars. This is especially apparent in its detailed enumeration of fundamental guarantees for all persons who do not or no longer take a direct part in hostilities, of the rights of persons whose liberty has been restricted, and of judicial guarantees. It should be noted that the Protocol's judicial guarantees provisions, in particular, surpass the protection afforded by human rights law, in as much as the specific judicial guarantees provided for under humanitarian law are non-derogable.

The value of the two Protocols also resides in their multicultural backdrop; indeed, States from all over the world participated in the negotiations of the texts. The adoption of the Protocols drew the curtain on a chapter of international humanitarian law which had in the past often come under criticism for being too western-oriented.

Today the Protocols are among the most widely accepted international instruments. 160 States are party to the First Additional Protocol and 153 to the Second Additional Protocol. These impressive figures still fall short of the virtually universal acceptance of the Geneva Conventions, to which 190 States are party.

These treaties represent the core of international humanitarian law. In the last 25 years, owing partly to the growing number of States party to the Protocols, and partly to their application by States, which are not party to them, a body of universal customary rules has emerged, reflecting the treaty-based norms, binding on all States regardless of ratification. This customary law offers or, rather, should offer a measure of security in situations where the treaties do not formally apply or where the rules are less developed, especially in non-international armed conflicts.

In this respect, I would like to mention that, as many of you know, the International Committee of the Red Cross (ICRC) was mandated by the 26th International Red Cross and Red Crescent Conference to carry out a study to determine what the customary rules of international humanitarian law are today. The study, which is about to be finalized, consists of two volumes. The first contains a list of the rules found to be customary, accompanied by a short commentary. The second volume contains a summary of the actual practice on which the conclusions were based.

It is expected that the study will be available next year, and that it will be submitted to the International Red Cross and Red Crescent Conference in December 2003. The study represents a unique and extensive review of modern practice which, we hope, will prove a very useful tool and improve the protection of war victims.

Thanks to the Protocols, the principle of humanity, which underlies all of international humanitarian law, was reaffirmed and specific new norms expressing that principle were crystallised. They provide valuable protection for individuals whenever there is resort to armed force.

While these were the advancements made in 1977, the twenty-fifth anniversary of the Additional Protocols also gives us an opportunity to look to the present day, and to the future, and to ask ourselves whether international humanitarian law addresses the realities of ongoing and potential future conflicts.

In the ICRC's view, in general terms, international humanitarian law is adequate to meet the challenges raised by modern conflicts. It lays down minimum protections and standards to be applied in situations where persons are most vulnerable during armed conflict: not only in the battlefield during actual fighting but also when combatants are captured, wounded or sick, shipwrecked, or when civilians are interned, detained, displaced or in occupied territory.

International humanitarian law also aims to prevent situations which exacerbate vulnerabilities, such as displacement, the destruction of civilian property and of objects necessary for the survival of the civilian population, and the separation of families.

Finally, it lays down additional protection for persons who are particularly at risk, such as children, women, separated families, detainees and refugees.

It is, of course, always possible to clarify or develop the legal framework in view of changing realities and needs. This will be the subject of discussion in the coming days.

One practical area where the law could be further clarified is with regard to targeting. As mentioned before, Additional Protocol I made important progress in the codification and development of the rules relating to the conduct of hostilities. However, the application of these rules in practice is sometimes difficult due to the fact that the provisions are framed in rather abstract terms, thus leaving room for divergent interpretations.

Specific challenges arising in modern conflicts relate to the definition of military objectives. There is considerable debate as to when traditionally civilian objects, such as TV and radio stations, make an effective contribution to military action and therefore become legitimate military targets.

The implementation of the principle of distinction is further challenged by the trend of the military to use civilian infrastructure, telecommunications and logistics also for military purposes. Such practices may be difficult to reconcile with the obligation of States to *"avoid locating military objectives within or near densely populated areas"* and to *"take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations"* to the maximum extent feasible.

Thus, while Additional Protocol I made important progress in the codification of the principle of distinction, its actual application in practice has often proved problematic.

Similar problems exist with regard to the principle of proportionality. Terminological imprecision linked, for example, to the concept of *"concrete and direct military advantage"* invites subjective interpretation and application. In addition, the proportionality test is quite complex to apply in practice: ideally, balancing involves the comparison of like values. In the case of proportionality the values are heterogeneous. Commanders are required to weigh the loss of civilian life, injury to civilians or damage to civilian objects against the concrete and direct military advantage anticipated. It has often been asked how one objectively calculates the relative weight of a military aircraft, tank, or vantage point in terms of human casualties.

This being said, I do not see a need to modify these rules, but there might be a need to further clarify their proper interpretation and application.

On the other hand, further development of rules would be desirable and hopefully possible with respect to Additional Protocol II, the text of which, as is well-known, was reduced to a minimum in the final hours of the 1977 Diplomatic Conference. It might be useful to examine which of the Protocol's currently rudimentary provisions on conduct of hostilities could be elaborated to provide better protection for civilians against the effects of hostilities in non-international armed conflicts. How to ensure better implementation of international humanitarian law by non-state actors is another topic deserving further examination.

As for the more general issue of the development of humanitarian law I shall come back to that a bit later.

At a more general level, it has been asked whether international law in general, and international humanitarian law specifically, are adequate tools for dealing with the post-September 11th reality.

My answer to this is that international law, if correctly applied, is one of the strongest tools that the community of Nations has at its disposal in the effort to re-establish international order and stability.

What we have to be clear about is which body of law is the right tool. It is the rules of the United Nations Charter, and not international humanitarian law, that regulate the use of force in international relations. The relevant provisions of the UN Charter provide guidance on questions such as legitimate resort to force, the right to self-defence and lawful responses to threats or breaches of international peace and security. It is the UN Charter that allows the international community to pass political and other judgment on the use of force in international relations.

International humanitarian law is, quite distinctly, the body of rules that regulates the protection of persons and conduct of hostilities during an armed conflict. Its aim is to alleviate the suffering of individuals affected by war regardless of the underlying causes - and therefore regardless of any justification - for the conflict. There are no "just" or "unjust" wars in terms of international humanitarian law because civilians, to name just one category of persons protected by its rules, have the right to be spared murder, torture or rape, no matter to which side they happen to belong.

A related doubt, which has been raised, is whether international humanitarian law is applicable to the challenges posed by terrorism.

The struggle against terrorism can take various forms: judicial co-operation and punishment of those responsible for acts of terrorism, the freezing of assets used to finance terrorism and, in the wake of the attacks of 11 September, armed conflict.

Accordingly, different bodies of law, including national and international rules of criminal law, are relevant in the struggle against terrorism. Inasmuch as the fight against terrorism takes the form of armed conflict, the position is uncontroversial: international humanitarian law is applicable. Factually, if there exists an armed conflict, whatever the causes, whatever the aim, whatever the name, it is regulated by international humanitarian law.

There is, in the ICRC's view, no doubt that international humanitarian law is also adequate to deal with security risks in war because its provisions were designed specifically for the exceptional situation of armed conflict. The generations of experts and diplomats who developed international humanitarian law over the last two centuries were fully aware of the need to balance state security and the preservation of human life, health and dignity. That balance has always been at the very core of the laws of war.

It cannot be emphasised enough that the protection afforded to individuals by international humanitarian law is not an obstacle to justice. The application of the protection laid down in the Geneva Conventions and the Additional Protocols will not amount to impunity – either in respect of crimes committed before the hostilities, or in respect of violations of international humanitarian law committed during a conflict. They only require that due process of law be applied in dealing with offenders.

Each of the Geneva Conventions contains specific provisions listing acts which are considered grave breaches of their rules, such as killing, torturing and denying the right to a fair trial to protected persons. The list of grave breaches was expanded with the adoption of the Additional Protocols to criminalize certain other acts, particularly those aimed at harming civilians through the unlawful conduct of hostilities. The Conventions and Protocols not only encourage States to bring perpetrators of war crimes to justice, they demand it, including by means of the exercise of universal jurisdiction.

Most scholars engaged in analysing present-day conflicts are of the opinion that the rules on the conduct of hostilities and on the protection of persons laid down in the principal treaties of international humanitarian law meet the basic needs of individuals and peoples caught up in the maelstrom of today's wars. We believe that these rules will be just as pertinent in the wars of tomorrow, since the fundamental values which need to be safeguarded are timeless.

Yet, international humanitarian law is not static. This body of norms, like all others, is constantly subject to refinement, change and development. The very first contemporary international humanitarian law treaty, the Geneva Convention of 1864, aimed to ensure that wounded soldiers, regardless of the party to which they belonged, were not left to die on the battlefield, but were protected and cared for. Today, the four Geneva Conventions and their Additional Protocols are the backbone of a complex web of humanitarian law treaties aimed at limiting the effects of violence in armed conflict.

The number of developments at the normative level in the past years is a significant indication of international humanitarian law’s dynamism and adaptability to new situations and needs.

In less than ten years we have witnessed the establishment of three international tribunals – one of which permanent – to try persons accused of violations of international law, including international humanitarian law. We have also witnessed the adoption of Protocol II to the 1954 Cultural Property Convention, the adoption of the Ottawa Treaty banning anti-personnel mines, the adoption of instruments restricting or prohibiting the use of certain other weapons: the Protocol on blinding laser weapons and the amended Protocol on mines, booby traps and other devices to the 1980 Convention on Certain Conventional Weapons. We have also seen the expansion of the scope of this Convention to non-international conflicts and the adoption of an instrument to enhance the protection of children in armed conflict.

These developments at the international level have been accompanied by a slow, but significant increase in the willingness of national courts to pursue persons accused of violations of international humanitarian law.

The ICRC's history is intimately linked to the creation and development of international humanitarian law. The ICRC contributed extensively to the elaboration of the Additional Protocols by

organising expert meetings, presenting draft protocols and actively participating in the negotiations of the Diplomatic Conference between 1974-1977.

More recently, the ICRC has been a driving force behind the efforts of the international community to address the scourge of explosive remnants of war. Far too often the ICRC has seen the horrific impact of weapons which fail to explode when delivered but later detonate, killing and injuring innocent civilians. The ICRC has been very active in encouraging States to improve international humanitarian law in this area. At the Second Review Conference for the Convention on Certain Conventional Weapons, held in December 2001, States Parties agreed to establish a group of governmental experts to examine possible solutions to the problem of explosive remnants of war. It is our hope that negotiations on a legally binding instrument will begin in early 2003.

The ICRC's belief in the continued validity of existing law should not be taken to mean that international humanitarian law is perfect, for no body of law can lay claim to perfection and does not mean we are not asking ourselves questions. However, any attempt to re-evaluate its appropriateness can only take place after it has been determined that it is the law that is lacking and not the political will to apply it.

Pacta sunt servanda is an age-old and basic tenet of international law, which means that existing international obligations must be fulfilled in good faith. This principle requires that attempts to resolve ongoing challenges within an existing legal framework be made before calls for change are issued. Any other course of action would risk depriving the law of its very *raison d'être* - which is to facilitate the predictable and orderly conduct of international relations.

There have been recent calls for the development of international humanitarian law, especially against the background of the fight against terrorism. I am not insensitive to such calls. The question whether or not international humanitarian law is providing the adequate tools for dealing with reality is indeed a legitimate one, not only after September 11th. But there is no doubt a need for intellectual rigor and honesty when addressing the issue. Some useful questions can and should be asked, among them:

- what do proponents for change consider as being really new?
- and if the situation is really new, why are existing rules of humanitarian law not considered to be adequate to deal with the new situation?
- what is the aim of those who call for development? Do they want to improve the protection afforded by already existing rules?
- do they want to extend the scope of application of international humanitarian law to new situations?

- do they want to lower existing standards of protection? As far as this last point is concerned, you will understand that the ICRC will never be associated with initiatives aimed at weakening existing standards of protection.

It seems to me a legitimate question to be asked: to what extent is the distinction between international and non-international armed conflicts still relevant given the complexity of some of today's armed conflicts (overlapping and penetration of different types of conflict in one region)?

I do not yet have an answer to the question as to whether or not an extension of the scope of application of humanitarian law to new situations is necessary and desirable, but I can understand that the question is being asked. We have rules for international armed conflicts between States and we have rules for internal armed conflicts between state and non-state actors. But what about a situation, which looks indeed as a pretty new one: the conflict of a coalition of States with a transnationally acting non-state actor, using methods of terrorism? Should the scope of application of humanitarian law be extended to this type of situation or to situations in a grey area between internal (internationalised or not) armed conflicts and police actions?

Let me be clear on this point though. If the scope of application of international humanitarian law is expanded to cover new situations, it will permit the prosecution of persons having violated the law, but it will also require them to be granted all the rights and protections foreseen by this body of law.

Without neglecting the possibility of and need for improvements of the law, I believe that the greatest challenge today towards which the ICRC, but also the international community as a whole, should direct its energies is ensuring greater respect of existing rules. Without greater respect of existing rules the credibility and protective value of new rules would also be very limited.

How can respect be improved? There is a multiplicity of possible avenues. First, and quite simply, respect can be improved by spreading the knowledge of the rules – both to authorities and combatants but also to civil society. We should not underestimate the potential of civil society in restraining the actions of authorities and combatants. It is therefore essential to renew training and dissemination efforts to expand the knowledge of and commitment to international humanitarian law. In this respect I cannot fail to mention and commend the activities of our host, the International Institute of Humanitarian Law for its commitment to the dissemination of international humanitarian law.

Secondly, respect during times of armed conflict can be improved by the adoption of preliminary steps by national authorities in times of peace. In addition to ratifying the relevant conventions, States must be encouraged to adopt national measures for the application of international humanitarian law.

The ICRC's Advisory Service – which was established in reply to a request by States – provides assistance in the form of legal advice, the organisation of seminars and meetings of experts and the preparation of specialised documents in all areas of humanitarian law which require the adoption of national measures. The Advisory Service also encourages the formation and supports the work of national committees tasked with incorporating international humanitarian law in national legislation. To date, more than 60 such inter-ministerial committees have been established worldwide.

Thirdly, the mobilisation of all those who can contribute, through their influence and action, to a better respect of the law remains a crucial activity for the ICRC. The representations made on a daily basis by delegates in the field to those who violate the rules is probably the most important – and often life-saving - contribution.

Last, but by no means least, I wish to recall that under the very first article of the Geneva Conventions and the First Additional Protocol, States Parties undertook to "respect and ensure respect" for their provisions in all circumstances. In particular, States not involved in an ongoing armed conflict should take appropriate action against States bearing responsibility for violations of humanitarian law with a view to terminating such violations.

This collective duty of States to strive to ensure respect of international humanitarian law is reiterated in Article 89 of Additional Protocol I, which calls upon States Parties to undertake to act jointly or individually in co-operation with the United Nations and in conformity with the United Nations Charter in situations of serious violations of international humanitarian law.

As has been stated by the International Criminal Tribunal for the former Yugoslavia *"norms of International Humanitarian Law (…) lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a 'legal interest' in their observance and consequently a legal entitlement to demand respect for such obligations".*

To conclude, I turn to you for inspiring suggestions on how this responsibility to "ensure respect" for international humanitarian law can be effectively applied in practice. I firmly believe that finding ways in which the international community can discharge this obligation is one of the major challenges facing humanitarian law in the years ahead. It is a challenge that must be addressed if humanitarian law is to continue to serve its very purpose.

I wish you an inspiring Round Table and thank you for your attention.

MESSAGE

Dr. Kofi ANNAN
United Nations Secretary General

It gives me great pleasure to send my greetings to this Round Table.

The United Nations has a unique role to play in promoting respect for, and enforcing compliance with, international humanitarian law. Indeed, more perhaps than in any other field of international law, the United Nations has contributed to the development of the notion of accountability and individual responsibility for war crimes, including grave breaches of the Geneva Conventions, crimes against humanity and genocide.

The establishment by the Security Council in 1993 of the International Tribunal for the former Yugoslavia, followed a few months later by the International Tribunal for Rwanda, triggered a proliferation of international criminal jurisdictions, both universal and "mixed". Within a decade, an International Criminal Court of universal jurisdiction was established by treaty, a Special Court for Sierra Leone was created by agreement between the United Nations and the Government of Sierra Leone, and special panels or mixed courts were established by the United Nations Administrations for Kosovo and East Timor. Also during that period, the United Nations, recognizing the applicability of humanitarian law to its own peacekeeping forces, promulgated a bulletin instructing peacekeeping forces about basic principles and rules governing combat and about the protection of civilians and persons *"hors de combat".*

The UN-based tribunals for the former Yugoslavia and Rwanda have clearly accomplished a break-through in combating impunity, contributing to the development of international humanitarian law and thus laying the foundation for international criminal jurisdiction. While it is premature to measure the success of the Special Court for Sierra Leone, its establishment in the image of the existing international criminal jurisdictions shows yet again the value of international standards of justice.

The task of codifying human rights and principles of humanitarian law is well advanced. The hard work of getting them implemented remains unfinished. To do so, we must look not only to tribunals and courts, indispensable as they are, but also to other forms of suasion and deterrence – such as democratic governance, development efforts that take account of social fissures and political factors, and accountable institutions that provide peaceful means of settling grievances. We must also do our utmost to inform people about humanitarian law, since often those most in jeopardy are those who know least about their rights.

You, from many disciplines, and with such varying concerns and expertise, will no doubt identify new arenas and new issues that merit the attention of the United Nations and the wider international community. I look forward to learning the results of this Round Table and offer my best wishes for a fruitful discussion.

MESSAGE

Dr. Ruud LUBBERS
United Nations High Commissioner for Refugees

Dear Professor Patrnogic,

I would like to congratulate the International Institute of Humanitarian Law on the enormous contribution that it has made to the development of humanitarian law over so many years. UNHCR greatly appreciates its long-standing co-operation with your Institute, and my Office counts on it to continue to provide this unique forum for discussion and spreading humanitarian law and principles.

I wish you fruitful and successful exchanges at this year's 26th Round Table on Current Problems of International Humanitarian Law, and I look forward to our continued co-operation in the years to come.

Yours sincerely,

Ruud Lubbers

GENERAL INTRODUCTION

THE TWO ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS 25 YEARS LATER: ACHIEVEMENTS AND CHALLENGES

Prof. Paolo BENVENUTI
University of Florence - International Humanitarian Law Committee of the Italian Red Cross

The adoption on 8th June 1977 of the two Additional Protocols (APs) to the Geneva Conventions (GCs) of 1949 - one relating to the protection of the victims of international armed conflicts (AP I), the other to the protection of the victims of non-international armed conflicts (AP II) – after four yearly sessions (1973-1977) of intense negotiations, themselves preceded by several years of accurate preparatory work co-ordinated by the International Committee of the Red Cross (ICRC), was greeted as a very significant step in the history of International Humanitarian Law. In fact, the two Protocols have improved the contents of the Geneva Conventions by filling some gaps present in them from their origin or subsequently emerged because of the new realities of post Second World War armed conflicts: wars of self-determination, new dimension of non-international armed conflicts, guerrilla warfare, technological progress of means and methods of warfare and new increased high risks for civilians, together with the everlasting problem concerning efficacious means to ensure respect for International Humanitarian Law. The 25th anniversary of the APs is an occasion to consider the results achieved in the field of International Humanitarian Law following their adoption and to focus the challenges they are facing in new realities of armed conflicts occurring at the beginning of this third millennium.

I

It is not an easy task to summarize the improvements of the discipline contained in the two Protocols in order to adapt International Humanitarian Law to the features of social phenomena characterizing the third quarter of the last century. Each one of us could make, to this effect, different choices and use different degrees of emphasis. On my part, I will suggest the following plurality of elements:

a) A first element one could indicate, is the enlargement of the concept of international armed conflict, so as to include the "epics" of wars of national liberation (and against alien occupation and racist regimes) which specifically have characterized the decolonization process of the sixties and seventies of the twentieth century;

b) A second element, in some way related to the previous one, is the extension of the concept of combatant to the guerrilla fighters and consequently the recognition to them of the protected *status* of prisoner of war in the event of capture. As is well known, in order to take account of the specific circumstances prevailing in self-determination wars, the wearing of uniforms at all times was no longer

mandatory, this exception not intending, however, to change the generally accepted practice of States with respect to the wearing of uniforms by combatants assigned to the regular, uniformed, armed units.

c) The improvement of the discipline concerning the medical assistance to victims of armed conflicts through the extension of the regime of special protection, so as to cover both military and civilian medical personnel, transports and units, is a third aspect of AP I which deserves to be underlined.

d) Moreover, I should point out to the substantial achievements of AP I with regard to the rules concerning the conduct of hostilities. Such set of rules was essentially omitted on the occasion of the codification of 1949, so that the discipline concerning means and methods of warfare and the connected protection of civilians against the effects of military operations and other acts of hostilities were to be found in the century-old conventions of The Hague. Protocol I appropriately emphasizes the crucial principle of distinction between the combatants and civilians and between military objectives and civilian objects, as well as the related obligations of the Parties to the conflict. The traditional principle of proportionality acquires in AP I a new efficacy through the complementary duties imposed on the Parties to the conflict to take precautions both in attack and against the effects of attack in order to avoid excessive incidental civilian casualties and damages. Therefore, under the coverage of the protection of the civilian population, one finds in AP I a valuable development of the law of The Hague: AP I achieves its confluence with the law of Geneva, so that the International Court of Justice (ICJ) in its advisory opinion concerning the legality of nuclear weapons is able to affirm, in 1996, that *"those two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single system, known today as International Humanitarian Law"*. In the opinion of The Hague International Court, *"the provisions of the Additional Protocols of 1977 give expression and attest to the unity and the complexity of that law"*. In connection with these mentioned achievements, Protocol I, in Article 85, includes in the list of the grave breaches of International Humanitarian Law many infringements of the revised rules prohibiting acts aimed at harming civilians through the unlawful conduct of hostilities.

e) In addition, the remarkable reinforcement of the discipline concerning both civil defence as a practical means aiming at an organised protection of the civilian population against the danger of hostilities and relief actions in favour of the civilian population, even in non-occupied territories, cannot be omitted from the list of improvements.

f) Furthermore, one cannot abstain from mentioning the effort of Protocol I to strengthen the control of respect for International Humanitarian Law. I will mention, on the one hand, a clearer recognition of the heavy responsibility of the commanders, who are required to prevent and, where necessary, to suppress and report to the competent authorities breaches of International Humanitarian Law; on the other hand, a reinforced procedure for the appointment of the protecting powers; and, finally, the establishment of a permanent International Fact Finding Commission which, alas, has not been able so far to exercise its competences because of the lack of willingness of States to ask for its services.

g) Again, an innovative element of AP I is found in the provision contained in Article 89, under the heading "Co-operation". It is one of the rare provisions of International Humanitarian Law making reference

to the United Nations (UN): according to this provision, *"in situations of serious violations of the Conventions and the Protocol, the HCP undertake to act, jointly or individually, in co-operation with the UN and in conformity with the UN Charter"*. Its reading leaves its implications wide open, but in fact it has turned out to be an important provision if one considers the role later acquired by the UN in case of breaches of International Humanitarian Law. Recently, Prof. Luigi Condorelli has depicted this provision as a door adapted by the *ius in bello* in order to allow the *ius ad bellum* and the UN to enter the building of Geneva ("*Les Protocoles Additionnelles 25 ans après"*, Round Table on "*International Humanitarian Law at the beginning of 21st Century: Challenges and Prospects"*, organised by the Swiss Federal Department of Foreign Affairs and the ICRC, Geneva, 6-7 June 2002). It appears to be a prophetic rule since, starting from the nineties of the last century, the door of Article 89 has been crossed with resoluteness by the UN: they no longer limited themselves to pass resolutions calling upon Parties to an armed conflict to respect their obligations under International Humanitarian Law, the APs included. In fact, the coming into play of the UN is accompanied by the current extraordinary development of the mechanisms pressing for the implementation of International Humanitarian Law: the criminal prosecution at international level of the grave breaches of International Humanitarian Law, even in the context of non-international armed conflict. At present, therefore, as Condorelli again observes, some important developments of International Humanitarian Law appear to take place not in Geneva, but in New York.

h) A further contribution I believe one may ascribe to the two APs is the rich catalogue of the fundamental guarantees to be recognized to all persons who are in the power of a Party to the conflict (both in international and non-international armed conflict). Consequently, it is possible to affirm that the APs reinforce – or, may be, they initiate - a tendency towards a merging or an overlapping of International Humanitarian Law and Human Rights Law insofar as the limits imposed on all governmental entities (should they be *de iure* or *de facto* entities) in exercising powers on individuals under their jurisdiction, whichever the context of such exercise, whether of peace or of war, are concerned.

i) With specific reference to AP II, one may observe that it represents a notable achievement, at least insofar as it is the first-ever international instrument specifically devoted to setting up *ad hoc* HL discipline concerning the protection of individuals in situations of non-international armed conflict, which have become an increasingly hard reality in the post Second World War experience. AP II may be considered a further step, following Article 3 common to the Geneva Conventions, towards the recognition of the concern of the international community as well as for all victims of this kind of armed conflict, and as a basis for further improvements in the future.

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I shall conclude the list of the praises of the APs with two more remarks:

j) The first comment refers to the strong confirmation in AP I of the fundamental principle of a complete separation between *ius ad bellum* and *ius in bello.* The Preamble affirms this in such clear terms that have no precedent: the GCs and the Protocols *"must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the*

armed conflict or on the causes espoused by or attributed to the Parties to the conflict". All those who are aware – also at a minimum level - of the themes of International Humanitarian Law are well conscious that questioning this crucial distinction risks endangering the entire fabric of International Humanitarian Law, whichever the cause of the derogation, even if it be the "war against terrorism".

k) A final contribution of the two APs, which I desire to emphasize, is the participation in the Diplomatic Conference of 1974-77 of all cultural, religious, political, economic segments of the post World War Two international community: we may well assert that the two Protocols are the true direct filiation of the pluralistic character of the current international community. International Humanitarian Law is reinforced by the Diplomatic Conference under the sign of its universality, so that - from that time on - any discussion about an allegedly too one-sided origin appears to be completely outdated. In fact, if one looks at the historical development of the law of armed conflicts/International Humanitarian Law, one discovers that from its very beginning it is the happy fruit of parallel paths and of fertile encounters among civilizations. Therefore, it is not surprising that the Protocols are currently among the most widely accepted treaties (160 States are party to AP I and 153 States to AP II) while the 1949 Geneva Conventions (with 190 States Parties) have gained a substantial universality.

II

Having had the pleasure, on the occasion of the 25th Anniversary, to enumerate the positive improvements of International Humanitarian Law by virtue of the two APs, at the same time it would not be fair to conceal that some important expectations present on the eve of the Diplomatic Conference of 1974-1977 - and supported by those delegates who were best conscious of the requirements of International Humanitarian Law - have been sadly disavowed.

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a) The first of such crude deceptions I am obliged to point out - in spite of the positive note I have expressed above with respect to the adoption *in se* of AP II -, is represented by the poor content of AP II itself. This Protocol constitutes a failure if compared with the ambitious Draft presented at the Conference by the ICRC, which aimed at the assimilation, as far as possible and *mutatis mutandis*, of the discipline of non-international armed conflict to that of international armed conflicts. In fact, Draft Protocol II was – euphemistically speaking - "simplified" from the original 47 articles of the Draft to the 28 articles of the version adopted at the fourth session of the Conference. In substance, it was attacked without pity and disabled, so as to reduce it to a slim document lacking *inter alia* adequate reference to rules concerning the conduct of hostilities (except for the prohibition of attacks against the civilian population, the protection of objects indispensable to the survival of the civilian population, the prohibition of forced movement of civilians), and deprived of rules concerning the right of the civilian population to humanitarian assistance. Moreover, it contains no reference to the individual responsibility for the grave breaches committed in the context of non-international armed conflicts; it does not envisage any mechanism in order to monitor and

ensure respect for its rules. Particularly regrettable is the limitation of the applicability of AP II to conflicts of high intensity, so that, instead of reaching the expected assimilation of internal armed conflicts to international armed conflicts, we have - from that time on – a plurality of thresholds and categories of internal armed conflicts, each of them with its legal discipline, and the consequent uncertainties and complicated problems of qualification.

b) Secondly, the definition of "armed forces" and of "combatant" of international armed conflict is not truly satisfactory. Notwithstanding the importance of the new broader approach which I have underlined above, it is evident that strong elements of ambiguity – which are the price paid for a compromise achieved on the ending of the Conference - are present in the new definition: the consequent danger of conflicting interpretation among belligerents is very high.

c) Thirdly, a further inadequate outcome of the negotiating process of the two Protocols is found if one looks at the measures in favour of children: in fact, the age "limit" of 15 years for recruiting children into armed forces and allowing them and even obliging them to take direct part in hostilities is rather a measure contradicting the concept of the protection of children. It is the result of a bad "compromise" in which those who favoured a better treatment turned out defeated.

d) Fourthly, the principles concerning the legitimacy of the means of warfare remains really too general (although a step forward has been made both through the prohibition to employ methods or means of warfare intended to cause widespread, long-term and severe damage to the natural environment, and through the definition of indiscriminate attack as contained in Article 51). The idea that, with regard to specific prohibitions or restrictions of weapons, it was necessary to elaborate *ad hoc* instruments finally prevailed and was formally recognized in Resolution 22 adopted during the last session of the Conference: this Resolution envisages a follow-up, that is to say, a governmental Conference to be convened no later then 1979, no longer in Geneva but within the milieu of the UN, with the aim of reaching agreements on the prohibitions or restrictions on the use of specific "conventional weapons" including those which may be deemed to be excessively injurious or having indiscriminate effects, taking humanitarian and military considerations into account.

e) Moreover, the above-mentioned reference to "conventional weapons" is indicator of a further fundamental ambiguity present in the two Protocols, that is, the uncertainty surrounding the problem of the legitimacy of the use of nuclear weapons according to International Humanitarian Law in force. In fact, weapons of mass destruction, above all nuclear weapons, were hardly mentioned by the drafters of the Protocols during the negotiations, perhaps implicitly assuming that they were extraneous to the scope of the Protocols themselves. Due to such ambiguity, it has been possible for some nuclear States to accompany the signature and ratification of the Protocols with a declaration, not rejected by the other signatory or ratifying States, according to which: *"the rules introduced by the Protocol apply exclusively to conventional weapons without prejudice to any other rules of international law applicable to other types of weapons. In particular, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons".*

f) Lastly, the results concerning the means for ensuring respect for International Humanitarian Law, which are a key element of whatever juridical system, have been really disappointing. I have already observed their total regrettable absence in the context of non-international armed conflict. With regard to the situation of international armed conflict, while the substantive list of the grave breaches has been expanded to unlawful conducts of hostilities aimed at harming civilians, the only novelty concerning the mechanisms to ensure respect for International Humanitarian Law appears to be – as I observed before - the International Fact Finding Commission. But it is a poor solution if compared to the proposals presented at the table of the Conference: this opinion is aggravated by the no-practice experience of such instrument during the following quarter of a century, because of the absence of the political will of States to introduce applications. International Humanitarian Law appears, again, a system of law lacking effective watchdogs.

III

Whatever the positive outcomes and the *lacunae* of the two APs at the time of their adoption, they may be looked at as a further brick in the constant flowing of the fabric of International Humanitarian Law. As the law is a social phenomenon (*ubi societas ibi ius*), the Protocols, in addition to the Geneva Conventions, constitute the updated basis on which further elements of law may later germinate in line with the consolidated principles of the system. Therefore, new components of International Humanitarian Law are on the point of stemming in order to cover social exigencies which were not adequately taken into account by the Protocols themselves at the time of their adoption, being constrained by the contingent political equilibrium at the Diplomatic Conference, or in order to cover new social problems and expectations emerging in international society. By virtue of such improvements, one may assume that the reading in *anno Domini* 2002 of the two Protocols entails more complex and richer meanings than five *lustra* before, because it takes place in a context characterized by a plurality of further data, some of them bridging the uncertainties or gaps of the codification of 1977.

In the third part of my contribution, I am going to focus my attention on some of these relevant new elements well aware of the difficulty of selecting from a basket full of multifaceted novelties.

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a) An aspect to consider at the outset, in proceeding to an actualised reading of the Protocols, is the new dimension of customary international law as developed following the spark lit by the adoption of the Protocols themselves. Summarising, it is worth mentioning that the vast majority of States have ratified the Protocols; the application of the contents of the Protocols by States which are not Party to them; the reference to them by the United Nations institutions in many resolutions calling upon Parties in conflict to the observance of IHL or blaming those committing grave and serious breaches; the reference to them in the Status of Force Agreements between the UN and States on the territories of which the UN forces are deployed; the explicit extension of the competence of the Special Court for Sierra Leone to violations of AP II by the Agreement and Statute of January 2002. One may add the statements about the relationship between customary law and the Geneva Protocols by international judicial bodies, such as the ICJ in the above

mentioned advisory opinion of 1996 and the jurisprudence of the international criminal *ad hoc* Tribunals for the former Yugoslavia and Rwanda. All such elements, if considered together, lead to the conclusion that the substantive rules contained in the two APs are part – except, may be, for some very limited aspects (see Fausto Pocar, *"Protocol I Additional to the 1949 Geneva Conventions and Customary International Law"*, in Israel Yearbook on Human Rights, 2002, p. 145 ff.) - of that body of customary rules reflecting treaty-based norms. Therefore, most of the substantive norms set out in the Protocols, apply to all international and non-international armed conflicts, to all State and non-State actors, even if they are not formally Parties to the instruments.

But, with specific reference to the vast majority of States Parties recalled above, one must note and regret that some important States have not yet joined the club of ratifying States. This has negative effects, insofar as it may happen that in documents which are the outcome of negotiating processes concerning International Humanitarian Law, the specific mention of the Geneva Convention is not accompanied by a parallel mention of the APs: an outstanding example is the Statute of the ICC, although, in substance, the catalogue of the crimes of war contained in Article 8 shows clearly its derivation from the APs too.

b) Moreover, the vast recognition that followed the adoption and entry into force of the APs makes these legal instruments able to spread their effect also under a different perspective: they may favour further normative developments inspired by the legal solutions they embody. An appropriate example relates to the protection of cultural property which was treated in 1977 by AP I in terms of mere reference to The Hague Convention of 1954. But The Hague Convention of 1954 had proved quite inadequate in achieving its purpose and the need for a qualified amendment was at last bridged by the adoption of the new Protocol of March 1999. It is easy to ascertain that the solutions contained in this recent conventional instrument are in line with the analogous legal solutions introduced for the protection of civilians and civilian objects in Protocol I additional to GCs. In particular, one may observe that the provisions of Chapter 2 of the 1999 Protocol, headed "General Provisions regarding Protection", significantly redraft the rules of 1954 by introducing concepts contained in the 1977 Additional Protocol I and spelling them out more clearly with respect to cultural property. That is particularly evident with regard to the definitions of "military objective", "imperative military necessity", "precautions in attack" and "precautions against the effect of hostilities". In other words, AP I demonstrates that it is sustained by a sound and general logic, thus spreading its vitality to specific sectors of armed conflict regulation.

c) A further significant follow up during these 25 years since the adoption of the APs is the evolution of *ad hoc* rules creating limits to specific conventional weapons. It is a development which was forecasted by the above-mentioned Resolution 22 approved at the Diplomatic Conference. In October 1980, under the auspices of the UN, the Convention on Prohibition or Restriction on the Use of Certain Conventional Weapons was adopted accompanied by three annexed Protocols: (a) on Non-Detectable Fragments; (b) on Prohibition or Restriction on the Use of Mines, Booby-Traps and other Devices, (c) on Prohibition or Restriction on the Use of Incendiary Weapons. Subsequently, this set of conventional rules was enriched by the adoption, in October 1995, of a fourth Protocol on Blinding Laser Weapons, and, in May 1996, by the

amendment of the mentioned Protocol II on the use of mines, which applies to internal conflicts within the meaning of common Article 3. Finally, on December 2001, Article 1 of the 1980 Convention was modified to extend the applicability of the entire system of the Convention and Protocols to non-international armed conflict, under the broad meaning of Article 3 common to the Geneva Conventions.

Of course, it is not possible to refer to the aforesaid development concerning conventional weapons without stressing the adoption, in December 1997, of the Ottawa Convention on the total ban, in all situations of conflict, of anti-personnel landmines, whose destructive impact on civilians has come to be regarded as totally unacceptable by the conscience of humanity. As I will observe soon, this total ban is the outcome of a negotiating process opposite to that characterising the 1980 Convention on conventional weapons.

But, despite these positive legal improvements, the concern remains high for the use – at least in some circumstances – of other questionable weapons which, at present, are not object of specific regulation: I mean – *inter alia* - cluster bombs and depleted uranium projectiles, fuel explosive weapons, high intensity microwave radiation arms, the so-called non lethal arms. I should add the problem of explosive remnants of war, to which a Group of Governmental Experts - established in December 2001 by the Second Review Conference of the Convention on Certain Conventional Weapons - is examining possible solutions. One should also note that Article 36 of Protocol I, concerning the preventive evaluation of the legal compatibility of new weapons - according to which *"in the study, development, acquisition or adoption of a new weapon, means or method of warfare, a HCP is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by the Protocol or by any other rule of international law applicable to the HCP"*, has not received so far an adequate scheme of implementation.

d) The above-mentioned improvement in relation to the legitimacy of weapons, important *in se*, although necessitating further improvement, is also important for our purposes because it makes clear two aspects of the dynamics of International Humanitarian Law of this last quarter of a century characterized by the presence of the APs .

Firstly, I refer to the growing role of non-governmental instances in law-making: the development of International Humanitarian Law has become more permeable to the opinions without borders of non-governmental organizations exerting pressure for a better protection of human beings also in the emergencies of armed conflict. One may observe that in reaction to the extremely cautious negotiations for the revision of the 1980 Treaty on conventional weapons and to the disappointing results obtained with regard to mines, the Coalition of the non-governmental organizations, the Red Cross and Red Crescent Movement and a determined group of like-minded States were able to draw the attention of the world opinion directly to the victims of anti-personnel mines, to the great suffering caused to them, to the terrible consequences caused to the life of entire populations, thus removing the debate on anti-personnel mines from the practically invisible monopoly of political, diplomatic and economic equilibrium maintained by disarmament tables. Once having placed the problem within a framework where attention was concentrated immediately on the victims of anti-personnel mines and on the unbearable human cost of this terrible instrument, the path to reach the Treaty

which determined the total ban was very rapid and overcoming. The Treaty of Ottawa has attracted so far the ratifications of 125 States. Significantly, the Preamble of the Convention pays tribute to the role of the public conscience in furthering the principle of humanity as evidenced by the call for the banning of mines and to the efforts to that end undertaken by the International Red Cross and Red Crescent Movement, the International Campaign to Ban Landmines, and numerous other non-governmental organizations around the world.

Again, I affirm without hesitation that it would not have been possible to establish the International Criminal Court (ICC) as it is, without the strong role played with great intelligence, preparation and determination by the Coalition of non-governmental organizations and numerous other non-governmental entities supporting it. The strong role of NGOs is also evident in the very rapid process of ratification which allowed the Statute to enter into force on 1st July 2002. At present, the very risk rests in the fact that through new elements of secret diplomacy some of the positive results gained in Rome could be watered down. I refer, on the one hand, to the recent Resolution 1422 of 12 July 2002 of the Security Council by which this political organ of the UN determines the exclusion of certain categories of cases from the jurisdiction of the ICC: the Security Council *"requests that the ICC, if a case arises involving current or former officials or personnel from a contributing State not Party to the Rome Statute over acts or omissions relating to a United Nations established or authorised operation, shall for a twelve-month period starting from 1 July 2002 [such period is renewable] not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise"*. One may assume that it is an illegitimate Resolution, deprived of any legal force, but all the same a grave event for International Humanitarian Law. On the other hand, I mention the rather hysterical campaign of pressures exerted by USA on States having ratified the Statute of Rome in order to coerce them - Italy included - to accept bilateral agreements allowing immunity for US military personnel and peacekeepers from the jurisdiction of the ICC and, in substance, to contradict their commitments of co-operation with the ICC, and, after all, to introduce discrimination in the application of International Humanitarian Law.

e) The second aspect emerging from the recent treaties on conventional weapons is a tendency to extend the prohibitions and limits so as to include situations of internal armed conflict. In fact, this tendency is a specific aspect of a more general process according to which the distance between the rules of inter-national and intra-national armed conflict is narrowing nowadays also with regards to features concerning the conduct of hostilities and not only with regard to the protection and treatment of persons in the power of the enemy. It is a tendency which becomes manifest whenever a rule applicable in armed conflict has a clear humanitarian goal. As well affirmed by ICTY in the *Tadic* jurisprudence, no *ratio* is able to support the distinction between international conflict and internal conflict if the goal of the law is the protection of the human being as such: it is natural that the dichotomy should lose its weight. Furthermore, with regard to the attitude of the Security Council, one may observe the practice to pass resolutions [add the practice of the Presidential Statements] where usually no distinction is made between international and internal armed conflicts. The rules of International Humanitarian Law are referred to in a broad sense without any

qualification of the conflict, and this attitude is much more evident where the concern of the Security Council relates to the need for respect and protection of the civilian population.

In this way, under many aspects customary international law has gone considerably beyond the contents of AP II, and it becomes then easy to reach an unexpected conclusion: the Draft originally prepared by the ICRC for the Diplomatic Conference and on that occasion cast aside, 25 years later demonstrates its sound logic and vitality: that Draft is resurrected in the form of customary law.

f) But, coming back to the above reference to the conventional improvements of the discipline of the means of warfare, a complementary remark is needed concerning non-conventional weapons.

On the one hand, it is unavoidable to mention the Convention, adopted in Paris in 1993, banning chemical weapons. According to this Convention, each State Party "undertakes never under any circumstance" to develop, produce, acquire, stockpile, retain, transfer, use, prepare to use chemical weapons. The contracting States also bind themselves not to assist or encourage anyone to engage in any activity prohibited by the Convention. This is a much more momentous Convention because accompanied by a complex system (in fact, a true international organisation) designed to ensure its faithful implementation and effective verification and enforcement: in fact, some efficacious mechanisms for implementing the respect of law in peace time are used on this occasion in order to make the prohibition work effectively in time of war. Because of the presence of such efficacious and compelling peace-time mechanisms, the number of the ratifying States has raised rapidly to the current conspicuous number of 146 States.

On the other hand, with regard to nuclear weapons, it is worth recalling the advisory opinion given in 1996 by the International Court of Justice (ICJ) on the legitimacy of their use. It is an opinion which was criticised for some inconsistencies and ambiguity, but it gives nonetheless a clear indication for our purpose. Notwithstanding the Court's admission that the Conference of 1974-77, as well as the Conference of 1949, left this category of weapons aside, all judges are firmly convinced that nuclear weapons fall under the established principles and rules of International Humanitarian Law. The unanimous opinion of the Court is that *"a threat or use of nuclear weapons should be compatible with the requirements of international law applicable in armed conflict particularly those of the principle and rules of International Humanitarian Law"*. In other words, the ICJ reaches the conclusion that even if nuclear weapons are considered formally extraneous to the applicability of AP I, such weapons still fall under the rules there embodied which have an additional legal foundation: it is exactly the case of the substantive rules contained in the AP I which, as I observed above, are part of that body of customary rules reflecting treaty-based norms. Therefore, in substance, the ICJ rejects the idea (and the related reservations of some States) that the rules contained in the Protocol do not have any effect nor do they prohibit the use of nuclear weapons. As the Court observes, *"the rejection of the applicability of International Humanitarian Law would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future"*. The integrity of the International Humanitarian Law system as depicted by Protocol I has been thus restored.

g) I do not want to end these remarks about the improvements of the two APs during the last quarter of a century without a last brief mention of the adoption, on 25 May 2000, of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which entered into force on 12 February of the current year. In fact, the dimension of the problem concerning the protection of children from participation in hostilities has grown in a particularly grave way in the nineties, while the provisions contained in the APs, greatly inadequate for the purpose as I have observed above, have confirmed such inadequacy. By virtue of the new instrument, the legal status of children has been improved by the requirement of the minimum age of 18 years for participating directly in hostilities (of whatever character, international or internal); the minimum of 18 years for the conscription into the armed forces, while the voluntary recruitment under the age of 18 years is permitted under specific and strict safeguards. One may observe that, here again, the reasons of those who struggled vainly for a better compromise in the 1974-77 Conference have been finally redressed!

IV

Apart from the improvements above mentioned, I must now note that the two APs, beginning from their adoption, have also run very serious risks. It is true, - as I have observed - that the codification of 1977, by extending the list of crimes of war to unlawful conducts aimed at harming civilians, has reinforced the idea that the reasons underlying the respect for International Humanitarian Law are very strong, so that the ICJ itself in the advisory opinion of 1996 qualified the principles of humanitarian law as “intransgressible”. Unfortunately, the last 25 years and especially the last decade of the century have been characterized by armed conflicts of an exacerbated violence accompanied by large scale, unspeakably grave breaches of fundamental rules embodied in the Protocols and qualified as “crimes of war”, when committed in international armed conflicts.

In the presence of such appalling tragedies, the system of the Geneva Conventions and Protocols appeared close to collapse, because of the inadequacy of means to react which were not reinforced in 1977. The most incisive instruments should have been – but limited to situations of international armed conflicts - the exercise of the mandatory universal criminal jurisdiction by States Parties on individuals responsible for committing grave breaches. Unfortunately, such a system resulted to be inapt for the purpose, because it was jeopardized by the fact that most States do not have a suitable legislation insofar as substantive penal sanctions and the jurisdiction of the tribunals according to the mandatory principle of universality are concerned. Moreover, many difficulties arise in practice as a result of different attitudes; from a lack of co-ordination of national legal systems insofar as active and passive extradition is concerned; because of the presence in the legislation of the States Parties of statutory limitations barring legal actions or the enforcement of the sentences. Add the absence of political will to prosecute. One cannot say that the system of repression of violations of International Humanitarian Law through the action of national courts is a success. The risk of the Protocols becoming a little pile of ashes was very high.

But this critical situation had a sudden, unexpected and positive effect on the International Humanitarian Law system by virtue of the reaction of the "organized international community" and the entrance in the arena of International Humanitarian Law of a new protagonist: the United Nations, as prefigured by Article 89 of Additional Protocol I. It is by virtue of the entrance on the stage of the UN that the criminal jurisdiction of national courts has been flanked by criminal primary jurisdiction in favour of international *ad hoc* Tribunals for the former Yugoslavia and Rwanda. Besides, the jurisprudence of the two Tribunals has given a valuable contribution to the clarification and development of legal concepts concerning the prosecution of heinous crimes committed on the occasion of armed conflicts. In particular, the experience of the two *ad hoc* Tribunals has facilitated the positive evolution of the substantive system of International Humanitarian Law with special reference to non-international armed conflict.

The adoption of the Statute of the International Criminal Court, which entered rapidly into force, followed. The International Criminal Court has the power to try *inter alia* grave or serious violations of International Humanitarian Law, according to the material competence on war crimes provided for by Article 8 of the Statute: the principle of complementarity allows the Court to exercise its jurisdiction if national criminal jurisdictions are unwilling or unable genuinely to carry out the investigation or prosecution. Moreover, all these new events have reawakened the willingness of a remarkable number of States to honour the duties to respect and to ensure respect for International Humanitarian Law, including the enactment of the necessary legislation allowing them to abide satisfactorily by their obligations concerning the duty to prosecute alleged criminals.

*

It is now time to observe that the above-mentioned new dimension of the role acquired by the UN in the field of International Humanitarian Law has brought to the fore further points to discuss on the agenda of the functioning of the legal system of which the Additional Protocols are a significant part. I allude to the danger that in a scenario characterised by the UN as protagonist, the logic of *ius in bello* could merge with the logic of *ius ad bellum* and that International Humanitarian Law could, in the framework of the UN, be applied selectively, in contradiction with the fundamental principle emphatically set out in the Preamble of Protocol I.

a) A first aspect of what I mean, relates to the ambiguity that has too long accompanied the applicability of International Humanitarian Law to UN forces acting in enforcement or in peacekeeping operations (or to States' forces acting under mandate of the UN). In fact, this ambiguity was related to the more or less hidden pretence of some States *soi-disant* acting on behalf of the "organised international community" to transpose the typical distinction between the aggressor and the defending side made by *ius ad bellum* into the realm of *ius in bello*: the demand of those fighting the "just war" for exemption from at least some of the duties of International Humanitarian Law is consequential. The problem has, in the end, found its adequate solution in the Bulletin promulgated by the Secretary General of the UN on August 1999. It provides detailed guidance for UN Forces when engaged in enforcement actions or in peacekeeping action when the use of force is permitted in self-defence. What is more interesting is that these guidelines, covering

all the main chapters of International Humanitarian Law, are drawn from the best level of humanitarian law instruments regulating international armed conflicts, but it applies to all situations of conflict leaving aside any qualification; moreover it applies to all national contingents acting under UN command and control even if the national State of the contingent has not ratified the instruments from which the guidelines are drawn. The conclusion is that the Bulletin appears to be a tool pushing in the direction of the universal recognition of the two APs and other International Humanitarian Law instruments.

b) A second aspect I desire to point out relates to the discussed item of "humanitarian intervention". This is a dangerous expression *in se* because it may suggest the wrong idea that the right to resort to military force for purpose of human protection could be considered a part of the system of International Humanitarian Law itself, so that *jus ad bellum*, penetrating to a certain extent into *jus in bello*, could condition and weaken the latter.

I observe that an in-depth reflection on the delicate dilemma of "humanitarian intervention" – which may appear as an unacceptable assault on sovereignty on the one hand, and as necessary means to respond to gross and systematic violations of human rights that offend every precept of our common humanity on the other hand - has been asked by the Secretary General of the United Nations in addressing the General Assembly of the United Nations on its 54th Session in September 1999. I agree with some of the conclusions contained in the Report *The Responsibility to Protect* by the (independent) International Commission on Intervention and State Sovereignty, established by the Government of Canada, in September 2000, in order to give an answer to the difficult question put by the UN Secretary General.

In particular, it is worth mentioning, for our purpose, 1) firstly, the decision, made by the Commission, to set aside the wide and popular usage of the terms "humanitarian intervention" which is strongly opposed by humanitarian agencies, humanitarian organizations and humanitarian workers refusing any militarization of the word "humanitarian". The Commission deliberately prefers to refer "either to 'intervention', or as appropriate 'military intervention', for human protection purpose".

With regard to the second conclusion, I prefer to quote directly the efficacious words of the Commission: *"it should go without saying that all the rules of International Humanitarian Law should be strictly observed in these situations. Indeed, since military intervention involves a form of military action significantly more narrowly focused and targeted that all out warfighting, an argument can be made that even higher standards should apply in these cases"*.

c) Coming now more specifically to the danger of selective application of International Humanitarian Law, unfortunately, the threat is before our eyes these days, because of the adoption by Security Council of Resolution 1422 (2002) I have mentioned above, which purports to exclude certain categories of cases from the jurisdiction of the ICC. It is a decision, I believe, that violates the law of the UN, contradicts the equality of States, denies the value of the basic rule *pacta sunt servanda* and, after all, undermines international law as such, as a maniple of courageous States, among them Canada, pointed out in the discussion preceding the adoption. Besides, it suggests the unacceptable idea that the functioning of the ICC itself and the prosecution

of those committing genocide, crimes against humanity, war crimes may constitute a threat to international peace and security.

Furthermore, I have already mentioned the intense pressure exerted by USA aimed at making other States enter into bilateral agreements seeking to single out the position of US nationals accused of genocide, crimes against genocide or war crimes and prevent them from being surrendered to the ICC, introducing a selectivity in assuring respect for International Humanitarian Law.

Concern over this Security Council pretence of supreme "law making" and for the USA's attitude, adds up to the further worry created by the doubt that has been raised that, in case the reaction to acts of terrorism takes the form of armed conflict, such "war against terrorism" – emotional terms which do not actually have any legal meaning - could derogate to a greater or lesser extent to International Humanitarian Law: that in order to oppose the unprecedented security threats posed by the new adversary; or even because the detestable nature of criminal acts of terrorism makes individuals committing or sustaining them undeserving of the protection of International Humanitarian Law. I mean, for example, the protection coming from the status of prisoners of war; or from the right to a fair trial; or, once more, the protection coming from the right of civilians of an occupied territory, not charged with an offence, to be safeguarded from the deportation or transferral within or outside this territory. Therefore, those fighting *pro iusta causa* have more rights and less duties then the bad adversaries.

V

Each one of the challenges I have pointed out calls for deeper comments. On this occasion, my goal has been to single them out in the general trend of development of International Humanitarian Law during the last 25 years. I limit myself to observe that I am convinced, under the experience of no less serious challenges of the past, that International Humanitarian Law and the Protocols will be able to overcome this further difficult trial. I would like to conclude paraphrasing the already quoted sentence of the ICJ in the advisory opinion on the legitimacy of nuclear weapons when rebutting the argument of their exclusion from the applicability of International Humanitarian Law. This sentence is very appropriate as a compass needle for our mind: the rejection of the applicability of International Humanitarian Law would be incompatible with the intrinsically humanitarian character of the legal principles which permeates the entire law of armed conflict and applies, without any adverse distinction based on the causes espoused by or attributed to the Parties to the conflict, to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.

PANEL I

THE CONDUCT OF HOSTILITIES AND THE PROTECTION OF THE CIVILIAN POPULATION

DISTINCTION BETWEEN CIVILIANS AND COMBATANTS

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In this brief report I propose to address the following points:

- The achievements brought about by the 1977 Additional Protocol I to the Geneva Conventions, including the difficulties encountered in applying and interpreting some of the rules
- The status of these rules under customary international law
- The achievements and problems with regard to specific weapons in other treaties of International Humanitarian Law
- Specific challenges to the distinction between civilians and combatants in future armed conflicts.

Achievements of Additional Protocol I

One of the major achievements reached in 1977 with the adoption of the Additional Protocols was certainly the codification of rules relating to the protection of the civilian population against the effects of hostilities. These - contrary to the rules relating to the treatment of civilians in enemy hands - see the Fourth Geneva Convention of 1949 (GC IV) - had remained untouched since the Hague Conventions of 1907. This development in the codification of International Humanitarian Law was so much needed given the technical advances in weapons' technology. Especially, advances in military aviation and rocket development made it possible to bombard military objectives far behind the lines where ground forces were engaged in combat and thereby expose the civilian population to greater danger.

Article 48 of the 1977 Additional Protocol I explicitly defined for the first time the principle of distinction. The provision reads as follows: *"In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to a conflict are required at all times to distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly must direct their operations only against military objectives".*

The principle of distinction is the foundation on which the codification of the laws and customs of war rests. It was already implicitly recognized in the St. Petersburg Declaration of 1868 renouncing the use of certain projectiles, which had stated that *"the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy"*.

The requirement to distinguish is a classical result of the attempt to restrict warfare to acts of violence against the enemy, which are strictly "necessary" from a military perspective. In the whole of Additional Protocol I this may be the most cardinal provision.

As far as the protection of civilians is concerned, Additional Protocol I further develops the principle of distinction in particular:

- by prohibiting direct attacks against civilians and the civilian population as such;
- by prohibiting indiscriminate attacks, which strike military objectives and civilians or civilian objects without distinction;
- by prohibiting area bombardments;
- by defining precautions to be taken in attack and against the effects of attacks.

As a consequence, all methods and means of warfare, which primarily damage the civilian population, are prohibited and the Parties to an armed conflict must take constant care to spare the civilian population and civilians in the conduct of their military operations. Attacks must be directed against military objectives only, which includes combatants. If such lawful attacks are expected to cause incidental civilian casualties, the attacks become unlawful if the casualties are excessive in relation to the concrete and direct military advantage anticipated (principle of proportionality).

Additional Protocol I determines under which exceptional circumstances civilians lose their entitlement to protection against direct attacks. It stipulates that *"Civilians ... enjoy [this] protection, unless and for such time as they take a direct part in hostilities".*

A precise definition of the expression "direct participation in hostilities" does not exist, and cannot be derived from the negotiating history of the Additional Protocols. There is an obvious risk that Parties to an armed conflict tend to regard the greatest possible number of behaviours as direct participation in order to be able to attack everybody showing the slightest enmity towards itself or the slightest sympathy towards the opposing Party. If such an interpretation were adopted the principle of distinction becomes easily meaningless because in practice civilians would be presumed to participate directly in hostilities.

The International Tribunal for Former Yugoslavia in the *Tadic* and *Blaskic* cases, where the issue of direct participation was at stake, did not take a clear position in this regard. It only examined *"the relevant facts of each victim and ascertain[ed] whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time".*

Thus it failed to give any precise guidance. It should be clear however that on the one hand a direct participation encompasses the performance of hostile acts, which, by their nature or purpose, are designed to

strike enemy combatants or material, and on the other hand, the concept is far narrower than that of making a contribution to the war effort. As the ICRC has pointed out in its commentary to the draft additional protocols: *"To identify such activities would be tantamount to the nullification of all the efforts undertaken to reaffirm and develop international humanitarian law, for, in modern warfare, all the nation's activities contribute in some way or another, to the pursuit of hostilities". In extremis*, an argument could otherwise be made that wives staying at home ensuring the survival of the family may be attacked because they allow their husbands to fight in the army. Or if moral support for an armed conflict by the civilian population or even only parts of it would qualify as direct participation, this would lead to a complete withdrawal of protection.

While these upper and lower thresholds should be uncontested, in state practice there exists regrettably quite a grey area in between.

This is just one example demonstrating the difficulty to apply and interpret some of the rules on the conduct of hostilities, which are often formulated in rather general and abstract terms. Their application often depends to a certain extent on the good faith of the belligerents and their wish to conform to the requirements of humanity. While I would agree that it seems to be necessary to leave some margin of interpretation to those who have to apply the rules in the heat of the battle, there is need for discussion on how to ensure a faithful and more uniform implementation and interpretation of these rules.

It is obvious that the protection of the civilian population from the effects of hostilities depends to a large extent on the way combatants distinguish themselves from the civilian population in the conduct of their military operations. In this regard Additional Protocol I adopted an entirely new approach in so far as it created a limited exception from the obligation of combatants to distinguish by the wearing of a uniform or having a fixed distinctive sign and carrying arms openly. Taking into account the reality of guerrilla warfare, Additional Protocol I requires in situations where, owing to the nature of the hostilities, an armed combatant cannot so distinguish himself, he must only carry his arms openly. This must be done during each military engagement, and during such time as he is visible to the adversary while he is engaged in a military deployment preceding an attack. It is true that this provision has been frequently criticized. It should be born in mind however that this rule is not of general application, for it applies only in situations where compliance with the traditional stricter requirements is impossible. These situations are – in accordance with several declarations of interpretation made by States on signature or ratification - limited to the currently rather theoretical case of wars of national liberation as defined in the Protocol and the fighting of organized resistance movements in occupied territories. I agree with other scholars that it would be extremely difficult today to reach agreement on a better text. It is much more important to ensure a reasonable interpretation and to encourage all combatants to comply with the basic requirements to distinguish. In fact, the exception is now almost generally accepted by States.

Customary international law

The general prohibition against indiscriminate warfare applies independently of Articles 48 and 51 of Additional Protocol I. The relevant provisions of Additional Protocol I merely codify pre-existing customary law. Most of the other rules, which are based on the principle of distinction, have merged with customary international law, if they were not already at the time of codification.

Achievements and problems with regard to specific weapons

The impact of the principle of distinction as well as of the rules that follow from it has been greatly enhanced by several treaties relating to specific weapons, which pose a considerable threat to the civilian population. Clearly, the Protocols prohibiting and limiting the use of incendiary weapons as well of mines, booby-traps and other devices annexed to the 1980 Convention on Certain Conventional Weapons were meant to clarify the implications of the principle of distinction on these weapons. The adoption of the Ottawa treaty in 1997 was the culmination of the efforts by the international community to stop the widespread and indiscriminate use of anti-personnel landmines, which resulted in horrendous civilian casualties in many armed conflicts.

However, there are weapon systems and military tactics which are not specifically dealt with in a particular treaty, and the aforementioned treaties are not yet universally ratified. For these situations the provisions of Additional Protocol I and of customary international law are particularly relevant as they impose certain limits on the use of such weapons or tactics. For instance, the International Court of Justice had no difficulty in holding the principle of distinction applicable to the possible use of nuclear weapons in its Advisory Opinion on the Legality of the Treatment or Use of Nuclear Weapons. The protective provisions are also valid for new methods of waging of war. This finding may be of great importance, for example, in the field of cyber warfare and computer network attacks, which may become an important feature in the waging of future conflicts. Given that the employment of such methods of warfare is likely to affect the civilian population, by possibly causing great damage and even loss of life, it must be subject to the same rules based on the principles of distinction and proportionality as are more traditional weapons.

While not a prohibited weapon, one should be concerned about the effects of the use of cluster bombs, which so far may only be assessed under the general rules of the conduct of hostilities. These weapons are usually fired or dropped from a distance far from the intended area of attack and differ from other explosive munitions in that by their design each cluster bomb can attack a fairly large area - usually a radius of 100 meters at a minimum. Multiple cluster bombs will increase this effect. Thus, discriminating between military objectives and civilians in the area can be difficult. In past conflicts, the large-scale use of cluster bombs has been a concern because of the large number of bomblets which have failed to detonate. Their occasional use in urban centres is a specific issue of concern, as it raises two problems: first, in such circumstances these weapons are likely to have indiscriminate effects as defined in Article 51 of Additional

Protocol I. Secondly, the communities targeted in such a way will have to live with the deadly legacy of unexploded cluster bombs for many years. International Humanitarian Law, however, demands, as a precaution in attack, that the Parties to the conflict choose their means of attack with a view to avoiding or at least minimising civilian losses.

Specific challenges to the distinction between civilians and combatants in future armed conflicts

One aspect of recent weapon development is the increasing availability of highly reliable precision weapons. There seems to be little doubt that the use of such weapons can contribute considerably to a better implementation of the principle of distinction. However, the availability of these weapons may also have negative consequences. It may constitute an incentive to hit military targets in highly populated areas which would be prohibited if carried out with less accurate weapons because of the foreseeable risk of causing excessive collateral damage or injury. The use of precision weapons does not eliminate the risk of weapon failure and this may cause disastrous consequences in terms of loss of civilian life. Under such circumstances the defending side might also be tempted – contrary to what is required by Article 58 of Additional Protocol I – to place military assets in the vicinity of civilians and civilian objects. Thus trying to make the attacker hesitate because of fear of causing disproportionate collateral damage or injury.

Given that targets can be hit far behind the combat lines it is even more imperative that accurate intelligence is gathered to ascertain which objects are military objectives and to determine their precise location. This is certainly a problem, which is common to all forms of aerial bombardment and missile warfare. Unless major efforts are made to improve the accuracy of identification of targets, the implementation of the principle of distinction will be at risk.

A feature of recent armed conflicts has been the tendency to make use of high altitude bombing in order to protect pilots from the opponent's air defences. While this attitude is comprehensible and nothing in existing International Humanitarian Law precludes that a Party to an armed conflict takes into account the security of their armed forces, it should be stressed that international humanitarian law requires that constant care be taken to spare the civilian population and civilians. In the context of the prohibition of indiscriminate attacks, bombing raids from extremely high altitudes, where the target accuracy becomes unacceptably low, are particularly questionable. Parties to an armed conflict must do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects. Additionally, they must take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental civilian casualties and damages. According to various interpretations given by States, feasible precautions *"are those which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations".* This means that the security of own forces may be considered, but it cannot be a justification for not taking precautionary

measures and thereby exposing the civilian population or civilian objects to a greater risk.

The militarization of civilians and civilian activities also poses an important threat to the implementation of the principle of distinction and the related rules. There is not just the situation where civilians take up their arms. This would qualify as taking a direct part in hostilities, and make them a lawful target for the time of their participation and they may be prosecuted and punished for that if captured. The situation becomes more difficult when civilians are used in support of military activities. The question will be at what time the threshold of direct participation in hostilities is crossed. There will be measurable pressure to interpret the range of targetable objects and individuals more liberally. Any such calls for relaxing the criteria for valid targets should be opposed. Otherwise, the principle of distinction could easily become meaningless and the humanitarian achievements of the last decades could be considerably endangered.

It is obvious that those who launch an attack, which is defined by Additional Protocol I as an act of violence against the adversary, whether in offence or in defence, bear a specific responsibility to spare the civilian population and civilians. But it must be stressed at the same time that the adverse Party that might be the object of an attack must also take necessary precautions with a view to protecting the civilian population as well as individual civilians. In particular, Additional Protocol I requires that, to the maximum extent feasible:

- the civilian population and individual civilians under their control be removed from the vicinity of military objectives; and
- locating military objectives within or near densely populated areas be avoided.

These obligations must be taken very seriously in order to ensure the protection of the civilian population and should be borne in mind if a further militarization of civilians and civilian facilities is considered.

Concluding remark

In conclusion, despite several shortcomings and challenges identified in this report, the main concern must be today that the rules protecting the civilian population, be they contained in Additional Protocol I or in treaties dealing with specific weapons, are fully and faithfully implemented. The fact that intentionally attacking the civilian population as such or individual civilians is not only a grave breach under Additional Protocol I, but also a war crime under customary international law, as recognized in the case law of the International Criminal Tribunal for the former Yugoslavia, may reinforce the protection of the civilian population. The inclusion of this crime in the Statute of the International Criminal Court will hopefully increase the deterrent effect and contribute to a better protection of the civilian population.

TARGETING IN PRESENT DAY CONFLICTS

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CHALLENGES TO THE PRINCIPLE OF DISTINCTION

Prof. Michel BOURBONNIÈRE
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Introduction

Mr. President, distinguished guests, colleagues, friends,

I would like to thank the Institute and its President for inviting me to participate in this colloquium. I was delighted and honoured to receive the invitation. It is always a pleasure to be in Sanremo, to renew friendships with all who work at the Institute, and to participate in the work of the International Institute of Humanitarian Law. However, as I see the names of the other speakers and the quality of the participants, the experience is, for me, a humbling one.

My work has been centered upon the use of advanced space based military technology and its civilian commercial interface. I, therefore, apologize in advance if I diverge somewhat from purely the application of Geneva law in present conflicts. However, in dealing with the issue at hand, namely distinction and future conflicts, issues of technology and new areas of military operations will necessarily have to be dealt with. In analyzing distinction, perhaps we can refer to Carl Von Clauswitz*: "The theory of any activity, even if it aimed at effective performance rather than comprehensive understanding, must discover the essential, timeless element of this activity and distinguish them from its temporal features. Violence and political impact were two of the permanent characteristics of war another was the free play of human intelligence, will and emotions".*

In this presentation I plan to look at the evolution of military technology and its relation with legal thinking. My presentation will conclude with observations and remarks on new technologies and their interface with the principle of distinction.

Message: technology has increased the transparency of military action: this transparency will have an impact on the perception and application of the principle of distinction

Part 1: Relation between military paradigms and legal paradigms

Conceptually speaking, four epochs of technological military evolution can be identified. These four epochs are seen from a perception of military applications of technology and the conduct of operations. The perspective which I will present traces the evolution of conflict and of military strategy, which follows a constant directional progression. Within the directional progression certain attributes become more and more prevalent over time. It is these attributes of progression that in turn will influence the evolution of the application of the regulatory matrix of humanitarian law.

Although the evolution of the two, that is both military strategy and law are parallel, they nonetheless have certain inherent structural differences, which influence their evolutionary path.

Humanitarian legal norms generally attempt to follow the development of military operations. Although the norms themselves evolve attempting to regulate the new military reality, the theoretical paradigms of the legal superstructure remain constant. During the same evolutionary period we can, however, see a change in military paradigms.

Part 2-A Evolution of Conflict

First Generation Warfare

This period has been described as the era of the smoothbore musket. The primary attribute of military strategy of the epoch was that of tactics of line and column.[1]

The tactics were used to maximize the effect of the available technology. Battlefields were structured in lines to maximize firepower. It is this linear conceptual structure which influenced the battlefield-legal interface.

Second Generation Warfare

The second generation saw a technological evolution which created indirect fire. Tactics were starting to develop concepts of movement although linearity was still predominant. This epoch can be summarized in the following maxim: *"The artillery conquers, the infantry occupies".*

Other technological innovations of the epoch were the use of railways and telegraph. The linear attributes of the battlefield were starting to erode with the reality of technological evolution.

[1] Col. William L. LIND, *"The Changing Face of War: Into the Fourth Dimension"*, and on internet site*:* www.d-n-i.net/fcs/4th_gen_war_gazette.htm.

Third Generation Warfare

Third generation warfare matured during World War II. New tactics of manœvre were developed to bypass static military positions. Tanks were probably the best metaphor of this generation, while the Germans developed the "*blitzkrieg".*

Each of the first three generations of conflict had an evolutionary constant. The constant is the delinearization of military engagement. In other words, battlefield structures have become increasingly diffused.

In a sense conflict structures have evolved in a similar direction as economic structures. Thus, in looking at economic and technological structures we can deduce certain principles applicable to conflict structures.

Economic structures have recently evolved towards the globalization of markets. At the same time we have lived through a revolution in information gathering and distribution. As Alvin and Heidi Toffler wrote in "War and Anti-war": *"the way a nation makes wealth is the means by which it will choose to wage warfare"*. However, in taking this analysis one step further we can now deduce that the way a nation makes wealth might also be the manner through which it is attacked.

We are presently witnessing the development of a fourth generation of conflict. This new generation can be described in many ways. Certain authors have called it asymmetrical warfare. Asymmetry is certainly a useful metaphor in describing conflicts. As an analytical tool "asymmetry" will help determine and influence our perception of the principle of distinction on future conflicts. But as a tool we must also recognize its inherent analytical limit. Thus it can help us perceive part of the subject studied but not the entire subject.

The concept of "asymmetry" is a descriptive categorization centered upon the disproportional capability in the means and methods of warfare of the protagonists. Since there is a correlation between technology and the application of legal obligations, asymmetry will necessarily also has an impact on the concept of distinction.

Diversification of perspectives and of metaphors is necessary to perceive totality of the attributes of the concept studied. Another analytical perspective is gained if we concentrate on the structural evolution of conflict. One way of looking at the evolution of conflict is to see the relation between the linear dissolution of the battlefield, and the creation of what might be called a "battle space", a diffused area of conflict, which involves many areas on national interaction.

Part 2-B The Function of Law

Vis-à-vis the reduction of the battlefield and the appearance of the "battle space", what is the function of law?

19th Century Legal Paradigms

The relationship between conflict structures and legal paradigms is important as legal theoretical paradigms make certain assumptions upon the activity they are attempting to regulate. In this respect legal paradigms are a cognitive force defining the perceived reality of the activity.

Military operations are contingent upon the technological structures of their epoch. The initial period of conflict, which created the concept, and strategies of a linear battlefield also created the legal paradigms based on a dichotomy. A legal perception of two sides, two classifications of people, is in harmony with a linear view of military operations.

In other words, the linear military concept of a static battlefield generated a legal theory based upon a conceptual structural division of two things, which are either opposed or entirely different. This dichotomy has come to define the concept of distinction itself. The vocabulary used is one which divides rights between combatants and non-combatants, aggressors and those who act in legitimate self-defence. The application of legal structures based upon dichotomies was easy and efficient on a linear battlefield. The application, however, becomes more problematical when applied in a diffused battle space.

Our present legal architecture has a conceptual foundation which was created in the 19th century. It is in fact the structure of military strategy of the 19th century which influenced the conceptual foundations of our contemporary humanitarian law architecture.

In other words, 19th century linear military operational paradigms created a corresponding paradigm of legal analytical theory. Distinction as a practical principle is easily applicable in a linear battlefield. Combatants and military objectives are easily identified. Thus a legal structure based upon a dichotomy of combatants and non-combatants could easily be applied. A legal paradigm based on the combatant-non-combatant dichotomy was a natural fit for a linear battlefield.

Historically speaking, we can trace the modern origins of this principle to a 19th century legal instrument. The Preamble of the St.Petersburg Declaration of 1868, states that: *"[…] the only legitimate object, which States should endeavour to accomplish during war, is to weaken the military forces of the enemy"*;

The Hague Regulations prohibit unnecessary destruction by belligerents.

- The means of injuring an enemy is not unlimited (Article 22)

- The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended are prohibited. (Article 25)
- In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals. Visible signs must identify such buildings. (Article 27)

These principles on the conduct of hostilities are now more commonly referred to as "the principle of distinction". The "principle of distinction" has witnessed and endured three centuries. The "principle of distinction" has transcended epochs; it has seen two world wars, cold war, and global systemic competition of wars through proxies, the incredible evolution of technology and its destructive forces. Through its incredible "time travel", the principle has found applicability in a variety of conflicts while accompanying the evolution of the means and methods of warfare. The "principle of distinction" has in fact survived the perils of legal Darwinism.

Just as this principle has witnessed three centuries, it has also seen applicability in three generations of warfare. The first generation coincided with the early development of humanitarian law.

Each of these generational changes forced the legal regime to adapt, to protect civilians, to reduce the increasing horrific effects of war.

The legal paradigm structuring the rights and duties of combatants has served us well throughout the 19th, 20th and now the 21st century

Subsequently, military operations evolved finding new paradigms of operations. Humanitarian legal theory has followed this evolution while maintaining a loyalty to its founding paradigms. Other legal principles helped the concept of distinction to adapt to new realities. These are:

1. Proportionality
2. Military Necessity

Within our present legal architecture, there must be a clear difference between combatants and civilians, between objects, which may legitimately be attacked, and those which are protected. In order to protect civilians from attack, combatants are obliged to distinguish themselves from the civilian population. Uniforms are worn, weapons are carried openly, and equipment is identified.

Fourth generation warfare brings both new challenges and strengths to this time endured principle.

What are the strengths which technology and fourth generation warfare bring us?

Firstly, certain technologies facilitate the application of the rule. I am referring to space-based imagery. Military technology has finally secured the proverbial "high ground" which military strategists have always longed for. Satellites orbit our planet unhindered by national borders and gather images of targets. Once targets are located in the Global Positioning System (GPS) satellite constellations play a key role in guiding high tech weapons to their targets. Perhaps one of the most eloquent image showing the contrast of asymmetrical operations is that of US Special Forces soldiers in Afghanistan riding horses while circling B-52 Bombers and satellites completed the team to identify and neutralize targets in an efficient manner.

However, military satellites do not only collect target imagery, but also by civilian earth observation satellites. Civilian satellites are an important part of the information gathering process. A global market is presently being developed for satellite imagery. The result of this new information infrastructure is the increasing transparency in government activity, and necessarily in military activities.

Just as we can image the position of opposing forces, our forces can also be imaged.

Example 1
CURRENT CONFLICT in AFGHANISTAN

Example 2
FUTURE CONFLICT in IRAK

Remember, all that is needed to acquire these images is a computer with an internet connection and a credit card.

What is the impact of imagery on distinction and particularly on humanitarian ICRC operations?

On the issue of overhead imagery, these are divided between "Synthetic Aperture Radar imagery" and "Optical imagery". Although an optical satellite with a good Ground-Sample Distance (GSD) resolution recognizes a large Red Cross emblem, the same cannot necessarily be said of a Synthetic Aperture Radar satellite. A radar satellite has the advantage of providing imagery at night, or through clouds.

Aspects of interest for humanitarian applications are:

1. Perhaps the creation of a Red Cross sign, which can be electronically perceived by intelligence gathering assets, could be desirable.
2. Imagery can be used to verify Prisoners of War camps. Granted there is nothing better than on the spot inspections, imagery can be a useful tool to complete and maintain humanitarian surveillance.

3. Satellite imagery can be used to gather evidence for war crimes. Just as military satellites can evaluate the success or failure of a strike, civilian satellites can help determine the respect of IHL in military operations.

Double edged sword: **challenges**

First challenge: The challenge to distinction lies in the nature of asymmetrical warfare itself. As belligerents have different technological capabilities, the weaker Party might not apply the principle with the same rigor, even perhaps ignoring the concept altogether. This is a serious problem, which will have to be addressed. However, space-based earth imaging has created a transparency of government action. Consequently, military action is also now more transparent. This transparency has generated a greater public awareness and a lower tolerance for undisciplined military operations. Freedom of the press and transparency of government action has high standards for the respect of International Humanitarian Law in military operations. In this sense the principle of distinction has been reinforced within democratic regimes. The challenge lies in terrorist attacks on civilians, which I consider to be a horrible rime against humanity. It is important for us in fighting terror to maintain a rigor, a moral fortitude and maintain our principle of distinction.

Second challenge: The application of distinction to a diffused battlespace, which includes a space dimension and cyber space, provides increasing technological challenges. Viruses used in CAN might be very effective, but these might not distinguish between belligerent computer systems and computers linked to computers, or Red Cross facilities. The application of distinction, and proportionality has from a methodological perspective been linear in application. However, the reality of orbits forces a different conceptual approach.

Conclusion

The legal obligation of distinction is an important one. Coupled with the principle of proportionality, these legal concepts are the equivalent of the principle of economy of force. However, the practical application of distinction along with its articulation within treatise has created a concept of distinction based on a duality of application.

The conceptual question which needs to be asked is whether the concept of distinction is necessarily a two dimensional concept as it is perceived and applied in legal theory and practice. The pertinence of the question resides in the fact that the linear battlefield is no longer the primary structure of conflict.

We will most probably continue to see some linear attributes in conflicts. These will, however, appear more during classical state-to-state military operations. It is important to understand and accept the diffusion of the battlefield and adapt legal theory to this new reality of conflict management.

Space-based earth imaging has been, since the end of the cold war increasingly commercialized by private businesses. The security issues involving the commercialization of these assets have been extremely complex. The pertinence of the commercialization and modern conflicts is that the commercial process if not properly controlled in fact allowed the use of this technology to spread to either belligerent States or hostile organizations.

Nonetheless the use of this technology has greatly helped to reduce casualties in targeting. A paradigmatic change in military operations must be accompanied by a paradigmatic change in legal structures. A legal paradigmatic change in turn presupposes a change in legal vocabulary.

As the difference between war, peacekeeping, and peace enforcement becomes more blurred a change in legal perceptions becomes necessary.

PROTECTION OF THE CIVILIAN POPULATION IN NON-INTERNATIONAL ARMED CONFLICTS

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I. Introduction

II. Applicability of Humanitarian Law in Non-International Armed Conflicts

1. Defining Situations of "Non-International Armed Conflict"

   a. Existence of an Armed Conflict

   b. Temporal and Geographical Scope of the Armed Conflict

   c. Nexus between the Acts and the Armed Conflict

   d. Types of Armed Conflicts
      i. International Armed Conflict
      ii. Non-International Armed Conflicts
      iii. Internal Disturbances and Tensions

   e. The Distinctive Criteria of "Non-International Armed Conflicts"
      i. Distinction between Non-International Armed Conflict and Internal Disturbances and Tensions
         I. Intensity of the Conflict and Organisation of the Parties to the Conflict
         II. Aim and Objective of the Parties to the Conflict
      ii. Distinction between International and Non-International Armed Conflicts
         I. Coincidence of both Categories
         II. Criteria of an International Armed Conflict in contrast to a Non-International Armed Conflict

2. Concurrence of Common Article 3 of the Geneva Conventions and Additional Protocol II

   a) Relationship between Common Article 3 of the Geneva Conventions and Additional Protocol II

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b) Customary Nature of Common Article 3 of the Geneva Conventions and Additional Protocol II

c) Binding Force for Non-Governmental Parties to the Conflict

III. Regulation of the Protection of the Civilian Population in Non-International Armed Conflicts

1. Modern Specialised Treaties of Humanitarian Law

2. Relationship between Humanitarian Law and Human Rights Law in Non-International Armed Conflicts

3. Some Experiences from Recent Non-International Armed Conflicts

a) Directly Targeting the Civilian Population

b) Denial of Access to vulnerable Populations

c) Displacement of the Civilian Population

d) Prosecution of Violations

e) Common Characteristics

IV. Implementation and Enforcement of the Law

1. International Criminal Law

a) Serious Violations of International Humanitarian Law

b) Crimes against Humanity

c) Genocide

2. Third State Reactions

a) Chapter VII of the Charter of the United Nations

b) "Humanitarian Intervention"

V. Possible Conclusions

I. Introduction

In 2001, 24 major armed conflicts were reported, 22 being of a non-international character and eleven having lasted for eight or more years. Eleven of the 20 humanitarian emergencies were counted in non-international conflicts. In the twelve years of the so-called 'post-cold war' period between 1990 and 2001, 57 different major armed conflicts in 45 different locations were counted, all but three of them – without taking into account conflicts in the context of military operations in the framework of Chapter VII of the UN Charter – being non-international. The suffering of civilians in armed conflicts has been widely reported. The proportion of war victims who are civilians among casualties of armed hostilities has leaped to at least an estimated 75 per cent. Other sources speak of nine out of every ten war casualties being civilians. Armed hostilities, the majority of which being internal, have claimed more than 5 million lives since the 1990s.

They were characterised by a diverse set of antagonistic groups, variously driven by political ambitions, economic motives, ideology and fear, ethnicity or religious belief being widely used as a tool to define and motivate certain groups. Conflict resolution was hampered by the facts that contemporary rebel movements often tend to break apart into factions, all sides have access to weapons and funds, the fighting often takes place in remote locations and the belligerents perceive their vital interests to be at stake. Consequences of these non-international armed conflicts have been the flow of refugees and internally displaced people, cross-border movement of armed personnel as well as the undermining of economic and political structures in neighbouring States through illicit trade in natural resources and arms.

The Secretary-General of the United Nations, Kofi Annan, recommended in 1999 a *"clear course of action for the Security Council to compel Parties to a conflict to better protect civilian populations and to respect the rights guaranteed to civilians by international law"*. Member States of the United Nations pledged in the Millennium Declaration to expand and strengthen the protection of civilians in complex emergencies, in conformity with international humanitarian law. In his second report UN Secretary-General stated in 2001 that *"the realities of distressed populations have not changed"*.

What today is often being qualified as having changed is the nature of armed conflicts in general and of non-international armed conflicts in particular. Although assertions of that kind are extremely difficult to make, it may be maintained that number, shape, conduct of hostilities, participants, and victims of armed conflicts have changed since the adoption of the two Additional Protocols to the Geneva Conventions in 1977. Especially the global changes after the dissociation of the contrast between East and West in world politics set off enormous national, religious, anthropological and ethnical incompatibilities and gave rise to a great number of respectively motivated clashes. Today, non-international armed conflicts are more numerous and more brutal and entail more bloodshed than international armed conflicts. The conduct of hostilities in Liberia, Southern Sudan, East Timor and Colombia as well as former Yugoslavia and the Great Lakes

Region are only some and recent examples. At the same time interest, awareness and concern of the international community focus considerably more on non-international armed conflicts than in 1977.

Prior to Additional Protocol II of 1977, common Article 3 of Geneva Conventions of 1949 was the only humanitarian law treaty regulation of the protection of the civilian population in non-international armed conflicts. The adoption and ratification of Additional Protocol II have been simultaneously both enthusiastically praised for the progress and more detailed regulation of humanitarian law for non-international armed conflicts and harshly criticised for its shortcomings, deficiencies and non-regulation compared to Protocol I and to the practical needs. However, at least compared to content and comprehensiveness of Additional Protocol I, Protocol II appears as a 'torso' with a comparatively poor status.

While the Geneva Conventions have been ratified by 189 States, Additional Protocol II today has 152 States Parties. As the question of a changed quality and number of (non-international) armed conflicts has been raised, the further question is automatically evoked as to whether the Additional Protocols of 1977 have made any difference in 2002 or not, and if there has been any progress. Although I tend to be somewhat cautious as to the extent in which today's armed conflicts have changed in nature, definitely a new dimension is reached with regard to civilians having become the principal victims of armed hostilities, in particular in non-international armed conflicts motivated by ethnic or religious hatred. Asking the question if the Protocol II 'torso' has made any difference to the fate of the civilian population as such and to individual civilians in non-international armed conflicts seems to imply the answer in the negative already – having only a superficial glance at the conduct of hostilities in Rwanda, Colombia, East Timor, and former Yugoslavia as examples. One might even be hopeless facing the fact that evident chances for a progressive development of the law have not been made use of.

I will nevertheless try to shed some light on how much of a reason we have to be frustrated and explore whether and eventually up to what extent it might be justified to see light at the end of the tunnel – and what needs to be undertaken in order to approach this light. In undertaking this effort, only selected issues, questions and problems will be highlighted which might be of specific importance for an effective and efficient protection of the civilian population in a non-international armed conflict. A detailed and particularly comprehensive study of and commentary on all issues deserving discussion and solution cannot be provided within the present framework. I am extremely aware of the fact that most questions may remain unanswered and that many participants may be dissatisfied with the amount of solutions being suggested.

II. Applicability of Humanitarian Law in Non-International Armed Conflicts

The applicability of humanitarian law norms in non-international armed conflicts is the initial, but crucial step in any observation of the problem in question.

1. Defining Situations of "Non-International Armed Conflict"

According to the traditional concept of International Humanitarian Law and in spite of various semantic differences, there exists a classical distinction with regard to its applicability, i.e. the distinction between international armed conflict, non-international armed conflict and merely internal or domestic conflict situation. An international armed conflict is the traditional and 'normal' situation in which the provisions of international humanitarian law are applicable. It is still a fact that in non-international armed conflicts only a more limited range of humanitarian law provisions is applicable compared to the much more numerous and elaborate rules for international armed conflicts. Finally, the traditional concept of international humanitarian law is based on the fact that States do not apply humanitarian law rules at all and exclusively rely on instruments of domestic public and criminal law in situations qualifying as mere internal or domestic armed conflicts. Additional Protocol II (Article 1 para. 2) and the International Criminal Court (ICC) Statute (Article 8 para. 2 lit. d and f) refer to such internal situations as *"situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature".* In other words, despite different categorisations and sub-categorisations on the basis of various criteria and for differing purposes, States have made it clear that they distinguish – in general and in all lack of clarity – between situations where international law in general and international humanitarian law in particular is applicable on the one hand and situations, on the other hand, where the applicability of international humanitarian law is denied, which are reigned under the aegis of national criminal law and domestic rules of law and order, and where governments at the utmost accept the applicability of international Human Rights Law.

a) Existence of an Armed Conflict

Modern international humanitarian law does not legally define the situation of armed conflict. Very generally the notion of armed conflict may be described as to include the use of force in a warlike manner. The Geneva Conventions refer to such a definition in so far as they clarify that the Conventions shall apply *"to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties"* (common Article 2 para. 1 of Geneva Conventions). This determination of the field of application is reiterated by Article 1 para. 3 Additional Protocol indirectly repeated in Article 1 para. 1 Additional Protocol II, while Additional Protocol II explicitly exempts internal disturbances and tensions from the notion of "armed conflict". The almost generally accepted definition as applied in continued jurisprudence by the International Criminal Tribunal for the former Yugoslavia (ICTY) states that *"an armed*

conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".

b) Temporal and Geographical Scope of the Armed Conflict

Yet there remains the question of the temporal and geographical link between the armed force or the protracted armed violence and the relevant law protecting the civilian population. Therefore, it is decisive whether any behaviour violating humanitarian law has to be committed at a time and in a place where hostilities are actually taking place or what other connection between the armed force or protracted violence and the behaviour in question has to be. It derives from the nature of the occurrence of armed force or protracted violence that the whole complex situation forms "the armed conflict", be it international or non-international. Thus, the very existence of an armed conflict in terms of its temporal and geographical scope extends beyond the exact time and place of hostilities. The criterion of "armed conflict" is fulfilled until a peaceful settlement of hostilities is achieved and in the whole territory under the control of a Party to the conflict, whether or not actual combat takes place there. Concluding, hostilities do not have to occur at the exact time and in the exact place of the alleged behaviour in order to fulfil the criterion of armed conflict. Armed force or protracted violence in the general context is sufficient for the application of international humanitarian law in non-international armed conflicts.

c) Nexus between the Acts and the Armed Conflict

Having noted that a very general link between the behaviour and the temporal as well as geographical frame of the (non-international) armed conflict is sufficient in order to apply International Humanitarian Law, there remains the question in the context of criminal jurisprudence as to whether or not a substantive link between the behaviour and the armed conflict is to be required, i.e. how closely they have to be substantially tied.

The question is of crucial importance since at least a minimum connection has to be required in order to justify the application of international in preference to domestic criminal law. However, tightening the link between the alleged offence and the armed conflict too narrowly has the effect that acts, which have been committed according to a general perception within the context of an international armed conflict, but are less obviously part of the official – governmental or non-governmental – conduct of hostilities, fall outside the application of international law. They would exclusively have to be dealt with under domestic law. Such effect would especially be inadequate in the situation of non-international armed conflicts in which the functioning of the domestic legal systems is very much at stake.

The findings of the ICTY are not wholly stringent on that issue, but nevertheless reveal a certain line of argument: While referring to a "sufficient connection" – *"rapport suffisant"* and an "obvious link" between the criminal act and the armed conflict the Court explicitly emphasised that it did not require a

"direct connection" in order to establish a "clear nexus" between the armed conflict and the acts in question. Such clear nexus was based on the following criteria: the place of the offence being operated by one Party to the conflict, the location and status of the victims resulting from military operations conducted on behalf of that Party to the conflict and in the course of this conflict, and the *de facto* position and duties of the accused. Although the sufficient nexus between the alleged acts and the armed conflict is not defined, neither in the ICC Statute nor by the jurisprudence of the ICTY, it seems to be a settled finding that the required link does not have to be a direct one. In case such direct link may not be established, it is adequate to have recourse to the positions of the victim and the alleged perpetrator as well as their connection to any party to the armed conflict. When this global evaluation appears to provide for a "sufficient" nexus between the offence and the armed conflict, the way for the application of international criminal law by the International Criminal Court is paved.

d) Types of Armed Conflicts

The classical concept of international humanitarian law pays tribute to the principles of sovereignty of States and distinguishes between international and non-international armed conflicts and merely internal violence.

i. International Armed Conflict

It is well established in modern humanitarian law that an armed conflict is to be qualified as an international one whenever at least two subjects of international law are involved. An international armed conflict may be described as to include the use of force in a warlike manner between subjects of international law (whether they recognise themselves as being at war or not), all measures short of war (whether they are compatible with Article 2 No. 4 UN Charter or not), and wars of national liberation under the conditions of Article 1 para. 4 and Article 96 para. 3 of Additional Protocol I.

ii. Non-International Armed Conflicts

International humanitarian law does not provide a legal definition of the notion of non-international armed conflict. It follows from the wording of common Article 3 of the Geneva Conventions that a non-international conflict constitutes an armed conflict without the involvement of at least two subjects of international law generally referred to as a 'non-international armed conflict'. The contrast to international armed conflicts is provided by Article 1 para. 1 of Additional Protocol II which defines non-international armed conflicts as *"all armed conflicts which are not covered by Article 1 [of Additional Protocol I]"*, while Article 1 para.s 3 and 4 of Additional Protocol I determine the applicability of Additional Protocol I in situations of international armed conflict.

There remains the question as to whether both common Article 3 of the Geneva Conventions and Article 1 of Additional Protocol II address principally the same situation of non-international armed conflict with a

different threshold of applicability or whether both provisions cover substantially different conflict situations. Whereas common Article 3 of the Geneva Conventions addresses an *"armed conflict not of an international character occurring in the territory of one of the High Contracting Parties"*, Article 1 para. 1, Additional Protocol II refers to 'non-international armed conflicts' *"which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".* Thus Article 1 Additional Protocol II adds several criteria which have to be fulfilled in order to entail the applicability of Additional Protocol II. While common Article 3 Geneva Conventions is applicable in any non-international armed conflict, the threshold being depicted in Article 1 Additional Protocol II is considerably higher. Yet, the type of conflict which both provisions address is the very same, only the quality of the conduct of hostilities and the threshold of applicability of these provisions differ considerably.

iii. Internal Disturbances and Tensions

Although common Articles 2 and 3 of Geneva Conventions are not totally clear on that point, Article 1 para. 2 Additional Protocol II unambiguously exempts internal disturbances and tensions from the applicability of Additional Protocol II and from the definition of armed conflict at all. The provisions thus reaffirm the traditional concept that internal disturbances and tensions form a third type of conflict situation which is not regulated by international humanitarian law.

e) The Distinctive Criteria of "Non-International Armed Conflicts"

One might doubt whether the traditional concept of international humanitarian law distinguishing between three different types of armed hostilities is a helpful one and whether it still reflects modern approaches to the problem, but it is a fact that this concept is the basis for the existing humanitarian law regime. The problem arising out of this concept is not a problem of legal definition. To define the non-international armed conflict as a conflict which neither constitutes an international one nor one of internal disturbances and tensions, is legally correct and not contestable.

Rather, the problem is its actual application in currently highly complex conflict situations. As has emanated from the various conflicts and sub-conflicts on the territory of former Yugoslavia as clearly as never before in the history of armed conflict, the actual qualification of a conflict as international, non-international or merely internal is not an issue of academic interest, but a matter of international concern and a necessity of jurisprudential practice.

i. Distinction between Non-International Armed Conflict and Internal Disturbances and Tensions

I. Intensity of the Conflict and Organisation of the Parties to the Conflict

In order to distinguish non-international armed conflicts and internal disturbances and tensions in more detail, criteria of the intensity of the conflict and a sufficient organisation of the Parties to the conflict may be of considerable value. Indeed the International Criminal Tribunal for Rwanda (ICTR) Trial Chamber had recourse to these criteria in the *Akayesu* Case qualifying the armed conflict in Rwanda. With regard to the criterion of organisation of the Parties to the conflict, the Chamber first distinguished *"mere acts of banditry or unorganized and short-lived insurrections"* from *"genuine armed conflicts"* and excluded them from the scope of common Article 3 of the Geneva Conventions. It then simply stated that the Rwandan governmental forces on the one hand and the Rwanda Patriotic Front (RPF) on the other hand were *"well-organized and considered to be armies in their own right"*. The Tribunal thus considered such acts of banditry and unorganised and short-lived insurrections as types of internal disturbances and tensions not qualifying as non-international armed conflicts. Concerning the criterion of organisation of the Parties to the conflict itself, the Court only formally referred to such criterion of sufficient organisation. It did not answer the question, under which conditions an organisation is "well organized", except that the self-estimation by the Parties concerned was deemed sufficient. Sub-criteria as to when an organisation of the non-governmental parties in particular meets the threshold of sufficiency are not provided, neither by recent jurisprudence nor by legal writing.

The criterion regarding the intensity of the conflict has been referred to by the Tribunal, but again substantial indications with regard to when an armed conflict is deemed to be – sufficiently – intense for being qualified as a non-international armed conflict in the sense of common Article 3 of Geneva Conventions and Article 1 para. 1 of Additional Protocol II, have not been provided. The Tribunal first clarified that ascertaining the intensity of a non-international conflict does not depend on the subjective judgement of the Parties to the conflict. It then referred to the qualification of the Rwandan conflict as *"a war, an internal [i.e. non-international] armed conflict"* by *"all observers to the events, including UNAMIR (United Nations Assistance Mission for Rwanda) and UN Special rapporteurs"*.

II. Aim and Objective of the Parties to the Conflict

The criterion of aim and objective being pursued by the Parties to the conflict might be another possibility to reveal the distinction between non-international armed conflicts and internal disturbances and tensions. Although the ICTY used this criterion it did not elaborate on its substance. It did not examine the conditions under which the aim and objective of an armed conflict may characterise the conflict as either international or non-international.

Concluding from these observations, there are no established criteria or more substantive criteria than intensity of the conflict, sufficient organisation of the Parties to the conflict as well as aim and objective of these Parties in order to distinguish between non-international armed conflicts and internal disturbances and tensions. Even with respect to these two criteria it is left open which sub-criteria should ascertain such intensity of the conflict and sufficient organisation of the Parties to the conflict.

ii. Distinction between International and Non-International Armed Conflicts

I. Coincidence of both Categories

According to legal writing in international humanitarian law, the distinctions between international and non-international armed conflicts in theory may relatively clearly be drawn by applying the rule of "two or more subjects of international law". In practice, only the quality of non-governmental Parties to the conflict as subjects of international law would generally be arguable.

Yet, such approach is rendered questionable on the basis of statements of the ICTY on that issue. The Appeals Chamber, in its judgement on the appeals against the Trial Chamber's *Tadic* Case judgement, seemed to hint to the possibility that an armed conflict *"could be international in character alongside an internal armed conflict"*. From this construction, the case that an international and a non-international armed conflict co-exist, should be stressed as the International Court of Justice in the *Nicaragua* Case discovered for instance. The Appeals Chamber held that the conflicts in the former Yugoslavia had *"both internal [i.e. non-international] and international aspects"*. The Trial Chamber in its judgement in the *Tadic* Case qualified the conflict between the Government of the Republic of Bosnia-Herzegovina and the Bosnian Serb forces in its entirety as at least a non-international one and during a certain period and in certain parts of the territory of Bosnia-Herzegovina even an international armed conflict. This wording might have to be understood in a way that the very same armed conflict in the same timeframe and at the same place could be qualified as international and non-international coincidentally. Yet, the Appeals Chamber does not further elaborate on this question. The situation where a non-international armed conflict turns into an international one, will now be dealt with.

The question if the very same actual armed conflict may be international and non-international in character at the very same time thus remains unanswered in the judgement. From a logical point of view such an idea is hardly conceivable. It appears much more adequate and therefore preferable to determine the temporal as well as the geographical scope of the armed conflict in question sufficiently precisely so that a convincing categorisation is rendered possible. A complex armed conflict has to be split up with respect to sub-timeframes and/or sub-places and the split sub-conflicts are to be qualified separately. The test, therefore, has to be that the armed conflict in question will have to be qualified as either international or non-international. Once qualified, the respective rules of international humanitarian law and international

criminal law apply throughout the entire territory, unless singular conflicts in specific areas have to be separated from the general conflict and their type has to be qualified separately and differently.

II. Criteria of an International Armed Conflict in contrast to a Non-International Armed Conflict

Therefore, there remains the problem of distinction between international and non-international armed conflict in complex situations. The aforementioned question of the qualification of non-state actors in International Humanitarian Law as subjects of international law or, more precisely, the qualification of the relationship between such non-state actors to States 'behind' such actors has been developed by recent jurisprudence in the context of the armed conflicts in former Yugoslavia. The Appeals Chamber in the *Tadic* Case clarified that, despite the formal involvement of a non-governmental Party any conflict is to be qualified as an international one if that non-governmental Party acts "on behalf of" another State. If, on the other hand, participants in a non-international armed conflict do not act on behalf of another State, the armed conflict is hence to be qualified as a non-international one.

The problem remains in establishing the criteria for such attributability of non-governmental participants' acts to a subject of international law. The issue whether criteria of imputability in the context of State responsibility are to be applied directly or indirectly with reference to the definition of the status of combatant under Article 4 para. A, sub-para. 1 of Geneva Conventions III, or whether some kind of material "assimilation" is at stake, are only some of the questions.

Any construction results in a test of control of that other State over the persons fighting against the authorities of their home State. The ICTY Trials Chamber in the *Tadic* Case elaborated on the test of "effective control" which has been developed by the International Court of Justice in the *Nicaragua* Case with respect to the concept of State responsibility. This test of effective control stipulates that specific instructions concerning the various activities of the individuals in question must have been issued by the State. The Appeals Chamber rejected the test of "effective control" and decided to use the less strict test of "overall control" instead, distinguishing between single private individuals acting as a *de fact*o State organ on the one hand and armed forces on the other hand. For a single private individual – or a group that is not militarily organised – to be qualified as acting as a *de facto* state organ when performing a specific act of armed violence, it is necessary to ascertain that specific instructions concerning the commission of that particular act of armed violence had been issued. For subordinate armed forces – or militias or paramilitary units – to be qualified as *de facto* state organs, it is necessary to determine control by that State in the form of an overall character, especially co-ordination or help in the general planning of the military activity, which comprises more than the mere provision of financial assistance or military equipment or training, but definitely requires less than "effective control".

In conclusion mention should only be made of the fact that practice does not make extensive use of *ad hoc* agreements in specific situations, with the aim of widening the scope of applicable provisions and in

particular rendering rules for international conflicts applicable in non-international armed conflicts. If they were used more frequently, such agreements could improve the protection of the civilian population in non-international armed conflicts considerably.

2. Concurrence of Common Article 3 of the Geneva Conventions and Additional Protocol II

a) Relationship between Common Article 3 of the Geneva Conventions and Additional Protocol II

Common Article 3 of the Geneva Conventions does not distinguish between armed conflicts not of an international character and situations below this threshold, i.e. between the application of international humanitarian law and domestic law and order and criminal law. Yet, although details and specific questions are still under discussion, it suffices to state here that – provided the threshold of application is met– all non-international armed conflicts without exception are regulated by common Article 3 of Geneva Conventions. The application threshold of Additional Protocol II is comparatively higher, as stated in Article 1 para. 1. Once this higher threshold is met, common Article 3 of the Geneva Conventions remains applicable and the situation is governed by both common Article 3 of the Geneva Conventions and Additional Protocol II.

There is no room for elaborating on the content of common Article 3 of Geneva Conventions and Additional Protocol II. It is only mentioned that common Article 3 constitutes the "minimum standard" of international humanitarian law being applicable in all armed conflicts, whereas the core of protection of the civilian population under Additional Protocol II is regulated by Articles 13 to 18 in particular, setting out many of the provisions of common Article 3 of Geneva Conventions in more detail, extending the protection afforded to civilians, detainees and medical personnel. This part IV of Protocol II provides for a protection of civilians and specific civilian objects as well as a regulation of the forced movement of civilians and humanitarian assistance operations. A common distinctive feature of both common Article 3 and Additional Protocol II is the lack of a definition and a regulation of 'combatants'. Although the reason for this approach is clear, it might, under certain circumstances, be useful to rethink the renunciation to such status in non-international armed conflicts. Such status is to be distinguished from any form of 'recognition of belligerency' – a notion which is not at all discussed in the present contribution, in particular because of the fact that it is not relevant in present state practice. It is not necessarily excluded that a recognised status on the basis of clear criteria and prerequisites might clarify and enhance non-governmental Parties to a conflict being bound by humanitarian norms in non-international armed conflicts and thereby improve the protection of the civilian population.

b) Customary Nature of Common Article 3 of the Geneva Conventions and Additional Protocol II

It has been and still is extensively discussed whether common Article 3 of the Geneva Conventions and Additional Protocol II respectively, *in toto*[2] or in part, codify or have crystallised as customary law. Without going into any detail it seems to be generally accepted that common Article 3 of the Geneva Conventions is not only binding as treaty law, but also on the basis of customary law. With regard to the provisions of Additional Protocol II the question is probably more difficult to answer, and even more important because the Protocol has not been universally ratified, in contrast to common Article 3 of the Geneva Conventions. Presently, 152 States are Parties to Additional Protocol II out of 189 Members of the United Nations and 189 States having ratified the Geneva Conventions. In this context the Study of Customary Rules of International Humanitarian Law, undertaken by the International Committee of the Red Cross (ICRC), is of crucial value and one cannot but hope that the sooner it is published the better. Because of content and scope of the results expected from this study, further comments in this context would appear inadequate.

c) Binding Force for Non-Governmental Parties to the Conflict

As treaty law provisions, both common Article 3 of the Geneva Conventions and Additional Protocol II are binding on the Parties to the treaty, thus excluding non-governmental Parties. Yet already the wording of common Article 3 of the Geneva Conventions indicates the obligation for non-governmental Parties to the conflict in that it formulates *"each Party to the conflict shall be bound"*. Although arguments vary it is today generally accepted that both common Article 3 of the Geneva Conventions and respective customary law are binding on both governmental and non-governmental Parties to a conflict.

With regard to Additional Protocol II this assertion is more difficult to make as any mention of "the Parties to the conflict" was removed in the fourth session. Different arguments focus particularly on the principle of legislative jurisdiction, interpretation of treaty law and common sense supporting a binding force of Additional Protocol II provisions for non-governmental Parties to the conflict. In principle, it is again generally accepted that its provisions and, as far as they are valid also on a customary basis respective customary law, do oblige all Parties to a conflict alike.

It is in this sense that in a given situation the Security Council of the United Nations commonly urges *"all Parties to a conflict to comply with humanitarian law"* [S/RES/1265 (1999), para.s 4 and 9].

[2] Constitutional Court of Colombia, Judgement C-574/92, Section V, B2c, 28 October 1992, and Judgement C-225/95, Section VD, 18 May 1995; *"Kosovo Report".*

III. Regulation of the Protection of the Civilian Population in Non-International Armed Conflicts

1. Modern Specialised Treaties of Humanitarian Law

Despite the above described strict distinction between both types of armed conflict regulated by humanitarian law, the increased impact and awareness of non-international armed conflicts is not least mirrored in the legal regulation for such conflicts. From both States and scientific literature – in negotiating and applying humanitarian law and in interpreting humanitarian law rules – emanates a certain tendency from time to time to merge both areas of international humanitarian law. Apart from both Statutes of the Tribunals for Former Yugoslavia and Rwanda as well as the Statute of the International Criminal Court, particularly the Ottawa Treaty on Anti-personnel Landmines and the Second Protocol on the Protection of Cultural Property, as well as their negotiation history, reveal a certain trend to provide in non-international armed conflicts a body of humanitarian law similar to that in international armed conflicts.

This trend is not yet indicated by the 1980 Weapons Convention, but its 1996 Amended Protocol II in Article 1 expanded the scope of application to *"situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949"*, while at the same time excluding *"situations of internal disturbances and tensions"*. The 1997 Anti-Personnel Landmines Convention re-emphasises the aspect of application in non-international conflicts obliging States Parties *"never under any circumstances"* to undertake to use such mines (Article 1). The 1999 Second Protocol on the Protection of Cultural Property excludes application in *"situations of internal disturbances and tensions"*, but does apply *"in the event of an armed conflict not of an international character"*. The 2000 Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict prohibits both States Parties and non-state actors from forced recruitment of persons younger than 18 years or from directly involving them in hostilities.

The trend or maybe better the effort to assimilate the legal regulation of non-international conflicts to the regime of international conflicts also emerges in international criminal law. ICTY and ICTR have been instituted in major armed hostilities between governmental armed forces and non-governmental armed groups and of such groups among themselves. Decisions and judgements of ICTY and ICTR are exclusively based on their Statutes and are binding in the specific trials alone. Yet, their jurisprudence paved the way for a certain assimilation of international criminal law in international and in non-international armed conflicts. This assimilation influenced the jurisdiction of the ICC and the offences incorporated in its Statute: Neither Article 6 on genocide nor Article 7 on crimes against humanity distinguish between commitment of the offence in international or in non-international armed conflicts. Article 8 on war crimes does distinguish between these two types of armed conflict and excludes application to *"situations of internal disturbances and tensions"*, but assimilates offences in international and in non-international armed conflicts up to a certain extent. The Statute of a future Special Court for Sierra Leone establishes jurisdiction on crimes against humanity, focusing on attacks *"against any civilian population"* (Article 2), violations of Article 3

common to the Geneva Conventions and of Additional Protocol II (Article 3), other serious violations of International Humanitarian Law, not specifying the underlying armed conflict (Article 4), and crimes under Sierra Leonean law (Article 5).

This development evolves into a general tendency to overcome traditional differences in the legal covering of international and non-international armed conflicts in certain aspects. Whereas in 1977 the attempt to reach an identical protection of the civilian population in international as well as in non-international armed conflicts failed considerably, international humanitarian law in the meantime reveals concrete steps to give precedence to the protection granted by international humanitarian law against the preservation of national sovereignty in non-international armed conflict.

2. Relationship between Humanitarian Law and Human Rights Law in Non-International Armed Conflicts

The protection of the civilian population in non-international armed conflicts is naturally also characterised by the regime of human rights law. In general, with the exemptions intrinsic in human rights law and in particular the derogation clauses, human rights law does not cease to be valid when violent situations within the territory of one State turn from merely internal disturbances and tensions into non-international armed conflicts, thus entailing the application of international humanitarian law. In fact, much of the humanitarian law applicable in non-international conflicts mirrors provisions of human rights law. With respect to the protection of the civilian population it is less the relationship between humanitarian and human rights law, which is of crucial importance for the effectiveness of such protection, but mainly the questions emanating from the problem of derogation and the fact that human rights law in non-international armed conflicts is generally not binding for the non-governmental Parties to the conflict .

3. Some Experiences from Recent Non-International Armed Conflicts

The conduct of hostilities in recent non-international armed conflicts caused the civilian population a whole series of sufferings. Although in the present framework it is impossible to analyse all non-international armed conflicts since 1977 or at least to examine those having received the most attention in a comprehensive manner, the following aspects deserve at least to be mentioned:

a) Directly Targeting the Civilian Population

Directly targeting the civilian population, making the civilian population as such, groups of civilians or civilian individuals the direct object of attack, has become a rather common conduct in non-international armed conflicts and often even a characteristic feature of hostilities. Without speaking of the genocide in Rwanda and the practices of a so-called ‘ethnic cleansing’ in Bosnia-Herzegovina and in Kosovo, for example all Parties to the conflict in Southern Sudan had and have resort to this method of warfare. Less

obvious in Sudan, such direct attacks on the civilian population have been conducted with the aim to eliminate or at least expel a specific group among the civilian population.

Attacks on the civilian population, be it the population as such or individual civilians, are prohibited by Article 13 para. 2 of Additional Protocol II, as are acts or threats of violence, the primary purpose of which is to spread terror among the civilian population. It is hoped that the ICRC Customary Law Study will prove the same prohibition to be valid as customary law. A strong indication is the fact that the UN Security Council *"strongly condemn[ed] (...) the deliberate targeting of civilians in armed conflicts"* [S/RES/1265 (1999), para. 2]. Provided one accepts the binding force of prohibitions contained in Additional Protocol II – and customary law respectively – not only for the States Parties, but also for any non-governmental armed forces falling under the scope of Protocol II, humanitarian law for non-international armed conflicts covers acts of genocide or 'ethnic cleansing' and directly targeting the civilian population is prohibited under humanitarian law. No existing treaty rules cover the regulation on the proportionality of losses among the civilian population which are not the result of direct targeting, but which are caused incidentally or collaterally.

The objective to eliminate or expel specific parts of the civilian population has been widely motivated by psycho-sociological and/or religious motives. In this context the sometimes extensive use of psychological methods of warfare or 'propaganda' and the respective use of the media is remarkable. The effect of such use is specifically crucial with respect to practices of genocide and 'ethnic cleansing'.

Neither common Article 3 of the Geneva Conventions nor Additional Protocol II provide for any prohibition of psychological methods and means of warfare, nor is there any such prohibition under existing customary law. On the contrary, to exert psychological influence or to use 'propaganda' is almost inherent in any conduct of hostilities, be it international or non-international. In this respect it might even be counterproductive to consider legal coverage of this phenomenon. In that context the Secretary-General of the United Nations acknowledges that *"combating hostile propaganda (...) may require a more immediate and intense effort by the international community, (...)"* - and probably such effort would have to be undertaken outside the area and outside the set of tools of international humanitarian law.

b) Denial of Access to vulnerable Populations

The problem of access to vulnerable populations is intrinsic in almost every armed conflict in general and non-international armed conflict in particular [S/RES/1265 (1999), para. 7 and 9]. Armed hostilities, as for example in Liberia, Sierra Leone, Sudan, Chechnya or Colombia, imply situations of deliberate denial of access to a suffering civilian population, combined with the corresponding interests of the international humanitarian community with regard to the provision of humanitarian assistance and more accidental

hindrances of access to the victims. Very often such situations coincide with practices of starvation of the civilian population employed as a method of warfare in non-international conflicts.

Access to a suffering civilian population is a prerequisite for any protection be such protection in terms of relief or in terms of the law. Article 18 para. 2 of Additional Protocol II provides that relief actions shall be undertaken, provided certain preconditions are met: Firstly, on the side of the civilian population, it has to suffer undue hardship and this due to a lack of supplies essential for its survival (such as foodstuffs and medical supplies). Secondly, on the side of the governmental Party to the conflict, the High Contracting Party has to give its consent to the provision of relief. Thirdly, on the side of those providing relief, it has to be made sure that relief actions are of an exclusively humanitarian and impartial nature and are conducted without any adverse distinction.

According to common Article 3 para. 2 of Geneva Conventions, an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. Such offer therefore may not be considered as interference into the domestic affairs of a State on whose territory a non-international armed conflict is taking place. Article 18 of Additional Protocol II is the only more detailed treaty provision regulating the delivery of humanitarian assistance and access to the victims in non-international armed conflicts. The wording of paragraph 2 is in several aspects rather problematic, to mention here only the difficulties of defining what hardship is "undue" in the meaning of Article 18 para. 2. In addition, relief organisations, both governmental and more important in this context non-governmental and particularly Red Cross / Red Crescent components, are almost generally blamed for operating partially and on the basis of unjustifiable distinctions. Maybe the most crucial criterion is still the precondition of consent of the High Contracting Party.

From the legal viewpoint it is accepted that in the case the civilian population does suffer undue hardship owing to a lack of supplies, the High Contracting Party is legally obliged to give its consent, without any discretion –the problem of ascertaining when the threshold of undue hardship is reached remaining. In cases where such consent is deliberately and arbitrarily denied or withdrawn by any government, it is inflicting the prohibition of starvation of civilians as a method of combat and the protection of objects indispensable to the survival of the civilian population, being incorporated in Article 14 AP II and also valid under customary law. From a practical viewpoint the application of Article 18 para. 2 is rendered considerably problematic in situations where efficient governmental structures are missing or where access to the victims is hindered by non-governmental Parties to the conflict exercising effective control. Yet, replacement of the criterion of consent by criteria focusing on the perceived needs of the civilian population and the extent of the humanitarian emergency would be both unrealistic at present and not necessarily helpful in terms of the discretion in applying such criteria.

With respect to the questions of the right of victims to receive humanitarian assistance, the right of the international community – comprising States and Non-Governmental Organisations – on the issue of granting and offering humanitarian assistance and the legal details and consequences of these rights in non-international armed conflicts, treaty law is silent and we rely exclusively on customary law. The same is true for any regulation of the involvement of relief personnel in an environment of non-international armed conflict. Privileges or immunities, duties of relief personnel in non-international conflicts, particularly references to safety and security and respective protection of the personnel, are not regulated under treaty law. Admittedly, development of the law in recent years indicates that the international community intends to apply the provisions of Additional Protocol I on humanitarian assistance to non-international armed conflicts. Such customary basis for the regulation of humanitarian assistance operations and personnel in non-international conflicts entails all the advantages that customary provisions have in comparison to treaty law. But the experiences, for example, in Liberia, Sierra Leone, Sudan, the Democratic Republic of Congo, Colombia and Sri Lanka, render the disadvantages and weaknesses quite evident – especially for the sake of clarity and support of negotiations.

c) Displacement of the Civilian Population

The conflicts for example in Angola, Burundi, Democratic Republic of Congo, Colombia and Indonesia, not to mention former Yugoslavia, are widely characterised by substantive displacement of the civilian population, resulting either in refugees or internally displaced persons. The relevant treaty provision is Article 17 of Additional Protocol II which does not prohibit displacement absolutely. It only prohibits the ordering of displacement for reasons related to the conflict in principle, while explicitly allowing it for the sake of the security of the civilian population involved or for imperative military reasons. In that case all possible measures shall be taken so that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

Displacement of the civilian population is one of the issues where existing law – or what at all may be regulated by legal norms – is insufficient. Article 17 of Additional Protocol II already proves inadequate for those situations where displacement is not the effect of military planning, but rather effected upon individual decisions or by the actual circumstances. In addition, especially the caveat of "imperative military reasons" gives ample discretion to any Party to the conflict, and the criteria of "satisfactory conditions" must be perceived as making a mockery of the overwhelming majority of civilians being exposed to forced displacement.

d) Prosecution of Violations

Although prosecution of violations of humanitarian law is not a new concept, the widely pursued objective not to let perpetrators of serious violations of humanitarian law go unpunished has reached a new dimension with the establishment of the two a*d hoc* Tribunals for Former Yugoslavia and for Rwanda and with the

entering into force of the Statute of the International Criminal Tribunal. The establishment of further specific courts is being prepared for Sierra Leone and for Cambodia and a serious crimes panel has been commenced in East Timor.

Without detracting from the progress already made in international criminal and humanitarian law through the enhancement of international prosecution of violations, it cannot be overlooked that prosecution and punishment of perpetrators are far from being the perfect remedy and ideal reaction to violations. Antagonistic aspects are, firstly, the fact that international prosecution may only be effective if the international community is willing to implement and support it – the decision whether or not to establish special courts too often appears to be arbitrary and support is widely discretionary. Domestic prosecution relies on States' ability and willingness to prosecute violations of humanitarian law, to implement the principle of universal jurisdiction, to co-operate in particular in terms of evidence and extradition, and to adapt national legislation to standards of international humanitarian and criminal law. Secondly, although amnesties may have counterproductive effects, Sierra Leone might be an example, in specific situations they may be more helpful to secure peace and reconciliation than criminal prosecutions. Thirdly, by complementing and not substituting judicial prosecution, truth and reconciliation mechanisms may be a helpful instrument to overcome a violent past. After the institution of the truth commission in South Africa, commissions have recently been established in Nigeria, Panama and Sierra Leone and are planned in East Timor.

e) Common Characteristics

Present humanitarian law on non-international armed conflicts is characterised by considerable shortcomings on various issues. In several aspects of content and coverage it is simply insufficient. Examples are the questions of target selection, proportionality and precautionary measures where treaty provisions are at its very best rudimentary and customary rules at the least vague or questionable.

In other cases it is less the insufficiency of the existing law, but more the fact that certain problems and effects by their very nature cannot satisfyingly be regulated by legal provisions, that leaves the impression of inadequacy. This holds true, for example, for forced displacements of the civilian population which are not ordered as such but which are simply effected by the actual circumstances where refugees or internally displaced persons leave because of intolerable living conditions.

A third shortcoming of existing legal regulation is that the atrocities occurring in current non-international armed conflicts are committed by governmental and non-governmental armed forces alike. The 'classical' constellation of non-international armed conflicts where insurgents fight against the governmental forces has become much less typical then than in the period preceding the adoption of Additional Protocol II. It is therefore much more important to prove and to accept that any legal regulation in the conduct of non-

international armed conflicts, be it treaty or customary law, is not only binding upon governmental, but also upon non-governmental Parties to the conflict. Yet, such legal obligation of non-governmental armed forces may only be efficient in the case where the obligation is known to an individual fighter and perceived by him as legally binding. This presumption entails questions of code of conduct, hierarchy and discipline within non-governmental armed forces and these questions are probably among the most eminent aspects of inadequacy of existing legal coverage of non-international armed conflicts.

IV. Implementation and Enforcement of the Law

Awareness of such shortcomings in legal coverage of non-international armed conflicts to protect the civilian population, almost naturally entails the question as to how this humanitarian law is implemented and enforced. Implementation and enforcement mechanisms of particular interest are the individual criminal responsibility for violations under international criminal law and enforcement measures of third States.

1. International Criminal Law

In particular, the International Criminal Tribunal for Former Yugoslavia had on several occasions the opportunity to dwell on offences committed against civilians in the context of non-international armed conflicts. Its findings has considerably clarified the protection of the civilian population in such situations.

a) Serious Violations of International Humanitarian Law

Whereas Article 2 of the ICTY Statute covers only international armed conflicts, Article 3 of the ICTY Statute confers jurisdiction over any serious violation of international humanitarian law not covered by Articles 2, 4 or 5. Despite several objections it is confirmed jurisprudence of the ICTY that violations of common Article 3 of the Geneva Conventions are comprised in this clause and in the list of offences according to Article 3 of the ICTY Statute. In order to apply Article 3 of the ICTY Statute, several criteria have to be met:

- The offence has to have been committed in the context of an armed conflict. Both international and non-international armed conflicts are covered and it is irrelevant whether or not actual combat is taking place at the time and the location of the offence.
- There has to be a specifically close nexus – tighter compared to offences under Article 5 of the ICTY Statute – between the alleged offence and the armed conflict. This required relationship is satisfied where the alleged crimes were “closely related to the hostilities”.
- Further, the violation must constitute an infringement of a rule of international humanitarian law.
- The rule must be customary in nature or the required treaty law conditions must be met.
- The violation must be “serious”. The violation must constitute a breach of a rule protecting important values, and therefore comprise violations of common Article 3 of the Geneva Conventions. Regrettably,

the ICTY has not yet clarified whether or not all or only specific violations of common Article 3 of the Geneva Conventions amount to such seriousness in the meaning of Article 3 of the ICTY Statute.

- In addition to that, the breach must entail, under customary or treaty law, the individual criminal responsibility of the perpetrator.

The last two criteria focus on specific qualifications of the victim and the perpetrator:

- The offences have to be committed against persons taking an active part in the hostilities, thus reiterating the notion of protected persons under common Article 3 of the Geneva Conventions.
- Some relationship is required between the perpetrator and a Party to the conflict. It seems to be accepted that this condition comprises non-governmental Parties to a conflict, but details still have to be clarified.

Article 8 of the ICC Statute covers serious violations under the notion of war crimes, i.e. *"serious violations of article 3 common to the Geneva Conventions"* are listed in Article 8 para. 2 lit. c, *and "other serious violations of the laws and customs [of war]"* in lit. e. in situations of *"armed conflict not of an international character"*. Without going into any detail it is to be noted that the enumeration of serious violations of common Article 3 of the Geneva Conventions is less comprehensive compared to the list of grave breaches (Article 8 para. lit. a). First, the gap between grave breaches and serious violations of common Article 3 of the Geneva Conventions consists of the lack of any provision on the extensive destruction and appropriation of property (cf. lit. a, sub-para. iv), the unlawful deportation or transfer or unlawful confinement (cf. lit. a, sub-para. vii) and on compelling a protected person to serve in the forces of the opponent (cf. lit. a, sub-para. v) in non-international armed conflicts. If such acts are indeed less serious as a violation of common Article 3 of the Geneva Conventions, then the list contained in Article 8 para. 2 lit. c remains questionable. Secondly, a general clause is missing in Article 8 para. 2 lit. c which could, if it existed, fill in these lacunae.

With regard to the list of other serious violations of the laws and customs applicable in non-international armed conflicts, Article 8 para. 2 lit. e, it is to be stated that this list contains a further development of the law to a considerable extent. Among these provisions is in particular the *"intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict"* (lit. e, sub-para. iii). The aspect of the provision sanctioning attacks against humanitarian assistance operations reinforces the rather weak provision on relief actions in Article 18 of Additional Protocol II which does not explicitly prohibit such attacks. It thus contributes to the safeguarding of safety and security of humanitarian operations and of humanitarian space in general which is one of the recent problems of humanitarian assistance being most discussed in state practice and international and non-international relief organisations. A further example is that the ICC Statute provides for a system of international jurisdiction for war crimes

against personnel involved in humanitarian assistance and peacekeeping missions and their respective installations and material (lit. e, sub-para. iii).

The exhaustive list of serious violations of humanitarian law in non-international armed conflict does not cover all provisions of Additional Protocol II to ensure a humane treatment in general. Similar to the list of serious violations of common Article 3 of the Geneva Conventions, a general clause entailing individual criminal responsibility for inhuman treatment of persons not taking part in hostilities (Article 4 para. 1 of Additional Protocol II) is not implied. Moreover, specific acts such as collective punishments (Article 4 para. 2 lit. b) and slavery and the slave trade in all their forms (Article 4 para. 2 lit. f) are not contained in the list of serious violations. This is all the more surprising as the fundamental guarantee of the prohibition of acts of terrorism and spreading of terror according to Article 4 para. 2 lit. d and Article 13 para. 2 of Additional Protocol II are not qualified as sufficiently serious as to be sanctioned by a provision on the criminal responsibility for (serious) violations. Important provisions stemming from Articles 4, 5 and 6 Additional Protocol II have not been included in the list of acts entailing individual criminal responsibility, and any incorporation of Hague law provisions has completely been left out. Compared to the list of war crimes of international conflicts, the intentional direction of attacks against civilian objects (lit. b, sub-para. ii) is completely missing for non-international conflicts, as are the offences of attacking undefended civilian towns, villages, dwellings or buildings (lit. b, sub-para. v) and killing or wounding a combatant *hors de combat* (lit. b, sub-para. vi), perfidious acts (lit. b, sub-para. vii) and intentionally launching an attack and thereby causing incidental loss to civilian persons or damage to civilian objects or a qualified damage to the natural environment (lit. b, sub-para. iv).

Such protection of the civilian population in non-international armed conflicts, as it has been clarified and enhanced by the jurisprudence of the ICTY and by the Statute of the ICC is not only meaningful in the context of enforcement of international humanitarian law, but also interprets and clarifies the provisions of common Article 3 of the Geneva Conventions and Additional Protocol II.

b) Crimes against Humanity

In the jurisprudence of the International Criminal Tribunal for Former Yugoslavia, Article 5 of the ICTY Statute requires a jurisdictional prerequisite and six substantive conditions to be fulfilled:

- According to the wording of Article 5 of the ICTY Statute, crimes against humanity may only be committed in the context of an armed conflict. It has been debated whether this criterion is an unnecessary restriction to the customary law definition of crimes against humanity. However, the wording of Article 5 of ICTY Statute clearly requires the jurisdictional prerequisite of an armed conflict, though it allows for application of Article 5 both in international and in non-international armed conflicts.

- The first substantive criterion is an attack on the civilian population. Such attack is not identical with the definition of "attack" under humanitarian law and is not limited to the conduct of hostilities. It may outlast, precede, or run parallel to the armed conflict, without necessarily being a part of it and comprises any mistreatment of the civilian population. Compared to the framework of Article 3 of the ICTY Statute the nexus between the attack and the armed conflict is considerably looser; all that is required is a showing that a state of armed conflict exists in the larger territory of which a given location forms a part.
- The acts of the perpetrator have to be part of the attack but a crime which is committed before or after the main attack or away from it could still, if sufficiently connected, be part of that attack .
- The attack has to be directed against any civilian population, i.e. in the context of an international or a non-international armed conflict. The notion of the civilian population is broadly interpreted focusing on the population being of a "predominantly civilian nature" and excluding isolated or random acts. It is neither required that the targeted population has been chosen for its civilian status nor has the entire population of the geographical entity to bus subject to the attack, nor is it necessary to demonstrate that the victims are linked to any particular side of the conflict.
- Such an attack must be either widespread or systematic. Up to what extent such attack must be pursued on the basis of a respective policy, is still a matter of debate.
- On the subjective side the perpetrator must know the wider context of his acts and must know or at least take the risk that his acts are part of the attack on the civilian population and must at least consider the possibility of the civilian status of the population attacked. The individual motives of the perpetrator are irrelevant.

In contrast to the Statute of the ICTY, Article 7 of the ICC Statute, as well as Article 3 of ICTR Statute, do not refer to the criterion of any armed conflict. Within their scope of application crimes against humanity may be committed either in international or in non-international armed conflicts or even in internal disturbances and tensions.

c) Genocide

More recent jurisprudence focuses on the specific relationship between the offences of crimes against humanity and genocide. Yet, for the present context it suffices to state that the offences of genocide as incorporated in Article 4 of the ICTY Statute, Article 2 of the ICTR Statute extends its protection to the civilian population in non-international armed conflicts, and Article 6 of the ICC Statute incriminates genocide irrespective of any armed conflict at all. Since the crime of genocide does not refer to any type of conflict at all, it is applicable in non-international armed conflicts. However, in particular the criterion of the targeted group is an extremely distinct one and the necessary intent is highly specialised . Only where these criteria are met, provisions may exert their protective effects with regard to the protection of the civilian population in non-international armed conflicts.

2. Third State Reactions

In the present context, the most interesting ways in which the international community reacts to situations of non-international armed conflicts centre around military coercive measures according to Chapter VII of the UN Charter and the question of so-called "humanitarian intervention".

a) Chapter VII of the Charter of the United Nations

Non-international armed conflicts can have a profound effect on international peace and security. On the basis of the qualification of a situation as act of aggression or threat to or breach of international peace and security in accordance with Article 39 of the UN Charter, the UN Security Council may determine, *inter alia*, military sanctions according to Article 42. While specific agreements according to Article 43, providing the Security Council with armed forces under its own command, are still pending, it has been widely accepted that Article 42 also provides the legal basis for the Security Council authorising Member States to use armed force in order to restore international peace and security. It has been discussed whether situations of non-international armed conflicts may qualify as threats to or even breaches of international peace and security and, if so, whether the situation as such may be the basis for enacting the mechanism of Chapter VII of the UN Charter or whether 'internationalising elements' such as cross-border influx of refugees or transborder military activities have to be ascertained.

Regarding the situation of the Kurdish civilian population in northern Iraq in 1991 the UN Security Council maintained that the consequences of the *"repression of the Iraqi civilian population (...) threaten[ed] international peace and security in the region"* [S/RES/688 (1991), para. 1]. However, it did so on the basis of having stated that this repression had *"led to a massive flow of refugees towards and across international frontiers and to cross-border incursions which threaten international peace and security in the region"* [S/RES/688 (1991), preamble, para. 3; emphasis added]. Being seized with the situation in Haiti in 1993 the Security Council focused on *"mass displacements of population, becoming or aggravating threats to international peace and security"* and an increase in *"the number of Haitians seeking refuge in neighbouring Member States*" [S/RES/841 (1993), preamble, para. 9 and 11; emphasis added]. When the Council qualified the situation in Rwanda as being a threat to international [S/RES/918 (1994), under B] peace and security, it referred to the death of *"many thousands of innocent civilians (...), the internal displacement of a significant percentage of the Rwandan population, and the massive exodus of refugees to neighbouring countries"* [S/RES/918 (1994), preamble, para. 8; emphasis added]. Affirming that the situation in Kosovo in 1998 amounted to a threat to international peace and security, the Security Council based its decision *inter alia* on the *"flow of refugees into northern Albania, Bosnia and Herzegovina and other European countries as a result of the use of force in Kosovo"* [S/RES/1199 (1998), preamble, para. 7; emphasis added]. When the Council renewed this determination after the Kosovo conflict in 1999, it referred to the rights of refugees [S/RES/1244 (1999), preamble, para.s 4 and 7] and *"the other States of the region"* (para. 10).

Without referring to such cross-border influences of violent internal situations the Security Council determined the situation in Somalia as constituting a threat to international peace and security. The Council based its decision solely on *"the heavy loss of human life and widespread material damage resulting from the conflict in the country"* (emphasis added) and on its *"consequences on stability and peace in the region"* [S/RES/733 (1992), preamble, para. 3].

Within the framework of the UNPROFOR mandate the Security Council qualified the situation in Bosnia-Herzegovina as a threat to international peace and security [S/RES/770 (1992), preamble, para. 5], based on a continuing violation of the Sarajevo airport agreement of 5 June 1992 and the importance of delivery of humanitarian assistance [S/RES/764 (1992), preamble, para. 3 and 10] as well as on abuses committed against the civilian population, particularly on ethnic grounds [S/RES/769 (1992), para. 4] . On the basis of these qualifications it authorised the mission to use military armed force [S/RES/836 (1993), para. 9].

In conclusion, situations of non-international armed conflicts have been qualified as threats to international peace and security in the framework of Chapter VII of the UN Charter, and the Security Council has enacted Article 42 of the UN Charter and authorised Member States to use military armed force. With the exception of Somalia qualifications and authorisations have been based on cross-border effects of international situations. With a view to the question of protection of the civilian population in non-international armed conflicts one may state on the one hand that the use of Chapter VII of the UN Charter as an instrument to put an end to the non-international armed conflict and to restore international peace and security is at least intended as an additional means of enhanced protection of the civilian population. The UN Security Council itself expressed not only its determination to ensure peacekeeping mandates to effectively protect civilians [S/RES/1265 (1999), para. 11], but also stated that *"the deliberate targeting of civilian populations (...) and the committing of systematic, flagrant and widespread violations of international humanitarian law and human rights law (...) in situations of armed conflict may constitute a threat to international peace and security"* [S/RES/1314 (2000), para. 9, S/RES/1265 (1999), para. 10]. It further reaffirmed its readiness to consider such situations and to adopt appropriate steps where necessary. One cannot deny two problems: Firstly, such imposition of military sanctions in a non-international armed conflict entails increased risks for the civilian population because of the potential danger of intensifying the fighting and aggravating the violence. Secondly, on the basis of the existing legal structure and framework of the United Nations, Security Council decisions are up to a certain extent discretionary and even arbitrary and therefore unpredictable. Its decisions and often the lack of decisions are considerably perceived as being unjust and counterproductive to the protection of the civilian population.

b) "Humanitarian Intervention"

In the context of the protection of the civilian population by third States, the problem of so-called "humanitarian intervention" has at least to be mentioned. Definitions of the term "humanitarian intervention" are as manifold as efforts have been made to justify certain actions in the international relations within the system of the non-use of force of the United Nations Charter. One of the more recent examples of such an effort is the Independent International Commission on Kosovo's judgement on the lawfulness of the NATO involvement in Kosovo: *"(...) the NATO military intervention was illegal but legitimate. (...) the intervention was justified (...) because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule".*

In its classical sense, "humanitarian intervention" may be defined as a coercive action by one or more States involving the use of armed force in another State without the consent of its authorities, and with the purpose of preventing widespread suffering or death among the inhabitants. Up to a large extent, the discussion has centred around the problem of authorisation. Debate and practice since 1990 have focused on the question of whether or not the Security Council of the United Nations and/or regional international bodies and/or individual States and groups of States can legitimately authorise such intervention. Much of the debate has been about whether or not there is a right of humanitarian intervention in those cases in which the UN Security Council, even though it may have formally recognised the gravity and urgency of a threat to international peace and security, is unable to reach agreement on specific military action. In more simplistic words the question is whether there is a "right to humanitarian intervention" beyond the UN Charter or not.

In the present contribution the problem will not be examined in detail. In the framework of the protection of the civilian population it coincides in many aspects with the problem of access to vulnerable populations in general and the criterion of consent of the Party to the conflict concerned to the delivery of humanitarian assistance. Up to a considerable extent, any 'right to – humanitarian – intervention' encounters parallel difficulties and doubts, particularly in regard to the 'soft' application of 'hard-law' criteria for any such intervention. As debates in the UN General Assembly in 1999 and 2000 on the military operation in Kosovo have shown, up to now the international community has not reached an agreement on the existence of a "right to humanitarian intervention" – a fact which is not necessarily obstructing the protection of the civilian population in non-international armed conflicts.

V. Possible Conclusions

In conclusion, the value of the regulation of the protection of the civilian population in non-international conflicts as provided by common Article 3 of Geneva Conventions and Additional Protocol II, emanates significantly from the ICRC Study of Customary Rules of International Humanitarian Law. The results of the Study will show that the impact on the physical and verbal practice of States has been tremendous, both among States having ratified Protocol II and among those that have not. The concept of

Protocol II has shaped not only the language of international humanitarian law but the whole concept of protecting the civilian population in non-international armed conflicts over the past 25 years.

The above overview of the legal coverage of civilians in non-international armed conflicts has revealed several shortcomings and lacunae, in particular with respect to proportionality, detailed criteria and conditions for the granting of access to a suffering civilian population and the partially deficient catalogue of offences under the Statute of the ICC. Yet, it has emanated from the existing law that the reason which causes more frustration and even despair than these unsatisfying shortcomings is the fact that existing norms are being violated: It is the fact of commitment of violations and it is the scope of such infringements.

A major part of the problem is that Additional Protocol II and common Article 3 of Geneva Conventions, be it on a treaty law or on a customary law basis, are not sufficiently adhered to in practice. Most of the disappointment and often helplessness is caused by the fact that law in general and humanitarian law in particular do not prevent the commission of breaches of the law and that the existence of international humanitarian law rules does not prevent perpetrators from committing atrocities. One could imagine a regulation of non-international conflicts equivalent to the regime of international ones or with even higher standards. But that does not help very much for as long as there are no better chances for an observance of the already rudimentary rules.

However, this discrepancy is the crucial problem in all areas of law, be it international or domestic. Such divergence entails the problem of existing regulation on the one hand and questions with regard to possibly most effective and efficient implementation and enforcement on the other hand.

Generally, the mere and sole existence of a legal norm might prevent the actual infringement of the law whenever and wherever decisions are being taken on a most abstract level and in an environment where lawful behaviour constitutes a value and where it may grant an advantage of any kind. From a psycho-sociological point of view, the crucial factor is represented by the actors in armed hostilities – in inter-state relations as well as in intra-state relations. In the typical constellations of non-international armed conflict the actors may not only be manifold, but also characterised by completely unstructured, conflicting and contradicting backgrounds, interests and motivations. In contrast to international armed conflicts, the different legal relationships, considerations and reasoning are much less abstract and much more personal.

Maybe it is an effective and efficient implementation and enforcement of the law which in non-international armed conflicts is even more pivotal than in international ones – i.e. effective and efficient implementation and enforcement on a personal basis, in other words directed at the individual and not at abstract entities. Individual criminal responsibility is one aspect of such an approach. However, it is not the only one and maybe not even the best one. Prosecution and punishment of those who violate the law cannot

be a substitute for preventing violations. Attention needs to shift from repression of those who violate the law to the area of prevention. But how?

What would be needed is both an international as well as domestic environment where the acquisition of certain principles and patterns of behaviour constitutes a value and an advantage. Apart from sociological considerations and approaches, this has to be enacted by Governments – Governments who are the "natural" actors in international law, be it treaty law or customary law. Traditional approaches to implementing and enforcing international humanitarian law, which more or less followed the lines of international conflicts, did fail up to a considerable and well-known degree. Maybe they had to fail because they did not sufficiently address and affect the crucial actors in non-international armed conflict: i.e. very often individuals and only rather by chance organised groups of individuals.

The importance of reaching the relevant actors cannot be overestimated. But how to reach them and really make a difference? Can dissemination be an appropriate tool? Is 'preventive dissemination' what we need, provided on a general basis and apart from actual conflicts? Is 'training' the keyword to grant a change?

In the end there are more open questions than answers. However, this does not liberate the international community from remaining seized with this matter. If there is one lesson from the history and sociology of law, then it is that renouncing legal norms – their existence, their implementation and their enforcement – has never brought any progress nor any improved protection for anybody.

THE NEW SANREMO MANUAL ON THE PROTECTION OF VICTIMS IN NON-INTERNATIONAL ARMED CONFLICTS

Dr. Dieter FLECK
Director, International Institute of Humanitarian Law Research Project

The present research project of the Institute deals with the most urgent, most challenging and most important issue of international humanitarian law today: the protection of victims in non-international armed conflicts. The deplorable number and intensity of non-international armed conflicts in recent years has indeed added a new dimension to the implementation of international humanitarian law and its further development. Consequently, the Council of the Institute on 7 March 1999 adopted a detailed mandate to conduct a comprehensive research project on this topic, which should result in a Manual on the protection of victims of non-international armed conflicts, supported by relevant case studies and a Commentary.

Accepting the task to conduct this project in my personal capacity, I had the privilege to co-operate with a group of government, Red Cross and academic experts, who had been invited considering their professional experience with the topic. We have met in three plenary conferences and a number of smaller sessions. The work achieved so far has led to complex discussions in which a wide consensus should be reached, considering the progressive development of customary law in this respect, but also a need was felt to critically look into further issues, including the role of human rights and measures to secure and promote compliance with existing rules. *Interim* reports have been published and discussed at various international *fora* where this project has attracted the attention of an increasing international community of experts.

The "Tentative Text" is now available. It has been prepared for use and discussion in relevant military and legal courses. It is not for citation as it still remains subject to further considerations in the light of ongoing international discussions and the work on the Commentary which is under preparation. A wide distribution is, however, encouraged. Comments and proposals would be most welcome.

Considering the wide attention this project deserves, a critical discussion is, indeed, highly important at this stage. Comments would ideally be based on a trial phase in military and academic courses and include experience on state and relevant group practice, experience of NGOs and legal opinions. Indeed, the project fits into current international activities, such as the United Nations project on "Fundamental Standards of Humanity", the adoption by the International Law Commission of the "Draft Articles on State Responsibility for Internationally Wrongful Acts" and Security Council activities on the protection of civilians in armed conflicts.

It meets with expectations of the International Committee of the Red Cross (ICRC) and of non-governmental organisations (NGOs) which have an important role to play in conflict prevention, conflict resolution and post-conflict reconstruction, and of untold numbers of individuals.

International treaty law to protect victims in non-international armed conflicts has been rather rudimentary. Article 3 common to the Geneva Conventions is confined to minimum standards of protection. Additional Protocol II (1977) established a considerably high threshold of application due to widespread concern that the application of the laws of war in internal situations could obstruct the State's ability to prosecute and punish insurgents under domestic law for their belligerent acts. Article 3 para. 4 common to the Geneva Conventions expressly underlines that the application of provisions on humanitarian protection may not affect the legal status of the Parties to the conflict. Recently, the scope of rules of conventional international law originally designed for international armed conflicts, was formally expanded to ensure their application also in non-international armed conflicts: the 1993 Chemical Weapons Convention prohibits the use of chemical weapons in all armed conflicts; under the 1997 Ottawa Convention on the prohibition of landmines each State Party undertakes to destroy or ensure the destruction of anti-personnel mines irrespective of their use in international or non-international conflicts. The Second Protocol to the 1954 Hague Convention on Cultural Property adopted on 26 May 1999 extended the provisions of the Hague Convention to non-international armed conflicts. At the Second Review Conference in 2001 on the 1980 Convention on Certain Conventional Weapons, the scope of that convention was amended to cover non-international armed conflicts, due to a successful US initiative, following similar earlier developments under the 1995 Blinding Weapons Protocol and the 1996 Mines Protocol.

Recent rulings of the International Criminal Tribunals for crimes committed in the former Yugoslavia (ICTY) and in Rwanda (ICTR) have helped to clarify the definition of crimes and have confirmed that many rules of international humanitarian law applicable in international armed conflict have become customary rules also applicable in internal conflict.

Customary law supports the current trend towards expanding the scope of application of the rules related to the conduct of hostilities. The forthcoming ICRC Study on Customary Rules of International Humanitarian Law will be an important contribution to this ongoing development. At the same time, the distinction between international and non-international conflicts which continues to exist on matters of status must be respected.

Relevant human rights norms are generally applicable in armed conflicts (irrespective of their international or non-international character) as they are in peacetime. The adoption in July 2001 by the Human Rights Committee of a general comment on Article 4 of the International Covenant on Civil and Political Rights (ICCPR) clarified the application of human rights norms in situations of national emergencies and practically limited derogation. The importance of human rights to military operations is progressively developing.

In contrast to these positive legal developments the world is facing numerous and severe breaches. In the light of frequent violations of existing law, remedies to secure and promote compliance are of key importance. It is certainly not enough to rely on national and international criminal jurisdiction. The international community as a whole, but also individual men and women are challenged to remove ignorance

of the law, to overcome scepticism and cynicism of the actors and to establish effective monitoring, fact-finding and dispute settlement.

The Advisory Board of the Project and the Council of the Institute have been regularly briefed to assess the development of the research project and to endorse ongoing further activities. I welcome this opportunity to share with you at this Round Table on Current Problems of International Humanitarian Law the results we have achieved so far and our commitment for further work still to be done. The final Manual will be submitted in due time together with the Commentary.

Let me express my gratitude for the excellent co-operation of my fellow colleagues who have participated in the process of stimulating debates and fruitful work over the last three years. I would also like to thank the Institute for its continuing support.

SUMMING UP of PANEL I

General Arne W. DAHL
Deputy Director, General Defence Command, Oslo

During this hectic afternoon session our panelists have outlined to us the state of affairs concerning the protection of the civilian population from the effects of hostilities in armed conflicts. Modern weapons and means of observation have brought progress. It has become easier to identify targets and assess the effects, also for the general public. On the other hand, there are trends in technical developments that give reason for concern – for instance, reliance on computer networks and the associated possibility of cyber warfare. Militarization of civilian activity is another challenge. When is the line for direct participation by civilians in hostilities crossed?

There have, however, been clearly negative developments since 1977, civilians having been targeted directly, especially in internal armed conflicts. The response has included the establishment of *ad hoc* tribunals and the ICC. In this process, customary law has evolved, to some extent filling in lacunas in the treaty law governing non-international armed conflicts.

Refugee law is insufficient, especially with regard to internally displaced persons. There is a clear need for clarification and possibly updating of the international law on non-international armed conflicts in all its aspects. The coming Sanremo Manual can be expected to be an important contribution in this respect.

Thanks to panelists and interveners for their efforts. All present have shown excellent discipline.

PANEL II

THREAT CAUSED BY
OLD AND NEW WEAPONS

NEW WEAPONS AND METHODS OF WARFARE

Dr. Robin M. COUPLAND
Medical Adviser, International Committee of the Red Cross

Why does the Legal Division of the International Committee of the Red Cross (ICRC) have a medical adviser? It is a reasonable question. Let me first squash the idea that I act in any kind of capacity for the health and well being of the ICRC's lawyers. Let me also point out that most doctors are terrified of lawyers. Lawyers seem not to reciprocate with a fear of doctors. I usually find lawyers feel rather sorry for us as a profession. Therefore, I speak to you with some trepidation. It would clearly be unwise on my part to offer this audience anything resembling a legal opinion. However, I feel I do have a few ideas which might be of interest to you. I would frame what I have to say by posing three questions.

1. Am I qualified to speak to you about new weapons and methods of warfare?
2. What can a surgeon bring to a legal debate on new means and methods of warfare?
3. The future seems to promise weapons that carry a minimal chance of killing the victim: wouldn't it be best to promote their use?

I hope in the next few minutes to answer these questions and, in answering them, to pose further questions for specialists in international humanitarian law.

Am I qualified to speak to you about new weapons and methods of warfare?

I would like to describe a few days I had the misfortune to witness in the ICRC hospital in Kabul nearly ten years ago. This was a time when many battles raged in that town following the months after the fall of the communist government in early 1992. Our hospital was in a residential part of town. I was the surgeon in one of the four surgical teams. One morning, all was normal; by nine o'clock, the admission room had collected a handful of patients including a young boy who had stepped on an anti-personnel mine and had lost a leg – this last represents a testimony which you have heard many times over in recent years. We set to work and then we heard the rumours that yet another battle was about to start. By late afternoon, about 80 wounded were lying around the hospital. The battle had moved closer to and in fact briefly overran our hospital. A mortar landed in the sterilising room, which curtailed all operations for 24 hours. After four days, we had admitted 600 wounded - to a hospital with 150 beds. The wounded were put wherever there was space in the courtyard or between buildings; the majority was clearly not combatants. They arrived in such numbers whilst some arrived dead; some arrived with large parts of their bodies missing and some were only parts. It was not always easy to walk around the hospital; one was always stepping over bodies. One's feet stuck in the congealed blood. We worked in a constant cloud of flies: all determined to get their feed.

Although this account is not one of normal days in an ICRC hospital, does seven years as a field surgeon qualify me to talk about weapons and methods of warfare? Probably not. But I hope you will agree that I am qualified to talk about the effects of weapons and methods of warfare on their victims. I find it difficult to consider the situation that I have just described in terms of distinction, proportionality and precaution in attack. I see my role today as ensuring that, in your legal deliberations about weapons and methods of warfare, their effects are not far from your minds.

What can a surgeon bring to a legal debate on new means and methods of warfare?

You may accept that I can speak with some authority about the effects of conventional weapons. Does the above account qualify me to speak about new weapons and methods of warfare the effects of which we have not yet witnessed? Permit me to try to persuade you that it does.

The physical effects of weapons with which I am familiar are those resulting from force applied to the human body by explosions or projectiles, by which I mean blast, bullets or fragments. Can we take these effects as a kind of reference point for consideration of new weapons and methods of warfare, which might exert their effects in a different manner? We might be able to predict the effects on the proportion of the wounded who are civilians when a new munition which employs a particularly large or widespread explosion is used in a populated area. We might also be able to predict the effects on an individual combatant of a bullet, which carries an explosive charge, or a new rifle, which fires more bullets at higher velocity. Likewise, the effect on whole populations of the widespread availability of small arms is comprehensible. But what about an eye-attack laser, or an aerosolised anaesthetic agent, or a foam which sticks the people to the ground and to each other or, as is apparently being researched, the means to alter brain function with electromagnetic waves.

I am unable to tell you what the precise effects of such weapons when used for real would be in terms of mortality and residual disability or civilian deaths and injuries but what I can tell you with certainty is that nobody else can tell you either and this is in contrast to weapons which injure by missile or explosive force. Furthermore, I am not sure if any of my medical colleagues would recognise, let alone be able to treat such unusual effects. There are important implications of the distinction between weapons, which injure by explosive and projectile force and weapons, which injure by other means. In relation to the legal notion of superfluous injury or unnecessary suffering and our concerns about indiscriminate effect and public abhorrence, I draw your attention to Article 36 of Additional Protocol I which reads: *"In the study, development, acquisition or adoption of a new weapon, means or methods of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party".* Surely, among the questions, which should be asked when making this determination, are: What is

the mechanism of injury? Will the effects be recognisable? Will the effects be treatable? Will the effects be permanent? Does the weapon lend itself to cause indiscriminate effect? Is there something fundamentally abhorrent about the weapon and its effects?

The reality is that the effects on people of a new weapon or method may be neither understood nor recognised by medical people. If they are not understood by medical people, are they likely to be understood by soldiers or, for that matter, designing engineers and diplomats or even, dare I say, lawyers? If these effects are not well understood how are judgements about legality to be made in light of the prohibitions on "superfluous injury or unnecessary suffering?" Does it not become apparent that when the weapon or method of warfare in question does not injure by explosive force or projectile, particularly careful multidisciplinary review is necessary to ensure its conformity with international law? In brief, I would ask that when conducting a legal review of a new weapon or method of warfare you ask yourselves: Have I really thought through all the implications of its deployment for the victims?

There is another question that I would like to pose, not as a former field surgeon, but as a member of the medical profession. What are the risks associated with the extraordinary advances in biotechnology that we are witnessing and which are likely in the near future to revolutionize medicine and maybe even agriculture? This is not a frivolous question if one thinks that any major scientific endeavour be it chemistry, metallurgy, electronics, nuclear physics or aviation has been turned to hostile use. The ICRC is concerned that, even though they could bring enormous benefit to humanity, the advances brought by the biotechnological revolution, the verge of which we are standing on, could bring enormous risks also. The recent announcement that scientists have created a poliovirus from fragments of DNA ordered by mail order and information on the internet is a prime example of the risk justifying our concerns. In brief, biological weapons could be made much more attractive as a means to achieving an end and so military or even non-state group's interest in them might be increased. On September 25th of this year, the ICRC will launch an appeal on Biotechnology, Weapons and Humanity. This appeal will highlight the risks as perceived by governments and numerous experts, the existing legal norms prohibiting poisoning and deliberate disease and the responsibilities of States, scientists and industry to ensure that new biotechnologies are used only for the benefit of humankind. Obviously, and it is not unconnected, the ICRC regrets that States Parties to the 1972 Biological Weapons Convention failed to reach agreement at its 5th Review Conference last year on means to ensure a compliance and monitoring regime to strengthen this Convention.

The future seems to promise weapons which carry a minimal chance of killing the victim: wouldn't it be best to promote their use?

All of you will be aware that there is increasing interest in so called "non-lethal" weapons. The use of such weapons is foreseen for the full spectrum of both police and military activities: that is, from riot

control to international armed conflict. My comments today address mainly, but not exclusively, the use of "non-lethal" weapons in armed conflict.

I should point out that the ICRC has a policy of referring to non-lethal weapons as "so-called" non-lethal weapons in speech and in quotation marks in writing. The reason for this is that this class of weapon has not been adequately defined. No weapon when used and as a function of its design carries a zero risk of mortality among its victims. The same could be said for "lethal" weapons; no weapon, when used in battle and as a function of its design carries a 100% mortality. For reference, of people injured in battle by a Kalashnikov about 25% eventually die. I remind you of the important distinction between weapons which injure by explosive force and those which injure by other means. The weapons in the "non-lethal" category cause their effects on both sides of this distinction. For example, a rubber bullet causes its effects on humans by projectile force; by contrast, an eye-attack laser causes its effect by electromagnetic energy and a calmative agent is simply a chemical agent.

Whatever the weapon, whatever its purported effect and whether or not it is labelled "non-lethal" , the ICRC is of the opinion that a "non-lethal" weapon, from the perspective of international humanitarian law, should be considered as any other weapon. There is nothing, to my knowledge, in any body of international law that says "non-lethal" weapons fall in their own distinct category which excuses them from legal scrutiny. In fact, two of them have already been prohibited in warfare; namely, blinding laser weapons and riot control agents. There has even been talk of "non-lethal" biological weapons the development and production of which would be a clear violation of the Biological Weapons Convention. "Non-lethal" weapons may offer military advantages under certain circumstances and theoretically could lead to a reduction of deaths on the battlefield but their legality must still be reviewed.

When we recommend legal review of each individual "non-lethal" weapon according to a State's obligation under Article 36 there is sometimes a regrettable and hasty assumption that we recommend a ban on all non-lethal weapons. Questioning the classification or legality of certain "non-lethal" weapons has often led to a response *"Well, I suppose you'd prefer we kill people!"* To bring this debate to a more rational level, it is useful to consider what would happen if the perfect "non-lethal" weapon really existed. That is, a beam or energy form is deployed without risk of any permanent effect which can incapacitate its victim by simply eliminating all movement of the body for, say, 30 minutes from the instant of attack. This, believe it or not, throws up some interesting questions for international humanitarian lawyers. Imagine a soldier entering an area in which enemy combatants have been incapacitated; they are standing or lying still with their weapons at hand with their eyes fixed on the sky. How will the attacking soldier know his enemy has been incapacitated especially in poor visibility? I know what I would do if I were that attacker if I had any doubt; I'd shoot. In other words, being incapacitated could simply serve to increase the vulnerability to

attack by conventional weapons. Thus, “non-lethal” weapons could cause increased mortality because of increased vulnerability. I don’t think this is such an unrealistic projection.

But isn’t vulnerability and, importantly, recognising the opponents vulnerability, at the very core of international humanitarian law? Is, in our case, the incapacitated soldier wounded and *hors de combat*? There would be no obvious sign of injury; he or she would not be bleeding from a gaping wound. Does the incapacitated soldier intend to surrender? He or she will be unable to show signs of such an intention to anyone approaching. Therefore, the deployment of “non-lethal” weapons on the battlefield is a serious question for us here. Not so much because there needs to be law regulating their use but more because there may be confusion about which law offers protection to this new category of vulnerable person. Another major concern in relation to “non-lethal” weapons is that their proponents propose they can be used by soldiers against civilians when necessary. Does this not risk undermining a fundamental customary international law: that civilians shall be spared attack.

In conclusion, I would argue that when, as lawyers, you are considering weapons and methods of warfare, you give realistic and multidisciplinary consideration to the effects or purported effects on the victims. I would even go further and argue that the effects should be the starting point of your deliberations because it is, ultimately, the prevention and limitation of certain effects of weapons and methods of warfare that are at the core of the 1949 Geneva Conventions and their 1977 Additional Protocols.

REVIEW OF DEVELOPMENTS REGARDING CONVENTIONAL WEAPONS

Mr. Steve SOLOMON
Deputy Legal Adviser, US Permanent Mission at the UN Office, Geneva

In my capacity as Deputy Legal Adviser at the U.S. Mission to the UN in Geneva and as a lawyer for the Department of State before that, I have had the privilege of being involved with many people here and on the panel in some of the recent efforts to improve and advance the law of armed conflict and it's a pleasure to be with them and you today to offer some views on these International Humanitarian Law related efforts.

My topic today concerns developments regarding conventional weapons generally.

In the next few minutes I'd like to focus on a development that is, I believe, especially significant in light of the 25th anniversary of the Second Additional Protocol. I refer to the decision taken last December at the 2001 Second Review Conference of the Convention on Conventional Weapons (CCW), to expand the scope of the CCW's application, previously limited to conflicts between sovereign States, to apply as well in non-international armed conflict. I'd also like to say a few words about the international work underway to address humanitarian concerns surrounding the use of anti-vehicle mines, as distinct from anti-personnel mines which have been the subject of considerable and well-deserved international attention.

But first, the issue of "scope."

I should, by way of background, explain that historically the laws of war have applied almost only in conflicts between sovereign States and indeed were developed with such wars in mind. Unfortunately, civil wars were left largely unregulated. Yet that is clearly changing, and fortunately so because such civil wars now constitute the majority of conflicts taking place in the world today.

Thus, the expansion of the scope of application of the CCW, the most important International Humanitarian Law instrument dealing with conventional weapons, represents, I believe, something of a watershed in an important trend to reduce the distinction between international and non-international armed conflict for purposes of the rules governing the conduct of hostilities.

Two questions are often asked in regard to the successful effort to expand CCW's scope: first, how did such a development come about, especially given historic sensitivities to expanding the scope of

International Humanitarian Law; and, second, why has it been relatively quiet, why hasn't this development attracted more attention?

Let me address the latter question first; why haven't we heard more about this?

Part of the explanation is the fact that the CCW itself is not as well known or as widely subscribed to as it should be. The CCW is a United Nations Convention adopted in 1980. It regulates the use in armed conflict of certain conventional weapons, including landmines, incendiary weapons and blinding lasers. It has been accepted by 89 States. By way of comparison, the 1997 Ottawa Convention banning anti-personnel mines has been accepted by 125 States. If the CCW had been more widely subscribed to, I think the decision of the Review Conference last December would have attracted more attention than it did.

Part of the explanation also has to do with the way the media operates. The fact that there is no "optical" quality to a decision to expand the scope of application affected how the story was covered and reported. Had the Review Conference, for example, adopted a decision to restrict anti-tank mines, there would have been a "visual" for the story. A juridical improvement like expanding scope offers no equivalent visual image.

Also, the fact that there was little public conflict among the delegations at the review conference over the scope issue resulted in less press and public interest. Had, for instance, the United States opposed the expansion, there might have been, presumably, greater press interest. In fact, the proposal to expand the scope was sponsored by the United States, along with the Netherlands and South Korea, and the U.S. pushed hard for its adoption.

But the relatively modest public attention did not, as it turned out, affect governmental interest which was, in fact, quite substantial, with over 85 States, including all major military powers, attending the 2001 Review Conference where the consensus decision on scope was taken.

With respect to how the agreement to expand the scope was reached, a number of explanations have been offered. Of them, 3 bear special note.

First, a great deal of credit must go to those who managed and presided over the 2001 Review Conference, in particular to Ambassador Les Luck of Australia who served as Conference President.

Second, the agreement reflects the fact that States have come to better understand the distinction in International Humanitarian Law between the rules governing conduct during armed conflict, on the one hand, and the rules on status of individuals involved in those conflicts, on the other. Specifically, States have

come to better understand that extending the former to internal conflicts the rules on means and methods of warfare doesn't necessarily mean extending the latter.

In fact, States which face the threat of internal war have long been concerned that application of the laws of war to non-international conflicts might somehow change the status of the fighters they oppose. In particular, a primary concern for such States is that application of the law of war will confer protected or privileged belligerent status on members of armed groups, such as rebels and insurgents, in internal conflicts. It is this concern, in fact, which gave rise to the paragraph of common Article 3 of the Geneva Conventions which provides that *"[t]he application of [common Article 3] shall not affect the legal status of the Parties to the conflict."* This paragraph, in other words, makes clear that the rules of international law regarding status that confer "combatant immunity" upon regular armed forces in international armed conflict will not generally apply to rebel fighters in non-international armed conflict. This assurance was important, arguably central, to the adoption of common Article 3 and established the point of departure for future efforts to expand the scope of other instruments.

In essence and admittedly oversimplified, many States required the assurance that their ability to prosecute domestic rebels for their combatant acts would not be compromised. Once so assured, along these lines, among others, they were willing to accept extending the rules related to the conduct of the hostilities, such as the rules on the use of particular weapons contained in the CCW, to internal wars.

Third, the agreement to expand the scope of the CCW was helped enormously by the fact that the Review Conference had a trend to follow. The trend began with the 1996 Amended Mines Protocol to the CCW. In the context of the First CCW Review Conference, States agreed to expand the scope of application of the Amended Mines Protocol (AMP), but declined at that time to do so with respect to the other CCW protocols.

Then in 1998, just two years after the successful expansion of the scope of the AMP, the Rome Statute creating the International Criminal Court was adopted, Article 8 of which applies to both international and non-international armed conflicts.

In 1999, less than 9 months after the Rome Statute was adopted, negotiators at a conference in the Hague concluded a second protocol to the Hague Convention on Cultural Property in Armed Conflict with an article on scope that was nearly identical to that of the Amended Mines Protocol.

The agreement in 2001 to expand the scope of the whole of the CCW through an amendment of the main Convention, including all its protocols, built upon these earlier developments.

I might mention that in all these cases the breadth of coverage of common Article 3 was the touchstone. That is to say, there was no serious effort to impose the more stringent threshold of applicability established by Additional Protocol II – a threshold that requires, among other things, control of territory by rebel forces and which many consider regressive when set against the humanitarian spirit reflected in common Article 3's threshold.

Anti-Vehicle mines

Before I conclude, a word about work underway on restricting anti-vehicle mines.

Under the Amended Mines Protocol, anti-personnel landmines (APL) must be detectable, and, if remotely-delivered (that is, delivered by artillery or aircraft), must be equipped with self-destruction devices.

Unfortunately, these detectability and self-destruction requirements apply only to APL. As a result, non-detectable, long-lived anti-vehicle mines may continue to be employed. Such mines can be activated by a tractor or truck as easily as by a tank. This poses troublesome questions.

Indeed, the rationale for stricter rules for anti-vehicle mines is compelling. Many States, as well as relief organizations such as the ICRC, have recognized that the irresponsible use of anti-vehicle mines poses a serious humanitarian problem that is not adequately addressed by existing instruments. According to the ICRC, although the number of civilian casualties associated with anti-vehicle mines is less than those associated with anti-personnel mines, there are major humanitarian effects in terms of denial of assistance and post-conflict reconstruction.

The United States and Denmark had originally sought detectability and self-destruction provisions for anti-vehicle mines during the 1996 negotiations of the Amended Mines Protocol in order to address such concerns. At the time, the proposal faced a virtual wall of opposition. Over the course of the Second Review Conference in 2001, however, the supporters of new restrictions on anti-vehicle mines demonstrated that such mines indeed pose serious humanitarian concerns. A proposal for a new, free-standing protocol on anti-vehicle mines has now been formally co-sponsored by a dozen States and enjoys growing support.

The proposal, however, is still opposed by several key countries. One reason standing in the way of their support is military doctrine, with some opponents maintaining that the continued, relatively unrestricted, use of anti-vehicle mines remains an essential component of domestic defense. Nonetheless, work on this issue continues in the context of the ongoing work of the CCW group of governmental experts. A report on the subject is expected this December by the co-ordinator for this issue, Mr. Peter Kolarov of

Bulgaria, and those who support the proposal for a new protocol, including the United States, are hopeful that objections can be overcome and progress made.

Conclusion

Summing up, the 2001 Second Review Conference of the CCW has demonstrated a number of things about developments regarding conventional weapons. First, the amendment of the Convention to expand its scope provides a good example of how the law of armed conflict is catching up with modern war, particularly the predominance of non-international conflicts. In comparison to the 1970s, CCW Parties in 2001 were open to a change in the law requiring its application in non-international armed conflict once the necessary assurances were understood and expressly stated. While States preserved the interest in keeping the status of persons in civil conflicts a separate matter from their status in international armed conflicts, it is clear that States are increasingly agreeable to extending the applicability of the rules governing the conduct of hostilities in armed conflicts, whether international or non-international, without regard to the more stringent threshold of Additional Protocol II.

Second, the Review Conference shows that the negotiating fever of the 1990s that led to the adoption of the Amended Mines Protocol, the Ottawa Convention, the Rome Statute, and the Second Protocol to the 1954 Hague Convention has not yet abated. On the contrary, the amendment of the Convention and the initiation of a Group of Governmental Experts to consider anti-vehicle landmines and Explosive Remnants of War (ERW) suggest that there is continuing interest in further protecting civilians in armed conflict and to do so in part through international legal instruments.

Third, the focus on anti-vehicle mines and ERW suggests that States are increasingly willing to focus their energies on post-conflict issues. This trend can be seen in the significant focus of the Amended Mines Protocol and the Ottawa Convention on clearing mines already in the ground.

In a larger sense, namely, the developments on scope, ERW and anti-vehicle mines demonstrate that the CCW itself remains a dynamic instrument in the law of armed conflict and weapons. But its ultimate relevance, of course, remains to be tested in ratifications of the amended scope of application and, even more importantly, in its implementation in armed conflict, whether international or internal.

Thank you.

WEAPONS OF MASS DESTRUCTION

Col. Giuseppe CORNACCHIA
Head of the Office for Armaments Control, Italian Ministry of Defense

There is no agreed definition of weapons of mass destruction (WMD). Certainly, there is not one in NATO even if, as a political-military structure dealing with security and defense, it has formally agreed definitions on terms and concepts covering the entire security domain and deals extensively with this subject.

We all accept thisexpression, though, as including at the same time nuclear and/or radiological (N), biological or bacteriological (B) and chemical (C) weapons, generally synthesised by the acronym NBC.

I mentioned the term radiological, which is relatively new in the WMD context. It seems, however, appropriate to underline the difference between the nuclear weapon - the one adding to the devastating effects of the nuclear blast those, even more lethal, originating from the fall out of radioactive material - and the numerous radiation sources existing on the territory (nuclear power plants, radioactive waste, industries, research centres, etc.) all potential weapons in the hands of criminals. One example is the so called "dirty bomb" whose most dangerous and terrifying effects are to be found in the spread of radioactive material in the environment, and its prolonged effects rather than in the conventional explosive it contains.

Certainly, chemical and bacteriological weapons are not a product of modern warfare. Recent in time is the systematic planning for their use and the introduction, in large quantities, in the war stocks of military forces along with the more modern nuclear weapons. All together, however, and with some emphasis on the nuclear component of the arsenals, they have constituted a nightmare during the balance of terror characterising the Cold War that nowadays we look at, with some relief, as "a relic of the past".

It may appear legitimate, then, to ask ourselves why today we pay so much attention to the problem posed by the WMD; if there are and what could be the new elements modifying the perception of the risks normally associated with the presence of these instruments of death, now in a time when more peaceful perspectives have definitively replaced the bipolar confrontation.

As is often the case, it is not possible to identify a single cause. We must rather take into account a number of concurring factors.

It is well known, from the available literature on the subject, that the end of the Cold War has made a major conflict highly remote. It has not meant, however, the cessation of low intensity conflicts. On the contrary, all analysis have indicated and agreed on a clear and inevitable rise of instability, although at a local or regional level.

In concise terms, we may say that a great political and diplomatic success and a significant positive step in the evolution of international relations has also brought, with the new sense of freedom, the blossoming of the many latent elements of contrast of various nature (economic, political, ideological, social,

ethnical, religious, etc.). Long compressed by the bipolar structure, they have become the initiators of micro-conflicts risking exploding, in some cases with the gravest consequences.

Focusing for a moment on the specific military aspects, this new situation of diffused instability has called for measures of adaptation in the organisation and structure of the armed forces in order to be able to carry out new types of missions: increase of readiness for swift interventions in peacekeeping operations to defuse crisis at the outset - contain the spreading to wider areas or avoid direct confrontations, - increased mobility to intervene in distant areas, increased inter-operability to be able to operate in multinational coalitions formed on *ad hoc* basis in response to UN calls.

These operations have to be carried out in situations always different in nature and environment, often without sufficient time to evaluate properly the complexity of the task at hand and the inherent difficulties, having to deal with contenders and in not very familiar geographical areas of the world, in international conflicts or internal confrontations between factions.

The evaluation of risks in the medium and long term, the identification of trends potentially destabilising and affecting security, the search for countermeasures apt to prevent the consolidation of such trends transforming them in real threats, are all fundamental elements of military planning. But they are not an exclusive privilege of the military.

Security is a comprehensive concept and the contribution by the military is only part of the effort. The Biological Weapons Convention of 1972 as well as the Chemical Weapons Convention of 1993 constitute a valid example of the effort posed by the international community in the search for measures of prevention in favour of more security for all. They are part of the wider network of arms control treaties and agreements.

We must admit, however, that notwithstanding the efforts in preparing ourselves militarily and the existence of such largely shared Conventions, there is a trend, in the post cold war scenario, that has caught the attention quite early in the process and is cause of concern: the uncontrolled accumulation of weapons, particularly in areas of potential crisis. Conventional weapons and WMD continue to flow from countries producing or detaining them not just in the form of ready to use material but often as projects or know-how favouring the development of indigenous capacity.

There is some irony in the fact that there is the principle of free trade at work. Although being coherent with the idea of eliminating barriers, it is operating for the wrong objectives. It is the perverse effect of the globalisation process.

A potential source of proliferation of WMD, for example, may be found in the availability in large quantities of materials and professionals on the market following the downturns of the economies in the countries of the previous Soviet Union. The difficulties to maintain the huge apparatus built in past times implicitly determine the conditions for the illicit transfer of materials and availability of experts.

In addition to the WMD, the proliferation of missiles is causing concern. As means of delivery of WMD, they considerably modify the geographical dimension of events. At present a sizeable number of countries have the capability, or are acquiring it, to procure or produce missile systems whose ranges,

measured in hundreds and thousands of kilometres, exceed by far the legitimate needs of security and defense.

There is, at last, a further element of preoccupation, closely related to the proliferation of WMD. It is the ever-increasing prominence of non-state actors. They have considerable means, direct or covert support from countries of concern and are skilfully utilising "globalisation" in terms of media and freely available technological means and resources. Although not comparable in size, they challenge defiantly sovereign States and even the international community decisions and pledges. The "asymmetry" of the confrontation is evident and a form of blackmail the likely result.

It is a worrisome perspective to consider that the production of chemical and biological weapons does not require technological basis and resources as complex and sophisticated as for nuclear weapons.

This also makes it extremely difficult to devise effective systems of verification of compliance as demonstrated by the laborious effort to find a compromise position on the Protocol to the Biological Convention being negotiated at the Conference on Disarmament in Geneva.

NATO countries have attached considerable importance to studying and analysing the proliferation of WMD and missile systems for their delivery. They have constituted, since the early nineties, high level groups with the objective of defining, as a priority, adequate political and diplomatic measures of dissuasion, but, at the same time, also concrete military measures to counter the threat in case of failure of the political and diplomatic means.

There are also other structures of the international community contributing to the effort of the containment of WMD and missile proliferation.

UN dedicates periodical meetings to the Treaty of Non-Proliferation. The Geneva Conference on Disarmament, which could soon resume work on measures on radiological weapons, is carrying out negotiations on the Fissile Material Cut Off Treaty as well as on the said Protocol of Compliance to the Biological Convention.

The International Agency on the Atomic Energy is providing an excellent contribution on the verification of fissile materials in the same way as the Organisation of States Parties in The Hague is doing for the Chemical Convention. Concurring objectives are being pursued by other structures such as the Missile Control Technology Regime, negotiating an International Code of Conduct on transfer of dual-use technology, the countries adhering to the "Wassenaar Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Technologies", and other similar groups formed on a voluntary basis.

Other initiatives are being carried forward by a number of countries, at the government level or with the active support of non-governmental organisations, providing help in the destruction of the huge quantities of armaments accumulated during the Cold War in the former Soviet Union countries.

Notwithstanding all these efforts, we are far from having achieved an acceptable level of security and mastering of the risks. The race in the acquisition of new weapons by States already oppressed by social and economic problems, whose populations are on the verge of starvation, renders the factors of potential crisis even more acute. On the other hand, the possession and control of such weapons by individuals having

a tendency not to adhere to international rules and norms gives them an unacceptable instrument of pressure and, in extreme situations, of blackmail.

The high sensitivity, in fact, of the public opinion to the humanitarian aspects, becomes a limiting factor in all developed countries while remaining irrelevant where dictators rule or respect for human life is marginal.

The risk of losses in peacekeeping interventions, instinctively unacceptable and conceptually incompatible with the idea of losing lives, exposes and conditions the countries willing to help. Nor are those pressures and possible blackmail being limited to potential losses among military forces, since, for their very same nature, WMD will heavily affect civilian population.

I do not intend to give here a simplistic interpretation of current events as they develop and the associated perspectives we read in the media. They require much more extensive considerations and analysis. I do not believe it would be wise, though, to overlook and forget the victims of the tragic events of September 11, 2001 and to underestimate the impact the even limited use of anthrax is having on our way of life.

In closing these general remarks on WMD and in relation to the Additional Protocols to the Conventions of 1949, I will offer two brief considerations.

The first is an expression of gratitude for those who conceived the Protocols and posed their convinced efforts in their coming into existence. The intuition to amplify the fundamental concepts already contained in the Conventions of 1949 and codify them in detailed rules is clear evidence of having ample vision and being forward looking. The presence of defined rules to protect and alleviate the suffering of the victims of armed conflicts, international or non international in nature, is particularly useful in situations of emergency and troubles during which the first victims are often the rules themselves, being violated or simply ignored. A set of rules remains, in any event, a reference, ethical much more than juridical, against which even violators can and must measure up and reflect on the consequences.

The second thought is towards promoting the universalisation of the Additional Protocols. We must insist in our efforts to spread their knowledge, inform and form the operators. Applying the rules strictly and correctly, the operators become the most qualified and effective promoters. The commendable work of this Institute goes in that direction and this Round Table concurs to the same end.

Keeping the focus on the humanitarian dimension of armed conflicts is a challenge all military organisations should have as a top priority in planning crisis response operations. It is a fact that the realities our representatives in uniform face daily in various parts of the world, in support of our ideals and values, have a prominent humanitarian character. The testimonies we receive, through them or the media, confirm the need of extensive improvements to achieve an acceptable level of respect for human life and the victims of conflicts, without regard to the legitimacy or convictions of the contenders.

The continuous co-operation among the active and sensitive components of civil society, the humanitarian institutions, the voluntary organisations and the military forces can produce adequate synergies

and ensure more effective results in divulging and implementing these norms. They must also have the support of a duly informed public opinion, to be stimulated by initiatives like this Round Table.

ARMS PROLIFERATION AND INTERNATIONAL HUMANITARIAN LAW

Mr. Peter HERBY

Co-ordinator, Mines-Arms Unit, International Committee of the Red Cross

Sometimes, we are asked why the International Committee of the Red Cross (ICRC) is concerned about the proliferation and availability of arms. Isn't this a crime-related issue, or a disarmament issue, which has mostly to do with the legitimate rights of sovereign States to self-defence? To a certain degree it is, but the proliferation, especially of small arms and light weapons, also has major implications for international humanitarian law and humanitarian assistance operations.

A single shot from a standard rifle fired into a crowded market is normally a criminal incident. Unloading dozens of bullets a minute from an automatic weapon into that same market can unleash a bloodbath. An artillery shell landing in such a situation can arouse passions which render violations of the laws of war virtually inevitable. The proliferation of weapons, and the easy access to these weapons, give people - including children - an incredible power. As one woman in Sierra Leone said; *"People who hold the guns have all the power. The rebels who killed my children and my husband, they raped me. They raped me openly in the town square"*.[3]

In recent years these types of incidents have become all too familiar to delegates of the ICRC and their partners from National Red Cross and Red Crescent Societies in war-torn countries. The unregulated availability of weapons, in particular small arms, combined with their frequent use in violation of the most basic humanitarian norms, poses a direct challenge to the dual mandates of the ICRC — to assist the victims of conflict and to promote respect for international humanitarian law.[4] Both of these missions are today undermined by the uncontrolled spread and abusive use of arms.

The increasingly devastating effects for civilian populations of the proliferation of weapons, particularly small arms, and the difficulties of providing humanitarian assistance in an environment where arms have become widely available to many segments of society are well known to most humanitarian relief agencies today. The high levels of civilian death and injury in recent conflicts are no longer being seen simply as an inevitable by-product of these conflicts. Rather, these results are increasingly viewed as a result of inadequate or non-existent control of the flow of weapons — both internationally and domestically. However, until recently the relationships between the availability of weapons, the worsening situation of civilians during and after conflict and the challenges of providing humanitarian assistance have not been addressed directly.

[3] "People on War" radio series, *ICRC*, Women and War programme, citing woman from Sierra Leone, March 2000.

[4] International humanitarian law is a set of rules which, for humanitarian reasons, seeks to limit the effects of armed conflict. In particular, it protects those who are not, or are no longer, taking part in fighting and restricts the means and

Arms availability and the impact on civilians

In recognition of the trends described above, the 26th International Conference of the Red Cross and Red Crescent called upon the ICRC *"to examine, on the basis of first-hand information available to it, the extent to which the availability of weapons is contributing to the proliferation and aggravation of violations of international humanitarian law in armed conflicts and the deterioration of the situation of civilians".*[5]

In fulfilment of its mandate from the 26th International Conference, the ICRC has, since 1996, attempted to distil by a variety of means its experience with the effects on civilians of high levels of arms availability. It carried out two case studies, analysing information drawn from its sizeable medical database on patients treated in the organization's hospitals and elsewhere by its medical staff. The objective of these two case studies was to examine the circumstances in which weapon injuries were inflicted, and to assess the levels of weapon casualties (death and injury) during and after periods of conflict, in the absence of disarmament. This work provides unique insights into the nature of arms-related injuries in two situations in connection with which the ICRC has worked. To our knowledge, these are among the few systematic studies which have been published on the nature of arms-related casualties suffered by the local population in war-torn societies. Some of the specific findings from these case studies include:

- in Afghanistan, the annual incidence of weapon-related casualties decreased by only 33 % during the 18 months following the end of hostilities in one war-torn area where high levels of arms remained in circulation. One might have expected a far more dramatic drop in arms-related death and injury in a post-conflict period. The mortality rate of injuries actually increased over the same period.
- In a region of north-west Cambodia, civilians accounted for 71% of non-combat weapon casualties and 42% of the combat-related casualties (death and injuries inflicted as a direct result of inter-factional fighting or by landmines). Weapon-related casualty rates were reduced during the UN's presence, but increased to levels comparable to those preceding the peace accord following the UN's departure in 1993.

Both of these case studies indicate that to civilians, the threat of arms-related death or injury in non-combat settings can approach or exceed that during conflict periods if weapons are not removed.

The ICRC also carried out a survey among senior delegates with a collective experience of 41 assignments in conflict and post-conflict settings on four continents during the 1990s. The objective was to gather the perceptions of ICRC staff on the degree of arms availability within various segments of given populations, the nature of arms-related incidents involving civilians and the direct impact of arms availability on ICRC field operations.

There was general consensus among respondents that arms were used against civilians for criminal or coercive purposes regularly. The respondents also indicated that ICRC operations were interrupted more than once per month by armed security threats, impeding the access and denying the war victims the

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methods of warfare. International humanitarian law is also called the "law of war" and the 'law of armed conflict'. Its principal instruments include the Geneva Conventions of 1949 and their Additional Protocols of 1977.

assistance and protection provided for by the Geneva Conventions. In all contexts, assault rifles were seen as the principal weapon type responsible for civilian death or injury.

In 1999, the results of these two case studies, and the survey among ICRC delegates, were published in the study *"Arms availability and the situation of civilians in armed conflict".*[6] The ICRC's main conclusions in the study include:

Civilians often are the primary victims of an unregulated arms availability. The ICRC study highlights the high price that civilians have paid in recent conflicts. Civilian casualties outnumber those of combatants in many internal conflicts, and have increased throughout the century in parallel with the development of new military technologies. Weapons previously available primarily to organized armed forces are now in the hands of a wide variety of people involved in conflict and post-conflict situations. These include highly destructive weapons such as automatic rifles capable of firing hundreds of rounds per minute, rocket-propelled grenades, mortars and landmines.

Disease, starvation and abuse increase when humanitarian agencies, including the ICRC, are denied access to the victims owing to direct attacks, mined transport lines or the threat of armed violence. In a large number of recent conflicts, specific regions or even entire countries have become "no go" areas for humanitarian workers on account of attacks or the credible threat of attacks on them. ICRC field staff experienced a growing number of casualties through the mid-1990s. Although this may have been due to the changing nature of conflict, increased proximity to front-lines and the perceived politicization of humanitarian aid, the availability of small arms undoubtedly also played an important role. In addition to the impact on the safety of personnel, weapon availability increases the cost of humanitarian operations. When relief supplies have to be transported by air because of security concerns, the operation's cost has increased 10 to 20 times.

Suffering can continue, often for years after the fighting ends, since easy availability of weapons engenders a culture of violence, undermining the rule of law and threatening reconciliation between the former warring parties.

Widespread availability of small arms undermines the fabric of international humanitarian law: Beyond the immediate problems described above, the widespread availability of arms threatens to undermine the fabric of international humanitarian law — one of the principal means of protecting civilians in times of conflict. In addition to its assistance mandate, the ICRC is charged with helping States to promote knowledge of and respect for humanitarian law. However, this body of law assumes that military-style arms are in the hands of forces with a certain level of training, discipline and control. When such weapons become available to broad segments of the population, including undisciplined groups, bandits, mentally insecure individuals and even children, the task of ensuring basic knowledge of humanitarian law among those in possession of such arms becomes difficult if not impossible.

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[5] *"Meeting of the Intergovernmental Group of Experts for the Protection of War Victims"*, Geneva, 23-27 January 1995, (Recommendation VIII c), endorsed and adopted by the "26th International Conference of the Red Cross and Red Crescent", held in Geneva, 3-7 December 1995.

[6] "Arms availability and the situation of civilians in armed conflict", *ICRC*, Geneva, June 1999.

Compared with distributing arms, creating an understanding and acceptance of humanitarian rules is a profoundly difficult and time-consuming task. It should come as no surprise that as highly lethal weapons spread throughout a given population, the potential for violations of international humanitarian law in times of conflict increases.

Urgent humanitarian concern: Although the ICRC study does not suggest that excessive availability of weapons is the *cause* of international humanitarian law violations or a deterioration of the situation of civilians, it indicates that the unregulated transfer of weapons and ammunition can facilitate such violations, increase tensions, heighten civilian casualties and prolong conflicts. Among the central conclusions is that, because it is largely free of international control, the current pattern of transfers of small arms, light weapons and related ammunition should be a matter of urgent humanitarian concern.

Possible Ways Forward

While it is clear that the unregulated availability of weapons and their use to commit violations of human rights and humanitarian law exact an extraordinary price in human terms, finding solutions is far from simple. The trade in light weapons is a complex phenomenon, involving many types of actors, and existing knowledge of the dynamics involved is far from comprehensive. It is also evident that traditional arms control approaches are not well suited for the control of small arms and light weapons. Thus much creative effort – involving the participation of many types of experts, including representatives of governments, industry, police and customs services, humanitarian aid organizations and human rights groups – will be needed to develop successful approaches and strategies.

It is important to consider controls not only on the transfer of arms but also on munitions and ammunition. The shelf-life of many of the tens of millions of small arms and light weapons now in circulation may be measured in decades if the weapons are properly maintained. By contrast, it appears that factories for the production of munitions and ammunition can be far more easily identified. The reliable shelf-life for these items is said to be shorter than for the weapon itself. And stocks of such items need to be replenished regularly. As a result, efforts to limit the availability of munition and ammunition could, in the short term, yield significant results.

The importance of International Humanitarian Law in arms transfer norms and policies

While the ICRC considers that the primary responsibility for compliance with international humanitarian law falls upon weapons' users, States and private companies engaged in production and export bear a degree of political, moral and, in some cases, legal responsibility toward the international community for the use made of their weapons and ammunition.

The ICRC has encouraged governments, regional organizations and non-governmental organizations involved in bringing about arms-transfer limitations to recognize that international humanitarian law is often the body of law most relevant to the stated purpose for transfer of military-style arms and ammunition. Indeed, the stated purpose of most such transfers is to enable recipients to engage in armed conflict.

Specifically, the ICRC has called on States urgently to review their policies concerning the production, availability and transfer of arms and ammunition in light of their responsibility under common Article 1 of the Geneva Conventions to "respect and ensure respect" for international humanitarian law. In 1999, States party to the Geneva Conventions committed themselves (in the Plan of Action adopted by the "27th International Conference of the Red Cross and Red Crescent") to "*examine the establishment of means to integrate consideration of respect for international humanitarian law into national decision making on transfer of arms and ammunition"*.[7]

It would be important that States convert this commitment into reality by promoting humanitarian law and human rights-based criteria for arms transfer in norms adopted at the national, regional and international levels. These measures would be a means of reinforcing Article 1 common to the Geneva Conventions and of improving implementation of the whole fabric of international humanitarian law.

As a step towards limiting the availability of arms and ammunition among users likely to commit violations of international humanitarian law, States could develop codes of conduct for arms transfers which contain clear references to and indicators of respect for international humanitarian law or add such references and indicators to existing standards (laws or policy) which do not include them.

International Humanitarian Law norms in recent regional initiatives

In the last two years governments, regional organizations and NGOs have begun to develop new mechanisms, laws and codes of conduct, to limit small arms proliferation. Nevertheless, it is regrettable that among the existing body of export codes and national legislation known to the ICRC, few mention respect for international humanitarian law by recipients as a central element in decisions on arms transfers. Some of the regional initiatives that do, however, include:

EU: The European Union adopted in 1998 the *EU Joint Action on Small Arms* and the *EU Code of Conduct on Arms Transfers.* The *EU Code of Conduct* stipulates eight criteria on arms exports. Specifically, Member States should take into account *inter alia* the record of the buyer country with regard to *"its compliance with international commitments, in particular on the non-use of force, including under international humanitarian law applicable to international armed conflicts"*.[8] Although this reference to international humanitarian law perhaps could have been better formulated (as international humanitarian law regulates the use rather than non-use of force), it reflects the intention of EU States to take respect for international humanitarian law into account in arms transfer decisions.

OAU: In November 2000, the Organization of African Unity (OAU) held a preparatory expert meeting on the illicit proliferation, circulation and trafficking of small arms and light weapons, followed by a Ministerial Meeting in Bamako, Mali. The meetings resulted in the *Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons*, which highlighted the importance of international humanitarian law when addressing the small arms issue.

[7] Final goal 1.5 (23) of the "Plan of Action" adopted by the "27th International Conference of the Red Cross and Red Crescent", held in Geneva, 1-6 November, 1999.
[8] "*EU Code of Conduct"*, Criterion Six.

OSCE: The Organization for Security and Co-operation in Europe's (OSCE) *Document on Small Arms and Light Weapons*, adopted in November 2000, states that each participating State will avoid issuing licences for exports where it deems that there is a clear risk that the small arms in question might *"prolong or aggravate existing armed conflict, taking into account the legitimate requirement for self-defence, or threaten compliance with international law governing the conduct of armed conflict"*.[9]

NATO: The Parliamentary Assembly of the North Atlantic Treaty Organization (NATO) adopted in November 2000 a *Committee Resolution on Small Arms Control*. This Resolution urges member States to *"harmonise national approaches through wider acceptance and application of guidelines and codes of conduct - such as the EU Code of Conduct"* and *"enhance evaluation of recipient States' records with regard to adherence to international humanitarian law and control over stocks and flows of small arms"*.[10]

At the national level, Germany's *Policy Principles for the export of war weapons and other military equipment* of January 2000 state that the German Government will take into account whether the importing country complies with its international obligations under humanitarian law. In addition, the United Kingdom currently has a bill before Parliament which will, when adopted, allow the Secretary of State for Trade and Industry to impose export controls when there is a risk that the goods or technology in question might be used to carry out or facilitate *"acts contravening the international law of armed conflict"*.[11]

Despite the progress these initiatives imply, clear indicators of how a recipient's likelihood of compliance with international humanitarian law can be judged have not yet been adopted. The following indicators of respect for international humanitarian law could be incorporated in codes of conduct and national laws and policies on arms transfers (exports) as an aid in assessing whether the potential recipient is likely to comply with humanitarian law:

- Has the potential recipient adhered to the relevant international humanitarian law treaties?
- Are the potential recipient's forces trained in international humanitarian law?
- Are there mechanisms to punish violators?
- Are authority structures able to ensure compliance with international humanitarian law?
- Is the potential recipient the actual end-user?
- Will the potential recipient maintain control over the arms and ammunition transferred?

Other international measures

In addition to the above measures specifically relating to respect for humanitarian law the ICRC study urges States to consider measures of a more general nature aimed at strengthening transparency and accountability in arms transfers, in particular:

1. Establishment of an international system for the marking of small arms, light weapons and related munitions and ammunition. Marking with data on the date, country and company of manufacture could make it easier to monitor arms flows and lead to greater accountability and responsibility among arms suppliers.

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[9] *"OSCE Document on Small Arms and Light Weapons"*, Section III, (A), 2(b), (v).
[10] NATO Parliamentary Assembly *"Resolution on Small Arms Control"*, Art. 8 d.
[11] *"United Kingdom's Draft Export Control Bill"*, Schedule, para. 4, (5), D, (b).

2. Establishment or reinforcement of surveillance and enforcement mechanisms to ensure respect for United Nations and regional arms embargoes.

3. Extension of the scope of the existing UN Register of Conventional Arms Transfers to cover small arms and light weapons, beginning with specific weapons such as assault rifles and rocket-propelled grenades, which have been used to inflict high levels of civilian death and injury.

National measures

As regards national controls on the availability of arms the following measures could be considered:

1. Reinforcement of the ability of States to identify and put an end to illegal cross-border transfers of arms and ammunition.

2. Establishment of mechanisms for ensuring that military-style arms and ammunition are available only to authorized users and that such weapons in the possession of others are collected and destroyed.

3. Provisions in post-conflict settlements to ensure that States, with the assistance of the international community, will maintain or acquire direct control over arms and ammunition and destroy surplus weapons at the earliest possible time.

4. Vigorous efforts to ensure that weapons and ammunition rendered surplus by the modernization of arsenals are kept under strict surveillance and destroyed rather than exported. As compared with many other long-term measures proposed for addressing the problem of small arms and light weapons, such steps can have an immediate and beneficial impact. On the other hand, failure to address the issue of surplus arms as a matter of urgency could undermine most other current efforts.

Reducing violations of International Humanitarian Law

In addition to limiting access to arms for those likely to violate international humanitarian law a number of complementary steps could contribute to the reduction of civilian casualties in conflict and post-conflict contexts. These include:

1. Vastly expanded efforts to instil humanitarian principles in the general population and young people in particular.

In many societies, whether in conflict or at peace, acts such as killing, torture and rape of civilians and the execution of prisoners are accepted as a matter of course in conflict situations, although they violate basic humanitarian principles and the law of armed conflict. Such acts are often presented as normal and acceptable in film, television and news portrayals of armed conflict, and thus contribute to creating a "culture of violence". Passive acceptance of this type of behaviour means that violators of international humanitarian

law do not incur the legitimate revulsion of the societies on which they depend for support and of international public opinion.

Increased efforts are needed to ensure that all segments of society are aware of the limits – grounded in their own cultures as well as in international law – on the use of weapons even in times of armed conflict. An emphasis on influencing the attitudes of young people is particularly important in light of the widespread use of young combatants in internal armed conflicts.

The International Movement of the Red Cross and Red Crescent, of which ICRC is one component, has recently committed itself - in addition to promoting public awareness of the human costs of unregulated arms transfers and widespread arms availability supporting norms based on humanitarian law - to using its network of Red Cross and Red Crescent Societies to promoting a culture of non-violence.

2. Increased training of armed forces in international humanitarian law.

In peacetime a great deal more must be done to ensure that potential combatants not only understand the fundamental rules applicable in war, but are also aware that compliance with these rules is expected by their commanders and that violations will be punished. This requires political and military authorities to take political and resource decisions. It will also require, where possible, enhanced efforts at dialogue with non-State groups on the part of all those who have access to them – whether financial supporters, leaders within their own societies or external actors.

3. Ensuring personal security by means other than weapons.

The vicious cycle of insecurity which fuels a demand for arms, which in turn creates a demand for yet more weapons, needs to be broken. The trend towards the privatization of security and the failure of States to assume their responsibility to provide secure living conditions for all citizens is an issue that needs to be urgently addressed. Clearly this will require resources not only for police and criminal justice systems but also for economic and social development. It also implies renewed determination among political and social leaders to resolve conflicts without resorting to force and the support of the international community for efforts to that end.

Conclusion

The international community has in recent decades adopted wide-ranging prohibitions and limitations on the transfer of chemical, biological and nuclear weapons, missile systems and certain components of these technologies. States in some regions have established controls on the transfer of major conventional weapons systems. However, until recently little attention was given to the transfer of small arms and light weapons, which have inflicted most of the death and injury in recent conflicts.

Recent small arms initiatives on both national, regional and international levels are encouraging. Nevertheless, much work still remains to be done before these initiatives have a real impact in human terms. Both governments and civil society have important roles to play.

In the short term, the challenge will be to raise awareness of the human costs of arms availability and to put the issue squarely on the international agenda. It will be necessary to challenge the fatalistic acceptance of daily news reports of armed attacks on civilians for which no one is held responsible. It will also be necessary to recognize the fact that a large proportion of all illicit transfers begin with weapons which were originally transferred legally, and that few problems will be solved without addressing both licit and illicit aspects of arms transfers.

In a long-term perspective, the principle needs to be established that those who supply arms in situations where violations of international law can be expected share responsibility for the use of their weapons. Success in reducing the human cost of unregulated arms proliferation will depend on creating a sense of responsibility and accountability among both those who produce and those who use arms. Weapons serve as tools for implementing life-and-death decisions and are instrumental both in enforcing and undermining the rule of law. They cannot be considered as simply another form of commercial goods to be governed by the law of supply and demand.

An evaluation of the likely respect for international humanitarian law by the recipient should be an integral part of all decisions by governments and arms manufacturers on the supply of weapons and ammunition. Codes of conduct for arms transfers are one promising approach to developing agreement on what constitutes responsible practice, but they need to be strengthened to include specific criteria, and finally to be implemented in order to be effective.

The ICRC strives to ensure that general and special protections to which civilians are entitled by international humanitarian law become realities in each and every armed conflict being fought throughout the world. Improved protection of civilians in situations of armed conflict can be achieved, through better implementation and respect of existing humanitarian law and other international norms. However, addressing the current unregulated availability of small arms and light weapons is also an indispensable element in improving respect for international humanitarian law.

The ICRC considers that, by requiring respect for humanitarian law from those who seek to arm themselves, States will make a major contribution to the protection of civilians from the type of unspeakable suffering that the world has seen in conflicts throughout this century. In so doing they will not only strengthen the basis for the rule of law, but also promote reconstruction of war-torn societies and long-term social and economic development.

PANEL III

REPRESSION OF WAR CRIMES

LESSONS FROM THE *AD HOC* TRIBUNALS

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Thank you Judge Pocar, let me first congratulate the Sanremo Institute for the organization of the conference. There are not that many events celebrating the 25th anniversary of the Additional Protocol this year. One has to wonder whether in particular the reluctance of States to organize appropriate festivities reflects a general disregard of the Additional Protocols or International Humanitarian Law in general. Despite constant repetitions of the Additional Protocols on the agenda of the General Assembly of the UN and the need to ratify the Additional Protocols, the protocols which have been regarded as a breakthrough or milestone in the history of international humanitarian law and international law are this year overshadowed by other events.

The topic of this panel cannot easily be connected with the Additional Protocols as of course the Tribunals, being international criminal law instruments, are not children of the Additional Protocols and only the International Criminal Tribunal for Rwanda (ICTR) Statute refers explicitly to Additional Protocol II. Moreover only Additional Protocol I, in a small section, refers to repression of breaches of the Protocols and the Geneva Conventions. Even if one takes into account of the Protocols being additional to the Geneva Conventions the picture is not very much different as the Conventions also refer, in small portions, to the repression of grave breaches. In addition, one of the theoretical difficulties in discussing the Tribunals and the Additional Protocols together is the context in which the trial and Appeals Chamber discuss the obligations of the individuals concerned. Their emphasis is on the criminal law aspect of humanitarian law and the specificities of international criminal law. Some scholarly work still needs to be done to sufficiently explain repercussions from the criminal law judgements on right and obligations under humanitarian law.

However, the public debate of the work of the Tribunal, its yearly reports to the Security Council and the scholarly evaluations of the Statute and its application by the Trial and Appeals Chamber allow me to state some general lessons such as:

1. For specific cases the international community has accepted the execution of international criminal justice by a specially constituted tribunal which has been able to develop the deficiencies of its statute and procedural law in such a way as to make the procedure and the judgements acceptable.
2. Also the international community knows now that the execution of international criminal justice by a specially constituted tribunal is expensive, it is ineffective when not provided with forces or police able

to arrest war criminals on the territory of a non-co-operative State, and it is limited in its effect as it can only handle some criminals out of a potentially large group. In addition to these general lessons (and of course there are others) one can also point out some more specific lessons related to the functioning of the Tribunal (and some might claim these are technical functions).

3. Prosecutor and Defence need the same means at hand to ensure equality of rights before the Tribunal, witness protection rules differ fundamentally from national rules and needs to be carefully adapted to the situation of the war.

Such lessons are definitely relevant for the valuation of the work of the Tribunal, they might also give hints for future *ad hoc* tribunals, but they are only indirectly related to the topic of this conference. So indeed there is a relevant and substantial link of the Tribunals to the Additional Protocols 25 years later and what impact there has been which justifies the title of this panel referring to "lessons" instead of using more moderate terms such as influence, example etc.

Obviously a link can be inferred from the States directly linking the tribunals with the already mentioned Article 85/11 of Additional Protocol I and Additional Protocol II more generally. Did the judgements of the Tribunals contribute to understanding that these articles were relevant 25 years after the adoption of the Additional Protocols? Secondly, has the Tribunals' jurisprudence been essential for the understanding of other articles of the Additional Protocols either by implicit reference in the Tribunals' Statutes or in explicit references in the judgements? If both questions are answered in the affirmative than one can discuss which lessons can be inferred from that and who learned them.

Before we look at the influence of the jurisprudence on the understanding of Article 85 and the other articles of Additional Protocol I, let us recognize that the Tribunal is looking at a specific type of warfare. With the exception of Kosovo one could argue that the war in Former Yugoslavia, to a large extent, was a Geneva Convention war meaning that the effects of hostilities hardly reached the level of Additional Protocol I rules. One could easily argue that the jurisprudence of the Tribunals lacks consistency regarding crimes related to method and means of warfare, as the relevant statements are only made in a few cases and by a chamber with a specific presiding judge. Can the judgements, therefore, be generalized? This is indeed a relevant question. On the other hand, the Tribunal in all judgements had made clear how it regarded its role. Let me quote from the *Kunarac* Appeals Chamber judgement of 2000:

Kunarac Case (No: IT 95-16-T, 14 January 2000). The Appeals Chamber agrees that *"so far as international law is concerned, the operation of the desiderata of consistency, stability, and predictability does not stop at the frontiers of the Tribunal […]. The Appeals Chamber cannot behave as if the general state of the law in the international community, whose interests it serves is none of its concern. However, this Tribunal is an autonomous international judicial body, and although the International Court of Justice is the "principal judicial organ" within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts. Although the Appeals Chamber will necessarily take into*

consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion".

Looking at the wording of Article 85 of Additional Protocol I one can hardly deny that the jurisprudence of the Tribunals has not only reaffirmed the validity of several paragraphs of the article but also affirmed its customary law character. Firstly, it is taken for granted that this is true for crimes related to prisoners of war, wounded, sick and shipwrecked or religious and medical personnel as mentioned in para. 2 of Article 85. But it is also true for making the civilian population or individual civilians the object of attack (para. 3 a); making a person the object of attack in the knowledge that he is *hors de combat* (para. 3 e); inhuman and degrading practices involving outrages upon personal dignity based on racial discrimination (para. 4 c) and, of special importance, deportation or forced transfers of populations (para. b).

Though the latter has been mainly discussed as crime against humanity the Trial Chamber in the *Krnojelac* Case in March 2002 stated: *"The content of the underlying offence, however, does not differ whether perpetrated as a war crime or as a crime against humanity"*.

It is justified to come to the same conclusion with regard to the launching of an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, para. 2(a) iii. With the words of the Trial Chamber in the *Kuprescic* Case: *"indeed, even in a situation of full-scale armed conflict, certain fundamental norms still serve to unambiguously outlaw such conduct, such as rules pertaining to proportionality"*.

There can be no doubt that the *Blascic* judgement of March 2002, in discussing the application of the principle of proportionality in the attack against the village of *Ahmici*, has confirmed both the rule in its obligatory content and the criminal law content.

While these findings can be supported by the jurisprudence of the ICTY it is difficult to find evidence in the judgements with regard to the other relevant paragraphs of Article 85 of Additional Protocol I such as paragraph 3:

- (c) *"launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii)"*;
- (d) *"making non-defended localities and demilitarized zones the object of attack"*;
- (f) *"the perfidious use, in violation of Article 37, of the distinctive emblem of the Red Cross, Red Crescent or Red Lion and Sun or of other protective signs recognized by the Conventions or this Protocol"*.

Only indirectly one could draw conclusions from judgements with regard to the crimes listed in paragraph 4:

- (b) *"unjustifiable delay in the repatriation of prisoners of war or civilians"*;
- (c) *"practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination"*;
- (d) *"making the clearly-recognized historic monuments, works of art or places of workship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives"*;
- (e) *"depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial"*.

Now when we look at some other articles of the Additional Protocol we also get some guidance from the jurisprudence of the tribunals.

First of all, it is taken for granted that the discussion about the term "international armed conflict" both in the Trial Chamber and Appeals Chamber in the *Tadic* Case and the consequent judgements, also clarified to a certain extent the application of the Additional Protocol in wars involving three Parties, one being controlling in the sense as "overall control" test. Co-ordinating and helping in the general planning of military activities is the crucial issue to determine whether a conflict is governed in such case by the rules for non-international armed conflict or by the rules for international armed conflict. It needs to be seen whether state community in the future will still make that difference with regard to international criminal law and International Humanitarian Law. In addition we also rely on the jurisprudence of the ICTY today *"in determining whether an armed conflict is a conflict between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State"* (*Kunarac* Appeal – 12 June, 2002).

Less relevant for humanitarian law but not without importance, is what the nexus must be between acts and the armed conflicts. Again, as stated by the *Kunarac* Appeals Chamber some weeks ago: *"The laws of war apply in the whole territory of the warring States or, in the case of internal armed conflicts, the whole territory under the control of a part to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, a peaceful settlement is achieved"* (para. 7).

One can easily see that this definition has its disadvantages (general conclusion of peace/Guantánamo not being part of the territory?).

While these two definitions have already been critized by scholars another important issue has been discussed critizing the ICTY for not having applied to a proper test in the determination of customary law.

In the *Kuprescic* Case the Trial Chamber first states that (513): *"the sacrosanct character of the duty to protect civilians, which entails, amongst other things, the absolute character of the prohibition of reprisals against civilian populations"*. It then continued by arguing the prohibition in Article 51 para. 6 of Additional Protocol I had been transformed into customary law by claiming: *"The before mentioned elements seem to support the contention that the demands of humanity and the dictates of public conscience, as manifested in opinion necessitatis, have by now brought about the formation of a customary rule also binding upon those few States that, at some stage, did not intend to exclude the abstract legal possibility of resorting to the reprisals under discussion"*.

One can argue, as for example Chris Greenwood has done, that this part of the judgement does not reflect State practice sufficiently, and one could moreover argue whether the wording of that specific part "seems to support", really is convincing. I am more concerned with the most recent State practice which gives firm indications that (some and important) States do accept reprisals under certain circumstances. Otherwise the debate about the use of weapons of mass destruction, if necessary in the context of responding to Iraq's use of such weapons, would be without legal basis and, in addition, the findings of the International Court of Justice in the advisory opinion on the threat and use of nuclear weapons would be disregarded. The judgements, with reference to claims which have been advanced only *in abstracto* and hypothetically by a few States, such as France in 1974 and the United Kingdom in 1998, might be falsified by the practice of a new conflict in the Middle East.

Another interesting indirect reference of the Tribunal's jurisprudence to Additional Protocol I (Art. 51) can be found regarding terror attacks. We all know how difficult it has been for state community to accept measures against terrorists. Even before September 11 the ICTY had identified what terror can mean not only regarding terror attacks. Absence of military objects, fortifications, fluctuating frontlines, lack of preparation for defence, use of "baby bombs", flame-throwers, grenades and a booby-trapped lorry, were used in the *Blascic* Case as indicators to describe the attack as terror attacks (509/787). Summarizing its findings the Chamber stated: *"In order to achieve this the HVO soldiers* (Military Units of the Croatian Community of Herceg-Bosna) *mainly acted as follows: - they terrorised the civilians by intensive shelling, murders and sheer violence"*.

While these criteria can be used as useful indicators in a different chapter the Chamber, however, referred to the proportionality of the attack and the defence. Here one can have doubts whether in different settings this comparison could justify the definition of an attack as being lawful or unlawful. The burden on the attacker would probably be overstretched if such requirements were the precondition under all circumstances.

Whereas in this specific case the Chambers might have gone too far, my reading of the references to attacks in the *Kuprescic* and *Blascis* Cases is that the types of attacks described do also fall under the prohibition of indiscriminate attacks under Article 51 paragraph 4 (a) prohibiting attacks which are not directed at a specific military objective and consequently, in each such case, are likely to strike military objectives and civilians or civilian objects without distinction. It should be mentioned in this respect that the Chambers were not only concerned with the effects of indiscriminate attacks on civilians but also with the effects on civilian property. The *Blascic* Trial Chamber judgement refers to property as well and uses a somewhat shortened version of the definition, of Article 52 of the Additional Protocol I, of military objective. In fact, one can hardly doubt the reasoning of the findings of the Tribunals in this respect, though one could argue about the clarity of the judgement. I have my doubts reading statements such as *"Targeting civilians or civilian property is an offence when not justified by military necessity"*. I had always understood that the advantage of Additional Protocols is to have eliminated the reference to military necessity when talking about attacks against the civilian population.

Not only has the customary law character of this rule (and the other parts of para. 4) been affirmed by the Trial Chamber in the *Celebici* judgement but the Trial Chamber included in its picture of existing customary law Articles 57 and 58 mainly as pointed out *"because they do not appear to be contested by any State including those which have not ratified the Protocol"* (by way of a test which was not followed in the reprisal part of the judgement).

If one agrees to the description of the content and leaves aside for a minute the validity of the arguments used one can safely conclude that the ICTY and ICTR have clarified to a useful extent and reaffirmed the customary law character of the content of part IV Chapter II of Additional Protocol I.

There is one aspect in which the Tribunal did again positively contribute to the interpretation and evaluation of that chapter. In the *Blascis* Case the question of human shields has not only been discussed with regard to prisoners of war and detainees. It has also been discussed, with regard to civilians under the control of a Party to the conflict, the *Hotel Vitez* Case, where Muslim civilians had to sit in front of the hotel for about three hours. The hotel at that time was the military headquarters of the Croat forces and they were expecting Muslim shelling of the place. Though the human shields also in other cases have been mainly discussed under Geneva Conventions and crimes against humanity aspects one can infer from the text of judgements that it also refers to obligations of Parties to an armed conflict in combat situations. Article 58,

which has already been mentioned as being regarded as customary law, takes a cautious approach regarding the obligation of the Parties *vis à vis* the protection of civilians under their control. Here the human shield jurisprudence of the ICTY has given a signal as how to interpret the "to the maximum extent feasible" clause in the *chapeau* of the article. It cannot have relevance in the context of the *Hotel Vitez* Case.

Now the lessons are rather clear from the jurisprudence of the ICTY regarding the articles mentioned in my short intervention. For the first time, since the adoption of the Protocols, a lawfully constituted international Tribunal had to examine the application or non-application of some of the core articles of the Protocols in a complex armed conflict situation. With all justified criticism regarding some of the findings and justifications, the Tribunal's work did contribute to the understanding of the major humanitarian achievement since the Second World War. Definitely the work had an impact on scholars and education and States (here we talk now about who learned the lessons). The Rome Statute would have been impossible without the jurisprudence of both Tribunals. All major developments regarding co-operation between the different national institutions regarding international crimes in general have been influenced by the jurisprudence.

On the other hand, we might come to a point where this jurisprudence in part will be regarded as just a snapshot of a specific point in time. The international community with September 11 and the ensuing Afghanistan war has entered an area where the traditional content (including the Additional Protocols) is challenged and tested about its appropriateness.

THE RELEVANCE OF THE INTERNATIONAL CRIMINAL COURT: HOW TO MAKE IT EFFECTIVE

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Let me start expressing how pleased I am to be back in Sanremo. My first stay in Sanremo, on invitation of the International Institute of Humanitarian Law, was in 1998, shortly after the adoption in Rome of the Statute of the International Criminal Court. It was one of the first occasions to exchange views on the results achieved in Rome and therefore very interesting to hear the reactions on these results of a number of scholars and practitioners participating in that meeting. It was also fortunate that the Institute succeeded in publishing the results of this meeting in a book published last year under the title "*Current Problems of International Humanitarian Law".* Reading the report of that 23rd Round Table one realizes how rapid the developments with regard to the International Criminal Court and generally with regard to the international legal community take place. That meeting discussed the problems resulting from the Statute in a rather abstract manner. Nobody expected the entry into force of the Statute very soon. The Preparatory Commission needed to complete first the Elements of Crimes and the set of Rules of Procedure and Evidence. The completion of these two subjects was essential for the implementation of the Statute in national legislation. In Resolution F of the Conference it was agreed that the draft texts of these two items had to be finalized before 30 June 2000. That was the only time limit agreed upon and the Preparatory Commission respected this deadline. With respect to its remaining tasks the Resolution said that the Preparatory Commission would remain in existence until the conclusion of the first meeting of the Assembly of States Parties.

In the aftermath of the Rome Conference the United States still undertook several attempts in the Preparatory Commission to get the Statute changed. They attempted to make it abundantly clear that nationals of non States Parties under no circumstances could be brought before the Court without the approval of the State concerned. They did not realize that the Statute, a fragile compromise so recently brought out, once reopened for modifications, could easily give rise to all sorts of new amendments. Exactly to prevent this happening the Statute in Article 123 provides a period of seven years after the entry into force for considering any amendment to the Statute.

The general feeling was that it would take quite some time to arrive at the required number of 60 ratifications. The discussions during the Diplomatic Conference in Rome indicated a preference for a number between 60 and 65. Some delegations, and also most of the Non-Governmental Organizations (NGOs), thought however that a smaller number would be sufficient so as to accelerate the entry into force. Others

asked for the requirement for the entry into force of a specified number from each of the geographical regions of the world to emphasize the legitimacy and representative character of the Court and to permit the election of judges in conformity with Article 36 of the Statute. Not only the need to be representative for the world community but also the costs were mentioned in support for a more substantial number. It became 60.

The Statute remained open for signature until 31 December 2000. After 31 December 2000 States cannot participate in the Assembly of States Parties with a right to vote unless they ratify the Statute. States must have completed ratification by 30 November 2002 in order to participate in the first round of decision-making. This can explain the recent growth in the number of ratification. At the initial meeting of the Assembly important decisions on the administration of the Court will be made and it is of importance for States to be involved in this process in order to contribute in shaping the Court.

In this introduction on the relevance of the Court and how to make the Court effective I selected in particular the activities with regard to the question of 1) the universal jurisdiction; 2) the election of judges and 3) the attitude and initiatives of the US. I made this choice because these subjects are in all respects topical and influential for making the Court effective. Due to lack of time I left out the subject of ratification and implementation. I do mention this since this subject is not less topical and influential for making the Court effective.

The universal jurisdiction

According to the Statute the jurisdiction of the Court is limited to crimes committed on the territory of States Parties or by nationals of States Parties. The only exceptions are when the Security Council refers a situation threatening international peace and security or when a State non-Party agrees to accept the jurisdiction of the Court over a particular crime. This was the last compromise adopted in Rome in order to get agreement about one of the most difficult issues of the Conference. Germany had proposed a jurisdictional regime based on the universality approach.[12] In their proposal the Court's jurisdiction would simply mirror the universal jurisdiction of the States Parties. They are of the opinion that all States can exercise universal jurisdiction for the crime of genocide and crimes against humanity and war crimes, irrespective of where the crime occurred or the nationalities of the suspects or the victim. Germany contended that the same universal jurisdiction was allowed for the core crimes under customary international law. In the course of the negotiations this proposal was eliminated.

The question whether and to what extent national States could exercise universal jurisdiction over the core crimes stood out after the adoption of the Statute. The Statute does not provide provisions on how to exercise this jurisdiction apart from two paragraphs in the Preamble, paragraph 4 expresses that the most serious crimes must not go unpunished and paragraph 6 says that it is the duty of every State to exercise its

[12] A/AC. 249/1998/DP. 2 (23 March 1998).

criminal jurisdiction over those responsible for international crimes. The way the States Parties exercise their jurisdiction is left to the discretion of the States themselves. A line of thought is then that, if the international system of justice is to be fully effective, all States Parties should fill the gap in the Court's jurisdiction by ensuring that their own courts can exercise universal jurisdiction over such crimes wherever they are committed, without requiring any link to the State such as the nationality of the suspect or the victim. This exercise is in the interest of the international society as a whole. There are, however, two notions of universal jurisdiction. The German proposal regarding universal jurisdiction did not require the custody of the suspect as condition for the exercise of jurisdiction. It was universal jurisdiction *in absentia*. The other notion of universal jurisdiction requires the presence or custody of the suspect in the State exercising jurisdiction.

This exercise of universal jurisdiction recently led to an inter-State dispute between the Congo and Belgium resulting in a judgement of the International Court of Justice. The Congo took the position that Belgium had violated international law when it exercised criminal jurisdiction *in absentia* over facts committed abroad by a foreigner, *in casu* the Minister of Foreign Affairs of the Congo. He was charged with offenses constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity. Article 7 of the Belgian Law, as amended on 19 February 1999, concerning the punishment of serious violations of international humanitarian law was especially contentious. It provides that «the Belgian Courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed». The Congo claimed that such exercise violated the principle that a State may not exercise its authority on the territory of another State and the principle of sovereign equality among all members of the UN. Ultimately, unfortunately, the International Court of Justice ruled only on the question of immunity and not on this question of universal jurisdiction for the Congo in its final submissions no longer claimed that Belgium wrongly conferred upon itself universal jurisdiction *in absentia*. Nevertheless, the judgement contains a few interesting views about universal jurisdiction especially in the separate opinions of the President of the Court, Judge Guillaume and of Judges Higgins, Kooijmans and Buergenthal jointly and in the dissenting opinion of the Belgian Judge v.d.Wijngaert. Guillaume argues that except in the case of piracy, there is no universality of jurisdiction for crimes against international law. A number of conventions provide for the establishment of subsidiary jurisdiction for purposes of the trial of certain offenders arrested on national territory and not extradited to a foreign country. The joint opinion of Higgins a.o., recognizes clear indications pointing to the gradual evolution of a significant principle of universal jurisdiction. First however, in their view, the opportunity must be offered to the national State of the offender to act upon the charges. It may only be done by an independent prosecutor or *juge d'instruction* without links or control by the government. Also, there must be special circumstances that require the exercise of an international criminal jurisdiction, for example, persons related to the victims request the commencement of proceedings or the availability of witnesses in the State. Judge van den Wyngaert concluded that there is no conventional or customary international law prohibiting universal jurisdiction *in absentia*.

It is of great importance that the establishment of the Court gives rise to this kind of discussion. It proves that the scope of international humanitarian law and in particular the limits to its enforcement is developing. Judgments of international judicial institution, like that of the International Court of Justice, may clarify this development and can assist States in their implementation of the rules.

In any appeal to States to fill the gaps in the jurisdiction of the Court by providing for universal jurisdiction in their national jurisdiction, serious considerations should be given to the parameters of such universal jurisdiction.

The nomination and election of judges.

At the same time we are meeting here the Assembly of States Parties (ASP) is meeting in New York from 3-10 September. According to the road map leading to the early establishment of the Court prepared by the Bureau of the Preparatory Commission in September 2001 (PCNICC/2001/L.2), the first session of the Assembly, among many other things,[13] must adopt the nomination and election procedures for the judges and the Prosecutor. The election of judges will likely take place in February 2003 during the resumed session of the ASP. The inaugural session will be held in March 2003.The Preparatory Commission last July almost completed a draft resolution of the Assembly of States Parties on the procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the Court. I will comment briefly on the nomination and election of judges, leaving aside the procedure of elections of the Prosecutor and Registrar. Not because they are less important, but they are less controversial and the date of their election has still to be fixed by the Bureau of the Assembly.

It is quite rightly observed that the viability of the International Criminal Court (ICC) will ultimately depend more on the calibre and experience of its judges and prosecutors than on the fine print of the Statute.[14] Nevertheless I would like to make some observations about the fine print.

For the purpose of the first election of the 18 judges of the Court, the nominations shall be opened, by a decision of the Bureau, during this first meeting of the Assembly of States Parties.

Nominations of candidates for election may be made by any State Party to the Statute and shall be made either:

i. by the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or

ii. by the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Candidates shall in any case be nationals of a State Party. The period for submitting nominations for the first election shall start after the approval by the Assembly of the draft resolution dealing with the

[13] Election of the officials of the Assembly, President (H.R.H. Prince Zeid Ra'ad Zeid Al-Hussein of Jordan), 2 Vice-Chairs, 18 members of the Bureau. Adoption of the 4-year work of the Preparatory Commission. Finalization of the procedures for the establishment of the Court. Adoption of the first budget (35 million dollars).

[14] Geoffrey ROBERTSON, "Crimes against Humanity", 2e ed., p. 374.

election and end on 30 November 2002. The Preparatory Commission concluded that the establishment of an advisory committee on nominations, as provided for in Article 36(4)(c), did not receive general support and therefore would not be established. One of the reasons was that it was considered imprudent to authorize a committee composed of experts or representatives of States to evaluate the qualifications of candidates nominated by States.

For the purpose of the first election of the judges a specific provision has been included which permits States that have commenced the ratification process to submit candidates on *interim* basis. These candidates shall be included only on condition that the concerned State submits its instrument of ratification on or before the date of closure of the nomination period.

The first election will be held in the resumed session of the Assembly in February 2003. The importance of this election is evident. One may recall that at the Conference in Rome the composition of the Court and the election of its officials was a very complicated and controversial issue.

According to the Statute and in conformity with the established principles for international judicial organs, such as the International Court of Justice (ICJ), the International Criminal Tribunal for the former Yugoslavia ICTY and the International Criminal Tribunal for the Rwanda (ICTR), judges should be persons of high moral character, impartiality and integrity, possessing the qualifications required in their respective countries for appointment to the highest judicial offices. As regards further qualifications of the judges, they were more controversial.

Firstly, Article 36(3)(b) (i) and (ii) provide that candidates for judges shall have: *"established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings (list A); or have established competence in relevant areas of international law such as humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court (list B)".*

This text is the result from two contending views. One view was that pre-trial and trial judges should all have trial experience and that only in the Appeal Chamber other expertise was required. The opposite view was that it is necessary to have judges with both categories of expertise in all divisions. Article 39(1) reflects this difference of opinion. It provides that the assignment of judges shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division contains an appropriate combination of expertise in criminal law and procedure and in international law. The pre-trial and trial divisions shall be composed predominantly of judges with criminal trial experience.

The Statute and also the Rules of Procedure and Evidence remain silent about the procedure to be followed for this assignment. One may assume that this will be a task for the presidency, as part of the proper administration of the Court, probably in consultation with the judges.

A second point was the adequate representation of men and women in the Court. This was part of a more general discussion about gender issues. In the preparatory stage it was proposed to provide for a gender balance in the selection of the judges.

The definition of gender and references to gender in the text of the Statute were very controversial, particularly in the discussions with regard to the definition of crimes. In relation to the composition of the Court it was felt that reference to gender was not necessary and could be substituted for a reference to "a balance of female and male judges". The notion of "balance" was however also controversial. In the view of the opponents it implied a 50-50 quota. As final solution balance was substituted for "fair representation". It implies that States should strive towards as balanced a representation of female and male judges as possible.

Thirdly, Article 36 (8) (b), referring to legal expertise on specific issues, including, but not limited to, violence against women and children, was controversial. It was, however, accepted that the Court should have such expertise at its disposal among the judges.[15] In this regard, mention is made of the expertise of a criminal defender and not merely as a prosecutor. One of the reasons why Nuremberg worked would have been that the English, French and American judges had experience as criminal defenders.[16]

Article 36(5) of the Statute provides an exception to this equilibrium. At the first election at least nine judges shall be elected from list A and at least five judges from list B [Article 36 (5)]. The remainder of judges could be elected from candidates in both lists.

In the Preparatory Commission there were different approaches concerning the application of paragraphs 5 and 8 of Article 36. The first was to vote on the basis of two lists and consider the criteria provided for in paragraph 8 as recommendations to consider while voting. The second approach was to insist on the application of a strict quota system to ensure adequate geographical and gender representation. The third approach emerged to bridge the gap between the two opposite approaches. Each State Party was required to vote for a minimum number of candidates from each region and from each gender. The text reflecting this approach was not discussed in the Preparatory Commission. It is a very complex procedure. Doubts exist whether such procedure can be put into practice. One of the problems is that the proposal does not have a clear and convincing procedure for distinguishing "abstentions from voting" from "not respecting the minimum voting requirements", which in principle should be considered as an invalid vote. This may produce a lot of invalid votes.

It was not possible to arrive at an agreement in the last session of the Preparatory Commission. One may question, however, whether or not the Preparatory Commission went beyond the content of the Statute in providing rules for the first election that in essence are rules that should be used for subsequent elections.

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[15] Reasons: dimensions of sexual and gender violence in the ICTR *Akayesu* Case had been originally revealed due to the questioning of Judge Pillay, a judge with experience in sexual and gender violence.The experience of the ICTY and the ICTR had shown that a lack of such experience at any level of the Court risked problems at all levels. As demonstrated by the jurisprudence of the Tokyo Tribunal and the ICTY and the ICTR, sexual crimes could be expected to form an integral part of the ICC prosecutions.

[16] ROBERTSON, *op. cit.*, p. 374.

The problem is that the number of States Parties is still growing and that the States Parties at present not in all respect are representative of the world community. Nevertheless, elections must be held and the outcome of the elections may be decisive for the credibility and efficiency of the Court. It needs a flexible procedure for the elections and a responsible behaviour of the States Parties to arrive at satisfactory results without engaging in political skirmishes. The importance of a Court composed of highly qualified judges should prevail over national interests.

Attitude of the United States

Finally, I would like to make some remarks about the last efforts of the United States to combat the Court.[17] It started on May 6, 2002 with the announcement in a letter to the Secretary-General of the UN that the US did not intend to become Party to the Statute and that the US accordingly had no legal obligations arising from its signature on December 31, 2000. The objections mentioned were the dilution of the UN Security Council authority over international criminal prosecutions and the lack of any effective mechanism to prevent politicized prosecution of American service members and officials". A signature under a treaty means, according to Article 18 of the Vienna Convention on the Law of Treaties, that the State concerned is obliged to refrain from acts which would defeat the object and purpose of the treaty, until it has made its intention clear not to become party. This undoing of its signature was therefore correct and even legally necessary for the US to pave the way for their subsequent activities[18].

At the occasion of this letter, the Secretary of Defense, Mr. Rumsfeld, already indicated that there may be mechanisms within the treaty by which the US could work bilaterally with friends and allies, to the extent they were willing to prevent the jurisdiction and thus avoid military complications in military operations.

A first action of the US was the threat to withdraw from peacekeeping activities in the UN unless they were guaranteed that their soldiers and officials in their exercise of UN functions would not to be transferred to the Court.

The question whether the Security Council could stop ongoing or impending proceedings before the Court was very controversial. It has been discussed without any result in the preparatory phase of the negotiations leading to the Rome Conference and it was resolved only at the very end of the Diplomatic Conference in Rome as part of a more general package.

The basic International Law Commission text provided that prosecution was prohibited if it arose from a situation which was being dealt with by the Council *"as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter unless the Council permitted otherwise"*. This draft article

[17] I will not discuss the American Service Members Protection Act (ASPA) since that is a national legal instrument although it offers a legal basis for the activities of the US administration and is illustrative for the attitude of the U.S. *vs.* the ICC.

[18] I disagree in this respect with Amnesty International which sent a letter to President Bush arguing that this unsigning of an international treaty was devastating. In their view it will antagonize US Allies and open the door for other countries to use this precedent to justify abandoning their international commitments.

was criticized because it would subordinate the judicial functions to the actions of a political body. Concern was also voiced that the Court should be prevented from performing its functions through the mere placing of an item on the Council's agenda and could remain paralyzed for lengthy periods.

The outcome of the negotiations in Rome was the inclusion of Article 16 in the Statute. No investigation or prosecution may be commenced or proceeded with under the Statute for a period of twelve months after the Security Council, in a resolution under Chapter VII has requested the Court to that effect.

The Security Council invokes this article now as a justification for the adoption, the 12th of July 2002, of the Resolution 1422. The Resolution requests that: *"[...] the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise"*.

It is difficult to understand what the real threat to international peace and security in this case is. The existence of the ICC as such, designed to curb major crimes that threaten peace, cannot by any stretch of imagination be considered as such a threat, otherwise not all closest Allies of the US would have become Parties to the Statute. As far as the Resolution invokes Article 16 it misrepresents the content and interpretation of that Article. The provision means that the Security Council can intervene preventing the Prosecutor to proceed with a particular case and was not meant as a *carte blanche* preventing the Prosecutor generally from pursuing cases against UN-personnel from non-Parties in peacekeeping operations. Together with the intention of the Security Council to renew this request for further 12-month periods the text gets more or less the character of an amendment of the Statute. It may result in a situation whereby for States Parties to the Statute a conflict of obligations arises in view of the pertinent provision in the Statute that all persons without any distinction based on official capacity should be held accountable.

According to paragraph 3 of the Resolution, member States are obliged to take no action inconsistent with the operative paragraph of the Resolution and with their international obligations. It is not easy to indicate how far this obligation affects the exercise of jurisdiction by the national judicial institutions but it may also constrain States in implementing other applicable international obligations, other than those under the Statute.

The Court is not a Party to the Charter but States Parties to the Statute are bound by their obligations under the Charter. It does harm to the position of the Security Council and it brings Parties to the Statute into an unnecessary dilemma when a resolution imposes obligations upon States that are conflicting with their obligations under the Statute, without convincing arguments that such measures are necessary to maintain peace and security.

Another initiative of the US, that may affect the obligations of the States Parties under the Statute, is the request of the US worldwide to States to conclude bilateral immunity agreements with the US preventing

the transferral or surrender of American nationals to the Court. In this request Article 98 of the Rome Statute is invoked.[19]

Article 98 is entitled *"Co-operation with respect to waiver of immunity and consent to surrender"* The Article imposes a limitation on the Court to issue a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law towards a third State. It is a recognition of protections flowing from international obligations relating to diplomatic immunity or state immunity and those arising from agreements like the Status of Forces agreements. The important aspect of Article 98 is that it leaves to the Court the determination whether implementation of a request would require the state to act inconsistently with its obligations. This determination by the Court shall be based on the provisions of the Statute, in particular on Article 27. As between Parties to the Statute this Article removes immunities as far as the core crimes are concerned whenever it is necessary to execute an arrest warrant or a request for surrender emanating from the Court. When requests for co-operation involve the immunities of officials of Third States the applicable rules of international law apply. One may observe, however, that these rules concerning State immunity are in full development, see the *Pinochet* judgement and the decision on preliminary motions in the *Milosevic* Case. The same cannot be said for the diplomatic immunities, as can be seen in the judgement of the International Court of Justice in the case between Belgium and the Congo. It is, therefore, of utmost importance to respect the judgement of the Court in this respect. When States agree to enter in bilateral agreements with the US, as suggested by the US, they may create precedents that are not in conformity with the provisions of the Statute. Does Article 98, for example, allow for this kind of agreement? Is it acceptable, especially in the light of the obligation of the States Parties, to co-operate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court (Article 86), to exclude systematically nationals of a single State from the application of the provisions of the Statute? Is such an exception in conformity with the principle of universal jurisdiction over the core crimes applicable for the national jurisdictions and with Article 14 of the International Covenant on Civil and Political Rights providing that all persons shall be equal before the courts and tribunals?

Since the Court as such is still not established and operational, it is first for the States Parties in the Assembly to arrive at a common position before States Parties individually commit themselves. The first Assembly of States Parties might be a good opportunity to discuss this matter.

In conclusion, within four years not only has the Statute entered into force but we are also already in the middle of very heated political discussions, in the UN and elsewhere, about the implications of the establishment of the Court. As has been observed quite rightly *"serious opposition may be the price of relevance"*.[20] It is proof of the fact that the Court must be seen as a reality in the international community. A reality that all States have to take into account even without being Party to the Statute.

[19] East-Timor, Tajikistan, Israel and Romania have concluded such agreements with the US, although Romania and East-Timor have indicated that these agreements still need ratification.
[20] Notes from the President, "*The Perils of Relevance"*, ASIL Newsletter, May/June 2002, p. 4.

THE RELEVANCE OF THE INTERNATIONAL CRIMINAL COURT: HOW TO MAKE IT EFFECTIVE?

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1. Introduction

In commemorating the silver jubilee of the two Additional Protocols to the Geneva Conventions it is gratifying to note that what are described as grave breaches of the Geneva Conventions are now crimes punishable under Article 8 of the Statute of the International Criminal Court. Hitherto they were merely principles without any sanctions.

Criminal law is closely associated with the concept of state sovereignty embodied in Article 2, paragraph 1 of the Charter of the United Nations.[21] It is within the exclusive province of a State to apply criminal law within its territory and in relation to persons and activities within its jurisdiction. National courts do apply foreign private or civil law. Criminal law, however, is a subject of national policy within the exclusive province of the *lex fori*.

2. Bases of Jurisdiction in International Law

International law recognises five *criteria* for assuming criminal jurisdiction.

A. The Territoriality Principle

This theory is a concomitant of sovereignty and is universally recognised, whereby a State prescribes and enforces rules of conduct within its physical boundaries, because *qui in territorio meo est, etiam meus subditus est* (who is in my territory, is also subject to me).[22] Territorial sovereignty extends over internal waters, territorial sea and the superjacent airspace.[23] The territoriality of jurisdiction also extends over crimes committed on board ships,[24] aircrafts,[25] and spacecraft.[26]

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[21] Case concerning *"Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua vs. United States of America*)", hereinafter referred to as the *"Nicaragua Case"*, 1986, International Court of Justice (ICJ) Reports, para. 212.

[22] In the "*Schooner Exchange vs. McFaddon Case"*, 1812, 7 Cranch 116, Chief Justice John Marshall reasoned: "the jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute. It is susceptible of no limitations not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction", *Ibid*, p.136. In the case of "*S.S. Lotus (France vs. Turkey)"*, hereinafter referred to as the *"Lotus Case"* Permanent Court of International Justice (PCIJ), Ser. A. No. 10, 1927, the Court held: *"[…] the first and foremost restriction imposed by international law upon a State is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from custom or from a convention"*, *Ibid*, pp.18-19.

[23] The *"Nicaragua Case*", para. 212.

[24] The "*Lotus Case"* also enunciated that *"vessels on the high seas are subject to no authority except that of the state whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no state may exercise any kind of jurisdiction over foreign vessels upon them"*; *supra* note 23, p.25. This

B. The Nationality Principle

Nationality is the bond which unites a person to a given State, constitutes his membership in the particular State, gives him a claim to the protection of the State, and subjects him to the obligations created by the laws of that State. Issues of nationality, such as those relating to acquisition or loss of nationality are matters which are within the exclusive domestic jurisdiction of each State.[27] In cases of dual or multiple nationality, espousal of claims, or matters *vis à vis* third States, jurisdiction is established on the basis of a "genuine link."[28] Corporation,[29] ships,[30] and aircrafts[31] and spacecraft[32] also have nationality under international law.

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

C. The Passive Personality/Nationality Principle

In contrast with the Nationality Principle, a State may exercise jurisdiction over an alien for an act committed outside its territory where such an act is directly injurious to that State, its nationals, or has a deleterious effect within its territory.[33]

D. The Protective Principle

This is in effect a long arm theory under which a State may overreach its territorial boundaries to safeguard its interests from harmful acts engaged abroad. A State can assert jurisdiction over an alien, individual or juridical entity, for acts outside its boundaries, which have an adverse effect on its interests.[34]

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principle is confirmed in Article 6 of the Convention on the High Seas, 1958, and Article 94 of the United Nations Convention on the Law of the Sea, 1982, in I. BROWNLIE, "Basic Documents in International Law" 4th edition, 1995, pp.100-188.

[25] Article 1 of the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963, in "*Blackstone's International Law Documents"*, 1991, p.92 (hereinafter referred to as *"BIL Documents"*), and Article 4 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, *ibid*, p. 183, confer jurisdiction on the state of registration of an aircraft for offences committed on board an aircraft.

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

[27] Advisory Opinion of the Permanent Court of International Justice in "*Nationality Decrees issued in Tunis and Morocco Case"*, 1923, PCIJ Rep., Ser B. No. 4, especially p. 24. Also Article 1 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws. This position is endorsed by the International Law Commission, 1952, "Y*earbook of International Law Commission"*, vol. II, p. 3.

[28] *"Nottebohm Case"*, (*Liechtenstein vs. Guatemala*), 1955, ICJ Rep 3.

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

[30] Article 5, Geneva Convention on the High Seas, 1958, and Article 91(1) of the United Nations Convention on the Law of the Sea, 1982, in "*Basic Documents",* p.100 and p.187.

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

[32] The "*Space Treaty"* does not use the concept of nationality. However, the 1959 Report of the United Nations a*d hoc* Committee (UN Doc. A/4141 of 14 July 1959) and the General Assembly Resolution 1721 (XVI) of 20 December 1961 suggest the competence of the States to attribute their nationality to a spacecraft. Unless otherwise indicated, resolutions of the General Assembly are cited from "United Nations Resolutions", edited by D. J. DJONOVICK, 1974 and later years.

E. The Universality Principle

An offence subject to universal jurisdiction is one which comes under the jurisdiction of all States wherever it may be committed. Such an offence is a delict *jure gentium* and contrary to the interests of the international community.[35]

3. Extradition[36]

The principles of jurisdiction, in substance, are generalisations of national laws and often interweave in practice. There may be an overlap between territorial and extraterritorial jurisdictions. Two States may recognise competence over an accused for the same crime. A State cannot take any measures in another State for the enforcement of its national laws without its consent. States, therefore, depend on the co-operation of other States for apprehending suspected or convicted criminals who have fled abroad. Extradition is the form of that co-operation.

Extradition is a process by which one State surrenders to another an individual accused of or convicted in the requesting State for an offence so that he may be tried, convicted and punished. In the absence of a treaty there is no right to seek extradition. There is, however, no rule of international law forbidding the surrender of the fugitive provided that the fugitive has no complicity in any conduct harmful to human rights, or in crimes under international law. Extradition depends to a large extent on internal law particularly the constitutional law and the correlation between international law and municipal law. The generally recognised conditions for extradition are (a) treaty or a law, and (b) double criminality, namely, the conduct is criminalized in both the States.

In theory, any person including nationals may be extradited. Some States, notably France and Germany, never extradite their nationals to a foreign State. They have jurisdiction to punish them for grave crimes committed abroad.[37]

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[33] A famous application of this principle is in the *"Lotus Case", supra* note 23, where the Permanent Court of International Justice upheld Article 6 of the Turkish Penal Code that gave Turkey jurisdiction over a foreigner for offences committed abroad against it or its nationals.

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

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

[36] For a detailed study on extradition see, I. SHEARER, "Extradition in International Law", 1971.

[37] Article 16 of the Basic Law of the Federal Republic of Germany and S. 3(1) of the German Criminal Code; Article 3(1) of the French Extradition Law of 1927. The "*Soering vs. United Kingdom Case*", 1989, 11 EHRR 439, where the European Court of Human Rights held that the extradition of Soering from the United Kingdom to the United States would be contrary to the obligations of the United Kingdom under Article 3 of the European Convention on Human Rights 1950 prohibiting *"torture or inhuman and degrading treatment"*, because of the death row syndrome in the prisons of the State of Virginia in the United States, Germany sought his extradition and claimed jurisdiction under its municipal law. Article 6 of the 1957 European Convention on Extradition, 1978, 17 ILM 813, allows non-extradition of nationals and authorizes the State Parties to define its "nationals". Many times the United Kingdom had secured the non-extradition of citizens of Commonwealth

4. *Travaux préparatoires* of the International Criminal Court[38]

National criminal laws deal only with crimes committed by individuals or legal entities. International law regulates the relationship between States *inter se* and deals with the rights and duties of States. A State is responsible for the violations of international law and has to pay either reparation to the aggrieved State or re-establish the situation *ante*. The concept of international torts (delicts) has existed for a long time in international law.

The Hague Conventions, or the four Geneva Conventions or their two Additional Protocols, while regulating the law relating to armed conflicts, do not envisage any control system to make them enforceable. It was only after World War I that the notion of international crimes began to emerge.[39] The mechanisms for the enforcement of international crimes, like the two International Military Tribunals at Nuremberg and Tokyo, and the two International Criminal Tribunals for Yugoslavia and Rwanda (ICTY, ICTR), have been on an *ad hoc* basis. It has taken years of sustained efforts under the auspices of the United Nations to establish the International Criminal Court (ICC) from 1 July 2002. The challenge ahead is how to make the ICC effective.

5. Techniques of making the International Criminal Court effective

This section will focus on the action that needs to be taken for fulfilling the obligations of co-operation with the ICC envisaged in Part 9 of the Statute.

A. Legal Audit

Article 88 of the Statute enjoins the State Parties to ensure that there are procedures available under their national law for meeting all of the forms of co-operation envisaged in Part 9.

To meet this obligation State Parties have to conduct a legal audit. The legal audit:

1. will identify the procedure necessary for co-operation under Part 9;
2. examine the adequacy of the local laws for such procedures;
3. identify the procedures that require national legislation;
4. examine the compatibility of the local laws with the provisions of the Statute;
5. recommend the extent to which local laws are to be amended *mutatis mutandis* to harmonise them with the Statute.

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countries and the Republic of Ireland. I. SHEARER, *supra*, note 37, Chapter. 4 and Appendix II, lists 163 bilateral treaties classified according to nationality provisions.

[38]Many of the earlier documents relating to the development of an international court may be found in B. FERENCZ, "*International Criminal Court",* 1980 (2 volumes hereinafter cited as *"Ferencz 1 "* or *"Ferencz 2"* followed by the page number).

[39]Article 227 of the Treaty of Versailles of 1919 required the arraignment of Kaiser Wilhelm II of Hohenzollern for the "supreme offence against international morality and the sanctity of treaties". Article 228 provided for the German recognition of the Allied and Associated Powers' right to bring before the military tribunal persons accused of having committed "acts in violation of the laws of war". Wilhelm II was to be tried by a special Tribunal consisting of five judges appointed by each of the major victorious powers, i.e. Britain, France, Italy, Japan, and the United States. No action was taken because Wilhelm II had abdicated and been given refuge by the Dutch. Germany, later, denounced the treaty as a *diktat*, "Ferencz 1", pp.32-33 and J. CAVICCHIA, "The Prospects for an International Criminal Court", 1992, *10 Dickinson Journal of International Law*, pp.223-224. For an historical perspective on international war crimes tribunals see B. F. MACPHERSON, "An International Criminal Court - Applying World Law to Individuals", 1992, p.3.

B. Correlation between International Law and Municipal Law

The need to modify local laws depends on whether the State Party follows the monistic or the dualistic doctrine on the relationship between international law and municipal (national or domestic) law. Some constitutions following the Monistic Theory assimilate international law with municipal law on ratification. International law becomes a part of the national law to be administered by national countries. In such countries the Statute becomes local law on ratification. In countries that follow the dualistic approach, international law requires to be incorporated into municipal law by legislation. There is a preponderance of the dualistic approach. Whether a country follows any of the doctrines, the national laws require adjustments to be in harmony with the Statute.

C. Constitutional Changes

Harmonising the local laws with the Statute may require constitutional amendments. Most of the countries in the world have codified constitutions. Constitutions are supreme. Any law or action inconsistent with the constitution would be void and unenforceable. In many of the common law countries courts have the power of "judicial review" which is competence of the courts to pronounce upon the constitutionality of the laws and render them nugatory if inconsistent with the constitution.

Judicial Power

The doctrine of Separation of Powers is at the core of many civil law and common law constitutions. In Westminster or English model constitutions there is tri-partition of powers. Legislative power belongs to the Parliament, executive power to the Head of the State and the Cabinet, and judicial power is vested in the judiciary. The constitution envisages a hierarchy of courts upon which the judicial power is bestowed.

Judicial power is a technical connotation and has been interpreted in many of the Westminster jurisdictions to mean the power of the courts to decide disputes, both civil and criminal, between contending parties. It includes the power of the courts to decide whether the accused is guilty or innocent of the crimes charged with. Judicial power consists of the power of the courts to try a person, decide the issues according to the judges' notions of justice, and sentence the accused to appropriate punishment. Transfers of judicial power to a forum which is not within the hierarchy of the judicial system, i.e. a *corum non judice*, have been held to be a usurpation of judicial power, and hence unconstitutional.

If a person is to be surrendered to the ICC under Article 89, his guilt or innocence is decided by the ICC, which is not a national judicial forum. If the duty to surrender is enacted in a law, that law would be unconstitutional. The constitutional provisions dealing with the judicial power and the hierarchy of courts require suitable amendments.

In some constitutional systems, such as in India, the power of judicial review cannot be curtailed by even constitutional amendment because of the Basic Features Doctrine, under which there is an implied limitation on the power to amend the constitution prohibiting any changes in its basic features.

Fundamental Liberties

Many constitutions have fundamental rights, fundamental liberties or bill of rights. They are constitutionally entrenched rights and freedoms of the people. Surrender of an alleged criminal to the ICC may result in the violation of some of the fundamental rights. Examples:

Right against Banishment: constitutions guarantee that citizens shall not be banished or excluded from the country. The freedom from "banishment and exclusion" in some cases is absolute and unconditional. Surrender of a citizen to the ICC and his eventual post conviction custody in a designated State Party under Article 103 violates the right against banishment.

Personal Liberty: many constitutions provide on such lines as "no person shall be deprived of life or personal liberty save in accordance with law". In some jurisdictions issues have arisen that the "law" has to be a "reasonable law" - issues of "substantive due process" and "procedural due process." It is not sufficient that there is a "law" for depriving a person of liberty. The law providing for deprivation of liberty should ensure that in the process of deprivation, the principles of natural justice are complied with. These principles require an unbiased tribunal, the opportunity to be heard, and the rule against testimonial compulsion or self-incrimination. The "law" is "*jus*" and not "*lex*."

An arrested person has specific rights. They include the right to be communicated with the grounds of arrest, the facts leading to the grounds, the right to consult and be defended by a lawyer of choice and the right not to be detained beyond certain hours like 24 hours except on the interception of an order by a magistrate. An unconstitutional detention entails release. In some systems the right to *habeas corpus* is itself a fundamental right.

The arrest of a person pursuant to a request for provisional arrest under Article 58 and for surrender involve the arrest, detention, the determination of the validity of the request, and the eventual physical delivery of the person concerned. All this can be done only in accordance with the law.

Even though the provisions for arrest or surrender essentially imply extradition, the extradition laws of a State Party may not cover them. The extradition laws provide for extradition to another State. While the ICC has "legal personality" and "legal capacity" under Article 4, it is not State. The distinction between "extradition" and "surrender" is clarified in Article 102. The extradition laws require to be amended to allow the surrender of a person to the ICC.

Whether a law which provides for surrender, possibly leading to expatriation, is a reasonable law requires close scrutiny.

Equality before the Law: constitutions guarantee equality before the law and equal protection of the law. Equality before the law ensures that in the conferment of rights or the subjection to liabilities there shall not be any discrimination. Equal protection of the law means that in the enforcement of rights or the subjection to liabilities there shall not be any invidious discrimination. What the concept of equality requires is that "like should be treated alike." Reasonable classification hence is not *per se* unconstitutional.

The tests for reasonable classification is:

a. Intelligible *differentia*: The classification must be founded on an intelligible *differentia* that distinguishes persons or things that are grouped together from those left outside the group;
b. Nexus: the classification must have a rational relationship to the object sought to be achieved by the legislation.

Paragraph 10 of the Preamble and Article 1 provide that the ICC is complementary to national criminal jurisdiction. A State Party may prosecute the alleged perpetrator of Article 5 crimes itself or surrender him/her to the ICC.

A State Party may decide to try "X" for Article 5 crimes. It may decide to surrender "Y" to the ICC. "X" may be sentenced to death because that State Party has not abolished the death penalty. "Y" will be given only a custodial sentence. A classification is, therefore, made between persons who are identically situated, namely, accused of similar crimes, yet exposed to different consequences. The classification is not founded on an intelligible *differentia* and the test is not satisfied and as such it will be unconstitutional. Provisions of the constitution relating to equality require to be amended.

D. Changes in other Laws

Criminal Laws

Article 5 crimes elaborated in Articles 6 to 8 are not crimes under the criminal laws of many countries. The conduct prohibited in the articles should be criminalised under the national laws.

Procedural Laws

Procedural laws deal with the hierarchy of criminal courts and their jurisdiction, process of arrest, trial, sentencing, appeals, etc. Since surrender to the ICC will result in a deviation from these procedures, they require changes.

Laws of Evidence

Laws relating to the evidence, namely, what facts are to be proved, what facts are not to be proved, how facts are proved, burden of proof, and who has the *onus probandi*, and rules relating to the admissibility of evidence, require to be adjusted with the Statute.

6. Article 98 Immunities

In discussing the measures for making the ICC effective one can not be oblivious to the efforts of the United States in inducing bilateral arrangements with State Parties that have ratified the Statute for granting immunity to American nationals from surrender to the ICC. A State Party that enters into such bilateral arrangement will be in a quandary because its obligations under an international convention, i.e. the Statute will be in conflict with its obligations under the bilateral agreement. On the analogy of the "*Aerial Incident at Lockerbie"*[40] it may be argued that obligations under a multinational convention prevail over bilateral agreements.

[40] 1992, ICJ, Report 3.

It may be noted that Article 120 of the Statute provides that no reservations may be made to the Statute. The Statute does not envisage any derogation either. In seeking immunity to American nationals from surrender to the ICC the United States is inducing the State Parties to circumvent the "non-reservation" clause under Article 120. The validity of such agreements procured under inducements may have to be examined with reference to Article 49 of the Vienna Convention on the Law of Treaties 1969 providing that *"If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty"*. Further, as and when trial of Article 5 crimes by the ICC become peremptory norm of general international law (*jus cogens*) because of the non-reservation clause, the validity of such bilateral immunity agreements may be examined under Article 53 of the Vienna Convention on the Law of Treaties providing that a *"treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of the States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".*

PANEL IV

LOOKING AT THE FUTURE OF INTERNATIONAL HUMANITARIAN LAW

25 YEARS OF THE TWO ADDITIONAL PROTOCOLS: THEIR IMPACT ON THE WAGING OF WAR; CHALLENGES FROM NEW TYPES OF ARMED CONFLICTS

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We are here today to celebrate a birthday – not a wake – and it is important that we do not forget that. The Protocols are now 25 years old. My task is to review the past assess the present and guess the future, a somewhat tall order in the time available. However, I am aided by the fact that previous speakers have already gone into the detailed provisions of the Articles contained in the Protocols themselves. I wish to content myself therefore with a more general overview, looked at, as is inevitable for a serving soldier, from a military rather than an academic perspective.

I will begin by looking at the conception and birth of the Protocols. I would suggest that their conception grew out of unfinished work from the drafting of the 1949 Conventions. These Conventions had been seen as seeking to resolve the problems arising from the Second World War but even by the time that they were being adopted, the world was beginning to change. The new United Nations was beginning to establish itself though its initial reaction to any attempts to regulate the conduct of warfare was ambivalent due to the primary aim of that organization to abolish war altogether as a means of political intercourse.

In addition, the balance of power was beginning to shift. In 1945, the United Nations consisted of 51 members and was dominated by the victorious Allied Powers from World War II. By 1968 when the Teheran Conference tasked the UN Secretary General to review again the law of armed conflict, there were already 126 members and that number was rising steadily as more former colonies achieved independence. There was a "de-westernization" of international law and self determination was now being seen as a positive right justifying the resort to armed struggle. The Allied Powers were now divided with the Cold War in full swing. Proxy wars were underway in which the Big Powers were ideologically bound to different parties.

It was in this new international climate that the ICRC, having taken back the reins, sought to achieve consensus on new rules drawing together Hague and Geneva law as well as seeking to widen the scope of international law to deal with the increasing scourge of non-international conflicts to which, at that time, only Common Article 3 applied.

[41] The views expressed are those of the author and do not necessarily reflect those of the Ministry of Defence or the United Kingdom Government.

The negotiations between 1974 and 1977 were long and laborious. As in all such negotiations, they involved changing alliances and political compromises. The increased number of States entitled to participate complicated the issue and the politics, particularly of national liberation, played a major role. The Vietnam war had just ended, the Gulf States were beginning to appreciate the strength of the oil weapon, and the 1967 war in the Middle East had led to new issues of occupation law and refugee law. The West itself was otherwise occupied with a new Labour Government in UK, still wrestling with the ghosts of a colonial past, and the US still recovering from not only Vietnam but also the Watergate affair which had cost it a President.

The attempts to extend the scope of the law relating to non-international armed conflict were also the subject of intense political lobbying. The ICRC would have liked parity across the board. Those States that supported "liberation struggles" were keen to ensure that such conflicts received the maximum international exposure and thus the maximum status for those involved. On the other hand, once power had been obtained, there was a marked reluctance to allow any status at all to other dissident movements. Independence was one thing, secession another. As soon as there was acceptance of the internationalized status of "liberation conflicts" under Article 1(4) of Additional Protocol I, there was a marked reluctance to go much further in relation to other forms of non-international armed conflict. Additional Protocol II was thus much weakened and the high threshold inserted made it hard to apply. Any government facing an insurgency of such intensity was already well on the way to losing power!

The birth of the Protocols was therefore at a time of considerable political turmoil and it would not have been surprising if the Protocols had found themselves victims of the turbulent times – but that was not so. The birth was not easy and the young child was, at first not strong but survive it did. I would suggest that this was for two main reasons. Firstly, there was a clear political advantage for those States who were supporting "liberation struggles" either ideologically or in real terms to sign up. Furthermore, those States not involved in conflict normally also could be relied upon to support what were seen as "progressive developments". The numbers game helped here and tended to disguise the fact that those countries most likely to be affected by the Protocols were not Parties whether they were major international powers or States affected by internal disturbances who did not wish to risk giving what they saw as extra credence to dissident groups. Of the five nuclear powers, only France took formal action and then only in respect of Additional Protocol II in 1984. All had severe reservations about some parts of the Protocols, particularly Protocol I, in relation to the issue of liberation struggles, the effect of Article 44 which some saw as a fatal weakening of the principle of distinction and the absolutist position seemingly taken in relation to protection of some civilian objects. However, the UK and the USA in particular were keen not to be seen to be isolationist and so a series of studies, both formal and informal, occurred designed to ascertain which parts of the Protocols – and in particular, Protocol I – reflected customary international law and were thus binding in any event. The

need for this was accentuated by the growing number of other NATO States who were becoming Parties such as Norway (1981), Denmark (1982), Belgium (1986), Italy (1986) and The Netherlands (1987).

However, the continuation of the Cold War meant that the effectiveness of the Protocols in action was not really tested as there were few occasions when they were applicable. In the Falklands Conflict, neither the UK nor Argentina were Parties.

The US position was reflective of its constitution. There were those who sought to draw out the good and isolate the bad, possibly with a view to dealing with the latter by way of reservation or declaratory statement. Others saw the underlying ethos as objectionable and thought that the bad could only be sorted by renegotiations. In 1985, Douglas Feith, then Deputy Assistant Secretary of Defense for Negotiations Policy wrote an article "Law in the Service of Terror – The Strange Case of the Additional Protocol". In that, he outlined many of the US objections in terms that would be strangely familiar today. That is hardly surprising as the same Douglas J. Feith is now the Under Secretary of Defense for Policy! President Reagan submitted both Protocols to the Senate in 1987 with a recommendation for ratification in respect of Protocol II. In relation to Additional Protocol I, he stated that it had "certain meritorious elements" but was "fundamentally and irreconcilably flawed".

The Protocols thus had a difficult childhood but survived. However, as they moved into adolescence, the world was about to change. Could they survive that change?

The change came with the end of the Cold War and had two main effects. Firstly, those Eastern European States, formally members of the Warsaw Pact were keen to show their democratic credentials. One way to do this was to ratify the Additional Protocols. Even Russia itself, then still the USSR, ratified – with reservations – in September 1989. At the same time, the nature of warfare was changing. No longer was the threat of a nuclear holocaust hanging over Europe. Conventional warfare was back on the agenda and the increasing access of international communications meant that conventional warfare would also be fought in the glare of publicity. The "CNN factor" was making its mark and this meant the need not just to win on the battlefield but also to win the "hearts and minds" campaign conducted on the television screens of the world. Legitimacy required the acceptance of humanitarian principles.

This came to the fore in the Second Gulf Conflict when the Coalition forces sought to evict Saddam Hussein from Kuwait. Iraq was not a party to the Protocols and so technically they did not apply to the conflict. However, many of the NATO States who did take part were Parties and others, like the UK, were beginning to consider again the issue of ratification which had gone somewhat on the backburner during the Cold War. Thus, even if not technically applicable, Additional Protocol I was like Banquo's ghost, very much the uninvited guest at the feast. In fact it turned out to be quite a welcome guest. The key areas in relation to the conduct of hostilities were found to be, for the most part, perfectly easy to apply and the

coalition forces found few interoperability problems between those States Parties to Additional Protocol I and who wished to apply it in full and those not Parties but who accepted that some reflected customary international law. In particular, from the point of view of targeting, the definition of military objective in Article 52 proved workable. It is fair to say that most of the areas of controversy did not arise in the Gulf Conflict and were thus not tested but the result in any event was to show to many that this was not the ogre that some feared.

The result of the Gulf Conflict was a greater move towards acceptance of Additional Protocol I and a belief that those areas of difficulty could be dealt with by way of interpretative statement. The UK ratified with such statements and was followed shortly after by France. Still the US sat on the sidelines but during the 90s, the rhetoric that had marked the rejectionist view in the decade before was much more muted. There was increasing recognition in Manuals and operational handbooks that much of the Protocol now reflected customary international law. However, despite growing pressure to ratify from both the international community and within the academic community in the US, there was still resistance both in the Pentagon and on the Hill. That resistance stood firm.

Another factor was now entering into play. The atrocities in Former Yugoslavia and Rwanda had led to the establishment of the two *ad hoc* Tribunals and the initiatives that were in due course to lead to the adoption of the Rome Statute for the International Criminal Court. The enforcement of the law in relation to Armed Conflict was back on the agenda and this too led to increased interest in the Additional Protocols. Both Yugoslavia itself (since 1979) and Rwanda (since 1984) were Parties to the Protocols and so these became the subject of detailed analysis within the jurisprudence of the Tribunals. In addition, it was necessary for the delegates in Rome to try to ascertain which, if any, parts of the Protocols were now customary international law.

The analysis conducted gave added strength to the substantive portions of Additional Protocol I. However, still the areas of real disagreement were only on the periphery and thus were not relevant to much of the discussion. However, at the risk of being controversial, I would state that Additional Protocol II did not come out of the analysis quite so well. This was a problem more of the threshold than the content. Many of the internal conflicts that were breaking out were outside the Additional Protocol II threshold. In particular, the problem of "failed states" was now high on the agenda. Here, different warring factions fought amongst themselves with the Government either powerless to intervene or, in some cases, non-existent.

In an attempt to get round this problem, the International Tribunal for the Former Yugoslavia propounded a new theory, namely that some of the general principles applicable in international armed conflict were now, as a matter of customary law, applicable in all forms of armed conflict, regardless of their designation. The problem was to identify which those principles were! The drafters of the Rome Statute

undertook that task and the result can be found in Article 8(2)(e) of the Statute in which the wording, applicable in conflicts not of an international character, is taken from the corresponding provisions in Article 8(2)(b) which deals with international armed conflict. The text actually bears a marked resemblance to Additional Protocol II and a belief has grown up that the Protocol was indeed the source of the text. It was not and the advantage of approaching the problem in this way was that the threshold problem could be overcome.

As you will know, there was great debate in Rome as to whether there should be any international criminal responsibility at all for acts committed in armed conflicts not of an international character. In the end, most States were prepared to accept Common Article 3 and a substantial majority was prepared to go further. Of those, some wanted to reintroduce the threshold to be found in Additional Protocol II but this was resisted and the final text – to be found in Article 8(2)(f) only requires that there be *"protracted armed conflict between governmental authorities and organized armed groups or between such groups".* The threshold for Additional Protocol II has thus been seriously weakened to the point where it now effectively correlates to that of Common Article 3. However, the price of that has been to rely on the extension of customary international law into armed conflicts of a non-international character rather than relying on the text of Additional Protocol II itself.

It follows from this that the importance of Additional Protocol II has been somewhat diminished but its effect is still real. The most important areas of Additional Protocol II are seen as customary law, having spread across from international armed conflict, and are those applicable in all armed conflicts. It is only those more obscure areas that remain limited in application by the threshold to be found in Article 1 of the Protocol. As more of these become accepted by the international community, the applicability of Additional Protocol II as a treaty text, thus limited by the threshold, will become less relevant. In time, it may be that the threshold will effectively become obsolete, having been bypassed by customary law!

However, whilst Additional Protocol II was weakening in influence, Additional Protocol I was growing in stature. The teenager was maturing into manhood. There was increasing acceptance of the underlying norms amongst the international community. The areas of difficulty, although still present in the text, were seen as less and less relevant. For example, the disagreements over the internationalization under Article 1(4) of *"armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations"* were seen as relics of a bygone age with the end of the colonial era, the collapse of the *apartheid* regime in South Africa and the growing moves towards reconciliation in the Middle East. As the Protocols came of age at 21, the future looked rosy for the world and for the future of the law of armed conflict.

However, any parent knows that problems do not end at the age of 21! More storms were about to break that would threaten not just the future of the Protocols themselves but the very foundations of the law of armed conflict. I refer of course to the events of September 11 last year and the unfortunately described "global war against terrorism". These terrible events and their consequences have once again brought to the fore some of those areas of Additional Protocol I that were controversial in 1977 and were increasingly thought to be of no practical relevance.

The primary difficulty arose over the definition of "combatant". Although this is often presented as mainly a problem over interpretation of Article 4 of the Third Geneva Convention, linked with Article 1 of the Hague Regulations of 1907, it spills over into Articles 43 to 45 of Additional Protocol I. The argument is put forward by Feith in his 1985 Article when he states that: *"[The Third Geneva Convention] does not bestow combatant status on just any fighter, guerrilla, terrorist, or irregular engaged in an international conflict. The conditions for qualification set forth in the [Third Geneva Convention] favour the interests of non-combatants above those of irregular forces"*.

That last sentence is perhaps crucial as it lies behind much of the US position today. He goes on to attack the provision in Article 44(3) which provides that: *"In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:*

a. during each military engagement, and

b. *during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate"*.

Feith considers that this provision "robbed civilian Peter to pay terrorist Paul" and is scathing even of the stance taken by the Head of the US Delegation, Ambassador Aldrich. He cites Gerald Draper who stated that: *"Once the (...) man with the bomb who is a civilian in all outward appearances but can blow you to smithereens as you pass him by, once you bring such a person within the framework of the protection given to regular armed combatants under article 4 of the Geneva Prisoners-of-War Convention, you make life for every single civilian hang upon a thread (...)"*.

These objections remain at the forefront of US thinking and indeed the UK on ratification of the Protocol made a statement to the effect that this provision could only apply in occupied territories or armed conflicts falling within Article 1(4). It should perhaps be contrasted with the wording of Article 44(7) which

states: "*This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular armed units of a Party to the Conflict"*.

However, all these provisions are based on the presumption that one is indeed dealing with "regular armed units". But what happens when you have a "failed state" situation where, perhaps, one faction has taken control of the organs of government but does not recognize the norms of international society? What of the situation where there are no "regular armed units" but rather groups of armed individuals, owing allegiance to their immediate superior in almost a throwback to the medieval feudal armies of Western Europe? How do such forces fit into the definitions contained in the Conventions and Protocols? Can you have a situation where none of the fighters on one side of an international armed conflict are entitled under existing definitions to combatant status? There are those that hold that view. However, I would suggest that if such is the law, then the law is nonsense and needs to be reinterpreted. However, do not think that these are extreme views held only by those who wish to destroy Additional Protocol I and much of the rest of the law of armed conflict with it. We in the UK have authority from our Privy Council dating from the Malaysian confrontation with Indonesia in the 1960s to the effect that even members of regular armed forces who conduct operations and/or are captured whilst wearing civilian clothes are not entitled to prisoner of war status.

The questions thrown up by the Afghanistan conflict are not straightforward and do require careful consideration. It would be very dangerous if this consideration was hampered by failure to recognize the *bona fides* of those taking part in the debate on both sides. Polarization of positions is never helpful in such debate. It would also be unfortunate if the debate on this one issue were to undermine the large amount of agreement that there is on the practical application of many other areas of Additional Protocol I as I have sought to show. The child has come of age and become a man.

The difficulties over the definition of combatant status have revealed an age old problem. Treaties in the field of the law of armed conflict tend to look backwards and then need to be reinterpreted in the light of new developments. It is not easy to reach international agreement on new treaties – particularly as the international community keeps expanding. Where possible, we should, I would suggest, stick with existing law and use the well-established principles of treaty interpretation, as laid down in the Vienna Convention and the jurisprudence of the ICJ, to react to unforeseen problems. At the end of the day, there is always the Martens clause!

The Protocols have now survived through a quarter of a century. From a somewhat sickly childhood they have developed into a major part of international law. However, their future will depend on how relevant they are to the modern day. I would like, therefore, to look into my crystal ball and see what other problems I see in the future as the international community develops.

There is increasing concern today on the development of what is sometimes called "asymmetric warfare". The growing disparity between the military strength of, in particular, the US but also the other developed nations has meant that those who wish to take on such States feel the need to adopt unconventional methods because they have no chance of winning in a conventional conflict. This problem is likely to increase and has lead to the increase in acts of terrorism culminating in the events of September 11 last year. How will the Protocols cope with this changing face of conflict?

I have already commented on how, through the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court, Additional Protocol II has been somewhat sidelined. However, the new face of conflict seems to be leading to a steady conjoining of the two types of conflict, international and those of a non-international character. In both Bosnia and Kosovo, as well as later in Afghanistan, we saw international armed conflicts superimposed on non-international conflicts. It is partly as a result of this that there is the growing movement towards merging the two sets of law.

In addition, the "global war against terrorism" is hard to categorize as it seems to include elements of law enforcement as well as international and non-international armed conflict. It may well be, therefore, that the trend towards common standards can work towards our advantage. It will, however, require some creative thinking.

And there lies the problem – one that the international community has so far sought to avoid but which may now have to be faced. In international armed conflict, the armed forces are given combatant status and thus cloaked in the immunity from domestic law that such status gives. This immunity is recognized by the grant of prisoner of war status if captured and the immunity from prosecution for legitimate acts of war. The situation is different in conflicts of a non-international character. There no such immunity is provided and there is thus an inequality between the opposing sides. Whatever the position under international law, dissident forces remain subject to the domestic law of the regime that they are fighting. If captured, they can be tried for offences under domestic law even if the conduct involved is legitimate under international law. Thus an attack on a military objective may be legitimate under international law but it remains a crime under domestic law. Even the detention of a member of the government forces is likely to be criminal, however well the member is treated.

The result of this is that there is little incentive to comply with international law if all it is saying is that *"You remain a criminal. However, if you insist on being a criminal, this is how to be a good criminal".* Arguments based on securing the legitimacy of the movement or seizing the moral high ground are unlikely to move the average rebel fighter who is more concerned about his own future.

How does one resolve this problem? One solution is to extend combatant status and eligibility for prisoner of war status. This line was effectively adopted in Article 1(4) of Additional Protocol I when "wars of national liberation" were brought within the scope of international conflicts. In practice, it has also occurred in cases where the level of violence has risen to the stage where the conflict is of a similar form and intensity to international armed conflict. The classic example, even if somewhat dated, is the American Civil War. However, there are other examples of where *de facto* prisoner of war camps were established either because the legal system could no longer cope or because there were political reasons to do so. In Algeria, the French authorities found that harsh penalties imposed on captured dissidents were counter-productive and merely meant that their own forces captured by dissident groups were subject to ill treatment and death. As a result, dissidents were held in what were in effect Prisoners of War camps rather than facing judicial procedures.

Many would argue that after a particular level of violence has been reached, there should be a "recognition of belligerency" bringing with it combatant status and the privileges that go with that status. Looked at from a purely humanitarian viewpoint there is much to support that. However, there are two major objections. Firstly, it would act as an incentive to dissident forces to increase the level of violence in order to cross the threshold. Secondly, it would involve the State authorities in an acknowledgement that the dissidents had passed outside the jurisdiction of domestic law. International law is the law of States, drafted by States and in the same way that turkeys will not vote for Christmas, States will not vote for anything that is likely to reduce their own control over their own territory. Article 1(4) was different. There the States who supported it were, for the most part, States that had themselves "thrown off the colonial yoke". However, they were quick to ensure that, once that "yoke" had been thrown off, secessionist movements that might threaten the new government could not take advantage of the same provisions.

What is the likely answer? I do not know. I notice that there is an increasing tendency to use the term "combatant" in conflicts of a non-international character and it may be that this, together with the growing use of human rights law to control the treatment of captured personnel, will lead to a situation where there is an acceptance by State authorities that the use of domestic law to control armed conflicts of a particular intensity is counter-productive and another way must, at least in practice, be found. This was the problem that faced the French. However, the other side to this is the use of a strict definition of "combatant" in international conflicts, thus removing many of the participants from that status. If this were carried to extremes, one could have conflicts where all the participants were "unlawful belligerents"!

Some would argue that this should indeed be so. War is illegal under the UN Charter and anybody who partakes in such activity is automatically tainted by the illegality of the enterprise on which he is engaged. However, that is to mix the *ius ad bellum* and *ius in bello* in a manner that is both unacceptable and dangerous. The *ius in bello* is based on the premise that force is to be used and seeks to control that use of

force. It is, in my view, an inappropriate use of that branch of law to seek to use it to abolish conflict. Indeed, it undermines its very *raison d'être*.

The "global war against terrorism" gives this an extra twist. Is this a "war" and if so what law applies? What is the status of those involved? There is an understandable reluctance to give members of organizations such as Al-Qaeda any status other than that of common criminals. However, by recognizing a "war" and accepting that our own forces are "combatants", we find ourselves with the strange position whereby all members of one side to the conflict are almost by definition illegal belligerents, as I have already commented.

Equally important are the rules relating to the conduct of hostilities. The present rules are looked at as unrealistic by those involved in asymmetric warfare. If the participants are "unlawful belligerents" in any event, can there be anything that is a "legitimate target" for such belligerents. If not, then what incentive is there for such belligerents to distinguish between military objectives and civilian objects, between combatants and non-combatants? This is a variation of the philosophical conflict between the legitimacy of actions under international law when the same conduct is illegitimate under domestic law. At least in those cases, there is the "carrot" that actions taken in accordance with international law will not bring international condemnation and thus the organization has some incentive to compel its members to act in accordance with the international rules. Somehow, we must find a similar incentive for those involved in asymmetric warfare.

And so the Protocols march into their second quarter of a century. Their place in history is assured as, I think, is their future. They have not fulfilled all the hopes of their drafters but neither have they fulfilled all the fears of their detractors. They have their faults – they were after all drafted by human beings, and diplomats at that! However, they have proved effective and above all workable when interpreted sensibly in accordance with humanitarian principles and military reality.

The challenge now is to take the principles that have been increasingly accepted by the international community and find ways of applying them to the new situations that face the world today. Furthermore, it will be necessary to find ways of encouraging compliance. Enforcement, whether by national or international courts, is certainly part of the answer but only part. Somehow, we must also look at developing positive incentives so that those involved are convinced that it is in the interests of themselves and their cause to comply with international norms. By labeling those who engage in asymmetric warfare as criminals and international outlaws, we actually remove any incentive for them to conform. The challenge therefore before us is to bring such people within the international fold to the extent that they are encouraged to comply with "the laws of humanity and the dictates of the public conscience" without seeming to legitimize anarchy, rebellion or terrorism in any form.

I have posed the challenge. I will not be so presumptive as to seek to supply the answer.

THE AFRICAN PERSPECTIVE

Brigadier T. K. GITHIORA

Kenyan Armed Forces

1. The changed strategic world order has called for new military thinking and practice. Military power and military missions are now being determined on new bases as to value and dimensions for application. The result is a progressive change of military roles to war prevention, intervention, defence involving peacekeeping, fighting against the strategic use of terror and maintaining or restoring order often in joint operations with civil police authorities. This change is taking place amidst pressing social and economic issues and fears of man-made disasters.

2. The military person, traditionally a warrior, is trained for combat to prepare him to be aggressive and decisive. Any imperfect knowledge of the principles and basic rules of International Humanitarian Law or inappropriate deployments which disregard the need to adjust general operational thinking and endstate requirements in these changed times will result in failure and general demoralisation.

3. It is often the case that a weakness in exposure of International Humanitarian Law training goes together with a low awareness of the significance of human rights law and standards including ethical behaviour during armed conflict. These shortcomings lead to serious consequences of unlimited violence and destruction especially when the enemy is the irregular fighter or child soldier: undisciplined or drugged driven by commercial rewards or by ethnic, religious or tribal hatreds. The challenges increase when the situation is one of anarchy where both the rule of law and good governance are inexistent.

In this scenario the rationale for restraint contained in Article 35 of Additional Protocol I, that during armed conflict violence is permitted only to the extent it serves the purpose of subduing the enemy; that no suffering, injury, destruction or damage is to be inflicted or caused for personal reasons or for punishment, is hardly respected.

4. Regular military forces with their traditions of good order, discipline and *esprit de corps* recognise the professional obligations of planning training and conducting combat operations in accordance with the law easily enough. Indeed, enforcing International Humanitarian Law training through their regular training disciplinary mechanisms has been easily achievable. It is the other kind of fighter, irregular unpredictable, an outlaw, often with fast-changing loyalties who is the object of so much concern to the task of promoting respect for International Humanitarian Law. This fighter is also the reason for the cynicism and scepticism

with which International Humanitarian Law is regarded by many who experience the extreme brutality of combatants in the many non-international armed conflicts in Africa.

5. No-one seriously disputes the good intentions or expertise behind the basic instruments of International Humanitarian Law – the four Geneva Conventions of 1949, the Additional Protocols of 1977 or indeed the other great documents containing the basic obligations of States to respect humanity in armed conflict; these include the Genocide Conventions of 1948 and the 1951 Refugee Convention. It is the failure to control brutality and cruelty, which the Conventions were meant to do, which is depressing. Africa has a long list of States in which these basic principles of the Geneva Conventions have been trashed. The 1994 genocide in Rwanda was a major test of the 1948 Genocide Convention.

6. International Humanitarian Law is valid in Africa and its problems arise chiefly from the neglect on the part of States and intergovernmental organisations to disseminate, enforce and nurture it. This latter notion involves constant affirmation of International Humanitarian Law relevant to conflict situations, genocide and refugee crises as they occur. Efforts would continue to carefully examine how International Humanitarian Law is to be applied and made relevant to the situations as they develop. This nurturing task has had to be undertaken frequently by non-African actors and the results have been slow in coming.

7. The lack of state monopoly of violence in some parts of Africa has seen the privatisation of violence through the use of militias and armed units engaging in commercial activities as an integral part of their means to support themselves. Other non-state actors complicating conflict zones include multi-national companies and other multi-lateral conglomerates and organisations These categories of players do not find International Humanitarian Law well-suited to their demands. The vacuum is often filled by codes of conduct which cannot provide humanitarian protections and rights that International Humanitarian Law contains either with regard to the protection of the civilian population, the proper conduct of operations or repression of International Humanitarian Law violations.

8. One aspect that the Additional Protocols might address afresh is war-created famine. The Protocols contain measures prohibiting the destruction of items necessary for the survival of the civilian population. It is acts which have a specific aim of creating starvation that are prohibited and there is no prohibition of prevention of activities necessary for the survival of the civilian population. In many instances in Africa civilians must be able to move to go to the market or tend livestock. When prohibitions on movement (as a method of warfare in order to create famine), are not prohibited then the Protocols contain an important shortcoming. The definition of "civilian" requires re-examination. Many fighting forces are closely integrated with the civilian population and there is need to accept the notion of different categories of "innocence" among civilians; for example, an infant is more innocent than the armed political cadre, man or woman. This is bound to help develop principles for the provision of relief during armed conflict.

9. It is argued often that the legal sophistication of much of International Humanitarian Law reduces its accessibility to many who actually fight the continent's wars. This, however, overlooks the reality that International Humanitarian Law has been taught among many of those fighters mostly during their service in the conventional national forces. Many of the fighters also have previous access to education and religious teaching capable of inculcating a system of ethical values closely related to the basic principles of International Humanitarian Law. It is, therefore, largely the failure to respect and implement International Humanitarian Law that is to blame for the violations characterising African conflicts and not lack of knowledge of International Humanitarian Law.

10. The task has thus been one of increasing International Humanitarian Law training in the continent's armed forces. Non-governmental humanitarian organisations and the UN itself have increasingly given support for such training among irregular forces and the general public. Many countries have taken advantage of International Humanitarian Law training support offered at the International Institute of Humanitarian Law (IIHL) in Sanremo and other Institutions. The message at these training programmes has been to build International Humanitarian Law into all levels of military training and all operations. Judging by my experience as a Course Director at the IIHL military courses it seems that the nurturing of International Humanitarian Law that has been lacking for a long time in the African situation has been revived by the military. This is being complemented by a well co-ordinated effort worldwide to encourage national implementation of International Humanitarian Law through domestication of Conventions by means of national legislation together with the crucial measure of establishment of National International Humanitarian Law Committees. The International Committee of the Red Cross has facilitated this through its Advisory services and expert legal advisers.

11. There is work to be done to ensure that the obvious benefits of the Geneva Conventions and Additional Protocols are seen in full bloom in Africa. The Continent's armed forces have kept pace with the rest of the world through their training programmes to ensure that International Humanitarian Law is respected and practised in all military activities. The weaknesses in respect for International Humanitarian Law in parts of Africa have been caused by too much concentration on the developmental struggle at the expense of International Humanitarian Law dissemination. There is, therefore, hope for International Humanitarian Law as awareness of its relevance increases in the changing circumstances of the world. African government must of course engage actively in dissemination enforcement and development of International Humanitarian Law. Their military organisations have the capacity and interest in spearheading the effort.

INTERNATIONAL HUMANITARIAN LAW AFTER 11 SEPTEMBER 2001

Summary of a panel intervention

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In the public discussion about the status of the persons detained by the United States in Guantánamo Bay, some people expressed the fear that international humanitarian law may end up as one of the collateral victims of the attacks of 11 September 2001. Today, one year after the events, is an appropriate time to nuance that earlier opinion through a larger assessment of how International Humanitarian Law survived that day which has been defined by many as a turning point in international relations. At the outset it may, however, be appropriate to underline that nothing can justify those attacks. Whether International Humanitarian Law formally applies or not, they are contrary to the very basics of International Humanitarian Law and Human Rights Law. It is prohibited to attack civilians and even if the Pentagon might be considered a military objective, it may obviously not be attacked by such a perfidious act as hijacked passenger planes.

The separation between *ius ad bellum* and *ius in bello* survived

Al-Qaeda tried to justify the attacks with all kinds of grievances against the U.S. and its policy. Even those States which share some of that criticism, did not accept it, however, as justification for the attacks. The U.S. reaction to the attacks, its "war against terrorism", is felt by Americans and their leadership as a particularly "just war". For the duration of one day it was even called by the U.S. President "indefinite justice". President Bush continues to label the Parties of that "war" in terms of "good" and "evil". In such a situation, the risk is always high that those who fight the "just war" are not prepared to fully apply International Humanitarian Law, the same law as their enemies should. Fighting for a better cause, they want to have more rights and less obligations than ordinary belligerents. This is a deadly threat for International Humanitarian Law. For practical, policy, and humanitarian reasons, this law, part of the *ius in bello* has to be, in every given conflict, the same for both belligerents: the one resorting lawfully to force and the one resorting unlawfully, in violation of the *ius ad bellum*, to force. From a practical point of view, the respect of International Humanitarian Law could otherwise not be obtained, as, at least between the belligerents, it is always controversial which belligerent is resorting to force in conformity with the *ius ad bellum* and which violates the *ius contra bellum*. In addition, from a humanitarian point of view, the victims of the conflict on both sides need the same protection, and they are not necessarily responsible for the violation of the *ius ad bellum* committed by "their" party. In addition, even if a party commits violations of the *ius in bello*, this cannot absolve its enemy from respecting *ius in bello*.

Once the U.S. had to apply International Humanitarian Law to the war in Afghanistan, some internationalists claimed that the Geneva Conventions were negotiated for a different kind of war. After some hesitations within and some rhetoric by the U.S. administration, President Bush however decided that those Conventions applied, at least to the Taliban. This confirmation that International Humanitarian Law applies even to the war against evil is welcome and important.

Do we need a law of transnational conflicts against non-state actors?

The attacks against New York and Washington were certainly crimes, some qualified them as crimes against humanity. The very idea of International Humanitarian Law excludes any possibility to justify the deliberate killing of 3000 civilians, for whatever cause, to redress whatever injustice. Formally, International Humanitarian Law, however, only applied to armed conflicts. Some doubts should be permitted whether the attacks, though qualified by the U.S. as "acts of war", constituted an armed conflict. Even if they did, the question arises whether they were international or non-international armed conflicts, and for what purpose it could be useful to apply, in addition to criminal law, International Humanitarian Law to those attacks. One may doubt whether this could deter organizations like Al-Qaeda.

The U.S. reaction was at the first stage an international armed conflict launched against Afghanistan represented by the Taliban as the *de facto* government of that country. It is an important victory for International Humanitarian Law that the U.S. to my knowledge never claimed that the conflict in Afghanistan was not subject to International Humanitarian Law of international armed conflicts, invoking that they were called to intervene by the government they considered as legitimate, that of the Northern Alliance.

Beyond the war in Afghanistan, the U.S. wages a war against Al-Qaeda world-wide and even beyond that against terrorism and evil in general. For International Humanitarian Law, armed conflicts are directed against States or armed groups within States, not against philosophical categories, nor against social or criminal phenomena. Al-Qaeda is an armed group, but not a State. As all parts of the globe except Antarctica and the High Seas belong to a State, the conflict of the U.S. against Al-Qaeda is necessarily taking place on the territory of a State. According to the letter of International Humanitarian Law, as long as the territorial State concerned does not oppose U.S. plans, only the law of non-international armed conflict could apply, but the latter appears in certain respects as inappropriate because it was made for conflicts occurring within a country, mainly between the government and rebels. It may be that a law specific to such transnational conflicts between a State and a global non-State actor could be elaborated. It is, however, doubtful whether such a law would be acceptable for the U.S. and whether it would be respected by future States involved in such conflicts, as it should necessarily also give some rights to the non-State actor involved. It is even more doubtful how such a new law could bind and whether it would be respected by groups like Al-Qaeda.

Guantánamo: The protection of civilians and combatants who have fallen into the power of the enemy

Under International Humanitarian Law, as it stands since 1949 (adoption of the four Geneva Conventions), everyone affected by an international armed conflict is either a combatant or a civilian. Civilians (unlawfully) taking a direct part in hostilities, lose their protection as civilians for as long as they participate. Once fallen into the power of the enemy, every person is, however, either a prisoner of war or a protected civilian. Prisoners of war may be interned without any judicial decision, civilians only for imperative security reasons or in view of a trial, e.g. for war crimes or unlawful participation in hostilities. In case of doubt, a person having committed a belligerent act is a prisoner of war. Hence, Taliban and possibly some Al-Qaeda fighters captured by U.S. and coalition forces are in principle and until individual decision to the contrary by a competent tribunal, prisoners of war protected by the Third Geneva Convention. Its provisions are not inappropriate for the treatment of such persons.

All persons who have been arrested by the U.S. in Afghanistan and are not combatants, are protected civilians under the Fourth Geneva Convention. Such persons may be tried by the U.S. or the Afghan Government, but they may not be held in Guantánamo, as civilians may never be deported out of an occupied territory.

The U.S. presently claims that the people they detain in Guantánamo are neither civilians nor combatants, but unlawful combatants. Firstly, it might be dangerous to revive such an easy escape category for detaining powers. Secondly, it is not clear how the U.S. can determine by ways other than individual decisions that the Taliban held in Guantánamo did not comply with the requirements of International Humanitarian Law for combatants (e.g. that they did not distinguish themselves sufficiently from the civilian population). Thirdly, one wonders how the U.S. will avoid or justify indefinite detention without trial, which is not only incompatible with any legal standard we can imagine, but also the most difficult thing to handle for anyone in charge of a place of detention. In my view, the example of those held in Guantánamo proves, through a violation, that the complimentary system provided for by Third and Fourth Geneva Conventions is the only viable solution to deal with enemies captured during an international armed conflict.

Must the concept of military objectives be revised?

Neither the attacks on the World Trade Centre, nor the U.S. hostilities against Afghanistan raised questions on whether the concept of military objectives, as defined in Protocol I of 1977, had to be updated. In the Kosovo war, some high officials claimed that a radio station was a legitimate military objective because it supported the propaganda of a regime. NATO also destroyed bridges, although it was unclear how they could effectively contribute to military action in a war fought hundreds of kilometres away and in the absence of any ground war. In Afghanistan, civilians were killed and non-military objectives were attacked, but the U.S. either admitted a mistake or the facts were controversial and the law, therefore, safe.

Are States paying lip service to International Humanitarian Law strengthening or weakening it?

The previous remark about the concept of military objectives leads to a more general observation. States, nowadays, do not so much contest the rules of International Humanitarian Law and call for their revision, but rather they deny facts which might constitute a violation or adopt very innovative interpretations of the existing law. On the face, this may seem to strengthen the law, which deals with the philosophical category of "Sollen" (what should be) and not with that of "Sein" (what is). Others may, however, consider that it would be preferable that States openly declare which rules in their view do not correspond to their needs and plans. Such transparency instead of hypocrisy would permit a discussion about the appropriateness of the law and could lead to the acceptance of a new, better law which would be better respected.

A reversal of alliances of some specialists of International Humanitarian Law

A final remark is directed at the lawyers specialized in International Humanitarian Law. Some of them have changed their basic theory of international law following the September 11 attacks. Previously, they supported views of Western governments with rather positivist arguments, based on the letter of existing treaties, while NGO activists pointed at the need to see the law in context, to adapt it rapidly and constantly to new needs, to interpret it according to the underlying values – or what they claimed to be the underlying values. Today, it is rather the pro-government lawyers who adopt a flexible approach to law, who see treaty rules in a "constitutional framework" and point out that the law must correspond to the needs of the practitioners. One may simply wonder whether we are prepared to include among those "practitioners" of contemporary wars the needs of whom we have to take into account, not only governments and regular armed forces, but also Palestinian suicide bombers and subsistence fighters in Africa, who also practice armed conflicts.

As we are commemorating the 25 years of the Additional Protocols, we should remember how difficult it was to adopt this last universal attempt to adapt the law to new realities and that even today not everyone has accepted them, even among those who call for a new revision of International Humanitarian Law.

Conclusion

In conclusion, as all law, International Humanitarian Law can and must adapt to new developments. No law can, however, be adapted in every case of application to the result desired by those (or some of those) involved. As part of international law, and pending a Copernican revolution of the Westphalian system, International Humanitarian Law must, in addition, be the same for all States.

L'INTÉRÊT DES PROTOCOLES ADDITIONNELS AUJOURD'HUI

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Les Protocoles Additionnels sont nés de la convergence de deux préoccupations :

- d'une part, les pays du Tiers Monde qui ont accédé à l'indépendance après 1949 ressentaient le fait d'être liés par un ordre juridique à l'élaboration duquel ils n'avaient pas participé et qui, à leur avis, ne reflétait pas suffisamment leurs aspirations et les formes de lutte auxquelles la précarité de leurs moyens militaires les acculait ;

- d'autre part, tandis que les règles protégeant les victimes de la guerre - blessés et malades des armées, naufragés, prisonniers de guerre et victimes civiles de la guerre - avaient été révisées de fond en comble par la Conférence diplomatique de 1949 pour tenir compte des expériences de la Seconde Guerre mondiale, les règles relatives à la conduite des hostilités étaient très largement restées en l'état où la Seconde Conférence internationale de la Paix, réunie à La Haye en 1907, les avait laissées. Un quart de siècle après Hiroshima, les règles relatives aux bombardements aériens dataient encore de l'époque des dirigeables.

Fallait-il porter la cognée sur les Conventions de Genève? La plus élémentaire prudence commandait de s'en abstenir. On opta donc pour la forme de Protocoles Additionnels qui permettait de développer le droit, tout en préservant les acquis des Conventions de 1949 et de tous les traités antérieurs. Retenons cette leçon, à l'heure où l'on évoque la perspective d'une nouvelle mise à jour du droit international humanitaire.

Les Protocoles Additionnels ont-ils répondu aux attentes de la communauté internationale ? Ont-ils surtout répondu aux besoins de protection humanitaire des victimes des conflits qui ont endeuillé le monde tout au long du quart de siècle qui a suivi leur adoption ?

Il est facile de mettre le doigt sur les lacunes des Protocoles Additionnels et sur les ambiguïtées de certaines rédactions. Nous laisserons ce soin à d'autres, car l'essentiel, à notre avis, n'est pas là.

En effet, en adaptant le droit international humanitaire aux conflits de notre temps, en mettant à jour les règles relatives à la conduite des hostilités et surtout en restaurant le principe fondamental de la distinction entre combattants et personnes civiles, de même qu'entre objectifs militaires et objets civils, les Protocoles Additionnels ont bien servi l'humanité. En matière de conduite des hostilités, ils ont posé des règles qui ont été invoquées lors de pratiquement tous les conflits survenus depuis 1977, même lorsque ces règles n'étaient pas formellement applicables parce que les belligérants concernés n'étaient pas parties aux Protocoles Additionnels, comme ce fut le cas lors de la guerre du Golfe au printemps 1991.

Les Protocoles Additionnels ont également contribué à la cristallisation de règles coutumières. L'étude sur le droit international humanitaire coutumier, à laquelle le Comité International de la Croix-Rouge met actuellement la dernière main avec le concours d'experts particulièrement qualifiés provenant de différentes parties du monde, a en effet démontré que, dans la mesure où les dispositions des Protocoles Additionnels qui ont trait à la conduite des hostilités n'étaient pas la codification de règles coutumières préexistantes, elles ont permis la consolidation de règles coutumières, de telle sorte que cet important chapitre des Protocoles Additionnels s'impose aujourd'hui à tous les États et à tous les belligérants, qu'ils aient ou non adhéré aux Protocoles Additionnels. Cette étude a également démontré que les règles du Protocole I qui régissent la conduite des hostilités s'appliquent à tous les conflits armés, internationaux et non internationaux.

Enfin, les Protocoles Additionnels ont donné un point d'appui à un développement remarquable de l'action humanitaire. Jamais le sort des victimes de la guerre n'a suscité un tel intérêt; jamais autant d'efforts n'ont été déployés pour leur venir en aide.

En dépit des graves violations qui ont été commises et qu'il serait vain de vouloir passer sous silence, le bilan des Protocoles Additionnels est donc largement positif. On comprend dès lors que 160 États aient adhéré au Protocole I et 153 au Protocole II. Ces chiffres continuent à croître, de telle sorte que l'on peut espérer que les Protocoles Additionnels finiront par atteindre une universalité comparable à celle des Conventions de Genève.

Bilan positif, donc, mais qui ne saurait justifier une attitude triomphaliste, car dans le domaine humanitaire, il n'y a jamais de victoire définitive, ni dispenser d'une réflexion tournée vers l'avenir.

En effet, à l'heure même où nous célébrons le 25e anniversaire des Protocoles Additionnels, leur pertinence et celle des Conventions de Genève sont remises en cause par de nouvelles formes de conflits.

Le monde a retenu son souffle lors des attentats du 11 septembre 2001 contre New York et Washington, et l'onde de choc provoquée par ces événements est loin d'être retombée. Nul doute que les conséquences de ces événements continueront à se faire sentir durant des mois et des années, et qu'elles détermineront un nouveau rapport de force sur l'échiquier des relations internationales.

Les attentats du 11 septembre et la guerre en Afghanistan qui en fut la conséquence immédiate ont ranimé l'intérêt pour le droit international humanitaire, mais ils ont aussi soulevé des questions délicates quant à l'applicabilité de ce droit dans la lutte contre une organisation terroriste disposant de ramifications internationales.

Disons-le tout net : le droit international humanitaire, qui est fondé sur le principe de l'immunité des populations civiles contre les effets des hostilités et qui impose aux belligérants de respecter en tout temps la distinction entre combattants et personnes civiles ainsi qu'entre objectifs militaires et objets civils condamne sans équivoque toute forme d'attaque terroriste. En outre, les Protocoles Additionnels condamnent expressément *"les actes ou menaces de violence dont le but principal est de répandre la terreur parmi la population civile"*, (article 51, para. 2, du Protocole I; article 13, para. 2, du Protocole II). Il n'y a donc aucune ambiguïté sur ce point.

À la suite des attentats du 11 septembre, des voix se sont élevées, aux États-Unis et ailleurs, pour déclarer que le droit international humanitaire ne s'appliquait pas à ce qu'on a appelé "la guerre contre le terrorisme". On a aussi prétendu que le droit humanitaire n'était pas adapté à cette nouvelle forme de conflit, voire qu'il faisait obstacle à la lutte contre le terrorisme.

Il est évident que la lutte contre le terrorisme prend des formes diverses: action policière, poursuites judiciaires, action diplomatique, gel ou séquestre des avoirs liés au terrorisme, etc. Le droit international humanitaire ne s'applique pas à ces formes de lutte contre le terrorisme, qui sont régies par d'autres branches du droit.

En revanche, dès lors que les États qui sont confrontés aux nouvelles formes de terrorisme international ont recours pour le combattre à des moyens militaires, comme ce fut le cas en Afghanistan à partir du 7 octobre dernier, ces opérations sont régies par le droit international humanitaire. Ce n'est pas la

nature de l'agression initiale qui est ici déterminante mais bien les moyens mis en œuvre par les États confrontés au terrorisme. Telle est la position que le Comité International de la Croix-Rouge a adoptée dans un mémorandum remis aux États-Unis, au Royaume-Uni et en Afghanistan le 5 octobre dernier, pour rappeler les principales dispositions du droit applicable en cas de conflit armé, notamment les dispositions relatives à la conduite des hostilités. L'applicabilité du droit humanitaire n'a pas été contestée, même si des divergences sont apparues quant au statut des personnes capturées en Afghanistan et transférées à Guantánamo.

Cela dit, nous ne pouvons pas ignorer que la lutte contre le terrorisme soulève des problèmes nouveaux auxquels des solutions devront être trouvées. Il n'est pas surprenant dans ces conditions que l'on ait proposé de réviser une nouvelle fois le droit humanitaire pour l'adapter à la lutte contre le terrorisme, dont on affirme qu'elle sera le moteur des conflits de demain.

Le Comité International de la Croix-Rouge, pour sa part, n'a encore été saisi d'aucune proposition concrète de révision des Conventions de Genève, et n'a encore pris aucune position sur ce point.

On peut toutefois esquisser quelques pistes de réflexion :

En ce qui concerne la méthodologie, tout d'abord, il faut s'interdire de réagir aux seuls événements du 11 septembre et à leurs suites directes. Dans l'ordre juridique international comme dans l'ordre juridique interne, il faut se garder d'établir des règles en réponse à un événement particulier. Ce serait le plus sur moyen de poser des règles qui seraient dépassées avant même d'entrer en vigueur. Nous savons en effet que l'histoire ne se répète pas. Il convient donc d'analyser les conflits de notre temps afin d'identifier les problèmes qui se sont posés de façon récurrente et ceux qui ne se sont posés qu'une seule fois; il faut légiférer en fonction des premiers et non pas des seconds, quelle que soit leur gravité.

En second lieu, il convient d'identifier nettement les causes des disfonctionnements. Si des besoins de protection n'ont pas été satisfaits, si des atrocités ont été commises, est-ce en raison du fait que les règles qui auraient dû protéger les victimes étaient inadéquates ou lacunaires, ou est-ce en raison du fait que ces règles n'ont pas été respectées? Dans le premier cas, la réponse passe sans doute par une nouvelle codification, visant à combler les lacunes qui ont été constatées. Dans le second cas, la réponse est probablement de nature diplomatique ou politique, car ce n'est pas en ajoutant à des règles qui ont été violées de nouvelles règles qui ne le seront pas moins que l'on assurera la protection des victimes de la guerre.

Quant au fond, maintenant, on peut identifier plusieurs pistes de réflexion :

La première concerne la distinction entre droit applicable aux conflits internationaux et droit applicable aux conflits internes. Comme vous le savez, les Conventions de Genève et le premier Protocole Additionnel ne s'appliquent de plein droit qu'aux conflits armés internationaux. Seul l'Article 3, commun aux quatre Conventions de Genève et, selon le niveau d'organisation du parti insurgé, le second Protocole Additionnel s'appliquent de plein droit aux conflits armés non-internationaux. Dans les faits, cependant, on est de plus en plus fréquemment confronté à des situations où conflit interne et conflit international se superposent. D'éminents commentateurs ont donc proposé d'abolir tout simplement la distinction entre conflits armés internationaux et conflits internes.

La proposition est séduisante. On doit toutefois garder à l'esprit que la coexistence des deux régimes juridiques n'est rien d'autre que l'expression du concept de souveraineté étatique dans le cadre du droit international humanitaire. On peut douter que les États soient prêts à y renoncer, même si l'étude sur le droit humanitaire coutumier, à laquelle le Comité International de la Croix-Rouge met actuellement la dernière main a permis de démonter que, dans le domaine de la conduite des hostilités tout au moins, les États appliquaient de fait les mêmes règles en cas de conflits internationals et en cas de conflit interne.

Une seconde piste de réflexion - à notre avis plus prometteuse - viserait à atténuer l'écart entre droit applicable aux conflits internationaux et droit applicable aux conflits interns en développant le droit applicable à ces conflits. La récente décision d'étendre du champ d'application de la Convention de 1980 sur les armes conventionnelles montre que cette démarche est aujourd'hui possible. Cet événement nous indique une direction prometteuse, c'est peut-être celle que nous devons suivre dans d'autres domaines. Dans cette perspective, je ne saurais assez souligner l'importance de la Convention révisée et je tiens à renouveler mes félicitations à l'adresse du Royaume-Uni et du Canada qui ont d'ores et déjà ratifié la Convention révisée; je ne saurais assez recommander aux autres gouvernements de suivre cet exemple. Que tous ceux d'entre vous qui ont des contacts ou une influence en profitent pour attirer l'attention des politiciens et des fonctionnaires concernés sur l'importance de ratifier le texte révisé.

Une troisième piste de réflexion, enfin, viserait l'adoption d'un ensemble de dispositions minimales qui seraient applicables à toutes les situations de conflits armés, quelle qu'en soit la qualification. Il s'agirait en quelque sorte d'un filet de sécurité de la protection humanitaire qui permettrait de recueillir ceux qui, pour quelque raison que ce soit, ne bénéficieraient pas d'un statut plus favorable.

On constate trop souvent, en effet, que des victimes de la guerre se voient refuser le bénéfice de la protection conventionnelle, que ce soit pour des motifs tirés de la qualification du conflit ou de leur situation personnelle. Elles se trouvent dès lors livrées à l'arbitraire de la puissance ennemie.

On m'objectera que l'article 75 du Protocole I a précisément pour objet d'instituer des garanties fondamentales pour tous ceux qui ne bénéficient pas d'un statut plus favorable. Toutefois, étant partie du Protocole I, cet article ne s'applique de plein droit qu'aux conflits armés internationaux, alors que c'est le plus souvent dans les autres situations qu'un filet de sécurité de la protection humanitaire serait le plus nécessaire. Il s'agirait donc d'instituer des garanties fondamentales, qui pourraient être calquées sur celles que prévoit l'article 75, mais qui pourraient être invoquées dans tous les cas de conflits armés.

Toutefois, c'est surtout vers les mécanismes de mise en œuvre qu'il faut orienter les réflexions si l'on veut améliorer véritablement le sort des victimes de la guerre. L'expérience montre en effet que dans l'immense majorité des conflits récents, les plus grandes souffrances ont été la conséquence des violations des règles existantes et non pas du caractère lacunaire de ces règles.

C'est très largement dans le domaine des mesures préventives, d'une part, et dans celui de la répression des crimes de guerre, de l'autre, qu'ont porté l'essentiel des efforts déployés ces dernières années, et l'on ne saurait sous-estimer le chemin parcouru.

Toutefois, des mesures supplémentaires sont nécessaires :

Les conflits récents ont montré l'importance des mesures de mise en œuvre prises en temps de paix déjà, notamment en ce qui concerne la réception du droit international humanitaire dans la législation nationale, d'une part, et l'instruction des troupes et des populations de l'autre. Ces mesures vont revêtir une importance accrue du fait de la prochaine création de la Cour Pénale Internationale. Or, de trop nombreux États rechignent à s'acquitter de leurs obligations dans ce domaine. Une forme d'encouragement, voire de supervision à l'échelle internationale, serait peut-être nécessaire.

Mais ce sont surtout les mesures de contrôle continu qu'il faudrait développer.

Deux possibilités peuvent ici être envisagées :

- soit de renforcer les compétences de l'institution qui existe déjà et qui est déjà investie d'un mandat dans ce domaine - le Comité International de la Croix-Rouge - par exemple, en lui garantissant beaucoup plus largement que ne le fait le droit en vigueur, l'accès aux victimes;

- soit de créer un mécanisme nouveau, par exemple un corps d'observateurs du respect du droit international humanitaire, qui seraient chargés de veiller sur une base continue au respect de ce droit et de faire rapport sur d'éventuelles violations. Pour mémoire, telle est la proposition que l'Union européenne a soumise lors de la Conférence sur le respect de la Quatrième Convention de Genève dans les territoires occupés par Israël, qui s'est tenue le 5 décembre 2001. Il n'y aurait aucun raison de ne pas faire les mêmes réflexions par rapport à d'autres conflits.

On doit également examiner la possibilité d'un mécanisme diplomatique de négociation et d'alerte, regroupant un nombre limité d'États qui auraient pour mission de veiller au respect des Conventions de Genève et d'offrir leurs bons offices en vue de mettre un terme aux violations.

Enfin, on ne peut ignorer que de graves problèmes sont liés à des divergences portant sur des points de droit, notamment sur la qualification de situations conflictuelles ou sur l'applicabilité du droit à certaines situations. Dès lors qu'il s'agit de différends juridiques, ne devrait-on pas envisager des procédures d'arbitrage ou des procédures judiciaires, notamment en déférant ces cas à la Cour Internationale de Justice, par la voie contentieuse ou par le biais de requêtes en avis consultatifs?

Lorsqu'on envisage une nouvelle codification du droit international humanitaire, on ne saurait ignorer le sévère avertissement que l'éminent juriste américain Richard Baxter a donné dans un excellent article intitulé: *"The effects of ill conceived codification"* et qui démontre, sur la base d'études de cas, que l'échec de la négociation, sur le plan international, n'est pas seulement sanctionné par l'absence du résultat espéré, mais risque de se traduire par la destruction des règles antérieures.

Il faut donc se donner des garde-fous :

J'en mentionnerai trois :

- En premier lieu, il faut travailler sur la base de propositions précises et clairement formulées. Il est trop facile de déclarer que les Conventions sont dépassées, et de se contenter de citer la question de l'avance

de solde des prisonniers de guerre, dont ne dépend pas la survie des prisonniers en question. Il faut donc amener ceux qui prétendent que les Conventions sont dépassées à indiquer clairement les articles qui devraient être révisés et à formuler des propositions.

- En second lieu, il faut se garder de compromettre qui existe déjà. Sachant que le succès n'est jamais garanti, il faut éviter de remettre en cause les résultats des conférences antérieurs. Comme en 1974, il faut viser la forme d'un ou plusieurs protocoles additionnels, et se garder de porter atteinte aux Conventions de 1949 ni aux Protocoles de 1977.

- En troisième lieu, les réflexions sur des développements éventuels du doit international humanitaire ne doivent en aucun cas servir de prétexte pour ne pas respecter les règles en vigueur. Ainsi que M. Kellenberger nous l'a rappelé au début de nos travaux, la crédibilité de toute négociation visant à développer le droit humanitaire sera réduite à néant si les règles existantes sont bafouées.

Comme vous le voyez, les questions sont complexes et vont requérir des analyses et des débats approfondis. Je crois que nous devons nous donner le temps de la réflexion et nous garder de légiférer sous le coup de l'émotion.

Le Comité International de la Croix-Rouge, qui a notamment pour rôle de veiller au respect du droit humanitaire et d'en préparer les développements éventuels, ne se dérobera pas si la communauté internationale estime que des développements sont nécessaires, pour autant que l'objectif visé soit une meilleure protection des victimes de la guerre.

Le défi est considérable. Nous aurons besoin d'appui pour le relever.

Il faut préparer l’avenir tout en préservant l’héritage du passé.

INTERVENTIONS

Professor Eun-Bum CHOE,
Visiting Professor, Keio University, Tokyo, Republic of Korea National Red Cross

Please, allow me to recall that, exactly one year ago, at this International Convention Hall, the 25th Round Table unanimously adopted the Sanremo Declaration on the Principle of Non-Refoulement as a rule of customary international law. I think it is natural as a follow-up to the above-mentioned Declaration, to review the refugee situation over the world. Is it much improved or has it even worsened? I am sad to say that the recent refugee situations are getting worse as far as the cases which have continuously happened in the sub-region of East Asia are concerned.

On my way to Sanremo to attend this year's 26th Round Table, I happened to find, on the Air France flight from Incheon to Paris on 4 September (Sunday), a copy of a morning daily newspaper published in Seoul, which carries three different articles concerning the very hot incidents involving North Korean people who fled their country.

Just for your information, I may quote only the head titles of the respective articles in question:

- *"15th North Korean Defectors Make their Way into the Diplomat Staff House of Germany in Beijing";*
- *"21 North Korean Defectors Due in Seoul soon";*
- *"A Congressional Forum Accords on Pressing Necessity of International Pressure to Prevent the Vulnerable People from Forced Repatriation to their Country of Origin, by Granting Them Legal Status as Refugees".*

As you may be aware, there were other similar cases which occurred in the Japanese Consulate General Office in Shenyang, China, preceded or followed by those cases at the Embassy premises of different countries including the Republic of Korea, Spain, Sweden, Germany, United States, Ecuador and others.

I must make it clear that I do neither blame nor admire the parties concerned. I can tell you key points in view of the seriousness of the question:

- Those vulnerable people now hiding in Chinese territory number as many as around 300.000;
- The Government of China denies refugee status to them on the ground that Chinese policy of repatriation is based on a bilateral agreement concerning border security and immigration.

In this context, I just want to propose that a kind of working group be formed by the International Institute of Humanitarian Law to study, and to find a practical solution to these refugee problems now prevailing in the territory of the People's Republic of China.

I look forward to an immediate and positive response from the Sanremo Institute. Thank you.

INTERNATIONAL CRIMINAL COURT – TRIUMPH OR DREAM?

Prof. Michael HERMAN
Member of the International Institute of Humanitarian Law

The idea of an International Criminal Court

The idea to establish an International Criminal Court (ICC) was born soon after World War II. It had been thought about since the Nuremberg Trial of the Nazi criminals. However, the confrontation of two political and military blocs and the period of the Cold War lasting nearly half a century had not created favourable grounds to do it. Although, for the first time, United Nations lawyers examined the possibility of establishing an international criminal court in 1948 and presented their report in 1950, and although on December 9th 1948 the UN General Assembly adopted the Convention on Prevention and Punishment for Genocide with the recommendation that such cases had to be judged by an international court[1]and that the Geneva Conventions of 1949 and the first Additional Protocol of 1977 made clear that grave breaches, regarded as war crimes, had to be punished,[2] half a century later, with 250 military conflicts and the loss of 170 million lives,[3] the effective process of establishing this kind of international court needed to begin.

Thanks to the revaluation of the world's political scene, system transformations have been made possible in many countries, especially in Southern, Eastern and Central Europe and former Soviet Union, as well as, due to the broad international lobbying grouping millions of people, many governmental and non-governmental organizations with an active participation of the Council of Europe, European Union, International Committee of the Red Cross, UNHCR, International Institute of Humanitarian Law in Sanremo, American Bar Association, Amnesty International, and many others. They also included NGO Coalition for an International Criminal Court, a network of over one thousand civil society organizations and legal experts from all around the world, working since 1995, towards a common goal: the establishment of a permanent, fair and independent International Criminal Court.[4]

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[1] Michael HERMAN, "The idea of International Criminal Court", in *Scientific Papers of the Faculty of Law of the University of Commerce and Law in Warsaw*, n° 3, Warsaw, 1999, pp.161-178; Stanislaw PODEMSKY, "On behalf of the world", in *Polityka*, n° 30/2151, Warsaw, 1998, p.51; Jacek MOSKWA, "Why Americans do not want International Criminal Tribunal", in *Rzeczpospolita*, Warsaw, 1998, and "Never again: sixteen fundamental rules of establishing a fair, independent, effective and impartial International Criminal Court", adopted by Polish Coalition for ICC (*Amnesty International of Ddańsk*).

[2] "Penal Repression, punishing war crimes", in *Advisory Service on International Humanitarian Law*, Comité International de la Croix-Rouge, p.3.

[3] Stanislaw PODEMSKI, *op. cit.*

[4] "Coalition for an International Criminal Court", *European Newsletter*, n°18, Brussels, September 2000, p.1; "Polish Agreement for ICC", http://panda.bg.univ.gda.pl/icc/ngo.html.02.07.31; "Our Histories show: Europe and the world need an Independent Criminal Court", *Den Norske Helsingforskomite*; "No justice, no reconciliation, no peace", *ISHR*, Frankfurt; "UNHCR and the establishment of an International Criminal Court: some comments on the draft statute", *UNHCR*, 1998, Geneva, p.6.

The struggle of the general public towards the establishment of an International Criminal Court became inevitable when the hopes to create an international justice system failed after the trials of war criminals and the dissolution of the war tribunals in Nuremberg and Tokyo. The establishment of an International Criminal Court was giving hopes to stop genocide, crimes against humanity, war crimes and other forms of cruelty discovered in Cambodia, Bosnia, Herzegovina, Rwanda and other places of the world.

In 1990, UN experts returned to the conception of the 1950s of establishing a permanent International Criminal Court and the events in former Yugoslavia and Rwanda made the Security Council establish two *ad hoc* war tribunals in the above countries in order to bring to justice war criminals guilty of genocide, crimes against humanity and other cruelties which so far had been treated quite ineffectively.

Although it was difficult to stop the process aiming at the establishment of an International Criminal Court, despite the attempts to obstruct or delay its establishment by some governments, the question of major importance was the political will of those actors of the political scene who were in favour of such a body as well as gaining them.

The idea to establish an International Criminal Court was well reflected in the resolution of the UN General Assembly stating that such a body should be appointed before 2000 and the treaty conference should be held in the months of June and July 1998. In 1999, the Preparatory Commission for the International Criminal Court was appointed. In accordance with this resolution the spirit of noble idealism overwhelmed the participants of the "*United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*" for five weeks to eventually triumph at night from July 17th to 18th 1998 in the voices of 120 of the 162 States taking part in the Conference on the acceptance of ICC Statute. However, there was a simultaneous breach of this enthusiasm and optimism caused by the voices of seven States opposing the idea, among them, USA and Israel with a significant number of States abstaining.

Ambassador David Scheffer, justifying the American standpoint, said that the United States could not accept the idea of a universal jurisdiction, that applied the resolution in the States which did not adopt it and that USA was going to defend the prerogatives of the Security Council. China, growing in importance as the second world power, expressed its objection, among others, because of the unsatisfactory, in their opinion, protection of the national sovereignty of the signatory States, and Israel objected to inclusion in the regulations of an article considering the translocation of people from a territory occupied in the course of war as a war crime.[5]

Advocates of the establishment of ICC acknowledged that the adoption of the Rome Statute was one of the greatest advances in international law since the founding of the United Nations, pointing to the fact that without the overwhelming support of the OSCE member States, this achievement could not have been realized.[6] They also held that the opposition of USA may even threaten the future of ICC, although, at the same time, they claimed that USA was the only State which could militarily prevent international aggression

[5] http://dzisiaj.dziennik.krakow.pl.pl/archiwum/dziennik/1998/07.20/Dziennik/s/swiat.Ht02-08-10
[6] "NGO Coalition for an International Criminal Court", submission to the *OSCE Human Dimension Implementation Meeting*, Warsaw, 2000.

and crimes committed on such occasions and it is paradoxical that having armed forces engaged in various regions of the world the submitting of their soldiers under international jurisdiction with the possibility of charging and sentencing them is a source of fear. Although Americans do not assume that members of their armed forces might be involved in genocide or other crimes with impunity such cases do take place. One evidence may be a Vietnamese village of My Lai but culprits of the deeds mentioned above can be judged by each State's own jurisdiction which is often criticized for being too strict (death penalty applied).[7] Supporters of ICC reassure that ratification does not imply automatic subordination to ICC because, according to the provisions of the Statute, ratifying States can suspend the application of its principles regarding their citizens for seven years. Moreover, in the Statute a principle was adopted whereby the ICC would not be retroactive and it would only apply to crimes committed after the Statute entered into force: when 60 States would have ratified, and also that it would act only on the command of the Security Council or when a given State was unable or reluctant to take proper legal measures aimed at people guilty of crimes committed on its territory.

Furthermore, this Court will only bring to justice individuals, not States, accused of genocide, crimes against humanity and war crimes. It will apply to both international armed conflicts, and crimes occurring in internal, inter-state wars. An independent Prosecutor, States Parties and Security Council will be able to refer situations to the Court, but in the two first cases either the State where the crime was committed or the state of an accused nationality must have ratified or accepted the jurisdiction of the Court. The ICC does not replace national legal systems, it is complementary to national jurisdictions and therefore, the primary responsibility for prosecution of these crimes should enable States to bring to justice the persons responsible for the crimes under Articles 6-8 of the Rome Statute and allow those States to comply with the obligations set up in the State and co-operate with the Court.[8]

Despite these and other compromising decisions, on July 17th 1998 on the last day of the Conference, U.S. representatives voted against the establishment of ICC, and numerous opponents of this body changed their decision after the introduction of the "opting-out" provision mentioned above, allowing States Parties of the treaty on the establishment of ICC the suspension of the war crimes prosecution on their territories for 7 years.[9]

The criticism and suggestions put forward earlier and currently by USA and other States, (for example: making an "opting-out" provision crimes against humanity, the assent of the State whose citizen is a war criminal to bring him to justice, the Security Council's right of veto against ICC decision, the defining by the Security Council of what is aggression and what is not, the subordination of ICC to the Security Council, etc.) did not appeal to the supporters of ICC. USA was criticized for the eagerness to protect their soldiers in military actions conducted according to the doctrine of " the defence of US vital affairs" whose topicality was acknowledged officially by President Clinton. Whereas ex-Secretary of State James Baker explained the logic of actions undertaken by USA as a leader in the uni-polar world highlighting the fact that the American administration fears that the United Nations initiatives may limit and disauthorize their actions

[7] Jacek MOSKWA, *op. cit.*
[8] "NGO Coalitition for an International Criminal Court", *op. cit.*
[9] Miroslaw IKONOWICZ, *"Bicz na zbrodniarzy"*, Przeglad Tygodniowy, 1998, pp.28-29.

as the world's "gendarme".[10] The Statute also included the "opting-out" provision allowing the States which did not ratify the Treaty to join it partially and in this way contribute to the efforts to prosecute particular kinds of crimes.

However, after five weeks of long and stormy discussions the spirit of noble idealism, enthusiasm and optimism won. The General-Secretary of the United Nations said that: *"…thanks to the establishment of the International Criminal Court the reaction of humanity towards crimes will be quick and fair".*[11] It was stressed at the same time that the future of the International Criminal Court does not have clear prospects especially taking into account the position of the USA in the world, their attitudes, etc.[12]

Vice-minister of Foreign Affairs Janusz Stańczyk, head of the Polish Group at that conference, admitted that the absence of the USA among the signatories of the final act would certainly impede the activity of the Court. However, he also pointed out that many international treaties functioned without US participation, for example, the Convention on the Law of the Sea.[13]

It became obvious that neither the opposition of the USA faithful to the rules of "realpolitics", nor of China or other States which had voted against, hindered the process of structuring a new international system of justice respecting a traditional rule of sovereignty of human rights, the rights of an individual which the international community seems to consider higher than state sovereignty. It is worth stressing that it was the USA which advocated and promoted the idea of modeling democratic rules and human rights, making them a significant instrument in their foreign policy, in particular, in the Cold War period and at the time of the creation of CSCE/OSCE.

It must be emphasized that, nearly at the same time, that is, on June 9th 1998, the Assembly of Leaders of States and Governments of the Organization for African Unity (OAU) adopted the Protocol to the African Charter of Human and Peoples' Rights, establishing an African Court on Human and Peoples' Rights which is to be a complementary body to the African Commission on Human and Peoples' Rights.[14] It also exemplifies the increase of attention paid to the legal order and legal norms, human dignity of an individual and his rights in the largest region of the world, whose numerous States supported the establishment of ICC.

2. The Statute of compromise and hope

The ICC Statute, adopted on the night of July 17th -18th 1998, is an expression of a compromise of States Parties of the Rome Conference on the one hand, and on the other their hope that the culprits of the heaviest crimes against humanity, defined in Art. 5 of the Statute, that is: a) The crime of genocide; b)

[10] Miroslaw IKONOWICZ, *op. cit.*
[11] Stanisław PODEMSKI, *op.cit.*
[12] Jacek MOSKWA: *op.cit.*; Krzysztof Teodir TOEPLITZ "Suwerenność", in *Przegląd Tygodniowy*, 1998, p.28.
[13] http://dzisiaj.dziennik.krakow.pl/archiwum/dziennik/1998/07.20/dziennik/s/swiat6ht02-08-10.
[14] N. KRISCH, "The Establishment of an African Court on Human and Peoples' Rights", in *Zeitrschrift für Ausländisches Offentiches Recht und Volkerrech*, 58/1998/3; Macau MUTUA, "The African Human Rights Court: A two-legged Stool?", in *Human Rights Quarterly*, vol. 21/199/, p.357.

Crimes against humanity; c) War crimes and d) The crime of aggression, no matter what nationality, citizenship, race or place of residence, would be brought to justice.

This compromise, based on the consensus principle, undoubtedly determined the contents of the Statute and its framework, which results in the lack of perfection, seen also by its signatories and those who ratified it. It is a historical, unprecedented document establishing, after 23 years of discussions in the United Nations, a permanent International Criminal Court judging criminals who committed the above-mentioned crimes while following all fundamental principles of modern criminal law (*nullum crimen sine lege, nulla poena sine lege* and others) enumerated in this Statute.

The reasoning of its creators and its aims can be found in the included preamble taking into consideration already existing international instruments and accepted by the international community.[15]

The range of punishments, itemized in the Statute, which can be administered by the Court, is also in agreement with the modern tendencies of humanitarian and human rights, eliminating the death penalty from the catalogue of punishments.[16]

Not only does the Statute regulate the legal standing of its States Parties, but it also pays a lot of attention to the States which did not sign and ratify the Statute, the ones which are going to join it in the future, co-operate with the Court or, finally, the ones which want to resign as a party of this document. Apart from commonly applied general principles of criminal law, the Statute introduces many new solutions, notions and definitions (for example, it replaces the term 'extradition' with 'surrender') which undoubtedly requires further refinement and transferring their elements to internal legislation of particular States.

It may lead to various difficulties depending on the traditionally accepted legal system. Thus the Statute is in this respect also an expression of a compromise on the one hand, and, on the other, further study of its contents is inevitable in order to be able to improve or alter what is necessary for its practical application and not for its re-negotiation. Nevertheless, this does not mean that many critical remarks made about the Statute among others during the 23rd Round Table on Current Problems of International Humanitarian Law, organised by the International Institute of Humanitarian Law (Sanremo, September 1998), related to ICC, eg. Articles 2, 4, 5, 6, 7, 8, 12-24, 31, 42, 53, 54, 121, are not justified. Even their authors realized that it would require many improvements or changes but that it would be indicated in practice what evaluation should be made by the State Parties of this act within the framework of mechanisms provided by the Statute in Article 13 and, in particular, in Articles 121, 122, 123.[17]

During the 23rd Round Table Professor Giovanni Conso emphasized the high status of the Diplomatic Conference in Rome, which he headed. He pointed out that many delegations participating in the Conference expressed the view that the date of the establishment of the ICC should be postponed.

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[15] Rome Statute of the International Criminal Court, Selection of International Instruments Related to the Subject Matters of the Round Table, extracts, *op.cit*., pp. 25-46;

[16] *Death Penalty News*, September 1998, Amnesty International, London, p.1.

[17] *"Selection of International Instruments Related to the Subject Matters of the Round Table"*, extracts of the"23rd Round Table on Current Problems of International Humanitarian Law: the International Criminal Court. Evaluation and progress of the UN Diplomatic Conference in Rome, June 15th-July 17th of 1998", Sanremo, September 2-4 1998, p.131. Also see: *"The International Criminal Court. Conclusions"*, *op. cit*., Sanremo, September 2-4 1998 p.19.

It would mean many years of delay in its ultimate implementation. Although the Statute does not comply with the intentions and expectations of many supporters, final decisions should be made promptly. It was acknowledged that putting it into force required not only further work of the mechanisms recognized by the Statute, but also the developing of a wide promoting campaign and the establishment of a lobby for the quicker signing by its further advocates and ratification by at least 60 States to allow its entrance into force and to enable ICC to begin its functioning.

The Secretary General of the United Nations in his message to the participants of the 23rd Round Table expressed a similar point of view emphasizing: *"I believe that scholars and practitioners have a crucial role to play in reviewing and disseminating the results of the Diplomatic Conference in Rome. As you are aware, important work remains to be done in the elaboration of the rules of procedure of the Court, as well as in the development of a framework for the co-operation between the Court and other organizations"*. Thus it becomes clear that the Rome Conference and the adoption of the Statute were historical events, although it was a hard task for its supporters to bring it into effect particularly, the work on defining the notion of aggression and elements of crimes enumerated in the Statute, setting the procedures of action for ICC, a prosecuting body and others, deciding on financing those bodies. The key issue was not to allow the activity of ICC to remain in the sphere of dreams solely,[18] not to remain an illusion but to become a real fact of the moment and not postponed for many further years.

Struggle to put the Statute resolutions into force

Further efforts to achieve international justice were made soon after the Statute had been accepted by 120 States. It was visible, for example, when on October 8th 1998, the Italian Cabinet gave full powers to its President to sign the decree ratifying the Statute.

On November 19th 1998 the European Parliament adopted a resolution stressing the historical value and significance of ICC. It called all European Union (EU) States to sign the Statute and conduct an effective ratification process. Hopes were expressed that governments of EU States would not use the so-called 'opting-out' provision included in Art. 124 of the Statute allowing States Parties a chance to temporarily exclude Court jurisdiction, which could weaken the status of ICC and delay the moment of putting it into force.

A month later, on December 8th 1998, the General Assembly of the United Nations adopted a resolution which drew attention to the fact that for the effective participation of ICC in shaping legal and political awareness of the international community and its contribution to creating justice and responsibility the Statute should enter into force immediately (Resolution no. 53/105). The Resolution recognizes the historical meaning of the Statute and expresses gratitude to the Italian Government for the efforts made to hold and finance the Conference. It also encourages other States to sign and ratify this document.

[18] Josf JOFFE, "It's still only a dream. The ICC won't work because States will always act in their national interest", in *Time Europe*, 2002, p.38.

Simultaneously, it calls the Preparatory Commission mentioned in the Final Act of the Rome Conference for the first session and defines the agenda of its later meetings.[19]

The encouragement and recommendations, as well as the will of the international community did not remain without response. Since December 31st 2000, 139 States have signed the Rome Statute[20] among them the USA which, as has already been said, voted against the adoption of the Statute.

Since then, the Statute has been ratified by 27 States. Their inner procedures were on many occasions the obstacle in this undertaking. Sometimes, as in the Polish legal system, it was the touchiness of the American power to release their citizens, which assumed national proportions. For example, the Polish Constitution from 1997 contains a strict prohibition to extradite a Polish citizen.[21] Despite these difficulties, till July 1st 2002, 74 States have completed the ratification process of the Statute, including all the European Union States and Poland. On July 1st 2002, that is, on the day when ICC began its functioning in The Hague, the Statute was ratified by two further States: Australia and Honduras (21). It was settled that the first meeting of the Assembly of States Parties would be held between 3rd and 10th of September 2002 and that there would take place an evaluation of the documents prepared by the Preparatory Commission for the International Criminal Court, established in accordance with Resolution F adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on July 17th 1998 and in accordance with General Assembly Resolution 55/155 of December 12th 2000. The subjects of its settlement include, among others, the following documents: draft text of the Rules of Procedure and Evidence, draft text of the Elements of Crimes, draft Relationship Agreement between the Court and United Nations, draft Financial Regulations, draft Agreement on the Privileges and Immunities of the Court, draft Rules of Procedure of the Assembly of States Parties, draft budget for the first financial year of the Court, proposed structure and administrative arrangements, basic principles governing an agreement between the International Criminal Court and the Netherlands regarding the headquarters of the Court, consolidated text of proposals on the crime of aggression (definition of the crime of aggression-three options and different variations), preliminary list of possible issues relating to the crime of aggression and others.

It examined many proposals, opinions and recommendations, in particular, a definition of the crime of aggression (proposals submitted by Bahrain, Iraq, Lebanon, the Libyan Arab Jamahiriya, Oman, Sudan, the Syrian Arab Republic, Yemen, the Russian Federation, Germany, Greece, Portugal, Colombia, Italy, Bosnia and Herzegovina, New Zealand, Romania and Guatemala (governments of particular countries, international governmental and non-governmental organizations).[22]

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[19] Michał PŁACHETA, "Problem ratyfikacji przez Polskę Statutu Międzynarodowego Trybunału Karnego", in *Palestra*, n°5-6/199, Warsaw, pp.118-119.
[20] Władysław SKRZYDŁO, *"Konstytucja Rzeczypospolitej Polskiej"*, Komentarz Zakamycze, 1998, p.52.
[21] http://www.igc.org/icc/index.html.
[22] *"The Preparatory Commission consists of representatives of States which signed the Final Act of the Conference and other States which were invited to participate in the Conference. It worked in the following groups: the Working Group on the Basic Principles of the Headquarters Agreement to be Negotiated between the Court and the Host Country, the Working Group on a Draft Budget for the First Year of the Court, the Working Group on the Rules of Procedure and Evidence, the Working Group on Elements of Crimes, the Working Group on the Crime of Aggression"*, in *Preparatory Commission for the International Criminal Court*, United Nations, PCNICC/2001/L.3/; Rev. 11, October 2001, p.20; "Preparatory Commission for the International Criminal Court, Commentary and Recommendations for the Adoption *of*

The above achievements of the Preparatory Commission and the strong support which the idea of international justice received not only from the States Parties of the Statute, but also from international governmental and non-governmental organizations, as well as the broad lobbying of the international community, show that despite the opposition of seven States, among them two members of the Security Council-USA and China, it will get the acceptance of the Assembly of States Parties and the instruments and mechanisms needed for the continuation of ICC work which began formally on July 1st 2002. In all likelihood, President Bill Clinton's goal of creating an International Criminal Court (ICC) will be achieved, but without the participation of the United States or China, Iraq, Israel, Libya, Qatar and Yemen, says William L. Nash in the publication: "The ICC and the Deployment of US Armed Forces", emphasizing in the conclusion that from a purely pragmatic standpoint, the United States can do more to advance national interest (and the interest of US service members) by signing the Treaty than it could by continuing to oppose the ICC. The United States had lost much of the moral high ground in the effort to shade the ICC. He also claims that the US military has reason to be wary of an ICC.[23] US not only has refused to ratify the Treaty that set up the International Criminal Court, but there is also a bill before Congress that would authorize force to rescue any American dragged before it.[24]

In a six-point long Statement of the European Union on the Position of the United States of America towards the International Criminal Court it was stressed that: the European Union takes note with disappointment and regret of the decision by the United States of America on May 6th 2001 formally to announce that it does not intend to ratify the Rome Statute of the International Criminal Court (ICC) and it considers itself released from any legal obligation arising from its signature of the Statute on December 31st 2000. While respecting the sovereign rights of the United States, the European Union notes that this unilateral action may have undesirable consequences on multilateral treaty making and generally on the rule of law in international relations - it reads further. It points out that the European Union is also concerned at

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the Rules of Procedure and Evidence and the Elements of Crimes", in *fidh-Federation of Human Rights Leagues Report*, June 2000, n°294/2, p.20; "The International Criminal Court-Guaranteed and Independent International Criminal Court", in *fidh-International Federation of Human Rights Leagues Report*, n°303/2, 2001, p.20; "Final Report, Conference of Implementation of the Rome Statute in Senegal", in *Lawyers Committee for Human Rights*, October 23-26, 2001, Dakar, p.25.

[23] William L. NASH, "The ICC and the Development of US Armed Forces", in *American Academy of Arts and Sciences*, p.11, http://ww.amacad.org/publications/icc9.htm,02-08-23.

[24] Josef JOFFE, *op. cit.*, p.38; "The United States opposition: ICC now, but not for us", The International Criminal Court: Guaranteeing an Independent International Criminal Court, *op.cit.*, pp.7-8; Sen Helms JESSE, introduced 5/9/2001 a bill to protect United States military personnel and other elected and appointed officials of the United States Government against criminal prosecution by an International Criminal Court to which US is not a part, see the *"Bill Summary and Status for the 107th Congress"*, also in http://thomas.loc.gov/cgi-bin/bdquery/z/d107:s00857.02-08-23; "The International Criminal Court: The Case for US Support", *Lawyers Committee for Human Rights*, also in gopher://gopher.igc.apc.org./oo/us/26icc-Ich.txt.02-08-23, p.12; *"The International Criminal Court*", United Nations, Department of Public Information, gopher://gopher.igc.apc.org/oo/orgs/icc/undocs/faq-dpti.txt..02-08-23, p.3; Andrew MORAVICSIK "The Human Rights Game. Europe and America are at odds over the International Criminal Court. They shouldn't be", in *Newsweek*, April, 2002, p.26; James GRAFF, "America is not pleased. The International Criminal Court is launched, but how effective can it be without US support?", in *Time*, Brussels, July, 2002, pp.36-37; "The International Criminal Court is in Danger! France must stand firm vis à vis American Pressure", French Coalition for International Criminal Court, in *fidh-International Federation of Human Rights Leagues Report*, p.2, Paris, November, 2000, also in http://www.fidh.org/communiq/2000/uk/cpi2311.htm.

the potentially negative effect that this particular action by the United States may have on the development and reinforcement of recent trends towards individual accountability for the most serious crimes of concern to the international community and to which the United States shows itself strongly committed and that US will not close the door to any kind of co-operation with the ICC, which is going to be reality in the near future.[25]

It is true what Josef Joffe holds in his publication: "It's Still Only a Dream", that Russia, China, India and Israel are quite different countries from the 67 that have ratified the ICC, and that the US is the one and only superpower. But it is also true that the principles of international law, the United Nations Charter, human rights, humanitarian law and principles of democracy give equal rights to all independent States and all human beings. Making an exception and excluding people who might be suspected of committing crimes defined by the Statute only because they are American citizens would be inconsistent with the principles adopted in the Statute. It would also shatter the need of its existence and the feeling of international justice.[26]

[25] *"Information document submitted by Spain"*, Preparatory Commission for the International Criminal Court, New York, July 1st-12th 2002, PCNICC/2002/INF/7.

[26] It must be emphasized that the issue of individual responsibility for the violation of international law had appeared for the first time in the Versailles Treaty in 1919 with an active participation of the American President in shaping it. The principle of penal responsibility before an international criminal court of the ones guilty of crimes against peace and war rights and customs was adopted (Art.s. 227-230). Article 227 was used when charging the former Emperor of the Reich and King of Prussia, Wilhelm II, of violation of international morality and sanctity of treaties. See Elżbieta DYNIA, *"Przestępstwa prawa międzynarodowego"*, Odpowiedzialność Prawnomiędzynarodowa Jednostki, Polish Foundation of International Affairs, Warsaw, May 1999, p.31.

PROTECTION OF THE CIVILIAN POPULATION IN NON-INTERNATIONAL ARMED CONFLICTS - SOME REFLECTIONS -

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1. The international community is certainly concerned with the protection of the civilian population against the effects of armed conflicts which are striking the world from all angles, causing great suffering and damage. Most of these conflicts are non-international armed conflicts, and, therefore, there is a special need for civilian protection.

The principle of the protection of the civilian population in the case of armed conflict is an age-old principle, essential to International Humanitarian Law. It is an expression of the fundamental principle of international law requiring the respect of elementary considerations of humanity in all situations. This calls for the efforts of all those concerned to ensure respect for this principle, which is a legal obligation. There must be a political will to act in this way. The principle has been confirmed by the International Court of Justice in the Corfu Channel and Nicaragua cases.

2. Different concepts of non-international armed conflicts exist:

a. the widely and not precisely defined concept described in Article 3 common to the Geneva Conventions of 1949 (GC);

b. the concept described in Article 1 of Additional Protocol II of 1977 (AP II), covering armed conflict between government forces and insurgents with more structured organisation and military operations. There is also a concept which is called "internationalised non-international armed conflicts" in which the elements of external (foreign) intervention are much more present than is usual in non-international armed conflicts. A concept of non-international armed conflicts is mentioned in the doctrine where the insurgent does not have all the structures necessary for a State. In practice, every case of non-international armed conflicts has its own features which are often difficult to classify according to theoretical types.

Concerning the subject of this Round Table it should be noted that it relates to the widest type of non-international armed conflicts, that of Article 3 (GC), without any additional conditions, therefore, covering all kinds of non-international armed conflicts. This is particularly important in view of the purposes of our debate on the legal protection of the civilian population.

3. There is a trend in modern international law and international humanitarian law to extend the rules designed for international armed conflicts to non-international armed conflicts as much as possible in view of the special circumstances of each case. In practice, in many non-international armed conflicts, especially in internationalised non-international armed conflicts, during the initial phase, the international community and some Parties to the conflict demand that the principles and many rules of International Humanitarian Law, adopted for international armed conflicts, be also respected in non-international armed conflicts. The confirmation of this trend can be found, for example, in the Statutes of the *ad hoc* Tribunals for ex-Yugoslavia and Rwanda, the International Criminal Court, and also in Article 1 of the Convention on Conventional Weapons of 1980, as amended on 21 December, 2001. This trend is in the process of being developed, but it certainly covers the principles on which the legal protection of the civilian population, in the various kinds of armed conflicts, is constructed.

It should be noted, however, that there are certain rules which can be applied to non-international armed conflicts, such as those on the occupation of foreign territory and the rules relating to non-citizens.

4. The preliminary problem in the application of the rules of International Humanitarian Law is the difference in the qualification of a situation. There is often a difference of opinion between the various Parties to the conflict and the bodies of the international community. An international armed conflict, non-international armed conflicts or simply disturbances can not all be considered in the same way because each of these situations calls for a different set of rules. The civilian population should be protected in all circumstances and cases, even though different rules have to be applied. It would be good if the qualification of a situation were made by an impartial and objective body from the international community.

In addition to these problems, there may be others which hinder the applicability of the law: the imprecision of the law, the contradiction between the rules in various sources, the lacunae, and changing situations, as well as its complexity.

There is often the case where some or all of the Parties to the conflict declare their intention to respect the rules of International Humanitarian Law, but in practice they violate them systematically and on a large scale. Such a declaration could be, however, the basis for new efforts on the part of various bodies, such as the International Committee of the Red Cross (ICRC) or the relevant UN body, to fight for better civilian protection.

The solution to these problems could be the elaboration of an act comprising the rules to be respected in all kinds of non-international armed conflicts, first by the doctrine, and then by an international intergovernmental organisation.

5. The protection of the civilian population has two main aspects:

a. protection against inhuman and bad treatment when in the hands of the adversary;
b. protection against the effects of military operations.

6. Protection against inhuman treatment covers many rights of persons belonging to the civilian population. It includes many specific rules of the law of armed conflict, but also many basic human rights to be respected in all situations, including war. This mixture of rights from two branches of law was already indicated in the Preamble of Additional Protocol II.

Some of the rights appear in both branches and this repetition by no way reduces their value, on the contrary, it can only make civilian protection stronger.

The problem may arise concerning the rights of persons who are not nationals of the Party in whose hands they find themselves. In non-international armed conflicts this category of victims is difficult to identify because all the persons, at least at the beginning of non-international armed conflicts, are of the same nationality. Later, during the progress of the war, there may appear a distinction between various persons on the basis of religion, ethnic origin, language or political belief, but this should not affect their rights to protection.

Rules concerning military occupation of foreign territory are not applicable non-international armed conflicts. But the basic rules of special protection of the civilian population in such territories should be applicable *mutatis mutandis*.

7. The rules on the methods and means of combat are generally considered to be equally applicable to Non-International Armed Conflicts. In particular, the limitations or restrictions of the use of certain weapons must be respected by all, both the government and the insurgents. Some new instruments confirming this view have been mentioned above in relation to the trend of development of International Humanitarian Law. The humanitarian reasons for the limitation of the use of weapons are evident.

8. The principle of distinction between the civilian population and armed forces, between civilian and military objectives, which is the basis of international humanitarian law, and the protection of the civilian population, may sometimes cause dilemmas in its application. This relates both to the treatment of victims and to the means of combat. Some parts of the population may support their adversaries and not the Party which controls their segment of national territory. The question is whether the Party which controls that territory considers this behaviour as being treason or supportive of the military operations of their adversary. In the latter case, the quality of non-combatant could possibly be withdrawn, thus the right to protection accorded to the civilian population would be forfeited. For these reasons there is need to specify the rules on the protection of civilians in a document adopted by a body, be it national or international, which has the authority to make a statement on the subject.

9. The problem of responsibility for the violation of basic rules of international humanitarian law is generally considered to be fully covered. The work of *ad hoc* tribunals and the Statute of the International Criminal Court of 1998 has confirmed this view. Great developments in international legislation over the past ten years clearly show that serious violations of international humanitarian law in non-international

armed conflicts are punishable. However, this is just the beginning of a process. Impunity is still prevailing. Many wars are being waged and large-scale violations of International Humanitarian Law are common practice. In certain conflicts some criminals are punished, in others all violations go unpunished. The solution is to speed up and develop the actions of the International Criminal Court, and at the same time, to induce countries to punish perpetrators of crimes through their national courts. In both cases the courts should act impartially so that the civilian population is protected without discrimination.

Justice should be universal because crimes are the concern of the whole international community as they are a source of suffering to the population. The International Criminal Court has not been accepted by all countries so far. It is to be hoped, however, that gradually over the years, this Court will be accepted world wide, so that impunity may be fought and the civilian population may be given better protection. Moreover, the International Court of Justice should not be forgotten in the treatment of the responsibility of States when their action results in the breach of International Humanitarian Law.

10. There is one right of vital importance for all the victims of war, particularly for the civilian population, and that is, the right to humanitarian assistance. This right is still in the process of recognition and affirmation. The wider acceptance and implementation of this right would greatly increase the effective protection of international disaster relief law, of which the right to humanitarian assistance is a part. A greatly improved system of this law would help the victims to recover from the effects of war and thus some of their basic rights, notably to life and health, would be protected.

11. The problem of enforcement of International Humanitarian Law, including the part relating to the protection of the civilian population, is one of the fundamental problems. Even in international armed conflicts, enforcement is far from satisfactory and for evident reasons it is more difficult to achieve in Non-International Armed Conflicts. The whole of the system of measures concerning international armed conflicts should be applied, *mutatis mutandis*, but in Non-International Armed Conflicts there is the additional difficulty of the sensitivity of the government to international intervention, as it is considered to affect the sovereignty of the country. However, because the lives and survival of the civilian population may be in question, new efforts should be made to ensure the implementation of relevant International Humanitarian Law rules. The possibilities of humanitarian action on the part of the ICRC should be enhanced and obstacles to such action removed. It is also important to develop the action of some other bodies of the international community, notably the United Nations. Various bodies of the UN system should be on the alert and act in order to protect all victims of war, in particular, the civilian population. Each body should act in accordance with its mandate. Peace-enforcement and peacekeeping missions, the Security Council, the General Assembly and ECOSOC should all be called to act. Specialised agencies and other bodies with specific humanitarian mandates - OCHA, the Commission on Human Rights, tribunals connected with the UN, and possibly other bodies, should all, by their action, press the demand for the respect of international humanitarian law and make contributions within their mandate. Better co-ordination

of their specific action is needed, to avoid there being different results. This is not an easy task because the bodies have such different mandates, structure, method of action. This question is to be studied further.

It should always be borne in mind that the protection of the civilian population against the effects of war is a contribution to the achievement of human rights. The greatly developed system of human rights is certainly an important base for international action. The implementation of this system of law should be one of the primary tasks considering the gravity of the violations of certain basic human rights committed against a great number of civilians affecting their very survival.

12. One of the obstacles to the more complete respect of the law protecting the civilian population in the case of non-international armed conflicts, is the fact that many States, and most non-state authorities engaged in such conflicts, are not formally bound by the relevant international instruments. But the principles and a great part of the rules contained in these instruments are an expression of customary international law. Thus, there is a need to establish the contents of such law. In this respect, an important effort has been made by the ICRC, and its completion would be of significant value to the improvement of the legal protection of all war victims, by indicating the law to be respected by all the actors in a war and expressing the general opinion of the world community of Nations.

13. The question may be raised as to how far the rules of existing International Humanitarian Law and other branches of international law applicable to non-international armed conflicts, correspond to the modern types of warfare. These rules are based on old principles. It is true that large scale violations which remain unpunished threaten the authority of the law in question. Is this a reason to doubt the validity of these principles? Numerous declarations, repeated on many occasions by various authorities, national and international, and by the doctrine, reaffirm these principles and show that there is the conviction and opinion that such principles of law have retained their full value, and must be respected by all. In the process of building up the modern international community, the recognition of international humanitarian law and other rules applicable to non-international armed conflicts, such as human rights law, contributes to this process. There is no alternative to it. Those who violate them should be made responsible for their actions.

14. It has been mentioned above that there is a need to have a document, a sort of code containing the principles and rules applicable to non-international armed conflicts. This could be done, first, by the doctrine, and consequently adopted by a relevant international intergovernmental body. The International Institute of Humanitarian Law is trying to do this. It has been working on a Project to produce a Manual on the Protection of the Civilian Population in non-international armed conflicts. Hopefully, once this project is completed and published it will influence further action on the part of some competent international intergovernmental authority.

THE LEGAL BINDING FORCE OF THE RED CROSS PRINCIPLES IN THE GENEVA CONVENTIONS OF 1949 AND THE ADDITIONAL PROTOCOLS OF 1977

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Introduction

The distinction between civilians and combatants is based on the principle of humanity and the principle is contained in "the Red Cross Principles". It may be said that the legal character of the "Red Cross Principles", that is to say, "Fundamental Principles" formulated by the International Conferences of the Red Cross, is a recommendation or an appeal that has no legal binding force. On the contrary, however, it is legally tenable that the legal character of the Principles to be contained in the provisions of the international agreements is a legal norm that has legal binding force.

A matter of importance is the provisions that the Parties to the Geneva Conventions of 1949 and to the Additional Protocols of 1977 have to respect the fact that all components of the Red Cross and Red Crescent Movement are bound by its Principles.

Provisions relating to the Principles in the Geneva Conventions

The legal binding character of the Red Cross Principles is brought out in that they are stipulated as norms for the behaviour of National Red Cross and Red Crescent Societies in the Geneva Conventions of 1949.

Article 44 of the First Geneva Convention stipulates that National Red Cross or Red Crescent Societies may, in time of peace, in accordance with their national legislation, make use of the name and emblem of the Red Cross or Red Crescent, in conformity with the principles laid down by the International Red Cross Conferences. Moreover, Article 63 of the Fourth Geneva Convention contains the provision that in occupied territories, National Red Cross or Red Crescent Societies will be able to pursue their activities in accordance with Red Cross Principles as defined by the International Red Cross Conferences.

Provision relating to the Principles in Additional Protocol I

Article 81 of Additional Protocol I of the Geneva Conventions provides that the Parties to the conflict shall grant to their respective Red Cross or Red Crescent organizations the facilities necessary for carrying out their humanitarian activities in favour of the victims of the conflict, in accordance with the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross.

Conclusion

As mentioned above the Red Cross Principles laid down by the International Red Cross Conferences were accepted as part of positive legal norms in Geneva Conventions I and IV, and in Additional Protocol I.

However, in Geneva Conventions II and III and in Additional Protocol II, there is no provision that the Principles be incorporated as a part of international humanitarian law. Therefore, it can be safely maintained that the Principles should be accepted in Geneva Conventions II and III, and Additional Protocol II, as part of legal norms. Some new international legislative measures to be complement are required.

L'IMPORTANZA DEI PROTOCOLLI DI GINEVRA DEL 1977 SULLE SANZIONI RIGUARDANTI I CRIMINI DI GUERRA CONTRO I BENI CULTURALI

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1. Generalità

Lo scopo della presente nota si propone di dimostrare come l'avvento dei Protocolli Aggiuntivi del 1977 abbia notevolmente cambiato la situazione del diritto internazionale nei confronti delle sanzioni nazionali ed internazionali relative ai crimini di guerra commessi nei confronti dei beni culturali di tutti i popoli, sia nei conflitti internazionali che in quelli così detti interni.

Svilupperò il tema esaminando dapprima, dal punto di vista essenzialmente storico, la situazione relativa al diritto internazionale, dei grandi beni culturali dei popoli prima dell'avvento del primo Protocollo aggiuntivo del 1977 alle Convenzioni di Ginevra del 1949; come questo abbia influito (Titolo VI – Sezione II – Articoli da 83 a 91) sulla condizione e sulla protezione dei beni culturali in tempo di guerra apparentemente nei soli conflitti armati internazionali; su come fosse necessaria sia una sanzione nazionale, sia una sanzione internazionale, per poi esaminare i dettati del Protocollo aggiuntivo del 1999, relativi alle sanzioni, per delineare, infine delle possibili conclusioni.

2. La situazione precedente ai Protocolli Aggiuntivi del 1977 alle Convenzioni di Ginevra del 1949

L'italiano è abituato da sempre a convivere con i beni culturali, non stupisce, dunque, che la situazione precedente ai Protocolli del 1977 deriva, per l'Italia, dai dettati dei regolamenti degli Stati preunitari, ed in particolare dal regolamento Albertino del 1833 (è detto così il regolamento per le truppe in campagna, cioè in guerra, del re Carlo Alberto del Regno di Sardegna). I beni culturali sono trattati come oggetti di proprietà privata, e quindi, come tali erano generalmente rispettati in guerra (questo non era scritto chiaramente nei regolamenti, ma era affidato al così detto "onore militare", per cui i beni erano affidati alla discrezione dei comandanti). Talvolta però i grandi beni culturali mobili, come taluni quadri o, per esempio, i cavalli di Venezia, facevano sia parte della preda di guerra e del bottino che veniva fatto, sia servivano per pagare le indennità alle truppe o i così detti "danni di guerra".

Un notevole passo avanti venne fatto dei regolamenti nazionali degli Stati Uniti d'America (le famose *Lieber's Instructions*" del 1863), corretti e completati poi, in Europa, dal "Manuale di Oxford 1880", che sfociavano nella Seconda Convenzione dell'Aja del 1899 – Prima Conferenza Mondiale della Pace – il cui testo, analogo al "Manuale di Oxford", è identico a quello della Quarta Convenzione dell'Aja del 1907.

La Convenzione, ratificata il 4 settembre 1900 dall'Italia, che allora faceva parte degli Stati emergenti più bellicosi del mondo, per quanto riguardava i beni culturali stabiliva:

- una generica affermazione che la proprietà privata non poteva essere confiscata dall'occupante (Art. 46);
- un generico divieto di saccheggio (Art. 28 e 47);
- i beni dei Comuni, quelli degli stabilimenti consacrati ai culti, alla beneficenza ed all'istruzione, alle arti ed alle scienze, anche se appartenenti allo Stato nemico, saranno trattati alla stregua di proprietà privata (Art. 56);
- qualsiasi appropriazione, distruzione o degradazione volontaria di simili stabilimenti, di monumenti storici, di opere d'arte o di scienza, è vietata e deve essere perseguita (Art. 56).

Come si vede era lasciato al libero arbitrio degli Stati non solo la punizione del proprio agente che deteriorasse un'opera d'arte in territorio nemico occupato, ma anche la punizione del nemico catturato che avesse fatto la stessa cosa in territorio amico occupato. Cosicché vi erano Stati i cui codici penali militari punivano sia il militare proprio che quello nemico che avessero compiuto tali atti (Italia – codice penale militare del 1870 e del 1941), e Stati inadempienti sotto questo profilo con generali che addirittura, come Göering, collezionavano, guerra durante, le opere d'arte del nemico.

Così avvenne che la 1ª Guerra Mondiale desse le avvisaglie (per esempio i bombardamenti di Treviso e di Venezia) di ciò che poi sarebbe stato eclatante nella 2ª Guerra Mondiale con i bombardamenti a tappeto delle città, che segnò la catastrofe dei beni culturali, anche in seguito allo scoppio delle bombe atomiche di Hiroshima e Nagasaki. Il mondo constatò che la 2ª Guerra Mondiale era costata più perdite di beni culturali che i saccheggi, le ruberie, le inondazioni, i terremoti, i maremoti e gli incendi dell'ultimo millennio. In fondo anche Attila era più civile dei belligeranti moderni, in quanto rubava un bene culturale per goderselo, anziché per il piacere di distruggerlo per sé e per tutti.

Pur in piena strategia nucleare delle due superpotenze e dei blocchi contrapposti, nacque la Convenzione dell'Aja del 1954, che sanciva dei principi indubbiamente nuovi per quanto riguarda i beni culturali, e cioè:

- il bene culturale non appartiene né allo Stato né all'individuo che lo detengono, ma appartiene all'umanità nel suo complesso e per l'umanità stessa deve essere protetto;
- il bene culturale non è "bottino o preda" bellica, o moneta di guerra e come tale deve essere protetto dai belligeranti;
- la proprietà del bene culturale non può essere cambiata durante la guerra, ma solo dopo il cessare delle ostilità;
- un bene culturale non può cambiare sito guerra durante se non per motivi di sicurezza e di protezione.

Lasciando perdere i problemi connessi al rispetto ed alla salvaguardia, alla protezione semplice e speciale, alla difficoltà di iscrivere i beni sul "Registro Internazionale della Protezione Speciale", all'applicabilità della Convenzione ai soli conflitti armati internazionali, lasciando le regole nebulose nei conflitti armati non internazionali, che sono in larga maggioranza, ci interessa quanto riguarda le sanzioni, che a mio avviso sono lasciate alla buona volontà delle Parti. Infatti, (Art. 28) "le Alti Parti Contraenti si

impegnano a prendere, nel quadro del loro sistema di diritto penale, tutte le misure necessarie perché siano perseguite e colpite da sanzioni penali o disciplinari le persone, di qualsiasi nazionalità, che hanno commesso o dato l'ordine di commettere un'infrazione alla presente Convenzione".

E' un passo avanti rispetto alle convenzioni precedenti, si contemplano gli amici ed i nemici, ma il tutto è lasciato alla buona volontà degli Stati, che non sempre è delle migliori, soprattutto nei confronti della punizione eventuale del proprio personale, che in genere esegue gli "ordini dei capi", anche perché la comunità internazionale non dispone dei mezzi per imporsi.

3. Il titolo quinto del Primo Protocollo del 1977

Il titolo V del Primo Protocollo aggiuntivo alle Convenzioni di Ginevra rappresenta indubbiamente una pietra miliare ed una svolta nel pensiero. E' indubbiamente importante la sezione I (Disposizioni esecutive) che detta le misure esecutive e le attività della Croce Rossa e delle altre organizzazioni umanitarie. Inoltre, impone i consigliere giuridici in materia di diritto umanitario in seno alle Forze Armate (e l'Italia su questo punto è particolarmente sensibile ed adempiente) e detta agli Stati le norme per la diffusione dei Protocolli e le leggi di applicazione degli stessi, ma è sulla sezione II che intendo soffermarmi.

Essa riguarda la "repressione delle infrazioni alle convenzioni o al Primo Protocollo, trasformando genericamente le "infrazioni gravi" in "crimini di guerra" da perseguire anche dopo gli atti bellici e con l'aiuto degli Stati. Dovrebbe limitarsi ai dettati delle Convenzioni di Ginevra del 1949, ma, invece, spazia anche nel campo della Convenzione dell'Aja del 1954, relativa alla protezione dei beni culturali in guerra.

Infatti, per quanto riguarda la protezione dei beni culturali in tempo di guerra, l'Articolo 85, riguardante la repressione delle infrazioni gravi al Primo Protocollo, afferma che tra le infrazioni gravi, che sono crimini di guerra a tutti gli effetti, vi sono le seguenti:

- *"lanciare un attacco indiscriminato" … "che colpisca beni di carattere civile, sapendo che l'attacco stesso causerà" … "danni ai beni di carattere civile che risultino eccessivi ai sensi dell'Art. 57, 2a), iii) (punto 3b)"*;
- fare oggetto di attacco località non difese o zone smilitarizzate (punto 3d);
- *"dirigere un attacco contro monumenti storici, opere d'arte o luoghi di culto chiaramente riconosciuti, che costituiscono il patrimonio culturale o spirituale dei popoli, ed ai quali sia stata concessa una protezione speciale in base ad accordo particolare, ad esempio nel quadro di una organizzazione internazionale competente"* (è il caso della "protezione rinforzata" data dall'UNESCO)*, "provocando ad essi, di conseguenza, distruzioni in grande scala, quando non esista alcuna prova di violazione ad opera della Parte avversaria dell'Art. 53 comma b) e quando i monumenti storici, le opere d'arte ed i luoghi di culto in questione non siano situati in prossimità di obiettivi militari"* (punto 4d) (è il caso, ad esempio, delle biblioteca di Sarajevo o dei Buddha dell'Afganistan).

Sono punite anche le omissioni di intervento del Governo o dei Comandanti che sanno; ciò è chiaramente indicato agli Articoli 86 (omissioni) e 87 (doveri dei Comandanti) e gli Articoli da 88 a 91 assicurano che l'assistenza giudiziaria che devono assicurarsi le Alti Parti Contraenti, sia la cooperazione

internazionale nel perseguire i crimini di ogni tempo (quindi anche dopo la fine dell'atto bellico), sia l'instaurarsi subito di una commissione internazionale di accertamento dei fatti (accettata dall'Italia dal momento della ratifica). Per quanto riguarda, infine, le responsabilità viene stabilito che ogni Parte in conflitto sarà responsabile di ogni atto commesso dalle persone che fanno parte delle proprie Forze Armate.

Sembra che il Primo Protocollo sia riferito ai soli "conflitti internazionali" (essendo il Secondo Protocollo riservato ai "conflitti non internazionali", con regole molto meno precise ed impegnative), ma in effetti avviene sempre meno così. Infatti occorre tenere presente sia l'instaurarsi in sede internazionale di un tribunale permanente (tipo Tribunale di Roma – 17 luglio 1998, a cui l'Istituto Internazionale ha dedicato una intera Tavola Rotonda) competente nel giudicare tutti i crimini di guerra comunque e dovunque commessi (viene così ad essere superata la logica perversa dei tribunali *ad hoc*, che sono sempre dei tribunali dei vincitori), sia il fatto che la comunità internazionale, intervenendo sempre più frequentemente nei conflitti di carattere interno alle Parti con "contingenti di pace" di pacificazione, in un tempo relativamente breve internazionalizza di fatto anche i conflitti interni.

Così i dettati del Primo Protocollo, che ho appena ricordato, tendono sempre più ad avere valore in ogni tipo di conflitto, stabilendo sia la necessità della punizione, sia una pena internazionale adeguata comminata da un tribunale internazionale permanente.

4. Il Protocollo Aggiuntivo del 1999 alla Convenzione dell'aja del 1954

Fermando la nostra indagine ai beni culturali, due atti internazionali stipulati nel 1998 e nel 1999, sembrano marciare nella direzione che ho indicato. Si tratta del già citato Tribunale di Roma ("Statuto Istitutivo della Corte Penale Internazionale – Roma, 17 luglio 1998", pubblicato e tradotto dalla "Scuola di Guerra dell'Esercito Italiano"), e del "Secondo Protocollo relativo alla Convenzione dell'Aja del 1954 per la Protezione dei Beni Culturali nei conflitti armati, del 26 marzo 1999", anche esso pubblicato e tradotto dalla Scuola di Guerra dell'Esercito Italiano". Infatti, entrambi i documenti fanno parte della "professionalità dei Quadri delle nostre Forze Armate. Quest'ultimo Protocollo, anche se non ancora ratificato dal Governo Italiano, è già impiegato all'estero dalle forze che fanno parte dei contingenti di pace, per espresso volere del Capo di Stato Maggiore della Difesa *pro tempore*, Gen. di Squadra Aerea Mario Arpino.

Per quanto riguarda le responsabilità penali, la competenza e le relative sanzioni (illustrate nel Capitolo 4 del Protocollo), il Protocollo è molto più preciso della Convenzione stessa. Infatti, si enumerano le infrazioni gravi e si chiamano chiaramente "crimini di guerra" – Articolo 15.2. – e si impegnano le Parti a perseguirle sul proprio territorio secondo il proprio diritto interno. Si evidenzia cosi sempre di più l'esigenza di una sanzione internazionale che sia uguale per tutti, cosicché la pena sia similare in tutti i paesi, senza che vi siano sospetti di partigianeria o di immeritate punizioni. L'Articolo 16 tratta con pignolesca precisione la "giurisdizione", mentre l'Articolo 17 impone l'obbligo della incriminazione e naturalmente di un equo processo penale, anche se si procede con il diritto interno. In ogni caso occorre procedere all'estradizione (Art. 18), se non si intende procedere con il diritto interno o se il reato è stato commesso all'estero. E' implicito che le Parti devono assicurarsi la più ampia reciproca assistenza giudiziaria (Art. 19) e vengono

stabiliti nel dettaglio gli eventuali contenziosi diplomatici (Art. 20). Sono esaminate anche le misure concernenti altre eventuali violazioni (Art. 21).

Quello che è importante è l'affermazione che il Protocollo è applicabile in caso di conflitto armato non internazionale, precisando però "che non è applicabile in caso di tensioni interne (tipo violenza sociale), di sommosse interne (compresi i colpi di Stato?: non è specificato), come i tumulti, gli atti isolati e sporadici di violenza ed altri atti analoghi".

Come si vede, qualcosa è lasciato nel vago, ma per quanto si riferisce ai possibili crimini di guerra, alle infrazioni gravi ed alla loro punizione costituisce un indubbio passo in avanti rispetto ai dettati della Convenzione. Si darà che ogni Convenzione internazionale riflette il suo tempo ed i problemi della sua epoca, ma non si tratta solo di questo!

Il Protocollo del 1999 assomiglia molto ai Protocolli di Ginevra di cui celebriamo il venticinquennale. Intanto esso allarga enormemente il campo ristretto e specifico della Convenzione di partenza; si occupa anche del modo di fare la guerra e non solo del campo delle "vittime della guerra"; assomiglia di più ad un sistema di convenzioni *ex novo* che non ad una aggiunta a chiarificazione di una Convenzione. Forse, come nel caso dei Protocolli di Ginevra, si è avuta la paura di perdere le ratifiche degli Stati che avevano già ratificato le Convenzioni, data la lungaggine burocratica in tutti gli Stati degli *iter* relativi, e forse questo sembra essere un motivo valido.

5. Conclusioni

Sembra che si stia avvicinando il giorno dell'unificazione (finalmente!) delle regole della guerra comunque combattuta, internazionale o non internazionale. Si afferma sempre di più il principio che il combattimento richiede professionisti della guerra, e non bambini o ignoranti armati, la cui professionalità riguarda prima di tutto la conoscenza di regole certe sul modo di applicare la violenza bellica. Il fenomeno guerra rimane sempre il segno della stupidità umana e dell'incapacità di dialogo tra opposti massimalismi, che schiavizzano sempre parte del genere umano, che non lo merita.

Si marcia verso un Tribunale Internazionale Permanente, abilitato a giudicare i crimini di guerra dovunque e comunque commessi, che affermi dei principi partendo purtroppo dai fatti: esso non avrà mai tra i suoi scopi la sanzione della vendetta, e non sarà mai più un "tribunale dei vincitori" e verso un codice penale internazionale, uguale per tutti ed applicabile a tutti. E' il segno del nostro tempo, in cui i concetti di globalizzazione devono naturalmente travalicare le economie e gli Stati e riguardare il pianeta, come il diritto internazionale e le regole per l'ambiente.

"Verdi" non può essere un partito, ma una consapevolezza ed un modo di essere, una caratteristica della vita di tutti gli uomini.

Pensieri anacronistici, come quelli di certuni che non tollerano che i loro cittadini possano essere giudicati da giudici diversi, devono essere banditi, come il sospetto e la paura della strumentalizzazione politica. Non ci sono nel genere umano uomini di serie A ed uomini di serie B, ma solo uomini e non c'è

spazio né per le discriminazioni, né per la disperazione. Bisogna tutti credere nel progresso e nel lavoro altrui ed affidarsi alla professionalità di ognuno, come quando si è dal medico in ospedale.

Ed allora il discorso Croce Rossa, Diritto Umanitario, regole della guerra, assistenza e protezione delle vittime della guerra, rifugiati e profughi politici, esodi verso i paesi del nord, immigrazione, ecc, rischia di diventare un discorso comprensibile, coerente ed unitario.

ADDITIONAL PROTOCOL I AND PRINCIPLE OF PROPORTIONALITY

Prof. Dr. Miodrag STARČEVIĆ

Yugoslav Red Cross, Senior Adviser on International Humanitarian Law

One of the important achievements of Additional Protocol I was the codification of some customary law rules regulating the conduct of hostilities. Moreover, at the same time, a progressive development of those rules was noticed. A special place in that sense, was devoted to the principle of proportionality of force implemented in hostilities, and particularly in attacking operations.

The principle of proportionality was, at the time of creating Protocol I, a customary law principle. Already, at that time, the principle of proportionality was defined as a request to belligerents to implement only necessary force against the enemy, no more than what was needed for achieving military advantage. Since international humanitarian law as a whole is a compromise between military necessity and humanitarian requirements, the principle of proportionality is a kind of compromise between the legitimate right of belligerents to use force and the humanitarian request to limit that force to avoid unnecessary sufferings and damages. Probably no one, or almost no one, has ever questioned the validity of it. However, in the practice of military operations, it has been seriously breached. In many cases, justification for such manner has been seen not in the invalidity of principle, but in the different understanding, different interpretation of it.

Additional Protocol I brought to us a very founded clarification of the principle of proportionality, introducing special, precautionary measures in attack, as a means for full implementation of the principle. In that way, even without explicit mentioning of the principle, Protocol I defines the principle in a rather clear manner. Even more, the concept of proportionality, created in Protocol I, does not leave too much confusion concerning its meaning and measures that must be implemented by all belligerents to avoid the breach of the principle.

It ought to be understood that the principle of proportionality is not a separated or isolated rule; on the contrary, the principle of proportionality is a part of humanitarian concept provided by Protocol I, and other sources of international humanitarian law. In that sense, it is complementary with other principles and rules of international humanitarian law and its purpose is to contribute to the protection of civilians and civilian objects, as well as other protected persons and objects, taking into account the principle of

distinction, but also having in mind military necessity. In that sense, asking to spare non-military persons and objectives and implementing only necessary force, the principle of proportionality does not influence military aims. It just puts the objective limits to that force and requests that no excessive force be implemented.

Such meaning of the principle of proportionality leads us to understand that the principle of proportionality is neither a governing nor a decisive rule. It is a subsidiary one. That means, it contributes to the clarification of ways of use of force in attack in accordance with humanitarian requirements adopted in international humanitarian law. In that light, an attack and the use of force in that attack cannot be justified only on the grounds of proportionality. Such attack must be in accordance with other principles of international humanitarian law, such as the principle of distinction or military necessity. However, it is not enough to respect only those principles; the principle of proportionality must be taken into account as well. In that sense, the principle of proportionality appears as a corrective criteria for the legitimate use of force, to keep it in certain, acceptable limits in order to avoid loss of civilian lives and damage to civilian objects which must not be in relation with anticipated military advantage.

The principle of proportionality is embodied in Article 57 and in Article 51 of Protocol I. For any discussion about the principle of proportionality, Article 57 of Protocol I regulating precautions in attack, is the most important one, for several reasons. First of all, this Article, especially its sub-paragraphs (a)(iii), (b) and (c), establishes a direct connection between the use of force and military advantage, expected or anticipated. The rule of proportionality is clearly laid down in sub-paragraph (a)(iii), requesting that each attack be launched only if the incidental loss of civilian lives or damage of civilian objects was not excessive *"in relation to the concrete and direct military advantage anticipated"*. The same purpose has a provision in sub-paragraph (b) asking that attack be cancelled or suspended if it becomes apparent that the expected attack could cause *"loss of civilian life or injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".*

For the very spirit of the principle of proportionality, paragraph 3 is very illustrative, asking to make, whenever possible, a choice of target that provides the least danger to civilian lives and civilian objects.

It is very important to notice that military advantage expected or anticipated must be concrete and direct. That means that military advantage, as a base for an attack, must be substantial and of real and clear military interest. It should be of such a nature that it contributes to the military weakening of the adversary. It also means that it should be timely and consequently close to the implementation of force. It would not be enough to see the advantage in the long term and hardly visible.

At the same time, it is important to understand that the principle is not intended to be implemented on a strategic level. On the contrary, it must be used as criteria in a specific tactical operation, taking into account each attacking operation as a whole. However, at the same time, it does not mean that during such attacking operations some particular action can be undertaken in the manner which would lead to extensive loss of civilian lives or to extensive damage or destruction of civilian objects.

However, even in a general attack the principle of proportionality must be taken into account and military advantage must be both concrete and direct. There is no excuse for undertaking attack, including and on a general level, with the knowledge that it would cause loss of civilian lives or damage to civilian objects.

For the implementation of the principle of proportionality, it is important to notice that the principle imposes an obligation to all participants in combat. There is no difference between the aggressor and the defender. The principle of proportionality equally obliges both sides. The position of the victim, factual or supposed, in a concrete case does not authorize the breaching of that principle.

That is quite clear from the definition of attack, in Article 51 of Protocol I. Namely, according to the definition mentioned, it covers both offensive and defensive acts, or, in other words, the term of attacks covers all combat activities. Naturally, the definition of attack applies to Protocol I as a whole. It means that Article 57, regulating the principle of proportionality, applies in all kinds of attack, whether they are an act of aggression or a response to aggression.

The fact that the wording of sub-paragraphs of Article 57 is rather clear does not obviously mean that misinterpretation is not possible. It is obvious that even relatively clear wording asks for interpretation in every particular case to find out whether the use of force, in concrete action, is in accordance with the rules prescribed in Protocol I. In spite of the fact that the mentioned provisions of Protocol I offer as distinct a meaning as possible, there is a place for military people for subjective evaluation and weighing up of humanitarian requirements and military necessity in each specific case. Especially, that could be the case in the assessment of military advantage, what would be acceptable or excessive, acceptable loss of civilians or damages of civilian objects, etc. That means the judgment of the compliance of concrete action with the above-mentioned rules would be submitted to the subjective understanding of exposed criteria.

That obviously imposes a serious obligation to the military commanders, who plan operations and to those executing them as well. In each particular case, they have to take into account military advantage compared with humanitarian interests. In that sense, the commanding staff and other military people have to be very well educated in international humanitarian law in general and have to have good understanding of the principle of proportionality to be capable to make the right decision in each particular case of attack. Good faith in the interpretation of the rules of international humanitarian law for those people is a precondition. Anyway, in my opinion, the provisions of Protocol I could be a good guideline for all of them to evaluate each concrete situation. At least, it would remind them of their responsibilities to do so very carefully in order to act in accordance with Protocol I.

In any case, the commanders and the military people executing attack operations have to be aware that they are responsible and could be punished for the breaches of the rules laid down in Article 57, according to Article 85 of Protocol I, regulating the repression of breaches of the Protocol. Namely, violation of Article 57, para. 2 (a)(iii) is considered as a grave breach and a war crime.

Belgrade, August 31, 2002

INTERVENTION (SUMMARY)

Ambassador Mounir ZAHRAN
Council Member of the International Institute of Humanitarian Law

The non-use of force in international relations is a principle enshrined in the United Nations Charter. The exception is embodied in Article 51 regarding individual and collective self-defense. However, regional armed conflicts have become widespread, including non-international conflicts. In many of these conflicts, the Geneva Conventions and the Additional Protocols have not been fully respected and are even widely violated with the failure of the international community to intervene, including the International Committee of the Red Cross, and the inability of the Security Council to intervene in the protection of the civilian population. This is, for example, the case of the civilian population of Palestinians under Israeli occupation who are deprived of their human rights including their collective human right to self-determination. Hence, they resist such occupation. The Israeli reaction, as evidenced by current events, is violating International Humanitarian Law, with the killing of civilians including children, the demolition of houses including the destruction of farms and infrastructure, and the construction and expansion of the colonial settlements, with the international community staying idle. Even ambulances and medical personnel, which should be protected in accordance with the First Additional Protocol, are not spared from Israeli practice in the occupied territories.

The Parties to that conflict should in *bona fide* negotiate, without any further delay, a comprehensive peace settlement with the withdrawal of Israel from all the Arab territories occupied since June 5 1967, and the creation of the State of Palestine with East Jerusalem as its Capital.

LES PROTOCOLES ADDITIONNELS ET L'AFRIQUE

M. François NDAGIJIMANA
Fondation de l'Institut International de Recherches pour la Paix à Genève

Dès la séance d'ouverture des travaux de la Table Ronde, le Président de l'Institut, le Professeur Patrnogic, à déclenché la sonnette d'alarme en mettant le doigt sur les menaces qui pèsent sur le droit humanitaire: les conflits visant les civils se multiplient. Le droit humanitaire international est menacé.

Dire que la situation est encore plus préoccupante en Afrique paraît une tautologie. Tant il est vrai, que lorsque quelque chose va mal ailleurs, quel que soit le domaine d'ailleurs, la situation est encore plus dramatique sur le continent africain. Pour ce qui est du droit humanitaire cependant, les principes les plus élémentaires perdent carrément de leur pertinence.

À titre d'exemple, le principe de distinction entre civils et combattants non seulement paraît insignifiant, mais les civils constituent l'objectif principal de la plupart des conflits, on devrait dire des massacres, sur ce continent.

Ainsi donc, ceux dont la protection constituait naguère un légitime *casus belli*: les plus vulnérables, les femmes, les enfants, les personnes âgées, deviennent en Afrique, non seulement les principales victimes, mais bel et bien l'objectif même de ces drôles de guerres et sont massacrés avec une sauvagerie inouïe, comme on l'a vu en direct à la télévision durant le génocide des Tutsi au Rwanda en 1994. Faut-il conclure à la pratique africaine de la guerre?!

Pour sa part, le Président du CICR, M. Kellenberg, lançait à la communauté internationale, un appel à l'aide pour faire respecter les principes élémentaires des Conventions de Genève et des Protocoles Additionnels.

Permettez-moi de rebondir sur cette requête en m'adressant à un auditoire tel que le votre et d'appeler à l'aide pour l'Afrique afin que la protection des populations, des civils, pour reprendre l'expression des Protocoles, ne soit pas un mot dépourvu de toute signification. A cet effet, il faudrait attirer l'attention sur la nécessité de responsabiliser davantage:

- les divers experts et autres spécialistes de l'Afrique;
- les médias pour qu'ils cessent, à partir d'articles d'archives, de qualifier presque automatiquement d'ethnique ou de ramener toutes situations conflictuelles vers des motivations et/ou des revendications ethniques ou ethnicisantes. Ils ne doivent pas surtout oublier qu'ils créent l'opinion et que celle-ci devient facilement vérité scientifique dans certaines régions du monde. Faut-il s'en laver purement et simplement les mains et conclure, par exemple, que si les africains sont si naïfs ils n'auront qu'à s'en prendre à eux-mêmes?

Si nous nous déplaçons, cette fois, non sur un champ de mines en tant que tel - en tout cas le terrain paraît bel et bien miné – mais en empruntant la terminologie en vigueur dans le domaine des mines, vous me permettrez de rappeler que depuis bientôt deux ans *l'Institut International de Recherches pour la Paix à Genève* plus connu sous son sigle anglais de GIPRI (Geneva International Peace Research Institute) s'efforce de mener une opération assez particulière de déminage, sur cette mine *sui generis* que constitue l'ethnisme.

Le GIPRI s'efforce donc de désamorcer cette espèce de bombe à retardement, d'une efficacité redoutable, que j'appellerais mine anti populations civiles qui est posée dans les têtes et les mentalités, en attirant l'attention sur les dangers et/ou les effets néfastes de la manipulation et de l'instrumentalisation de l'ethnie, terreau propice à l'idéologie génocidaire, en particulier sur le continent africain.

Et elle est d'autant plus pernicieuse que, si les consommateurs se trouvent principalement – mais pas uniquement – en Afrique et sont relativement faciles à localiser, les fabricants eux se situent à la fois à l'extérieur et à l'intérieur des pays où elle est (ou en passe d'être) placée et ne sont pas aussi facilement identifiables.

Enfin, sur ce continent où les armes sont en passe de devenir un produit de première nécessité, les complexes militare-industriels et autres trafiquants d'armes devenus littéralement trafiquants de mort, ne devraient pas trop facilement s'en laver les mains.

Rejoignant en ce point les propos de M. Herby, on ne peut qu'en appeler à la responsabilisation de ces marchands d'armes de toutes sortes déversées si facilement sur le continent africain (sans oublier, cela va de soit, les acquéreurs eux-mêmes, si souvent irresponsables).

Ceux qui fournissent les armes doivent accepter de partager la responsabilité de leur utilisation. La fourniture d'armes n'est pas une opération commerciale ordinaire dont on devrait se féliciter d'avoir astucieusement réalisé un succès de marketing. Faudrait-il se contenter de déclarer que les acheteurs n'ont qu'à en assumer l'utilisation?

Pendant longtemps, la plupart des gouvernements africains étaient montrés du doigt – déjà de façon hypocrite il est vrai, mais quand même – parce qu'ils consacraient des budgets importants bien que souvent issus eux-mêmes de l'aide extérieure ou d'autres accords appelés ironiquement accords d'aide au développement ou à la coopération (quant ils n'étaient pas baptisés accords de défense alors qu'ils étaient dirigés contre les populations elles-mêmes et non contre un ennemi extérieur) et ne consacraient que de maigres ressources, par exemple, à l'éducation, à la santé ou à l'infrastructure.

Au cours de la guerre froide les grands représentants des deux blocs se sont fait la guerre par procuration. Tandis que la guerre était et demeure chaude pour l'Afrique.

Après la guerre froide, le gros des projets réalisés semble avoir été fait dans le sens d'entraîner des pans entiers de population dans l'acquisition d'armes de guerre. Les civils sont directement impliqués dans de nombreux conflits actuels dits limités ou de basse intensité (limités à qui et sur quels critères ? le

problème semble ne pas devoir se poser et pourtant!). Il serait plus judicieux de parler de conflits dans lesquels les civils, normalement ceux qui requièrent encore plus de protection, ceux qui demandent qu'à vivre en paix chez eux et à vaquer à leurs tâches quotidiennes, constituent sans conteste le principal objectif visé.

La destruction des arsenaux devenus inutiles ou jugés obsolètes coûterait cher. Il est donc à la fois rentable et astucieux de les vendre même bon marché et de s'en débarrasser à bon compte: par une juteuse transaction économique et financière. Faudrait-il se priver d'une si rentable opération commerciale? Les modalités de paiement en nature (en matière première: or, diamant, pétrole, etc.…) ne sont pas, selon toute vraisemblance, le fruit du hasard pas plus qu'elles ne résultent, d'ailleurs, d'une simple coïncidence.

L'Afrique qui, en réalité, n'était ni communiste ni capitaliste n'a malheureusement pas eu la force de promouvoir et de faire valoir la priorité qu'elle accordait à l'homme et à l'humanisme. Le Mouvement des non-alignés, pour sa part, a été gentiment mais soigneusement étouffé. L'humanisme et la solidarité qui honoraient jadis l'Afrique ont dû céder vite le pas à l'ethnisme et à la barbarie. Sur le plan politique les préoccupations mercantiles et à courtes vues, sans véritable projet de société, accompagnent souvent et caractérisent une effroyable perversion du pouvoir exercé à l'encontre des populations elles-mêmes.

Lorsqu'un chef d'état et/ou de gouvernement, avec tout le sérieux dont il peut être capable, déclare officiellement qu'il crée et préside un par dont les membres le sont dès leur naissance, l'on peut dire qu'il se moque du monde. Par contre, il est moins sûr que l'on puisse valablement affirmer que le monde le lui rend bien en feignant de le croire.

Ainsi certaines lâchetés, apparemment anodines peuvent déboucher sur des désastres et de monstruosités. Quand on tolère, non sans une certaine dose de paternalisme et de condescendance, et que l'on accepte l'idée voire l'existence de partis abusivement appelés politiques mais essentiellement basés sur l'appartenance à une ethnie réelle ou supposée, partis dont on est membre dès sa naissance, on avalise de la sorte que l'enfant qui rit ou pleure manifeste ainsi un engagement politique. Point n'est besoin de s'embarrasser de projets de société dans de telles circonstances. Mais peut-on croire et laisser croire qu'en Afrique l'âge de raison est acquis à 9 mois? Serait-ce alors peut-être pour tenter d'expliquer des massacres même d'enfants pour divergences politiques? La situation en réalité dépasse l'entendement. Pourtant il se trouve des gens pour trouver une telle aberration sinon acceptable de moins tolérable puisqu'ils semblent bien aisément s'en accommoder.

En réalité, on commence par tolérer certaines aberrations fusent-elles jugées insignifiantes ou de curiosités plus ou moins banales et l'on finit par se trouver en face d'horribles monstruosités: le génocide des Tutsi au Rwanda en 1994 est là pour le rappeler si besoin était.

Il faudrait peut-être une autre dimension du droit humanitaire qui mette véritablement l'accent sur l'humain si l'on ne veut pas aboutir à l'humanitaire paradoxalement inhumain, quelle que soit la motivation invoquée.

Avec l'introduction ou l'exacerbation selon les cas de l'élément ethnique source et cause supposée de la plupart des conflits que l'on s'empresse obstinément de qualifier d'affrontements interethniques que l'on trouve même séculaires (avec parfois une curieuse conception de la durée d'un siècle: moins de 50 ans parfois) sans se soucier de vérifier quitte à faire jouer aux médias le rôle de pompiers pyromanes en attisant les conflits au lieu de contribuer éventuellement à les résoudre; et cela sous couvert, plutôt sous prétexte, d'objectivité de l'information sinon d'équilibre dans les reportages, à moins qu'ils ne soient au service d'intérêts inavoués voire mêmes inavouables.

La facilité avec laquelle les armes sont vendues et consommés en Afrique est alarmante. Ce continent sans cesse sous influence, sous domination persistante et constamment sous l'emprise de l'urgence, souffrant d'épidémies, de famines, de guerres sans fin et de cruautés d'un autre âge tout en cohabitant avec l'ordinateur, internet et le téléphone cellulaire, mérite d'être traité autrement qu'il ne l'est à ce jour. L'exportation d'armées à des acteurs irresponsables et par des trafiquants sans scrupules doit cesser.

Pour terminer, je n'ai pas de proposition juridique particulière à formuler: les dispositions existantes s'avèrent largement satisfaisantes; si seulement elles étaient appliquées.

J'aimerais simplement attirer l'attention sur la nécessité d'accorder son sens réel et entier à la notion même d'humanité au-delà de l'humanitaire qu'il soit civil ou militaire.

Je vous remercie de votre attention.

PROBLÈME ACTUEL DU DROIT INTERNATIONAL HUMANITAIRE

Mme Graciela ROBERT
Médecins du Monde

Le sujet qui nous occupe cette année, à savoir les défis et perspectives que constituent les Protocoles Additionnels aux Conventions de Genève, est l'un des plus fondamentaux en droit international humanitaire. En effet, 25 ans après leur rédaction et ratification, ces Protocoles demeurent, avec les Conventions de Genève, les textes qui régissent le droit de la guerre, et celui des civils.

Pour une organisation humanitaire telle que Médecins du Monde, c'est plus aux effets réels de ces Protocoles et à leur efficacité sur le terrain qu'à leurs spécificités juridiques que nous nous intéressons. C'est la raison pour laquelle mon intervention sera centrée sur le sort actuel des civils dans les conflits armés, qui tend malheureusement à nous interroger sur l'efficacité présumée des Protocoles Additionnels aux Conventions de Genève.

Les règles de droit fondamentales qui nous occupent

Les deux Protocoles Additionnels contiennent les règles fondamentales qui protègent la population civile prise dans le feu d'un conflit armé. En effet, la lecture des articles nous apprend que:

- *"les parties au conflit doivent en tout temps faire la distinction entre la population civile et les combattants, ainsi qu'entre les biens de caractère civil et les objectifs militaires"* (Art. 48).
- *"Les opérations militaires doivent être conduites en veillant constamment à épargner la population civile, les personnes civiles et les biens de caractère civil"*(Art. 57).

Ces règles sont les plus fondamentales car elles régissent le droit des populations civiles; ce sont elle qui théoriquement placent la population qui ne participe pas aux combats en situation d'être protégée, c'est-à-dire de ne pas être attaquée, de recevoir aide et assistance. Pour les organisations humanitaires, c'est cette règle qui prévaut car elle induit normalement le sort des civils. Pour Médecins du Monde en particulier, cela signifie également que dans des pays en guerre, la population et son lieu de résidence, ainsi que les structures de santé sont épargnés par les combats, ce qui devrait par là même lui épargner les déplacements, les blessures, les souffrances physiques en général et la famine. Or, force est de constater, à la lumière des conflits actuels qui font rage dans des zones où nous sommes présents, que les choses ne se passent ainsi.

En Tchétchénie, la population tchétchène a été prise en otage par les militaires russes, et s'est trouvée dans l'obligation de fuir dans la République d'Ingouchie voisine. La destruction quasi totale de Grozny, dont il ne reste plus rien, et les bombardements des quartiers civils ont obligé la population à se réfugier ailleurs, créant son lot de déplacements, de camps et de malheur.

En Afghanistan, et ce bien avant le mois de septembre, comme en Colombie, les populations ont été victimes des combats entre les forces armées. En utilisant lors de la guerre contre le régime Taliban, des bombes à fragmentation, les États-Unis se rendaient de fait coupables de ne pas protéger les populations civiles: en effet, ce sont les civils que ces bombes à fragmentation, cachées dans le sol prêtes à exploser, touchent en priorité. En minant un pays déjà très touché par la présence de mines antipersonnel, les États majors américains mettaient en péril avant tout les civils. Mais bien entendu, ces démarches émanent d'une décision politique. En Colombie, la population est prise en otage par l'une des deux parties et échappe difficilement aux représailles lorsque les alliances et les rapports de force s'inversent.

La réalité aujourd'hui

D'une façon générale, les civils n'ont jamais été autant utilisés par les parties au conflit, menacés par la violence des combats, délaissés par les États parties, les États tiers et la communauté internationale en général.

Aujourd'hui, la situation en Tchétchénie est intolérable, et pourtant acceptée ou ignorée par une majorité. Sans témoins, sans protestation officielle, les autorités russes rapatrient aujourd'hui de force la population tchétchène en Tchétchénie, afin de faire croire à la normalisation de la situation et à la résolution du conflit. Alors que rien à Grozny ne laisse croire que les conditions de sécurité sont réunies pour la population rentrée, les retours sont fortement encouragés et la protection à laquelle la population déplacée en Ingouchie devrait avoir droit de moins en moins dévolue. Les tentes vides sont démontées pour ne plus servir, la nourriture n'arrive pas toujours, le système de racket et de vol sème l'insécurité parmi les déplacés.

Toutes ces stratégies visant à se débarrasser des populations civiles gênantes s'effectuent dans le plus grand silence de la communauté internationale. Quelques ONG encore présentes telles que MSF, la FIDH et Médecins du Monde ont cette année publié des rapports -par ailleurs alarmants- sur la situation des Tchétchènes dans l'objectif de faire réagir la communauté internationale et ainsi faire respecter le droit international humanitaire. À noter également le travail important que réalise dans la région le CICR.

De même sommes-nous, humanitaires, très préoccupés par la situation de la population afghane. Tout porte à croire que la politique actuelle des migrations table en faveur d'un retour des réfugiés dans leur pays: l'Iran et le Pakistan ont entamé le rapatriement des réfugiés afghans, les pays d'Europe quant à eux sont prêts à renvoyer chez eux ceux qui gênent un peu, à Sangatte ou ailleurs. Or, pour nous qui sommes présents en Afghanistan, l'argument selon lequel il n'y aurait plus de danger guettant les Afghans n'est pas recevable. Après plus de 20 ans de guerre, le pays est exsangue, miné, le cheptel décimé, les champs incultivables, les villes détruites, les campagnes isolées. Médecins du Monde a privilégié la population civile la plus vulnérable, en soutenant des structures de soins destinées aux femmes et aux enfants, ainsi que des hôpitaux dans des régions très reculées (région de Ghor).

De plus, le contexte géopolitique international (la possible attaque américaine en Irak et les conséquences sur le régime iranien et afghan) et interne à l'Afghanistan (le gouvernement n'a pas réussi à

fédérer les chefs de guerre autour de lui, ni a recréer une unité propice à la paix et aux réformes) ne porte pas à croire que la paix soit revenue de manière permanente dans cette région du monde.

Ces quelques exemples sont le reflet des situations auxquelles nous, humanitaires, sommes confrontés quotidiennement. Pompiers arrivés le plus souvent après l'incendie, il nous faut composer avec la réalité, accepter de soigner des gens victimes de conflits qu'ils ne comprennent pas et ne partagent pas, et ce dans un silence parfois assourdissant !

D'où ma question aujourd'hui: si l'appareil législatif tel qu'il est à l'heure actuelle est suffisant, si les structures qui jugent et punissent ceux qui se rendent coupables d'exactions à l'encontre de civils sont créées, comment se fait-il que nous ne voyons pas d'amélioration dans le sort réservé aux civils? Pire: pourquoi a-t-on l'impression, à regarder ce qui se passe en Colombie, en Tchétchénie, au Chiapas, en Guinée, que leur sort est pire, et que le désintérêt de la communauté internationale est encore plus prononcé qu'il y a dix ans?

La responsabilité politique

Les organisations humanitaires sont à l'heure actuelle confrontées à un problème: celui de la redéfinition de leur rôle, à la lumière de la place qu'occupent les autres acteurs de la scène géopolitique. En effet, nous avons été utilisés par les politiques qui voyaient en nous un moyen facile et gratuit de se donner bonne conscience. N'a-t-on pas fait la guerre au Kosovo ou en Afghanistan en brandissant des arguments humanitaires? N'a-t-on pas cru que les ONG, aujourd'hui célèbres dans les médias, connues du grand public et perçues comme les garantes d'une certaine morale, pourraient remplacer les politiques là où ils avaient échoué, justement dans la protection des civils?

Bien que conscients que ce n'est pas notre rôle, nous n'hésitons cependant pas à aller aux devants des civils, à leur prodiguer tous les soins que nous pouvons, à les aider dans cette épreuve qu'est celle de la violence, du déracinement ou de la fuite.

Mais aujourd'hui, c'est au pouvoir politique de réinvestir le terrain des grandes causes, et parmi elles la protection des civils dans les conflits. C'est au Conseil de Sécurité de prendre position pour faire cesser les exactions faites aux Tchétchènes, aux Colombiens, aux Afghans, et de faire respecter des règles édictées par le système des Nations Unies.

Il ne s'agit plus aujourd'hui de batailles sur le droit, ou de la création de nouveaux appareils juridiques: l'avènement de la Cour Pénale Internationale, si douloureux soit-il, ferme le cycle du système de droit international humanitaire.

Il s'agit d'exiger des États, réunis dans l'instance supranationale la plus importante, crée à la suite du carnage de la seconde guerre mondiale pour prévenir les massacres et les guerres, qu'ils réinvestissent ce terrain. Que les États responsabilisent les relations internationales en faisant des règles les plus

fondamentales du respect des civils, rappelées dans les Protocoles Additionnels, des codes de conduite et non pas des garde fous, maniables et utilisables selon les circonstances.

THE CONCERN OF INTERNATIONAL HUMANITARIAN LAW FOR LEGAL ISSUES

Professor John CRABB
Member of the International Institute of Humantarian Law

Fundamental to the education and training of those directed towards dealing with law in a professional way, is developing the capacity to discern and formulate legal issues in matters under consideration. Such matters are unlimited as to the nature of facts and events potentially engaging a lawyer's expertise, but they all call upon him to "see the issue" as the start of effective legal handling of whatever is involved. Our interest, of course, is in legal issues involving International Humanitarian Law, according to the circumstances of a case or the disputed positions regarding its involvement. Our Institute and its collaborators must preliminarily examine and analyse whether and how International Humanitarian Law may be involved in a situation called to their attention.

The word "humanitarian" refers to an attitude, laudable by definition, whereby human beings seek to prevent or alleviate the perceived distress and sufferings of fellow human beings who are victims of misfortunes, events or circumstances for which they are not responsible. The kinds of matters that can evoke humanitarian response are innumerable and can pass privately simply between individuals or involve up to world-wide concern and activity of human society. Our International Humanitarian Law certainly draws on this humanitarian spirit, but is not co-extensive with it. Its essential concern is the protection of victims of armed conflict who are not participants in it. For this, an extensive body of international law has developed, as we here are well aware, as well as the intricacies involved in seeking its application.

This specificity of International Humanitarian Law is often not realized by the general public, which when mentioned, may confuse it with the notion of human rights or consider it a stylistic variant of referring to them. Situations can and do arise where there is common concern of both human rights and International Humanitarian Law, such as refugees who are victims of armed conflict. Solutions found for the same cases may vary, but presumably in the broad humanitarian ambit, they should be complementary rather than conflicting.

A fundamental specificity which International Humanitarian Law imposes on itself and colors all its activities is that of impartiality and neutrality as between mutually hostile causes creating serious violence, or the threat of it. This can amount to "armed conflict" with its potential non-combatant victims. We are here commemorating the 25th Anniversary of the creation of the two Protocols additional to the Four Geneva

Conventions of 1949. These Protocols to a degree extend into armed conflicts within a State, beyond the classic formal limitation of International Humanitarian Law to "international" armed conflicts.

When it is a matter of opposing causes exchanging charges and recriminations, International Humanitarian Law must avoid being perceived as favouring one of the causes over the other. This is what chiefly segregates International Humanitarian Law from activities seeking to promote or protect human rights. Human rights movements can indeed be activists, denouncing alleged violations and becoming complaining Parties in litigation when and where a judicial tribunal, having jurisdiction, can be found. Otherwise, human rights movements utilize the political process with its partisan positions which produce exchanges of recriminations creating tension thus threatening violence or disorder. All this is of course foreign to the concept and operation of International Humanitarian Law. It functions neither as prosecutor nor complaining party in case of litigation, and does not participate in partisan politics that may evolve. In the face of clear and obstinate violation of International Humanitarian Law, structures of it will discretely remonstrate and counsel the offending Party, leting the facts stand as pressure for compliance without further institutional activity in the name of International Humanitarian Law.

This seeming quiescence of International Humanitarian Law for purposes of impartiality does not obviously explain itself to much of the general public. It hardly seems heroic and is not of a sensational nature so prized by the media to capture readily the attention of the general public. Yet the basic logic is simple. The fundamental mandate of International Humanitarian Law is to aid all non-combatant victims of armed conflict, irrespective of which side they support. If International Humanitarian Law actors or organizations were to show favor to one side, they would lose authorization to operate to aid victims on the side of the party they disfavor. In an inflamed situation, both sides may put forth heavy propaganda distributed through the media. To see whether in all this there are implications for International Humanitarian Law, the exchanges of assertions and accusations must be analised to find whether solid facts emerge on which legal issues for International Humanitarian Law can be formulated.

The world is still reverberating from the horror of the cataclysmic event of 11 September 2001. The means and methods of terrorism were novel, creating difficulties in finding all relevant facts despite the application of the most advanced intelligence methods. Reams of publications and comments have appeared on the technical, political and legal ramifications involved for what is called a "war" against terrorism. Many of the questions thus raised remain up in the air awaiting the evolution of matters towards answers that have the promise of giving general satisfaction. Our toilers in the field of International Humanitarian Law must have patience but still feel confident that the classic search for pertinent facts for the formulation of a legal issue and conclusion for purposes of International Humanitarian Law will produce results.

THE AWARDING OF THE GIFT OF THE KOREAN BELL
TO THE INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW

Professor Eun-Bumn CHOE
Visiting Professor, Keio University, Tokyo, Korean National Red Cross

I would like to recall that, in a preface of a book entitled *"The Principles of the International Humanitarian Law"*, written by late Mr. Jean S. Pictet, he quoted a symbolic message of Latin words being carried in the sounds of a legendary bell. If my memory is not too bad, I may literally put it as follows:

"I mourn for the deceased;
I cry unto the living human beings
to break down the thunder of war".

I am pleased to give this miniature Korean bell to Prof. Patrnogic, as a modest token of gratitude to the International Institute of Humanitarian Law of the Korean National Red Cross, in commemoration of the 25 years of the Two Additional Protocols to the Geneva Conventions, and to congratulate it on the fruitful outcome of its 26th Round Table.

I really hope that this Bell with its 13 hundred years of history and legend will herald the very ideal and objectives of the Institute for the cause of humanity and peace, from Sanremo to every corner of the world, in order to see to that more human lives are saved through better implementation of international humanitarian law, law of human rights and refugee law.

I join all of you present in this closing session to wish the Institute's continued prosperity to Prof. Patrnogic and his colleagues and every success in its lofty endeavours in the years to come, under its President's inspiring and untiring leadership.

Sanremo, 7 September, 2002

AWARDING OF THE INSTITUTE'S 2002 PRIZE FOR THE PROMOTION, DISSEMINATION AND TEACHING OF INTERNATIONAL HUMANITARIAN LAW TO THE BRITISH RED CROSS

It is with great pleasure that I now present the Institute's Prize for the Promotion, Dissemination and Teaching of International Humanitarian Law to the British Red Cross.

Before I ask the Society's Chairman, Professor John McClure, to accept the award, let me tell you briefly about some of the activities of the British Red Cross in the field of International Humanitarian Law.

The British Red Cross is one of the oldest National Societies. It was established in 1870 and was one of the founding National Societies of the then League, now International Federation of Red Cross and Red Crescent Societies, in 1919.

Although the British Red Cross is a long established Red Cross Society, that does not mean that it is firmly set in its ways, on the contrary, its dynamism can be seen in its work in International Humanitarian Law.

At the national level, the Society has piloted the Exploring Humanitarian Law Education Project in schools in Northern Ireland and, in a unique tripartite venture involving the International Committee of the Red Cross and the Irish Red Cross, is developing cross-border and cross-community dissemination in Northern Ireland.

Summer schools and seminars are held for different audiences including Parliamentarians, government officials, armed forces officers, university lecturers and students, Red Cross/Crescent and other humanitarian agency staff, health professionals and journalists.

The British Red Cross was active over many years promoting UK ratification of the 1977 Additional Protocols and helped in the drafting of the implementing legislation.

It also was an active promoter of the establishment of a National International Humanitarian Law Committee and serves as a full and active member of that Committee.

At the international level, the British Red Cross has shared its International Humanitarian Law training materials with other National Societies. It has also sent dissemination delegates to work with the International Committee of the Red Cross , and has long supported the work of our Institute.

The Society has held conferences to support International Committee of the Red Cross initiatives on armed conflict and corporate social responsibility, anti-personnel landmines, and women and war.

The British Red Cross works closely with the International Humanitarian Law Advisory Service of the International Committee of the Red Cross, and has participated in International Committee of the Red Cross, and government experts' meetings, including those on the repression of war crimes at national level and the protection of cultural property during wartime.

The British Red Cross has played an active role in the process to establish a new protective emblem through the adoption of a Third Additional Protocol to the 1949 Geneva Convention. I could go on.

Dear Friends,

In February of next year, the British Red Cross will co-host with the British Foreign Office, the first Commonwealth Red Cross and Red Crescent Conference on International Humanitarian Law. Both Commonwealth governments and Commonwealth National Red Cross and Red Crescent Societies will participate in this conference. This special event shows Britain at its best: building on long experience to help address the challenges of today. It also helps to illustrate why the Council of the Institute has decided to award its International Humanitarian Law Prize for 2002 to the British Red Cross.

AWARDING OF THE XIIIth
"INTERNATIONAL PRINCESS MAFALDA OF SAVOY-ASSIA" PRIZE FOR PEACE
TO THE INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW
BY THE INTERNATIONAL ASSOCIATION "QUEEN HELENA"

The idea of creating the International Association "Regina Helena" was the idea of common friends from France, in memory of Queen Elena of Savoy, Queen of Italy, whose remains lie in the cemetery in Montpellier in France.

Queen Helena dedicated her life to charity work and assistance and she was greatly loved by the Italian people. Pope Pio XI called her "the Queen of Charity" and created the Golden Rose for Charity in her memory

CLOSING SESSION

CONCLUDING STATEMENT

Professor Jovan PATRNOGIC
President of the International Institute of Humanitarian Law

After a very constructive discussion and open dialogue among the participants at this very important humanitarian gathering on the occasion of the 25th Anniversary of the two Additional Protocols to the Geneva Conventions, I would like to very sincerely thank all rapporteurs, moderators and participants who have contributed with their interventions to clarifying some crucial problems related to the respect and implementation of International Humanitarian Law in armed conflict situations. I would like to present, on behalf of the Council, some reflections and conclusions which have arisen from this Round Table:

We very sincerely welcome the 25th Anniversary of the two Additional Protocols to the Geneva Conventions of 1949, adopted on 8th June 1977 at the Diplomatic Conference on the Re-affirmation and Development of International Humanitarian Law applicable in Armed Conflicts;

We are very conscious of the increasing acceptance of the principles contained in the two Additional Protocols by States;

We are aware of the changing nature of different armed conflicts at the beginning of the 21st Century;

We are also aware of the urgent need for clarifying the law in certain areas;

We welcome the steps taken in the last decade for the improvement, prevention and enforcement of mechanisms.

Bearing in mind the above, we would like to propose the following Plan of Action - to organise the method of work of assisting in the promotion, development, dissemination and application of International Humanitarian Law, including the two Additional Protocols, by:

- maintaining and improving the international military courses on the Law of Armed Conflict run by the International Institute of Humanitarian Law;
- continuing and expanding the various seminars and other courses in the programme of the International Institute of Humanitarian Law;
- working with the International Committee of the Red Cross, the United Nations High Commissioner for Refugees and other specialised organisations, to improve the dissemination and teaching of International Humanitarian Law;
- hosting meetings of experts to explore areas requiring clarification;

- examining other methods of assisting in the development, dissemination and implementation of International Humanitarian Law in armed conflict situations.

We must be optimistic. It is not a question of revising International Humanitarian Law, it is a question of how to develop it progressively and how to co-ordinate its interpretation, particularly for the practitioners who are involved in and/or confronted with the implementation of International Humanitarian Law. First of all, we need to develop the question of how to protect the innocent civilian population in a more efficient way, how to define military objectives, how to ensure protection, without any discrimination, of all categories of victims. To do this we should also re-enforce existing mechanisms and, if necessary, develop new ones, in particular, the system of supervision and control in the implementation of International Humanitarian Law.

The International Institute of Humanitarian Law must keep its own profoundly humanitarian profile. We have a lot to do and certainly we need permanent and constant dialogue. First of all, we must mobilise people of good will and there we certainly have the necessary forces to improve and protect International Humanitarian Law.